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# AMERICAN LAW REPORTS

## ANNOTATED

### VOL. 3

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DAVISON CHEMICAL COMPANY of Baltimore County, Appt.,  
v.  
BAUGH CHEMICAL COMPANY of Baltimore County.

*Maryland Supreme Court — June 20, 1918.*

(— Md. —, 104 Atl. 404.)

#### **Contract — sufficient effort to perform.**

1. One who has contracted to sell a specified number of tons of acid to be manufactured from pyrites, which he intended to import under carriage contracts with carriers, makes sufficient effort to secure the pyrites, in case of the breaking out of war, to relieve himself from liability under a war clause of his contract, if he repeatedly attempts to induce the carriers to comply with their contracts and unsuccessfully endeavors to purchase domestic pyrites, although he does not institute legal proceedings to compel the carriers to perform their contracts.

[See note on this question beginning on page 21.]

#### **— construction — rules.**

2. Contracts must receive a reasonable construction so as to give effect to the intention of the parties thereto, and so as to carry out, rather than defeat, the purpose for which they were executed.

[See 6 R. C. L. 841.]

#### **— sale — construction.**

3. A purchase by a manufacturer of acid phosphate of a specified quantity of chamber acid for a period of years refers to acid made from pyrites, where, to his knowledge, all but a small per cent of the acid produced

8 A.L.R.—1.

for that purpose was made from pyrites, to which the seller's plant was alone adapted, while that produced from sulphur could not be produced for the sale price named.

[See 6 R. C. L. 842.]

#### **Sale — manufacturer — duty to purchase from others.**

4. One who contracts to furnish acid produced at his own plant is not bound, in case war interferes with his own production, to purchase acid from other manufacturers in order to make deliveries under his contract.

[See 6 R. C. L. 885.]

— increase in price of raw material.

5. One who has contracted to furnish a specified quantity of acid, to be manufactured from pyrites to be imported, is not relieved from his obligation by a sharp increase in the price of pyrites, owing to the breaking out of war.

[See 6 R. C. L. 997; 23 R. C. L. 14-30.]

Evidence — act of other manufacturers.

6. That other manufacturers have been able to secure some raw material is not conclusive evidence that one who has contracted to manufacture and furnish a specified quantity of acid during a year has not exercised reasonable diligence in attempting to secure raw material, after war broke out.

APPEAL by defendant from a decree of the Circuit Court, No. 2, of Baltimore City in favor of plaintiff, in a suit brought to compel specific performance of a contract to deliver certain acid. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Venable, Baetjer, & Howard, for appellant:

Under the contingency clause in the contract, defendant was not obliged to manufacture and deliver to the plaintiff acid made from brimstone or pure sulphur, when it could no longer obtain a supply of pyrites.

2 Brantly, Contr. p. 423; Furness, W. & Co. v. Randall, 124 Md. 101, 91 Atl. 797; W. B. Saunders Co. v. Duck-er, 116 Md. 474, 82 Atl. 154, Ann. Cas. 1913C, 817; Phoenix Pad Mfg. Co. v. Roth, 127 Md. 540, 96 Atl. 762; Schlens v. Poe, 128 Md. 352, 97 Atl. 649; Bostock & Co. v. Nicholson & Sons [1904] 1 K. B. 725, 91 L. T. N. S. 626, 73 L. J. K. B. N. S. 524, 20 Times L. R. 342, 9 Com. Cas. 200, 53 Week. Rep. 155.

The evidence shows that the defendant has used all means reasonably within its power to secure an adequate supply of pyrites, and failure of its supply was not due to its neglect or fault.

Herrmann v. Bower Chemical Mfg. Co. 155 C. C. A. 3, 242 Fed. 59; Simpson Bros. v. John R. White & Son, 187 Fed. 418; Delaware, L. & W. R. Co. v. Bowns, 58 N. Y. 573; Jessup & M. Paper Co. v. Piper, 133 Fed. 108; Mineral Park Land Co. v. Howard, 172 Cal. 289, L.R.A.1916F, 1, 156 Pac. 458; Ebbw Vale Steel, Iron & Coal Co. v. Macleod, 32 Times L. R. 485.

Plaintiff was not entitled to the remedy of specific performance.

4 Pom. Eq. Jur. § 1402; Miller, Eq. § 664; Rickard v. Neff, 130 Md. 89, 99 Atl. 940.

Messrs. Frank R. Savidge, W. Irvine Cross, and Lee S. Meyer for ap-pellee.

Thomas, J., delivered the opinion of the court:

The appellee, the Baugh Chemical Company of Baltimore county, plaintiff below, is a corporation engaged in the manufacture of acid phosphate, and its plant is located in Baltimore county, Maryland, and the appellant, the Davison Chemical Company of Baltimore county, is a corporation engaged in the manufacture of sulphuric acid, and its plant is also located in Baltimore county. The chief materials used in the manufacture of acid phosphate, the product of plaintiff's plant, are sulphuric acid and phosphate rock, and for a number of years prior to the year 1913, the plaintiff had purchased the sulphuric acid required in the manufacture of its acid phosphate from the defendant. Sulphuric acid is made from sulphur, and originally, or in the early days, the raw material employed in the manufacture of that acid was native sulphur or brimstone. After the discovery of the sulphur-bearing ore called pyrites, containing about 50 per cent of sulphur, it became the raw material generally used in the manufacture of sulphuric acid, particularly the low grade of acid used in the making of acid phosphate. Just when this change from brimstone to pyrites took place is not definitely fixed by the evidence in the case, but the lower court, in its opinion, stated that it was between 1880 and 1890. The chief supply of

pyrites was imported from Spain, the supply from the Canadian mines and mines in this country being very small, and those mines were generally owned or controlled, and their product consumed, by companies engaged in the manufacture of acid or acid phosphate.

In the early part of 1913, the plaintiff and defendant began negotiations for the purchase and sale of sulphuric acid, which resulted in a contract executed by them the 28th day of April, 1913, by which the plaintiff purchased from the defendant from 30,000 to 50,000 tons, of 2,000 pounds each, of sulphuric acid per year, of the quality designated "chamber acid, ranging from 50 degrees to 54 degrees Beaume," to be delivered at the plaintiff's works at Canton, or to Baugh & Sons Company, Norfolk, Virginia, for a period of five years, beginning January 1, 1913, and ending December 31, 1917, for the sum of \$5.75 per ton. The contract provided that the plaintiff should declare on the 2d of January of each year what amount in excess of the minimum amount of 30,000 tons it would take that year, and that the deliveries of sulphuric acid should be made as nearly as possible in equal weekly instalments, and also contained the following provisions: "Fire, accident, or strike, in the work of any of the parties herein mentioned; obstruction to navigation, accident to acid barges, war, insurrections, or other uncontrollable causes rendering buyers unable to receive or sellers unable to deliver, shall be good and sufficient reasons to make this contract inoperative during the period of necessary repairs, reconstructions, or continuance of the difficulties."

Immediately following the execution of the contract, the price fixed thereby was, by agreement, reduced to \$5 per ton. In pursuance of the provisions of the contract, the plaintiff elected to take 50 tons of acid per year, and it appears that the deliveries of the acid were

accordingly and regularly made by the defendant during the years 1913 and 1914, and until some time early in the year 1915. During the year 1915, the defendant failed to make full deliveries to the plaintiff, and in February, 1916, the plaintiff filed a bill in equity to compel the defendant to perform its contract. The defense in that suit was that by reason of a breakdown in its plant, and other causes, the defendant had not been able to make full deliveries to the plaintiff and other parties, to whom it had sold sulphuric acid, and that it was therefore compelled to make a proportionate distribution of the product of its factory among them. In disposing of the case on May 18, 1916, Judge Bond said that the evidence produced showed that there had been much interruption in the defendant's factory, due to accidents and breakdowns in its plant during the year 1915, "and up to this time," which cut down its capacity to an "extraordinary extent," that as the defendant's contracts would have necessitated a full normal working of its plant, it was incapable, by reason of such interruption, of filling all of them; that the principle of "prorating" should govern and determine the rights of the parties when the output is involuntarily reduced was in that case conceded; that the suspected improper preference of later buyers over the plaintiff had not been established by the evidence, and that he would sign an order dismissing the petition for a preliminary injunction. The case was never pressed to a final hearing, and the bill was later dismissed by the plaintiff, and on the 10th of November, 1916, the plaintiff brought suit at law against the defendant to recover damages for the nondelivery of acid in accordance with its contract up to and including June, 1916.

Interference with the importation of pyrites caused by the war, which had diminished the normal supply during the year 1915, had



largely abated during the fall of 1916 and the early part of 1917, and by reason thereof, and the extra efforts made by the defendant in anticipation of difficulty in obtaining the ore, it had, in March, 1917, accumulated at its plant about 48,000 tons. About that time, however, just preceding the entrance of this country into the war, the interference with navigation, occasioned by the German U-boat campaign, became very serious. The companies with which the defendant had contracted for delivery of the ore, and whose contracts contained a clause similar to the clause in the contract between the plaintiff and the defendant, which we have quoted, notified the defendant that they would be compelled to suspend deliveries. After receiving this notice, and after making efforts to secure further deliveries of ore from the parties with whom it had contracted and from other sources, the defendant notified the plaintiff and all others with whom it had contracts for delivery of sulphuric acid that, after the exhaustion of its accumulated stock of pyrites, it would not be able to make deliveries of the acid contracted for, and would have to take advantage of the clause in its contract with the plaintiff, authorizing a suspension of deliveries. At the same time the defendant stated that it would continue its efforts to secure pyrites, and continue to deliver to them their proportion of acid from any pyrites that it might be able to obtain, and offered to install in its plant brimstone burners, and to furnish the plaintiff and other parties to whom it had contracted to furnish acid, with brimstone acid, provided they would agree to pay the increased cost of the brimstone acid, delivered in lieu of acid made from pyrites. All of the parties with whom the defendant contracted accepted the offer of the defendant and entered into agreements accordingly, except the plaintiff, and on the 25th of September, 1917, the plaintiff filed in the court

below a bill of complaint against the defendant, in which it prayed:

"(a) That a decree may be passed commanding the said Davison Chemical Company of Baltimore county to specifically perform, keep, and observe the several promises and agreement in the aforementioned contract set out to be performed, kept and observed, and commanding and directing the said defendant corporation, its officers, agents and servants, to make, during the time covered by said contract, the deliveries of acid to this plaintiff required by said contract.

"(b) That an injunction may issue, strictly enjoining and prohibiting the said Davison Chemical Company of Baltimore county, its and each of its officers, agents, and servants, from delivering, during the terms covered by its said contract with the plaintiff, any sulphuric acid to any parties with which it has entered into contracts on or subsequent to May 7, 1915, while said Davison Chemical Company of Baltimore county is in default as to the delivery of any part of the sulphuric acid to which this plaintiff is entitled under said contract.

"(c) And that a preliminary injunction may issue, strictly enjoining and prohibiting the said Davison Chemical Company of Baltimore county, its and each of its officers, agents, and servants, from discriminating against the plaintiff in the distribution and delivery among its customers of the sulphuric acid manufactured by it from whatever raw material, and from withholding from this plaintiff any part of the fair and accurate pro rata share of the sulphuric acid manufactured by it until the further order of this court."

On the same day the court passed an order, directing a preliminary injunction to be issued, requiring the defendant to "proceed forthwith to fulfil the contract between the complainant and the defendant, dated the 28th day of April, 1913,

in accordance with its terms," and providing that "the deliveries be at the rate of 50,000 tons a year, and that said deliveries be made weekly from this date, said deliveries to be made as nearly as possible in equal weekly instalments of 961 tons each. Provided, however, that if, in each and any week commencing from the date of this order, the defendant is unable to produce the entire output which it is normally capable of producing, or if for any justifiable cause the defendant is compelled to prorate its weekly output among its customers, then the defendant may abate the number of tons furnished to the complainant in each week, in the same proportion that the deliveries in such week to defendant's other customers are abated." The order further required the defendant to "continue to make such deliveries until such contract is fulfilled, or until the further order" of the court.

The defendant answered the plaintiff's bill, and moved that the preliminary injunction be dissolved; and the testimony in this case was taken at the hearing of that motion. Upon the evidence produced at the hearing, and on the 3d day of December, 1917, the court overruled the motion to dissolve the injunction, and, in accordance with the application of the plaintiff, modified its order of September 25, 1917, granting the injunction, to the extent of limiting the deliveries of sulphuric acid by the defendant to December 31, 1917, or the further order of the court. Nothing further appears to have been done in the case until it was submitted for final decree upon bill, answer, and evidence taken at the hearing of the motion to dissolve, and, the parties having agreed that after the issuing of the preliminary injunction on the 25th of September, 1917, and until December 31, 1917, the defendant delivered to the plaintiff sulphuric acid at the rate of 50,000 tons per annum, the court passed the following decree, from which this appeal

was taken: "It is, therefore, this 12th day of March, 1918, by the circuit court No. 2 of Baltimore city, adjudged, ordered, and decreed that the defendant, under its contract with plaintiff and the evidence adduced, was obliged to specifically perform and carry out said contract with plaintiff from the date of the filing of the bill on, and to deliver to plaintiff between, September 25 and December 31, 1917, both inclusive, sulphuric acid at the rate of 50,000 tons a year, and as nearly as possible in equal weekly instalments of 961 tons each, irrespective of the raw material from which the said acid might be made, and that the injunction heretofore granted in this case on the 25th day of September, 1917, as modified by the order issued on the 3d day of December, 1917, be and it hereby is made perpetual."

The defense relied on by the appellant is, that under its contract with the plaintiff of April 28, 1913, it was not required to deliver acid made from brimstone, and that as it was unable, by reason of the war, to obtain the necessary amount of pyrites to fulfil its contract with the plaintiff and other parties with whom it had contracted to deliver acid or acid phosphate, it was entitled, under the provision we have quoted, to suspend the deliveries of acid to the plaintiff to the extent of its inability to secure pyrites. The contention of the appellee is that the appellant was bound to deliver the acid to the amount specified in its contract, regardless of whether it was made from brimstone or pyrites, and, further, that the appellant, by a proper effort, could have obtained a sufficient amount of pyrites to enable it to comply with its contract. The learned court below took the view that by reason of the conflict in the testimony as to the meaning of the words, "chamber acid," the evidence produced by the defendant was not sufficient to establish a usage, and to show that the trade meaning of the words, "chamber acid," was acid produced

from pyrites, and further held that the evidence showed that the defendant had not exercised due diligence to secure sufficient pyrites to enable it to fulfil its contract with the plaintiff, and that it had not made an effort to procure acid from other manufacturers of acid for that purpose. The effect of the preliminary injunction was to require the defendant, during the period between the 25th of September and the 31st of December, to supply the plaintiff with sulphuric acid made from brimstone or pyrites, at the rate of 50,000 tons a year, without regard to its ability to procure pyrites.

The pleadings, exhibits, and testimony in the case cover about 800 pages of the printed record. It would necessarily greatly prolong this opinion to undertake to discuss this evidence, and we shall not attempt to do more than state the conclusion we have reached after careful examination of it.

It is apparent that the first and important question in the case involves the construction of the contract between the plaintiff and defendant of April 28, 1913. A large part of the evidence was offered for the purpose of showing the meaning of the words, "chamber acid." The witnesses produced by the plaintiff testified that they mean acid manufactured by the chamber process from either pyrites or brimstone, while the evidence offered by the defendant tends to show that, at the time the contract of 1913 was executed, they were generally understood by those engaged in the manufacture or sale of acid and acid phosphate, to mean the low grade of acid manufactured from pyrites by the chamber process. The precise question, however, to be determined, is, What is the meaning of the words, "chamber acid," as used in the contract between the plaintiff and defendant? In the case of *W. B. Saunders Co. v. Ducker*, 116 Md. 474, 82 Atl. 154, Ann. Cas. 1913C, 817, this court said: "It is an established canon of

construction that, 'in order to arrive at the intention of the parties, the contract itself must be read in the light of the circumstances under which it was entered into. General or indefinite terms employed in the contract may be thus explained or restricted as to their meaning and application; and the contract must be so construed as to give it such effect, and none other, as the parties intended at the time it was made.'"

Contracts "must receive a reasonable construction so as to give effect to the intention of the parties thereto, and so as to carry out rather than defeat the purposes for which they were executed. They should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design; nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability fairly within the scope or spirit of their terms [116 Md. 479]." And in the case of *Schlens v. Poe*, 128 Md. 352, 97 Atl. 649, the court said: "It is, therefore, the duty of the court to construe them [resolutions], to ascertain the intention of the parties; and that intention must be gathered from the language of the resolutions, read in the light of the circumstances existing at the time. The rule of construction, as stated in *Nash v. Towne*, 5 Wall. 699, 18 L. ed. 527, is this: 'Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and the correct application of the language to the things described.'"

Contract—  
construction—  
rules.

The evidence in the case shows that, in 1913, the defendant had been furnishing the plaintiff the acid used in the manufacture of its acid phosphate for a great many years; that, with one or two minor exceptions, sulphuric acid of the quality used in the manufacture of acid phosphate, and sold for that purpose, was made from pyrites ore, which contains about 50 per cent of sulphur, by the process known as the chamber process, and that only about 5 per cent of the brimstone or sulphur sold in this country was used for acid making, and that that per cent of brimstone employed in making acid was used in the production of what was known as a high grade acid or brimstone acid, which was used for purposes other than the manufacture of acid phosphate. Dr. Grosvenor, one of the plaintiff's witnesses, testified that in 1913 the amount of brimstone or sulphur used in the manufacture of sulphuric acid was only about 5 per cent of the raw material used for that purpose. The evidence further shows that the cost of the brimstone or sulphur, in 1913, was about \$22.50 per ton, while the cost of pyrites, containing an equal amount of sulphur, was about \$11 a ton, and that the cost of the brimstone required to make 1 ton of acid was \$5.15, while the cost of the pyrites necessary to make 1 ton of acid was \$2.60 a ton. The undisputed evidence also shows that the officers of the plaintiff were at the time considering the advisability of manufacturing the sulphuric acid necessary for its own plant, and knew what it would cost to produce it, and that they were familiar with the construction of the defendant's plant, and knew that it was, at that time, only adapted to the production of sulphuric acid from pyrites. In view of this evidence it is impossible to escape the conclusion that, when the plaintiff and defendant used the words, "chamber acid," to describe

the subject-matter of their contract, they did not refer to acid made ~~—sale—con-~~  
from brimstone, ~~struction.~~ which they both knew the defendant could not produce in its plant as then constructed, and could not furnish at the contract price of \$5 per ton. Whether, therefore, strictly and technically speaking, chamber acid may be said to include acid made by the chamber process from either pyrites or brimstone, if we are to give effect to the well-established canon of construction to which we have referred, arriving at the intention of the parties, it would seem reasonably clear that the contract referred to the kind of sulphuric acid that was almost universally employed in the manufacture of acid phosphate, and to the production of which the defendant's plant was adapted, and which alone the defendant could have furnished at the price agreed upon.

It would be giving the contract a strained and unreasonable construction to assume that the defendant obligated itself to deliver 50 tons of brimstone acid per year, through a period of five years and commencing at a date anterior to the date of the contract, when it knew, and the plaintiff knew, it could not do so except at a loss per ton equal to about one half of the price agreed upon.

In regard to the second proposition, the evidence shows that in 1913 the capacity of the defendant's plant was about 170 tons of sulphuric acid per year; that about the time it executed the contract with the plaintiff the defendant entered into a contract with the Pennsylvania Salt Manufacturing Company, by which the latter company agreed to furnish the defendant, "as near as possible in equal monthly quantities, delivered alongside vessels at Curtis bay, Baltimore, Maryland, their entire requirements of sulphur as pyrites, for use in their works at and near Baltimore, estimated as eighty

thousand (80,000) tons of twenty-two hundred and forty (2,240) pounds, for the calendar years of nineteen hundred and fifteen, sixteen, seventeen and eighteen (1915, 16, 17, and 18); said ore to be Spanish smalls or fines from the Rio Tinto Company's mines, to be shipped from port in Huelva, Spain, and to average from forty-six (46) to forty-eight (48) per cent of sulphur;" that the 80,000 tons of pyrites per year to be delivered by the Pennsylvania Salt Manufacturing Company would have been sufficient to produce 180,000 tons of sulphuric acid per year, and that that company had been supplying the defendant with its entire requirements for many years prior to 1913, and had never in the past failed to do so; that the defendant also entered into a contract with Naylor, Benzon, & Company, Limited, of London, for 140,000 tons of pyrites ore, to be delivered during the years 1917, 1918, 1919, and 1920, a contract with the Pyrites Company, Limited, of London, for 20,000 tons of pyrites, to be delivered during the years 1915 and 1916, and a further contract with the Pyrites Company, Limited, for 25,000 tons of pyrites, to be delivered during the year 1917; that the total importation of pyrites was about 1,300,000 tons per year, and that of that supply the three companies mentioned imported about 1,000,000 tons per year. It further appears from the evidence that after the defendant received notice from these companies in the spring of 1917 that, owing to the U-boat campaign and their inability to secure the necessary tonnage, they would have to suspend the deliveries of pyrites ore under their contracts, the president and officers of the defendant made repeated and weekly visits to New York to see the representatives of the companies mentioned, to induce them to make deliveries, and that they also investigated the possibility of obtaining Canadian and domestic pyrites, and found that it was im-

possible to secure any ore from that source; that they went to see the representatives of other importers of pyrites ore, and were unable to obtain from them any deliveries; that to induce the representatives of the importers mentioned, and other importers of pyrites, to make deliveries, they agreed to pay any additional freight charges that might be necessary to secure the requisite tonnage; and that the only pyrites they were able to obtain between April 20th and the time of the institution of the present suit consisted of two cargoes, one cargo from the Pyrites company, which was delivered in June, 1917, and one cargo from Naylor, etc., company, delivered in July, 1917, both of which cargoes were used by the defendant in the manufacture of acid, and the acid was distributed among the parties with whom it had contracts, including the plaintiff.

The evidence produced by the defendant tends to show that a number of other manufacturers of sulphuric acid or acid phosphate were able to secure pyrites, but it also appears that many of them were comparatively small manufacturers, and that in a number of instances they owned or controlled the domestic or Canadian mines from which they obtained the ore; and all of the evidence tends to show that there was great scarcity of pyrites during the time in which the plaintiff was unable to secure deliveries other than the two cargoes mentioned.

The learned court below in its opinion referred to the fact that it did not appear that the defendant had instituted legal proceedings to compel the Pennsylvania Salt Manufacturing Company to comply with its contract, or that it had attempted to purchase sulphuric acid from other manufacturers with which to meet its obligation to the plaintiff.

In the case of *Herrmann v. Bowser Chemical Mfg. Co.* 155 C. C. A. 3, 242 Fed. 59, where the contract

(— Md. —, 104 Atl. 404.)

under consideration contained a clause like the clause in the contract between the plaintiff and defendant, the circuit court of appeals approved the following instructions of the court below: "Now, where a party enters into a contract providing for the delivery of certain articles of merchandise, he is obliged to use diligence to supply himself with sufficient quantities to carry out the terms of his contracts, if he can do that in the exercise of due diligence. . . . So that the questions for you to consider under all the evidence are whether you are satisfied from the evidence that the defendant did use the diligence which I have stated, that is, the diligence which a reasonably prudent man, in good faith desiring to carry out the terms of his contract, would exercise, in obtaining supplies necessary to proceed with the manufacture and delivery of the prussiate of potash."

In the case of *Simpson Bros. v. John R. White & Son (C. C.)* 187 Fed. 418, the court said, in reference to a clause of a similar nature in a building contract: "In interpreting a clause of this character in a construction contract like that before us, due regard must be had to circumstances, and to the ordinary course of business in contemplation of the parties at the time of the execution of the contract;" and that a contractor, in such a case, is required to show that he had exercised ordinary diligence to secure the materials.

In the case of *Jessup & M. Paper Co. v. Piper (C. C.)* 133 Fed. 108, the court, dealing with a contract containing a clause excusing performance where the fulfilment of it was prevented by strikes or by hindrances beyond the control of the parties, said of the defendant: "It is bound to carry out its contracts even with that clause in, so far as, at all events, to put forth all reasonable and proper exertion to overcome whatever hindrances may be offered to the carrying out of its

contracts. . . . If . . . they could have obtained the cars for delivery to the plaintiffs, by arrangement with the railroad company, they were bound to make it. They were bound, in other words, to do whatever was reasonable and proper to overcome whatever hindrance existed with regard to this car supply; and, if they failed to do whatever was reasonable and proper, whether it be the expenditure of labor and exertion, or the reasonable expenditure of money, then they have failed in the discharge of their duty, and to that extent they would be liable to respond to the plaintiff in damages. But if there was a scarcity of cars, a shortage of cars, and it was beyond their power,—explaining, as I have, what their duty in that respect was,—if it was beyond their power to remove that hindrance, if they gave the plaintiff its ratable share of cars during the period in question, then they certainly have discharged all their duty with reference to that part of the claim that they could be called upon to discharge."

In the case of *Mineral Park Land Co. v. Howard*, 172 Cal. 289, L.R.A. 1916F, 1, 156 Pac. 458, the supreme court of California said: "The parties were contracting for the right to take earth and gravel, to be used in the construction of the bridge. When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were available, we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents, then, it was impossible for defendants to take it. 'A thing is impossible in legal contem-

plation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.' 1 Beach, Contr. § 216. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel."

Applying the principles stated in the cases referred to, to the facts of this case, we think the evidence shows that the defendant did exercise all reasonable diligence in its efforts to secure the pyrites necessary to enable it to comply with its obligation to the plaintiff.

—sufficient effort  
to perform.

The contract of the defendant was to deliver to the plaintiff the product of its plant, and the defendant was not required to purchase acid from other manufacturers in order to make deliveries to the plaintiff. It

Sale—manu-  
facturer—duty  
to purchase  
from others.

was bound to make every reasonable effort to secure the pyrites, and to pay any reasonable sum necessary to enable it to do so. The fact that the price of pyrites ore was greatly in excess of the amount that it had contracted

—increase in  
price of raw  
material.

to pay for it did not relieve the defendant of its duty to perform its contract. The evidence tending to show that other manufacturers of acid or acid phosphate had been able to secure some pyrites is not conclusive evidence that the defendant, by the exercise of reasonable diligence,

Evidence—act  
of other  
manufacturers.

could have obtained sufficient quantities of the ore to meet its obligations, or sufficient to overcome the positive evidence adduced

by the defendant to show that it made every effort to obtain the ore.

The case of *Wilson & Co. v. Tenants*, [1917] 1 K. B. 208, referred to by the court below, was reversed on appeal by the House of Lords, and in the opinions of the majority of the justices it was held that the evidence showed that the defendant was, within the meaning of the contract under consideration, prevented or hindered, because the cutting off of the German supply during the war left the defendant unable to secure enough of the articles to fill all of its contracts and supply its ordinary business. [1917] A. C. 495, 8 B. R. C. 450, 86 L. J. K. B. N. S. 1191, 33 Times L. R. 454, 61 Sol. Jo. 575, 23 Com. Cas. 41, Ann. Cas. 1918A, 1.

It follows from what we have said that the preliminary injunction should have been dissolved, and we must, therefore, reverse the decree from which this appeal was taken.

Decree reversed with costs, and bill dismissed.

Petition for rehearing and modification of opinion denied, July 30, 1918.

#### NOTE.

The question involved in the reported case (*DAVISON CHEMICAL Co. v. BAUGH CHEMICAL Co.* ante, 1), whether one who has undertaken to supply goods to another is protected by a provision in the contract, suspending or excusing performance in certain contingencies, where war conditions have cut short his supply of raw material, is dealt with in the annotation, post, 21, and more particularly in subdivision III. b, 2, thereof.

*DAVISON CHEMICAL Co. v. BAUGH CHEMICAL Co.* is of special interest by reason of its holding that the seller was entitled to the protection of the war clause, even though the willingness of its other customers to make new contracts left it in a position where it might have performed its contract with the plaintiff in full, had it not distributed among all its customers, pro rata, the acid made from such pyrites as it was able to obtain.

BLACKBURN BOBBIN COMPANY, Limited,  
v.

T. W. ALLEN & SONS, Limited.

*English Court of Appeal—June 19, 20, 1918.*

([1918] 2 K. B. 467.)

**Contract — sale of goods — impossibility of performance due to outbreak of war — discharge.**

Where a purchaser of Finland birch timber to be delivered f.o.b. at a British port, under a contract made before the outbreak of war, was unaware that no stocks of Finland timber were held in England, and that the invariable practice was to ship Finland timber direct from Finnish ports, no condition can be implied that the contract was made subject to the seller's ability to obtain shipments of timber; and the sellers are liable in damages although their failure to deliver the timber in accordance with their bargain was due to the war.

[See note on this question beginning on page 21.]

APPEAL from a decision of McCardie, J., reported [1918] 1 K. B. 540, 118 L. T. N. S. 222, 34 Times L. R. 266, by whom the facts were summarized as follows:

"The claim is for damages for breach of contract. The plaintiffs are manufacturers of bobbins for spinning. Their office is at Blackburn. The defendants are timber merchants at Hull. In the early part of 1914 the defendants sold to the plaintiffs seventy standards of Finland birch timber at the price of £10, 15s. per standard free on rail at Hull. Deliveries were to commence about June or July, 1914, and to continue during the season which would expire about November in that year. The contracts were not formal; they were created by correspondence. They contained no war or force majeure or suspension provisions. They were simple bargains of sale and purchase. Finland produces birch timber of a clean and pliable character. It is particularly useful for the purpose (inter alia) of manufacturing bobbins. The contract required that the timber to be supplied to the plaintiffs should come from Finland. Prior to the war the unvarying practice was to load the timber into vessels at ports in Finland for direct sea carriage to English ports. No timber was railed across Scandinavia for ship-

ment from a Scandinavian port to England.

"Up to August, 1914, the defendants had made no deliveries to the plaintiffs. Then war broke out. Imports of timber from Finland stopped at once. German war vessels traversed the Baltic. Transport was paralyzed. No vessels left Finland for Sweden. Swedish vessels ceased to sail for Finland. The vast disorganizing effect of the war on trade and transport need not be further indicated. It undoubtedly effected a revolution of circumstance, and rendered it impossible for the defendants to deliver the timber in accordance with their bargain. The English timber merchants who deal in Finnish timber do not hold stocks. Their timber as it arrived before the outbreak of war had gone to the customers to whom it had been already sold.

"Following upon the outbreak of war the defendants did not supply the plaintiffs with any portion of the timber to which the plaintiffs were entitled during the season of 1914. Correspondence took place between the parties up to November, 1914. Thenceforward no letter or communication passed be-



tween them until July, 1916. In that month the plaintiffs asked for delivery. The defendants then asserted for the first time that the contracts had been dissolved by the outbreak of war in 1914. The plaintiffs disputed this assertion; hence their claim to damages. The defense contains no plea that the contract was mutually abandoned, nor was any such point raised in argument."

McCardie, J., gave judgment for the plaintiffs, holding (1) that the contract had not been dissolved, and that the defendants were liable in damages for the nondelivery of the timber; and (2) that the contract was not one for the supply of materials "for any building or work" within § 1, subsec. 1, of the Courts (Emergency Powers) Act, 1917.

The defendants appealed from the decision on the first point.

MacKinnon, K. C. and Jowitt for the defendants.

C. Atkinson, K. C., and du Parc, for the plaintiffs, were not called upon.

[As the court held on the facts that the decisions relied upon by the defendants were inapplicable, and therefore that it was unnecessary to discuss them, the argument is not set out.]

Pickford, L.J., delivered the opinion of the court:

This is an appeal from a decision of McCardie, J., and the point raised is whether an implication is to be read into the contract the performance of which has been interfered with or prevented by matters arising out of the war. The contract, which contained no exceptions, was for the sale by the defendants to the plaintiffs of 70 standards of Finland birch timber at the price of £10 15s. per standard free on rail at Hull. Before the war it was the regular practice to load the timber on vessels at ports in Finland for direct sea carriage to English ports, and not to send it by rail across Scandinavia and ship it from a Scandinavian port to England. When war broke out the Germans declared timber to be

contraband, but, even before that declaration, sailings from Finnish ports had entirely ceased, and therefore the ordinary and normal method of supplying Finland timber came to an end. I will assume that it was not possible, at first at any rate, to get Finland birch timber to England at all, although it is true that in 1916 a certain amount was sent across Scandinavia and shipped from ports there. In August, 1914, and the following months, some correspondence took place between the plaintiffs and the defendants as to the timber, the former asking for supplies, and the defendants taking up the position that all pre-war contracts had been canceled by the war.

The defendants contend that the contract was at an end because it was in the contemplation of both parties that the defendants should be able to supply the timber according to the ordinary method of supplying it in trade, and that when that became impossible both parties were discharged from their obligations. We have had a most interesting discussion of the numerous cases where this doctrine has been dealt with, and it is from no disrespect to Mr. MacKinnon's argument that I refrain from going through them, but I refrain from doing so because I accept the principle for which those cases were cited. The principle was thus stated by Lord Haldane in *Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397, 406: "The occurrence itself," i. e., the occurrence preventing the performance of the contract, "may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." It was also stated thus by Lord Shaw in *Horlock v. Beal* [1916] 1 A. C. 486, 512, 85 L. J. K. B. N. S. 602, 114 L. T. N. S. 193, 32 Times L. R. 251, 60 Sol. Jo. 236, 21 Com. Cas. 201: "The underlying ratio

([1918] 2 K. B. 487.)

is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties." In my opinion McCardie, J., was right in saying that the principle of these cases did not apply to discharge the defendants in this case. He has found that the plaintiffs were unaware at the time of the contract of the circumstance that the timber from Finland was shipped direct from a Finnish port to Hull, and that they did not know whether the transport was or was not partly by rail across Scandinavia, nor did they know that timber merchants in this country did not hold stocks of Finnish birch. I accept the finding that in fact the method of despatching this timber was not known to the plaintiffs. But there remains the question, Must they be deemed to have contracted on the basis of the continuance of that method although

Contract—  
sale of goods—  
impossibility  
of performance  
due to outbreak  
of war—  
discharge.

they did not in fact know of it? I see no reason for saying so. Why should a purchaser of goods, not specific goods, be deemed to concern himself with the way in which the seller is going to fulfil his contract by providing the goods he has agreed to sell? The sellers in this case agreed to deliver the timber free on rail at Hull, and it was no concern of the buyers as to how the sellers intended to get the timber there. I can see no reason for saying,—and to free the defendants from liability this would have to be said,—that the continuance of the normal mode of shipping the timber from Finland was a matter which both parties contemplated as necessary for the fulfilment of the contract. To dissolve the contract the matter relied on must be something which both parties had in their minds when they entered into the contract, such, for instance, as the existence of the music hall in Taylor v. Caldwell (1863) 3 Best & S. 826, 122 Eng. Reprint, 309, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11

Week. Rep. 726, 6 Eng. Rul. Cas. 603, or the continuance of the vessel in readiness to perform the contract, as in Jackson v. Union Marine Ins. Co. (1873) L. R. 8 C. P. 572, (1874) L. R. 10 C. P. 125, 44 L. J. C. P. N. S. 27, 31 L. T. N. S. 789, 23 Week. Rep. 169, 2 Asp. Mar. L. Cas. 435, 6 Eng. Rul. Cas. 650. Here there is nothing to show that the plaintiffs contemplated, and there is no reason why they should be deemed to have contemplated, that the sellers should continue to have the ordinary facilities for despatching the timber from Finland. As I have said, that was a matter which to the plaintiffs was wholly immaterial. It was not a matter forming the basis of the contract they entered into.

On the facts the nearest case to this is Ashmore v. Cox [1899] 1 Q. B. 436, 68 L. J. Q. B. N. S. 72, 15 Times L. R. 55, 4 Com. Cas. 48. There shipment was to be made by sailer or sailers from a port or ports in the Philippine Islands between May 1 and July 31, 1898. The Spanish-American War prevented the shipment by sailer between the dates mentioned. Lord Russell of Killowen, C. J., held that no implied condition was to be imported that it was possible to ship by sailer between those dates. I think that case was rightly decided, and this is an a fortiori case.

For the reasons I have given the defendants have failed on the facts to make out their case that the contract was dissolved. The appeal will be dismissed.

Bankes, L.J.: I agree. I rest my decision upon the facts of this particular case. No doubt the defendants when they entered into this contract intended to perform it by shipment in the ordinary way, that is, direct from some Finnish port to a port in England, but so far as the plaintiffs are concerned, they knew nothing as to how the timber was brought to this country, whether brought wholly by sea or partly by land and partly by sea. In those

circumstances, whether one applies the test laid down by Lord Haldane in the *Tamplin Case* [1916] 2 A. C. 397, 406, 85 L. J. K. B. N. S. 1389, 115 L. T. N. S. 315, 32 Times L. R. 677, or that laid down by Lord Shaw in *Horlock v. Beal* [1916] 1 A. C. 486, 512, 85 L. J. K. B. N. S. 602, 114 L. T. N. S. 193, 32 Times L. R. 251, 60 Sol. Jo. 236, 21 Com. Cas. 201, or whether it is said that performance became impossible, as that expression is found in the judgment of Hannen, J., in *Baily v. De Crespigny* (1869) L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799, or whether the matter is treated as one to which the principle of an implied condition as explained by Lindley, L.J., in *Turner v. Goldsmith* [1891] 1 Q. B. 544, 60 L. J. Q. B. N. S. 247, 64 L. T. N. S. 301, 39 Week. Rep. 547, applies,—whichever of these is the correct method,—or whether all these tests are applied, the result is the same, because the facts are not such as to bring the defendants within the principle of any of the cases relied upon on their behalf. In my view the judgment of McCardie, J., was right.

**Warrington, L.J.:** I am of the same opinion. I also think that this case is to be decided on its own facts. In order to succeed the defendants must prove, to use the words of Lord Shaw in *Horlock v. Beal* [1916] 1 A. C. 486, 512, 85 L. J. K. B. N. S. 602, 114 L. T. N. S. 193, 32 Times L. R. 251, 60 Sol. Jo. 236, 21 Com. Cas. 201, a "failure of something which was at the basis of the contract in the mind and intention of the contracting parties." In the present case, what is alleged to have failed is the normal mode of transport of the subject-matter of the contract from Finland to this country. It was not proved that the continuance of that normal mode of transport was at the basis of the contract in the mind and intention of the contracting parties. The contract was merely for the sale and delivery of a certain quantity

of Finland birch squares free on rail at Hull. The judge has found as a fact, and I see no reason for upsetting that finding, that the plaintiffs were unaware, at the time of the contract, of the circumstance that the timber from Finland was shipped direct from a Finnish port to Hull. They did not know whether the transport was or was not partly by rail across Scandinavia, nor did they know that timber merchants in this country did not hold stocks of Finnish birch. It seems to me, therefore, that the normal mode of transport was not in fact in the mind and intention of the plaintiffs, and I see no reason for holding that that normal mode must be deemed to have been in their mind and intention. I do not deal in detail with the argument of Mr. MacKinnon or with the elaborate review of the cases by McCardie, J., because in the view I take it is unnecessary to do so. For the reason I have given I agree that the judgment of McCardie, J., should be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: Gibson & Weldon, for H. Worden, Blackpool.

Solicitors for defendants: Trinder, Capron, & Co.

#### NOTE.

The reported case (*BLACKBURN BOBBIN Co. v. T. W. ALLEN & SONS*, ante, 11) is of interest as holding that the fact that a seller's contemplated source of supply is shut off by an interruption of the usual modes of transportation by war will not excuse delay or failure to perform, unless he can show that the obtaining of a supply from such sources was an implied condition of his obligation; and that no such condition can be implied where the purchaser was unaware of the necessity of obtaining goods from abroad.

For an extended discussion of the rights of parties to contracts the performance of which is interfered with or prevented by war conditions, see post, 21.

ALLANWILDE TRANSPORT CORPORATION  
v.  
VACUUM OIL COMPANY. (No. 449.)

SAME  
v.  
A. W. PIDWELL. (No. 450.)

*United States Supreme Court—January 13, 1919.*

(249 U. S. 377, 63 L. ed. —, 39 Sup. Ct. Rep. 147.)

**Shipping — frustrated adventure — war embargo — retention of freight.**

1. The Federal government's repeated refusal, conformably to its decision to refuse clearances to sailing vessels destined to proceed through the war zone, to permit a second departure of such a vessel which had been compelled by a storm to return to port for safety and repair, frustrated the adventure, relieving the carrier from further obligation to carry the cargo, and justifying it in refusing to refund the prepaid freight, where the bill of lading incorporated by reference all the conditions and exceptions of the charter party, and the latter instrument contains, *inter alia*, the provisions, "freight to be prepaid net on signing bills of lading . . ." "freight earned, retained, and irrevocable, vessel lost or not lost," since the government embargo must be regarded as being so far permanent as naturally and justifiably to determine business judgment and action depending upon it, and the contract regarded a sailing ship only, not some other kind of ship or means.

[See note on this question beginning on page 21.]

**—provision of bill of lading.**

2. Provisions in a bill of lading issued by the owners of a sailing vessel bound for the war zone that the carrier shall not be liable for loss, damage, delay, or default "by causes beyond the carrier's reasonable control; . . . by arrest or restraint of governments, princes, rulers, or peoples; . . . by prolongation of the voyage," justify the shipowner in regarding the adven-

ture as frustrated, so as to relieve it from further obligation to carry the cargo, and in refusing to refund the prepaid freight, where, after the vessel had been compelled by a storm to return to port for safety and repairs, the Federal government repeatedly refused to permit a second departure, it having decided while the vessel was at sea to refuse clearances thereafter to sailing vessels bound for the war zone. [See 4 R. C. L. 12.]

**CERTIFICATION** by the United States Circuit Court of Appeals, Third Circuit, to the Supreme Court, of questions arising upon the filing of libels to recover prepaid freight for the transportation of certain goods and merchandise to designated ports in Europe. *Affirmative answers returned.*

The facts are stated in the opinion of the court.

Messrs. Oscar D. Duncan, Russell T. Mount, and Courtland Palmer, for claimant:

A contract is dissolved where the subject-matter of the contract or some-

thing essential for its performance is destroyed.

Taylor v. Caldwell, 3 Best & S. 826, 122 Eng. Reprint, 309, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week.

Rep. 726, 6 Eng. Rul. Cas. 603; The Kronprinzessin Cecilie (North German Lloyd v. Guaranty Trust Co.) 244 U. S. 12, 61 L. ed. 960, 37 Sup. Ct. Rep. 490; Appleby v. Myers, L. R. 2 C. P. 651, 36 L. J. C. P. N. S. 331, 16 L. T. N. S. 669; Walker v. Tucker, 70 Ill. 527, 8 Mor. Min. Rep. 672; Field v. Brackett, 56 Me. 121; Thomas v. Knowles, 128 Mass. 22; Johnson v. Lyon, 75 Mich. 477, 42 N. W. 993; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Western Hardware & Mfg. Co. v. Bancroft-Charnley Steel Co. 53 C. C. A. 548, 116 Fed. 176; The Tornado (Ellis v. Atlantic Mut. Ins. Co.) 108 U. S. 342, 27 L. ed. 747, 2 Sup. Ct. Rep. 746; Krell v. Henry [1903] 2 K. B. 740, 72 L. J. K. B. N. S. 794, 89 L. T. N. S. 328, 19 Times L. R. 711, 52 Week. Rep. 246.

A contract is dissolved where circumstances supervene which render performance of the contract in the manner, or in the time, contemplated by both parties, impossible.

Geipel v. Smith, L. R. 7 Q. B. 404, 41 L. J. Q. B. N. S. 153, 26 L. T. N. S. 361, 20 Week. Rep. 332, 1 Asp. Mar. L. Cas. 268; Jackson v. Union Marine Ins. Co. L. R. 10 C. P. 125, 44 L. J. C. P. N. S. 27, 31 L. T. N. S. 789, 23 Week. Rep. 169, 2 Asp. Mar. L. Cas. 435, 6 Eng. Rul. Cas. 50; Baily v. De Crespigny, L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; Krell v. Henry [1903] 2 K. B. 740, 72 L. J. K. B. N. S. 794, 89 L. T. N. S. 328, 19 Times L. R. 711, 52 Week. Rep. 246; Scottish Nav. Co. v. W. A. Souther & Co. [1917] 1 K. B. 222, 115 L. T. N. S. 812, 33 Times L. R. 71, 61 Sol. Jo. 85, 22 Com. Cas. 154; Anson, Contr. 14th ed. p. 384; The Kronprinzessin Cecilie (North German Lloyd v. Guaranty Trust Co.) 244 U. S. 12, 61 L. ed. 960, 37 Sup. Ct. Rep. 490; Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779.

The governmental order prohibiting the sailing of the vessel, and the government's refusal to grant her clearance, rendered the performance of the contract illegal, and released the carrier from any further performance, and dissolved the contract.

Baily v. De Crespigny, L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; The Kronprinzessin Cecilie (North German Lloyd v. Guaranty Trust Co.) 244 U. S. 12, 61 L. ed.

960, 37 Sup. Ct. Rep. 490; Jones v. Judd, 4 N. Y. 412; 2 Parsons, Contr. 9th ed. p. 827; Brewster v. Kitchell, 1 Salk. 198, 91 Eng. Reprint, 177.

The interference goes to the very foundation of the contract, or, as it has been termed, "frustrates the adventure."

Jackson v. Union Marine Ins. Co. L. R. 10 C. P. 125, 44 L. J. C. P. N. S. 27, 31 L. T. N. S. 789, 23 Week. Rep. 169, 2 Asp. Mar. L. Cas. 435, 6 Eng. Rul. Cas. 650; Bork v. Norton, 2 McLean, 422, Fed. Cas. No. 1,659; Bensaude v. Thames & M. Marine Ins. Co. [1897] A. C. 609, 66 L. J. Q. B. N. S. 666, 77 L. T. N. S. 282, 46 Week. Rep. 78, 8 Asp. Mar. L. Cas. 315; The Spartan, 25 Fed. 44; Guiseppie v. Manufacturers' Export Co. 124 Fed. 663; Adler v. Galbraith, B. & Co. 156 Fed. 259; Buffalo & L. Land Co. v. Bellevue Land & Improv. Co. 165 N. Y. 247, 51 L.R.A. 951, 59 N. E. 5; Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779; The Kronprinzessin Cecilie (North German Lloyd v. Guaranty Trust Co.) 244 U. S. 12, 61 L. ed. 960, 37 Sup. Ct. Rep. 490; The Eros, — C. C. A. —, 251 Fed. 45; Day v. United States, 245 U. S. 159, 62 L. ed. 219, 38 Sup. Ct. Rep. 57; Taylor v. Caldwell, 3 Best. & S. 826, 122 Eng. Reprint, 309, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week. Rep. 726, 6 Eng. Rul. Cas. 603; Baily v. De Crespigny, L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; Krell v. Henry [1903] 2 K. B. 740, 72 L. J. K. B. N. S. 794, 89 L. T. N. S. 328, 19 Times L. R. 711, 52 Week. Rep. 246; Horlock v. Beal [1916] 1 A. C. 486, 85 L. J. K. B. N. S. 602, 114 L. T. N. S. 193, 32 Times L. R. 251, 60 Sol. Jo. 236, 21 Com. Cas. 201; Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co. [1916] 2 A. C. 397, 115 L. T. N. S. 315, 85 L. J. K. B. N. S. 1389, 32 Times L. R. 677; Shipton v. Harrison [1915] 3 K. B. 676, W. N. 304, 84 L. J. K. B. N. S. 2137, 31 Times L. R. 598; Scottish Nav. Co. v. W. A. Souther & Co. [1917] 1 K. B. 222, 114 L. T. N. S. 171, 115 L. T. N. S. 812, 33 Times L. R. 71, 61 Sol. Jo. 85, 22 Com. Cas. 154; Anglo-Northern Trading Co. v. Emlyn [1917] 2 K. B. 78, 116 L. T. N. S. 414, affirmed in [1918] 1 K. B. 372, 8 B. R. C. 546, 87 L. J. K. B. N. S. 309, 23 Com. Cas. 231, 118 L. T. N. S. 196; E. Hulton & Co. v. Chadwick & Taylor, 33 Times L. R. 363; Lloyd Royal Belge Société Anonyme v. Sta-

thatos (1917) 33 Times L. R. 390, affirmed in 34 Times L. R. 70, 144 L. T. Jo. 42; Metropolitan Water Bd. v. Dick, K. & Co. [1917] 2 K. B. 1, affirmed in [1918] A. C. 119, 8 B. R. C. 483, 117 L. T. N. S. 767, 87 L. J. K. B. N. S. 370, 23 Com. Cas. 148, 34 Times L. R. 113, 16 L. G. R. 1, [1917] W. N. 352, 82 J. P. 61; Scrutton, Charter Parties, 8th ed. p. 91; Geipel v. Smith, L. R. 7 Q. B. 414, 41 L. J. Q. B. N. S. 153, 26 L. T. N. S. 361, 20 Week. Rep. 332, 1 Asp. Mar. L. Cas. 268; The Gracie D. Chambers, — C. C. A. —, 253 Fed. 182.

The contract remains perfectly valid down to the time when the unforeseen event occurs. Any payments made under it, for instance, or any rights which may have become vested, are left untouched, and it is only from the time in question that the parties are excused from further responsibility.

Chandler v. Webster [1914] 1 K. B. 493, 73 L. J. K. B. N. S. 401, 52 Week. Rep. 290, 90 L. T. N. S. 217, 20 Times L. R. 222; The Saratoga, 2 Gall. 178; Fed. Cas. No. 12,355; Scott v. Libby, 2 Johns. 386, 3 Am. Dec. 431; The Tutela, 6 C. Rob. 177; MacKinnon, Effect of War on Contr. Oxford, 1917, p. 18; Civil Service Soc. v. General Steam Nav. Co. [1903] 2 K. B. 756, 72 L. J. K. B. N. S. 933, 52 Week. Rep. 181, 89 L. T. N. S. 429, 20 Times L. R. 10; Lloyd Royal Belge Société Anonyme v. Stathatos, 33 Times L. R. 390; Metropolitan Water Bd. v. Dick, K. & Co. [1917] 2 K. B. 1; Appleby v. Myers, L. R. 2 C. P. 651, 36 L. J. C. P. N. S. 381, 16 L. T. N. S. 669; Oriental S. S. Co. v. Tylor [1893] 2 Q. B. 518, 63 L. J. Q. B. N. S. 128, 4 Reports, 554, 69 L. T. N. S. 577, 42 Week. Rep. 89, 7 Asp. Mar. L. Cas. 377; The Gracie D. Chambers, — C. C. A. —, 253 Fed. 182; 7 Am. & Eng. Enc. Law, 246; Carver, Carriage of Goods by Sea, 1909, 5th ed. p. 726; Greeves v. West India & P. S. S. Co. 22 L. T. N. S. 615; The Queensmore, 51 Fed. 250; Portland Flouring Mills Co. v. British & F. M. Ins. Co. 65 C. C. A. 344, 130 Fed. 860, 195 U. S. 629, 49 L. ed. 352, 25 Sup. Ct. Rep. 787; Burn Line v. United States & A. S. S. Co. 89 C. C. A. 278, 162 Fed. 298; National Steam Nav. Co. v. International Paper Co. 154 C. C. A. 563, 241 Fed. 861; A. Coker & Co. v. Limerick S. S. Co. 118 L. T. N. S. 726, 34 Times L. R. 296, 87 L. J. K. B. N. S. 767; De Silvale v. Kendall, 4 Maule & S. 37, 105 Eng. Reprint, 749, 16 Revised Rep. 873.

3 A.L.R.—2.

Mr. John C. Prizer, for libellants:

If, for any reason whatsoever, other than the fault of the shipper, the cargo fails to arrive at destination in merchantable condition, no freight is earned.

Asfar v. Blundell [1896] 1 Q. B. 123, 65 L. J. Q. B. N. S. 138, 73 L. T. N. S. 648, 44 Week. Rep. 130, 8 Asp. Mar. L. Cas. 106; The Harriman, 9 Wall. 161, 19 L. ed. 629; The Kimball (Duncan v. Kimball) 3 Wall. 37, 18 L. ed. 50; Willett v. Phillips, 8 Ben. 459, Fed. Cas. No. 17,683; Burn Line v. United States & A. S. S. Co. 89 C. C. A. 278, 162 Fed. 298.

Where the voyage is interrupted by any cause, even by a peril excepted in the contract, the vessel has the privilege of forwarding the cargo by another vessel in order to earn its freight; but unless it does so forward the cargo to destination, no freight is payable.

Hunter v. Prinsep, 10 East, 378, 108 Eng. Reprint, 818, 10 Revised Rep. 328; The Tornado (Ellis v. Atlantic Mut. Ins. Co.) 108 U. S. 842, 27 L. ed. 747, 2 Sup. Ct. Rep. 746; 1 Parsons, Admiralty & Shipping, 231.

A contract of affreightment may and frequently does provide that freight shall be prepaid upon shipment. In such a case, if the arrival of the cargo at destination is thereafter prevented by some cause excepted in the charter party (as by a peril of the sea), the American and English law differ upon the right of the vessel to retain the freight. The American and Continental law requires the freight to be returned to the shipper, since it has not in fact been earned.

The Kimball (Duncan v. Kimball) 3 Wall. 37, 18 L. ed. 50; National Steam Nav. Co. v. International Paper Co. 154 C. C. A. 563, 241 Fed. 861.

Under the English rule, the amount of the prepaid freight can be recovered as an item of damage, if the vessel has failed to perform the voyage in consequence of a cause against which it has not provided in its contract.

Great Indian Peninsular R. Co. v. Turnbull, 53 L. T. N. S. 325, 1 Cab. & El. 595, 33 Week. Rep. 874, 5 Asp. Mar. L. Cas. 465; Dufourcet v. Bishop, L. R. 18 Q. B. Div. 373, 56 L. J. Q. B. N. S. 497, 56 L. T. N. S. 633, 6 Asp. Mar. L. Cas. 109; Weir v. Girvin [1900] 1 Q. B. 45, 69 L. J. Q. B. N. S. 168, 48 Week. Rep. 179, 81 L. T. N. S. 687, 16 Times L. R. 31, 5 Com. Cas. 40, 9 Asp. Mar. L. Cas. 7.

Impossibility of performance is no excuse for the nonperformance of the obligations of a maritime contract.

Wald's *Pollock*, Contr. p. 356; 1 Parsons, Contr. 9th ed. p. 608; Scrutton, Charter Parties & Bills of Lading, art. 79; Carver, Carriage of Goods by Sea, 6th ed. § 74, p. 102; Anson, Contr. p. 325; Spence v. Chodwick, 10 Q. B. 517, 116 Eng. Reprint, 197, 16 L. J. Q. B. N. S. 313; Hills v. Sughrue, 15 Mees. & W. 253, 153 Eng. Reprint, 844; Kearon v. Pearson, 7 Hurlst. & N. 386, 158 Eng. Reprint, 523, 31 L. J. Exch. N. S. 1, 10 Week. Rep. 12; Jacobs v. Credit Lyonnais, L. R. 12 Q. B. Div. 589, 53 L. J. Q. B. N. S. 156, 50 L. T. N. S. 194, 32 Week. Rep. 761, 1 Eng. Rul. Cas. 338; Budgett v. Binnington [1891] 1 Q. B. 35, 60 L. J. Q. B. N. S. 1, 39 Week. Rep. 131, 6 Asp. Mar. L. Cas. 592; Thiis v. Byers, L. R. 1 Q. B. Div. 244, 45 L. J. Q. B. N. S. 511, 34 L. T. N. S. 526, 24 Week. Rep. 611, 9 Eng. Rul. Cas. 225; Empire Transp. Co. v. Philadelphia & R. Coal & I. Co. 35 L.R.A. 623, 23 C. C. A. 564, 40 U. S. App. 157, 77 Fed. 919.

An embargo does not abrogate, but simply suspends, the performance of a charter party.

The William King, 2 Wheat, 148, 4 L. ed. 206; Hadley v. Clarke, 8 T. R. 259, 101 Eng. Reprint, 1377, 4 Revised Rep. 641; Carver, Carriage of Goods by Sea, 6th ed. § 242, p. 324; Abbott, Merchant Ships & Seamen, 14th ed. p. 874; 2 Parsons, Contr. 9th ed. 828; Odlin v. Insurance Co. of Pa. 2 Wash. C. C. 312, Fed. Cas. No. 10,433; M'Bride v. Marine Ins. Co. 5 Johns. 299; Palmer v. Lorillard, 16 Johns. 348; Baylies v. Fettyplace, 7 Mass. 324; Tirrell v. Gage, 4 Allen, 245; Lorent v. South Carolina Ins. Co. 1 Nott. & M'C. 505; Kelly v. Johnson, 3 Wash. C. C. 45, Fed. Cas. No. 7,672; Braithwaite v. Aikin, 1 N. D. 455, 48 N. W. 354.

An embargo does not render performance illegal within the usual meaning of the term, "illegality."

Lorent v. South Carolina Ins. Co. 1 Nott. & M'C. 505; 2 Parsons, Contr. 1904, 9th ed. p. 828.

The principle of "frustration of venture" is a principle properly applicable only to contracts, or the severable portions thereof, remaining executory on both sides.

Carver, Carriage of Goods by Sea, 6th ed. § 232, pp. 308, 309, 319; Admiral Shipping Co. v. Weidner, 114 L. T. N. S. 173.

The cases relied upon by claimant to support its doctrine of "frustration of venture" either remained wholly executory on both sides, or were severable contracts which remained mutually executory as to the obligations in question.

Horlock v. Beal [1916] 1 A. C. 486, 114 L. T. N. S. 193, 85 L. J. K. B. N. S. 602, 32 Times L. R. 251, 60 Sol. Jo. 236, 21 Com. Cas. 201; Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co. [1916] 2 A. C. 397, 115 L. T. N. S. 315, 85 L. J. K. B. N. S. 1389, 32 Times L. R. 677; Scottish Nav. Co. v. W. A. Souter & Co. [1917] 1 K. B. 222, 115 L. T. N. S. 812, 33 Times L. R. 71, 61 Sol. Jo. 85, 22 Com. Cas. 154; Anglo-Northern Trading Co. v. Emlyn [1917] 2 K. B. 78, 116 L. T. N. S. 414; Admiral Shipping Co. v. Weidner, supra.

By failing to insert any exceptions in its charter party or bill of lading (other than the dangers of the seas), claimant assumed an absolute obligation to deliver the cargo at Rochefort, France, from which obligation it will not be absolved by the court.

Hills v. Sughrue, 15 Mees. & W. 253, 153 Eng. Reprint, 844; Budgett v. Binnington [1891] 1 Q. B. 35, 60 L. J. Q. B. N. S. 1, 39 Week. Rep. 131, 6 Asp. Mar. L. Cas. 592; The Harriman, 9 Wall. 161, 19 L. ed. 629; Empire Transp. Co. v. Philadelphia & R. Coal & I. Co. 35 L.R.A. 623, 23 C. C. A. 564, 40 U. S. App. 157, 77 Fed. 919.

Mr. Justice McKenna delivered the opinion of the court:

The questions in the cases arise upon libels filed against the Allanwilde to recover prepaid freight for the transportation of certain goods and merchandise to designated ports in Europe.

The solution of the questions turns upon (1) the asserted prevention of the adventure by a storm at sea which the vessel encountered, requiring her return to port for repairs, and (2) afterwards by the restraining power of the government.

On November 1, 1917, the Allanwilde, owned by the Allanwilde Transport Corporation, was seized upon libels filed by the Vacuum Oil Company and A. W. Pidwell, respectively, each of which had shipped certain goods to be carried

from New York to Rochefort, France.

In May, 1917, the Oil Company chartered the vessel to carry a cargo of oil in barrels at the rate of \$16.50 a barrel (changed afterwards to \$15.25).

The charter party contained, *inter alia*, the following provisions:

" . . . freight to be prepaid net on signing bills of lading in United States gold or equivalent, free of discount, commission, or insurance. Freight earned, retained, and irrevocable, vessel lost or not lost."

On August 25, the oil having been loaded, the vessel issued a bill of lading containing, *inter alia*, the following provision: "All conditions and exceptions of charter party are to be considered as embodied in this bill of lading."

Pidwell was permitted to ship certain kegs of nails on the vessel, and on August 15 a bill of lading was issued to him. *Inter alia*, it provided that the carrier should not be liable for loss, damage, delay, or default "by causes beyond the carrier's reasonable control; . . . by arrest or restraint of governments, princes, rulers, or peoples; . . . by prolongation of the voyage; . . ."

It is provided in ¶ 5 of the bill of lading that "full freight to destination, whether intended to be prepaid or collected at destination, and all advance charges . . . are due and payable to (the Allanwilde Transport Corporation) upon the receipt of the goods by the latter . . . and any payment made . . . in respect of the goods . . . shall be deemed fully earned and due and payable to the carrier at any stage before or after loading of the service hereunder without deduction (if unpaid), or refund in whole or in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up; . . ."

In pursuance of the contracts thus attested the oil and the nails were shipped on the Allanwilde, and the freight was paid in ad-

vance,—\$49,745.50 for the oil and \$3,128 for the nails.

The vessel was seaworthy and properly manned and equipped, and set sail September 11. After she had been out about fourteen days and was about 500 miles from New York, she encountered a storm so severe that her boats were carried away and she sprang a leak so threatening that the water in her hold was 3 or 4 feet deep and was gaining on the pumps. Thereupon the master properly decided that he must seek a port of refuge for safety and repair. Halifax was about 500 miles away, but in that direction the wind was against him, while it was favorable for New York, and on this account, as well as for other good reasons, he headed for New York, where he arrived on October 5, having been out twenty-four days. Repairs were undertaken at once, the cargo remaining on board meanwhile.

"On September 28, while the vessel was at sea, the government decided to refuse clearance thereafter to any sailing vessel bound for the war zone. The master did not know of this condition until the vessel returned to New York; he received no information from the shore after September 11. The repairs being finished, the vessel attempted to resume her voyage, but clearance was refused and none could be obtained in spite of her efforts to induce the government to modify its stand. Toward the end of October the shippers were notified by the carrier to unload their goods, and this they did, but under protest and reserving their rights. Afterwards the oil was forwarded by steamship, but at a higher rate of freight and under other charges. What became of the nails after they were unloaded does not appear.

"The vessel declined to refund the freight to either shipper, and the libels were filed to recover not only the prepaid freight but also damages for failure to carry. On each libel the district court entered a decree for the prepaid freight



alone, refusing recovery for the other damages."

Upon these facts the circuit court of appeals have certified four questions, two in each libel, as follows:

"1. Was the adventure frustrated, and was the contract evidenced by the charter party and by the bill of lading issued to the oil company dissolved, so as to relieve the carrier from further obligation to carry the oil?

"2. Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

"3. Was the adventure frustrated, and was the contract evidenced by the bill of lading issued to Pidwell dissolved, so as to relieve the carrier from further obligation to carry the nails?

"4. Whatever answer may be given to the third question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?"

A copy of the charter party and copies of the bills of lading are attached to the certificate and also the official bulletin refusing clearance to "sailing vessels destined to proceed through the war zone."

The argument of counsel upon the elements of the questions is quite extensive, ranging through all of the ways in which contracts can be dissolved or their performance excused by the agreement of the parties or prevented by some supervening cause independent of the parties and dominating their convention. We do not think it is necessary to follow the argument through that range. It may be brought to the narrower compass of the charter party and the bills of lading.

The physical events and what they determined are certified. First, there was the storm, compelling the return of the ship to New York to avert greater disaster; then the

action of the government precluding a second departure. Does the contract of the parties provide for such situation and take care of it, and assign its consequences? The charter party provides, as we have seen, that "freight to be prepaid net on signing bills of lading. . . . Freight earned, retained, and irrevocable, vessel lost or not lost." And it is provided that this provision is, with other provisions, "to be embodied" in the bill of lading. They seem necessarily, therefore, deliberately adopted to be the measure of the rights and obligations of shipper and carrier. Let us repeat: the explicit declaration is—"Freight to be prepaid net on signing bills of lading. . . . Freight earned, retained, and irrevocable, vessel lost or not lost." The provision was not idle or accidental. It is easy to make a charge of injustice against it if we consider only the defeat of the voyage and the noncarriage of the cargo. But there are opposing considerations. There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both. We cannot step in with another and different accommodation. It is urged, however, that there is no provision in the contract (charter party and bill of lading) of the oil company excepting "restraints of princes, rulers, and peoples," and that, therefore, the carrier was not relieved from its obligation by the refusal of clearance to sailing vessels. And it is further urged that such embargo was at most but a temporary impediment, and the cargo should have been retained until the impediment was removed, or transported in a vessel not subject to it. We cannot concur in either contention. The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition,—that is, the submarine menace,—and that, as far as then could be inferred,

would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. The *Kronprinzessin Cecilie* (North German Lloyd v. Guaranty Trust Co.) 244 U. S. 12, 61 L. ed. 960, 37 Sup. Ct. Rep. 490.

There is no imputation of bad faith. The carrier demonstrated an appreciation of its obligations and undertook their discharge. It was stopped, first by storm, and then prevented by the interdiction of the government. In neither situation was it inactive. It quickly repaired the effects of the former and protested against the latter, joining with the shipper in an earnest effort for its relaxation. It gave up only when the impediment was found to be insurmountable.

The answer to the other contention is that the contract regarded

the *Allanwilde*, a sailing ship, not some other kind of ship or means. The *Tornado* (*Ellis v. Atlantic Mut. Ins. Co.*) 108 U. S. 342, 27 L. ed. 747, 2 Sup. Ct. Rep. 746; The *Kronprinzessin Cecilie*, *supra*.

The bill of lading in No. 450 is even more circumstantial. It provided that "full freight to destination, whether intended to be prepaid or collect at destination . . . shall be deemed fully earned and due and payable to the carrier at any stage before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up."

And there is exemption from liability "for any loss, damage, delay, or default . . . by arrest or restraint of government, princes, rulers, or peoples; . . ."

The questions certified are therefore answered in the affirmative.

So ordered.

## ANNOTATION.

Right of parties to contract, the performance of which is interfered with or prevented by war conditions or acts of government in prosecution of war.

### I. Introduction, 21.

#### II. In general:

- a. Where subject-matter of contract or means of performance has been requisitioned, 22.
- b. Effect of requisition of chartered vessel, 24.
- c. Where performance involves doing of illegal act, 26.
- d. Change in conditions due to war as destroying basis of contract, 32.

#### I. Introduction.

The interest at present attaching to the subject of this annotation, which was prepared for use in connection with some important English decisions, reported in vol. 8 of *British Ruling Cases*, has prompted its inclusion in this series.

Its scope does not include the question of the effect of war on contracts

### III. Effect of provision in contract suspending or excusing performance in certain contingencies:

- a. As excluding doctrine of commercial frustration, 41.
- b. As covering situation occasioned by war:
  1. In charter parties or bills of lading, 43.
  2. In contracts of sale, 48.
  3. In other contracts, 53.

of persons who, upon its outbreak, have become alien enemies.

As to the effect of war on c. i. f. contracts, see *Arnhold, K. & Co. v. Blythe, G. J. & Co.* 7 B. R. C. (Eng.) 934, and note thereto appended.

The number and importance of the legal questions to which the European War has given and is still likely to give rise appear to justify a colla-

tion of the cases from the point of view indicated by the title of this note, although their decision may have been based on general principles of broader operation.

It is familiar law that, as a general rule, what a party is bound by contract to perform, he must perform, or pay damages upon his failure to do so. To this rule, however, there have been admitted certain exceptions. The first is where the contract is one for personal services, in which case there is generally the implied condition that the person who is to render the service shall be alive, and not incapacitated by illness. The second exception is where the specific thing which is essential to performance is destroyed. The third exception is where the performance of the contract has become unlawful; and the fourth, which is difficult to state in general terms which are not too broad, is where the conditions with reference to which the parties must be deemed to have contracted do not in fact exist, or where, without fault of either party, there has been such a change in conditions that to enforce performance under the changed conditions is in effect to substitute a different contract. This fourth exception has been termed by the English

courts, "the doctrine of commercial frustration."<sup>1</sup>

There are, in the class of cases described by the title of this note, two questions, considered respectively in subdivisions II. and III., *infra*, (a) whether the particular case falls within any of the above-stated exceptions; and (b) if it does not, whether the party sought to be charged has succeeded in contracting himself out of liability for nonperformance in the event which has occurred.

## II. In general.

### a. Where subject-matter of contract or means of performance has been requisitioned.

For discussion of the effect of the requisition of a chartered vessel upon the rights of the parties, see II. b, *infra*.

Where, after the making of the contract of sale, the subject of the sale has been requisitioned, the case may be regarded either as one in which the basis of the contract has been destroyed, or as one where performance has been rendered illegal by an act of state, and the seller is accordingly excused.<sup>2</sup> But where the requisition was not made until after the time for performance had expired, the buyer's right to damages for

<sup>1</sup> "Commercial frustration of an adventure by delay means," said Bailhache, J., in *Admiral Shipping Co. v. Weidner, H. & Co.* [1916] 1 K. B. (Eng.) 429, "the happening of some unforeseen delay without the fault of either party to a contract, of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made." And this definition is referred to with approval in *Scottish Nav. Co. v. W. A. Souter & Co.* [1917] 1 K. B. (Eng.) 222, 115 L. T. N. S. 812, 33 Times L. R. 71, 61 Sol. Jo. 85, 22 Com. Cas. 154.

The juristic meaning of the phrase,

"commercially impracticable," is that the contract cannot be applied to circumstances which could not have been within the contemplation of the parties when the contract was made. Per McCordie, J., in *Naylor, B. & Co. v. Krainische Industrie Gesellschaft* [1918] 118 L. T. N. S. (Eng.) 442.

<sup>2</sup> In *Re Shipton* [1915] 3 K. B. (Eng.) 676, 84 L. J. K. B. N. S. 2137, 113 L. T. N. S. 1009, 31 Times L. R. 598, 21 Com. Cas. 138, W. N. 304, performance of an executory contract for the sale of certain wheat was held excused, where the wheat was requisitioned by the government, Lord Reading, Ch. J., basing his conclusion on the ground that the contract must be taken to have been made subject to the implied condition that the wheat should not be requisitioned, and *Darling and Lush, JJ.*, upon the ground that performance had been rendered illegal by an act of state.

breach of contract is not affected thereby.<sup>3</sup>

One who has contracted to sell a vessel then being built by a third party as a tramp steamer, the bulk of the purchase price being payable when the ship should be ready for delivery, cannot recover the balance of the purchase price, where, while the mere skeleton of the ship was still on the stocks, she was requisitioned by the Admiralty, and by their direction completed as a tank steamer, the ship contracted for having never been ready for delivery, and it not appearing that the Admiralty had agreed to pay the purchaser the purchase price of the ship.<sup>4</sup>

An employee entitled to a commission on goods "sold" is not entitled thereto in respect of goods commandeered by the government.<sup>5</sup>

Performance of a contract to carry is excused by a requisition of the means of carriage contemplated by the parties;<sup>6</sup> but a requisition will not have this effect in the case of a contract to supply tonnage.<sup>7</sup>

The requisitioning of a portion of a cargo, not known to the parties at the time of making the agreement, will relieve the shipper from a promise to pay extra freight thereon in consideration of its diversion to another port than that to which it was originally destined.<sup>8</sup>

<sup>3</sup> Where there is a breach of a contract for the sale of beans prior to the making of an order by the food controller that any beans "which have arrived or shall hereafter arrive in the United Kingdom shall be held at the disposal of the food controller," the making of such order does not affect the buyer's right to recover damages. *Produce Brokers v. Weiss & Co.* [1918] 118 L. T. N. S. (Eng.) 111, 86 L. J. K. B. N. S. 472, affirmed by court of appeal, see [1918] 145 L. T. Jo. 188.

<sup>4</sup> *Dale S. S. Co. v. Northern S. S. Co.* (1918) 34 Times L. R. (Eng.) 271, 62 Sol. Jo. 328.

<sup>5</sup> *Thompson v. British Berna Motor Lorries* [1917] 33 Times L. R. (Eng.) 187, 142 L. T. Jo. 262.

<sup>6</sup> In *Graves v. Miami S. S. Co.* [1899] 29 Misc. 645, 61 N. Y. Supp. 115, it was said that a performance of a con-

In the performance of contracts with the government, even for military supplies, precedence over civilian contracts does not necessarily inhere, nor may be imported or imposed otherwise than as provided by act of Congress.<sup>9</sup>

The effect of National Defense Act, § 120 (39 Stat. at L. 213, 214, chap. 134, Comp. Stat. 1916, §§ 3115F-3115H, 9 Fed. Stat. Anno. 2d ed. p. 1343), which provides that, when an order is placed by the government, "compliance with all such orders for products or materials to be obligatory," and "shall take precedence over all other orders and contracts theretofore placed with such individual, firm, or corporation," and a similar provision of the Naval Appropriation Act of March 4, 1917, chap. 180, is to exonerate a manufacturer whose capacity has been engrossed by government requirements from liability for delay thereby occasioned in filling his other contracts, whether made before or after the enactment of such statutes; though such is not the case where he has voluntarily entered into a contract with the government.<sup>10</sup>

But a manufacturer cannot avail himself of the provisions of the National Defense Act as an excuse for failure to perform a civilian contract, where it does not appear that the government intended to exercise

tract to carry freight on a line of steamers might have been excused had the government, in the exercise of the power of eminent domain, seized the vessels; but that, as it appeared that the vessels were voluntarily chartered to the government, performance was not excused.

<sup>7</sup> See *Dinham, F. & Co. v. Witherington* [1916] W. N. (Eng.) 154, set out in II, b, *infra*.

<sup>8</sup> *Seville & U. K. Carrying Co. v. Mann, G. & Co.* [1916] 32 Times L. R. (Eng.) 522.

<sup>9</sup> *Mawhinney v. Millbrook Woolen Mills* (1918) 105 Misc. 99, 172 N. Y. 461.

<sup>10</sup> *Moore & Tierney v. Roxford Knitting Co.* (1918) 250 Fed. 278; *Mawhinney v. Millbrook Woolen Mills* (N. Y.) *supra*.

the powers conferred upon it by the act in the event of his declining to accept an order.<sup>11</sup>

*b. Effect of requisition of chartered vessel.*

As to the effect of an exception of "restraint of princes" to exonerate the owners or charterers from further

performance of a charter party, see III. b, 1, post.

According to a series of English cases, a time charter party is terminated by the requisition of the vessel by the government when the requisition, to the mind of a reasonable man, would seem likely to outlast a charter party;<sup>12</sup> the time as of which such

<sup>11</sup> *Mawhinney v. Millbrook Woolen Mills* (N. Y.) *supra*.

<sup>12</sup> There is no such reasonable probability of the charterers being unable to regain possession of the chartered vessels for a period which will enable them to derive a substantial benefit therefrom, as to dissolve time charter parties, where at the date of the requisition the charter parties had respectively two, three, and four years to run, notwithstanding it appears that practically the whole of that class of vessels are under requisition so that there is very little chance of any of the ships in question being released during the war. *Chinese Engineering & Min. Co. v. Sale & Co.* [1917] 2 K. B. (Eng.) 599, 86 L. J. K. B. N. S. 1465, 33 Times L. R. 464, 117 L. T. N. S. 32, 22 Com. Cas. 352.

A charter of a steamship for one month, with an option to the charterer of continuing the hire from month to month for an indefinite period, is not terminated by an Admiralty requisition, where there is no proof that the vessel is not likely to outlast the war; and it is immaterial that the requisition was made at the request of the charterers, or that during the period of requisition the vessel has been transferred from a gross basis to the net basis. *Elliott Steam Tug Co. v. Charles Duncan & Sons* [1918] 34 Times L. R. (Eng.) 583.

In *F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. (Eng.) 397, 85 L. J. K. B. N. S. 1389, 115 L. T. N. S. 315, 32 Times L. R. 677, where a vessel chartered by a time charter party was requisitioned by the Admiralty, and at the time of the hearing the charter party still had over nineteen months to run, it was held that, as there was a possibility that the vessel might be available for commercial purposes before the expiration of the charter period, there was no such alteration of the basis of contract as to warrant the owner in treating the charter party as at an end.

In *Heilgers & Co. v. Cambrian Steam Nav. Co.* (1917) 33 Times L. R. (Eng.) 348, affirmed in (1917) 34 Times L. R. 72, where a steamer chartered under a time charter was requisitioned at a time when only about four and one-half months of the charter period were unexpired, it was held that as the evidence showed that no business man would, at the time of the requisition, have felt that there was any hope of his obtaining possession of the vessel before the expiration of the charter, for any period which would enable him to use her for any useful purpose, the charter party was determined by the requisition.

In *Bank Line v. Arthur Capel & Co.* [1919] A. C. (Eng.) 435, where a vessel, chartered for a period of twelve months from the time the vessel should be delivered and placed at the disposal of the charterers at a coal port in the United Kingdom, as ordered by the charterers, to trade between safe ports within specified limits, the charter party providing that should the steamer not have been delivered on April 30th, 1915, the charterers should have the opportunity of canceling the charter, and that should it be proved that the steamer, through unforeseen circumstances, could not be delivered by the canceling date, the charterers, if required, should, within a prescribed time after receiving notice thereof, declare whether they would cancel or take delivery, was requisitioned after the 30th of April, 1915, but before delivery, the requisition and detention so destroyed the identity of the chartered service as to entitle the owner to treat the charter party as at an end.

A court is justified in finding that a time charter party, having five months to run at the time of the requisition of the chartered vessel by the government, is terminated by such requisition, where there is evidence that when a ship was requisitioned by the government the average general expectation was that it would be detained for the period of the war, and

test is to be applied being the time when the requisition is made.<sup>13</sup>

Whether a time charter party is determined by a requisition of the vessel by the government during its currency is a question of fact in every case, which has to be decided by the judge on the material before him.<sup>14</sup>

In the United States, it has been held that a time charter party is not necessarily terminated by a requisition of the vessel by the government, and the charterer is accordingly entitled to the compensation paid by the government so long as the ship is used for voyages within the charter limits and in carrying cargoes not of the character excluded by the charter party.<sup>15</sup>

The owners of a vessel under charter are justified in refusing to load a cargo as directed by the charterers, where the vessel has been requisitioned by their government, although it was at the time in foreign waters.<sup>16</sup>

In an English case, where a vessel

chartered for twelve months at a certain sum, payable monthly, and containing an exception clause under which the restraint of princes was mutually excepted, and a clause giving the charterer an option of subletting, was requisitioned by the Admiralty, it was held that as the owner was exonerated from obligation to put the ship at the charterer's disposal during the period it was under requisition, and as there was not an entire failure of consideration if the charter party was subsisting, the charterer having become entitled to the hire payable by the Admiralty, the charterer was liable for the hire during the requisition period, although the amount paid by the government was substantially less than the charterer's hire.<sup>17</sup>

#### Apportionment of hire paid by government.

Time charterers of vessels requisitioned by the government are not entitled to the whole of the hire paid by

at the date of the requisition there was no expectation that the war would come to an end in five months. *Countess of Warwick S. S. Co. v. Le Nickel Société Anonyme* [1918] 1 K. B. (Eng.) 372, 8 B. R. C. 546, 118 L. T. N. S. 196, 87 L. J. K. B. N. S. 309, 23 Com. Cas. 231.

The view taken by the English courts, that a time charter party is terminated by the requisition of the vessel by the government when the requisition, to the mind of a reasonable man, would seem likely to outlast the charter party, is commented upon by Judge Hand in *Earn Line S. S. Co. v. Sutherland S. S. Co.* (1918) 254 Fed. 126, who said, in part: "I should myself incline to think that any requisition ought, *prima facie*, to terminate the charter party. As I have said, I do not regard the conditions of the 'breakdown' clause as necessarily exclusive. It does not seem to me, with deference, a very practicable rule to speculate upon whether the charter party will outlast the requisition by any period at all. Suppose it does outlast it by a few months. The charterer may have been deprived of the use of the ship without adequate return for perhaps all but a short time. It seems unfair to hold him to the hire. I recognize the difficulties where the

charter may have years to run; but when, as here, the question is of months, it seems to me that a requisition which is presumably intended for a substantial time should terminate the contract. This question it is not, however, necessary for me to decide."

<sup>13</sup> *Heilgers & Co. v. Cambrian Steam Nav. Co.* (1917) 33 Times L. R. (Eng.) 349, affirmed in (1917) 34 Times L. R. 72.

<sup>14</sup> *Countess of Warwick S. S. Co. v. Le Nickel Société Anonyme* (Eng.) *supra*.

<sup>15</sup> *Earn Line S. S. Co. v. Sutherland S. S. Co.* (Fed.) *supra*.

<sup>16</sup> *Ibid.*; *The Adriatic* (1918) 253 Fed. 489.

<sup>17</sup> *Modern Transport Co. v. Dunerich S. S. Co.* [1917] 1 K. B. (Eng.) 370, 115 L. T. N. S. 535, 36 L. J. K. B. N. S. 164, 33 Times L. R. 55, 61 Sol. Jo. 71, 22 Com. Cas. 125, affirming [1916] 1 K. B. 726. The question was not raised in this case whether the adventure was determined by the Admiralty requisition, in as much as the Admiralty requisition proved to be for less than one half of the period of time chartered, and, owing to the rise in freights, it was to the charterer's advantage to treat the charter party as subsisting.

the government for their use where the use which the government may make of the vessels under its charter is more extensive than the use which the original charterers were entitled to make; but in such case the government charter takes effect partly out of the interests of the charterers and partly out of that of the owners, and the compensation paid by the government must be apportioned between the owners and charterers in a ratio to be fixed by ascertaining as fairly as possible what the owners could properly demand monthly for altering the charters to the Admiralty form, which sum should not only include what is necessary to indemnify the owners against the extra expense imposed upon them by the terms of the government charter, but also something to represent what they might reasonably have asked, if free to bargain, for consenting to alter the charter at all, and the sum which the charterers could properly demand monthly for the loss of the benefit of the charter, which must not include anything for special loss possibly inflicted upon the charterers by reason of dislocation of the trade for which they happened in fact to require the ships, but must be fixed on the basis of the value of the ships' services pursuant to the time charters in the tonnage market. The two sums forming the ratio must be calculated with reference to the values ruling on the day of the requisition, and on the

footing that the requisition is to last for an indefinite time, but to expire substantially before the expiration of the time charters.<sup>18</sup>

**Right of charterers to compensation where vessel is lost.**

Where, under the terms of a time charter, hire is to cease on the day of loss, the charterers of the vessel, which was lost by a war risk while under requisition by the government, have no right to share in the compensation money payable by the government.<sup>19</sup>

**c. Where performance involves doing of illegal act.**

It is, as above stated, a well-recognized exception to the general rule that what a party undertakes to do he is bound to perform, that where the performance of a contract becomes impossible by reason of the passage of a statute or by an act of state rendering performance illegal, both parties to the contract are discharged.<sup>20</sup>

This is the ground of decisions which hold that contracts involving continued intercourse are discharged by outbreak of war between the countries of the respective parties.<sup>21</sup> So, also, where a contract between citizens of the same country, or between a citizen and a neutral, cannot be performed without commercial intercourse with the public enemy, as in the case of some contracts for the sale of goods in the enemy's country,<sup>22</sup> or a charter party to carry to

<sup>18</sup> *Chinese Engineering & Min. Co. v. Sale & Co.* [1917] 2 K. B. (Eng.) 599, 86 L. J. K. B. N. S. 1465, 33 Times L. R. 464, 117 L. T. N. S. 32, 22 Com. Cas. 352.

<sup>19</sup> *London American Maritime Trading Co. v. Rio De Janeiro Tramway Light & P. Co.* [1917] 2 K. B. (Eng.) 611, 86 L. J. K. B. N. S. 1470, 116 L. T. N. S. 725, 33 Times L. R. 498, 22 Com. Cas. 359.

<sup>20</sup> *Andrew Millar & Co. v. Taylor & Co.* [1916] 1 K. B. (Eng.) 402, 8 B. R. C. 414, 85 L. J. K. B. N. S. 346, 114 L. T. N. S. 216, 32 Times L. R. 161.

<sup>21</sup> See note in L.R.A.1917C, 662.

<sup>22</sup> Performance of a contract for the sale of goods in a foreign country where they are to be delivered to the

purchaser is dispensed with, where prior to the time of performance war has broken out between the country of the contracting parties and the country in which such goods are situated, and performance cannot be had without commercial intercourse with the enemy. *Jager v. Tolme* [1916] 1 K. B. (Eng.) 939, 85 L. J. K. B. N. S. 1116, 114 L. T. N. S. 647, 32 Times L. R. 291; *Edward Grey & Co. v. Tolme* [1915] 31 Times L. R. (Eng.) 551.

Where a contract for the sale and delivery of foreign goods is made between a British vendor and a British purchaser, and during its continuance the country where the goods are manufactured becomes enemy territory by hostile occupation, trading with per-

or from an enemy's port,<sup>22</sup> it is dissolved by the outbreak of war. But

where other modes of performance are available, the case does not fall

sons in which is forbidden to British subjects by the laws of the realm, the vendor, if he has not the goods in his possession, may legally refuse to deliver, on the ground that to obtain the specified goods is not then legally possible. *Ross v. Shaw* [1917] 2 Ir. R. 367, as reported in *Butterworth's Dig.* 1917, col. 515.

A contract between two companies registered in England, for the sale and delivery of goods which were, in the contemplation of both parties, to be obtained by the seller from Germany, is dissolved by the outbreak of war between England and Germany, its further performance being thereby rendered illegal; and accordingly, the purchaser cannot claim damages for its breach. *Veithardt & Hall v. Rylands Bros.* [1917] 86 L. J. Ch. N. S. (Eng.) 604, 116 L. T. N. S. 706.

An executory contract for the importation of merchandise from a foreign country, made between citizens of the United States, is dissolved by the declaration of war between such country and the United States, rendering further intercourse unlawful. *M'Grath v. Isaacs* [1819] 1 Nott & M'C. (S. C.) 563, s. c. on subsequent appeal [1822] 2 M'Cord, L. 26.

A contract made between persons in England, prior to the breaking out of war between England and Germany, for the sale of sugar to be delivered at the option of the purchaser either on board vessel or at a selected warehouse in a German port, and which provides that in event of a German war the contract is to be deemed closed at the price prevailing on an ascertained date, and the matter adjusted by the payment of the difference between such price and the contract price, is not illegal on the ground that its performance involves trading with the enemy. *Smith, Coney, & Barrett v. Becker, G. & Co.* [1916] 2 Ch. (Eng.) 86, 8 B. R. C. 432, 84 L. J. Ch. N. S. 865, 112 L. T. N. S. 914, 31 Times L. R. 151.

<sup>22</sup> The effect of war upon a contract of affreightment made before, but which remained unexecuted at the time it is declared, and of which it makes a full execution unlawful, or impossible, is to dissolve the contracts and to absolve both parties from further performance of it. *Esposito v.*

*Bowden* [1857] 7 El. & Bl. 763, 119 Eng. Reprint, 1430. *Willes, J.*, said: "In all ordinary cases, the more convenient course for both parties seems to be that both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made, according to the well-known rule, to meet cases of ordinary occurrence, and in times when to permit trading with the enemy, even through neutrals, was the exception, not the rule. These considerations may explain the origin of the rule authoritatively laid down in the books as to war at once working an absolute dissolution."

The shipment of a cargo from an enemy port, even in a neutral vessel, involves *prima facie* a trading with the enemy which is forbidden by law, and therefore no action will lie for breach of an agreement to make such a shipment. *Esposito v. Bowden* (Eng.) *supra*.

A declaration of war between England and Russia before breach of a charter party entered into by British subjects for the loading at a Russian port of a vessel belonging to the plaintiff with goods of the defendant, which made impossible the loading or receiving of the cargo without trading with the enemy, was held in *Reid v. Hoskins* (1855) 4 El. & Bl. 979, 119 Eng. Reprint, 365, to be a defense to an action for failure to load the vessel as agreed. A similar result was reached in *Avery v. Bowden* (1855) 5 El. & Bl. 714, 119 Eng. Reprint, 647, affirmed in (1856) 6 El. & Bl. 962, 119 Eng. Reprint, 1119, 26 L. J. Q. B. N. S. 3, 3 Jur. N. S. 238, 5 Week. Rep. 45.

The charter party of an American ship for a voyage to England is dissolved by the breaking out of war between America and England. *Brown v. Delano* (1815) 12 Mass. 370.



within the exception,<sup>34</sup> but the promisor is excused, if at all, only upon the grounds discussed in II. d. *infra*.

Under the principle that no freight is earned unless a cargo is delivered at its destination, no freight is due where in consequence of a blockade of the port of destination the vessel is obliged to turn back,<sup>35</sup> or where in consequence of war the voyage is terminated at an intermediate port.<sup>36</sup> And where, in consequence of governmental detention of the goods at an

intermediate port, it has become impossible to carry them to their destination, the carrier cannot recover freight and lighterage and warehouse charges.<sup>37</sup>

The master of a vessel is justified in refusing to proceed under a charter party to a blockaded port, performance having become illegal.<sup>38</sup>

Where performance of a contract is prevented by an act of state, such as a prohibition of exportation,<sup>39</sup> or of

<sup>34</sup> Performance of a contract made in New York by a German firm for the sale and shipment from Europe to New York of a quantity "of Belgium H. H. antimony," a product manufactured only by a certain Belgian corporation in Belgium, shipment to be made monthly during the contract period, is not excused by the circumstance that by reason of the declaration of war between Germany and Belgium commercial intercourse between the sellers and the inhabitants or industries of Belgium became, under the laws of the German government, illegal and prohibited; or by the fact that because of the closing down of the factory under stress of the German invasion of Belgium all production of Belgium H. H. antimony ceased; or by the fact that since the outbreak of war all exportation of antimony over the frontier of the German Empire was forbidden by the German government, where it does not appear that the sellers could not have guarded against the contingency which arose, by providing themselves with a sufficient supply of antimony to make deliveries by shipment from some port in Europe, or that they could not have procured the antimony from a warehouse in some nonbelligerent country of Europe. *Richards & Co. v. Wreschner* (1915) 156 N. Y. Supp. 1054, affirmed without opinion in (1916) 174 App. Div. 484, 158 N. Y. Supp. 1129.

A contract made in Australia by an iron and metal merchant whose head offices were in London and Glasgow to supply a quantity of "Continental steel shoeing bars," "quality similar to last; to be shipped in quantities as ordered, in monthly shipments," does not, merely because some of the steel bars delivered under prior contracts were, in the custom invoices, described

as "German mild steel bars," and because Germany and Belgium were the only European countries from which this quality of steel was at the time being exported, necessarily contemplate that the seller is to procure steel from German or Belgian manufacturers, so as to bring it within the rule that supervening illegality will relieve either party from liability for damages to the other in respect of nonperformance. *Cooper v. Neilson & Maxwell* [1919] Vict. L. R. 66, affirming [1918] Vict. L. R. 583.

<sup>35</sup> *Scott v. Libby* (1807) 2 Johns. (N. Y.) 336.

<sup>36</sup> *Brown v. Delano* (Mass.) *supra*.

A British shipowner who agreed to carry goods to a German port, but who, in consequence of the breaking out of war, making completion of the voyage illegal and impossible, discharged the cargo at a British port, is not entitled to the freight, either in whole, since he did not complete the voyage, or in part, since no new contract between the shipowners and the owners of the cargo to give and take delivery at the British port instead of at the German port can be inferred. *St. Enoch Shipping Co. v. Phosphate Min. Co.* [1916] 2 K. B. (Eng.) 624, 21 Com. Cas. 192.

<sup>37</sup> *East Asiatic S. S. Co. v. S. S. Tronto Co.* (1915) 31 Times L. R. (Eng.) 543.

<sup>38</sup> *The Tutela* (1805) 6 C. Rob. (Eng.) 177.

<sup>39</sup> Performance of a contract made between residents of Great Britain for the sale of a quantity of aluminium to be delivered at a foreign port, which might have been implemented by a shipment from any country, is dispensed with where, before the expiration of the time fixed for performance, a governmental regulation is promulgated which provides that no person shall without a permit "buy, sell, or

building work,<sup>30</sup> or an order restricting street lighting,<sup>31</sup> nonperformance during the period of inhibition is excused; but the contract itself is not dissolved unless at the time when it should have been performed there is

a reasonable probability that the inhibition will continue for such a length of time as to frustrate the object of the engagement from a business point of view (see II. c, *infra*).

It has accordingly been held that a

deal in or offer or invite an offer, or propose to buy, sell, or deal or enter into negotiations for the sale or purchase of, or other dealing in, any war material," including aluminium, whether or not such sale, purchase, or dealing was to be effected in the United Kingdom. *Anglo-Russian Merchant Traders v. John Batt & Co.* [1917] 2 K. B. (Eng.) 679, 86 L. J. K. B. N. S. 1360, 116 L. T. N. S. 805, 61 Sol. Jo. 591.

Refusal to perform a contract to supply confectionery for export is not justified by a governmental prohibition of the export of confectionery, but the seller is bound to wait a reasonable time to see whether such prohibition will be continued in force before repudiating the contract. *Andrew Millar & Co. v. Taylor & Co.* [1916] 1 K. B. (Eng.) 402, 8 B. R. C. 414, 85 L. J. K. B. N. S. 346, 114 L. T. N. S. 216, 32 Times L. R. 161.

<sup>30</sup>In *Innholders' Co. v. Wainwright* [1917] W. N. (Eng.) 172, where the parties entered into an agreement to take land on a building lease, pull down the old buildings, and rebuild them, the agreement providing that a lease should be granted when the new building should be roofed in, and that "until the said lease shall have been granted the lessee shall, so far as circumstances will admit, pay such rents and other moneys, and perform and observe such covenants and conditions, as he would have to pay, perform, and observe if such lease had been actually granted," and after the old buildings had been pulled down a government order prohibited building work without a license, which was refused, in consequence of which the lessee could not make any justifiable use of the site whatever, it was held that the contract was suspended for the period during which it was impossible to get the prohibition against building removed. Mr. Justice Ridley, by whom the case was decided, expressed a willingness to go even further, and to hold that the whole contract was at an end.

<sup>31</sup>A contract by which a gas company agreed with a municipality for a

term of five years, to provide gas lamps, connect them to their mains, to supply gas and light, extinguish, clean, repair, paint, and maintain the lamps, for which service the municipality was to pay an inclusive fixed sum per lamp per annum, payable in four equal quarterly instalments, is not rendered so illegal and impossible of performance by an order made by the competent military authority under the Defense of the Realm Regulations 1914, prohibiting until further order the lighting of street lamps, as to preclude the gas company from recovering quarterly instalments falling due after the date of such order, the contract being not merely one to provide illumination, but also to provide and maintain the lamps and the supply of gas therefor, which obligation they might legally continue to perform. *Leiston Gas Co. v. Leiston-cum-Size-well Urban Dist. Council* [1916] 2 K. B. (Eng.) 428, 8 B. R. C. 559, 85 L. J. K. B. N. S. 1759, 115 L. T. N. S. 172, 80 J. P. 385, 32 Times L. R. 588, 60 Sol. Jo. 554, 14 L. G. R. 922.

The foregoing decision was regarded as controlling in *Wycombe Borough Electric Light & P. Co. v. Chipping Wycombe Corp.* [1917] 33 Times L. R. (Eng.) 489, in which it was also held that a provision in an agreement for the lighting of streets that "in case of any default in lighting the lamps or any of them, or if some shall remain not lighted or be suffered to go out during the times in which the same ought to be lighted, as aforesaid, from any cause whatever," the municipal corporation shall be at liberty to deduct a certain sum in respect of each unlighted lamp from any payment to be made by them, does not entitle the municipality to a deduction in the case of lamps unlighted because of governmental restraints; since the words, "from any cause whatever," must, in view of the whole contract, be taken as intended to be limited in fact to any cause within the lighting company's control, and as intended only to provide for default or negligence by the company.

domestic embargo preventing performance may merely suspend, and does not necessarily terminate, a contract of affreightment,<sup>32</sup> unless continued for such a length of time that the object of the voyage is defeated.<sup>33</sup>

<sup>32</sup> An embargo, to continue until the further order of the council, preventing a shipment to a foreign port, was held in *Hadley v. Clarke* (1799) 8 T. R. 259, 101 Eng. Reprint, 1377, 4 Revised Rep. 641, merely to suspend, and not to dissolve, the contract of carriage; so that, although more than two years elapsed before the removal of the embargo, it was held that the shipper could recover damages for a failure thereafter to perform the contract. Regarding this decision, the court in *Andrew Millar & Co. v. Taylor & Co.* (Eng.) *supra*, said that it was there held that although the period of suspense was extreme,—between two and three years,—yet if the effect of an act of state is not to render the completion of the contract impossible, but only to delay its execution temporarily and for a reasonable period, and does not frustrate the object of the engagement from a business point of view and as a mercantile adventure, the promisor is not excused, but must perform the contract; that is to say, must perform it within a reasonable time after the difficulty has been removed.

The rule that an embargo, to continue for an indefinite time, preventing performance, suspends, but does not dissolve, a contract contemplating the shipment of goods, is supported also by the case of *Baylies v. Fettyplace* (1811) 7 Mass. 325. And in this case, it was regarded as immaterial whether the act of Congress laying the embargo was constitutional or otherwise, as it was an ordinance of the government over which the obligor had no control, and rendered performance of the contract temporarily impossible.

This doctrine that a domestic embargo preventing performance merely suspends, and does not terminate, a contract of affreightment, although the embargo is in terms unlimited as to time, and the concurrence of both the legislative and executive branches of the government is necessary to its removal, was approved also in *Odlin v. Insurance Co. of Pennsylvania* (1908) 2 Wash. C. C. 312, Fed. Cas. No. 10,433, where the question, in an

Where a governmental prohibition prevents the doing of an act which itself is an essential condition of the contract, the party bound to perform cannot escape the consequences of nonperformance.

action on an insurance policy, was whether an embargo, imposed by the government to which the insurer and insured belong, subsequently to the beginning of the risk, furnished a legal ground for abandonment. A similar case is *M'Bride v. Marine Ins. Co.* (1810) 5 Johns. (N. Y.) 299.

In *Touteng v. Hubbard* (1802) 3 Bos. & P. 291, 127 Eng. Reprint, 161, 6 Revised Rep. 791, it was held that a British merchant who chartered a Swedish ship then in England, to transport a cargo of fruit from a certain port to England, was not liable for damages for nonperformance, where, because of an embargo laid by the British government on all Swedish vessels, the ship was detained in England until after the season for shipping fruit had passed. The court stated that, if this had not been a Swedish ship hired by a British merchant, the latter would have been obliged to furnish the ship with a cargo if she arrived at the port in question as soon as she might conveniently do so after the embargo was removed, although, by arriving after the fruit season was over, the object of the voyage might be defeated; also that an ordinary embargo does not put an end to the contract of affreightment, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise therefrom, unless they have provided against it by the contract. But the ground of the decision was stated to be that a British merchant is not liable to answer for any damages which the owner of a foreign vessel may sustain from an embargo laid by the British government on foreign ships in the nature of reprisals and partial hostility.

<sup>33</sup> The adventure contemplated by the charter of a Greek vessel for a voyage to New York and back to a French Atlantic port, the vessel to be delivered at Gibraltar, is frustrated and the charter accordingly dissolved, where the vessel was detained at Gibraltar by the British authorities in consequence of the situation that had arisen between the Allies and the

Thus a warranty to sail on or before a certain date in a policy of insurance on a ship is violated by a failure to depart until after such date, although the ship was prevented from sailing by an embargo.<sup>34</sup>

A contract of employment is subject to the implied term that it shall cease to be binding when future performance becomes unlawful; and therefore is finally determined, and not merely suspended, where the employee enlists in or is drafted into the Army.<sup>35</sup>

In a New Jersey case<sup>36</sup> it was held by the vice chancellor that contracts obtained as part of a scheme which, if successful, would have the effect of disrupting the organization of a plant engaged in the manufacture of war materials essential to the prosecution of the war, were avoidable so long as they remained executory, and this whether or not the parties intended to better themselves and had in mind no thought of injury to the government.

It has been held in an English case that further performance of a contract for a supply of print paper at a certain price is excused, whereby governmental restriction importers are forbidden to supply their customers

more than two thirds of the weight supplied to them in 1914, such prohibition rendering the performance of the contract impossible because the delivery of two thirds is not a performance of the contract.<sup>37</sup>

This decision seems as erroneous in principle as it is unjust in fact. The rule that partial delivery is nonperformance is one intended to benefit the purchaser, and should not be perverted to his disadvantage. There was a full performance in this case (compare *Leiston Gas Co. v. Leiston-cum-Sizewell Urban Dist. Council*, in note, 31, *supra*) the obligation of the seller having been, by operation of law, reduced pro tanto. Why should the purchaser lose both the paper of which the government order deprived him and the benefit of his bargain?

Illegality of performance created by the law of a foreign state is not a defense to an action for nonperformance if the contract is not one governed by the law of such foreign state.<sup>38</sup>

Accordingly, a charterer is liable for freight though unable to load a cargo because of a prohibition upon exportation by the government of a foreign country from a part of which the cargo was to be carried.<sup>39</sup>

Greek government. *Lloyd Royal Belge Société Anonyme v. Stathatos* (1917) 34 Times L. R. (Eng.) 70, affirming (1917) 33 Times L. R. 390.

A refusal by the government of clearance to sailing vessels destined to proceed through the war zone, being likely to continue for the duration of the war, of which there could be no estimate or reliable speculation, is not a temporary impediment, and may warrant a carrier in treating his undertaking as abrogated, and not merely as suspended. *ALLANWILDE TRANSPORT CORP. v. VACUUM OIL Co.* (reported herewith) ante, 15.

<sup>34</sup> *Hore v. Whitmore* (1778) 2 Cowp. 784, 98 Eng. Reprint, 1360.

<sup>35</sup> *Marshall v. Glanvill* [1917] 2 K. B. (Eng.) 87, 7 B. R. C. 621, 86 L. J. K. B. N. S. 767, 116 L. T. N. S. 560, 33 Times L. R. 301, 52 L. J. N. C. 165.

<sup>36</sup> *Driver v. Smith* (1918) — N. J. Eq. —, 104 Atl. 717.

<sup>37</sup> *E. Hulton & Co. v. Chadwick* (1917) 33 Times L. R. (Eng.) 363.

The decision, however, was affirmed by the court of appeal, though not without an expression of doubt on the point, on the ground that the parties had contracted on the footing that there should continue to exist the right to import the materials which were necessary for the performance of the contract, and that when the import was prohibited, except upon the terms which obliged the seller to deal with the diminished quantity in a manner other than that prescribed by the contract, the circumstances were so altered that the parties were relieved from the further performance of the contract. *E. Hulton & Co. v. Chadwick & Taylor* (1918) 34 Times L. R. (Eng.) 230, 62 Sol. Jo. 329.

<sup>38</sup> *Furness, W. & Co. v. Rederiaktie-golabet Banco* [1917] 2 K. B. (Eng.) 873, 117 L. T. N. S. 313, 62 Sol. Jo. 25.

<sup>39</sup> *Blight v. Page* (1801) 3 Bos. & P. 295, note, 127 Eng. Reprint, 163, note, 6 Revised Rep. 795.

*d. Change in conditions due to war as destroying basis of contract.*

The doctrine developed in a series of cases of which *Metropolitan Water Bd. v. Dick, K. & Co.* [1918] A. C. (Eng.) 119, 8 B. R. C. 483, 87 L. J. K. B. N. S. 370, 23 Com. Cas. 148, 84 Times L. R. 113, 16 L. G. R. 1, 117 L. T. N. S. 766, [1917] W. N. 352, 82 J. P. 61, is a conspicuous example, is that where performance of a contract has been more than temporarily interrupted or wholly prevented by a change in the conditions with reference to which the parties must be deemed to have contracted, the obligation of the contract is dissolved. In applying this doctrine the courts disclaim any assumption of power to absolve the promisor on the ground that to require performance is inequitable, but assume merely to give effect to an implied term of the contract that the

situation with reference to which it was made shall remain essentially unchanged.<sup>40</sup> The attractiveness of this doctrine lies in its appearance of even-handed justice. It is, however, open to grave objection as departing from the simple and certain rule that the parties' relative claims upon and duties in respect of each other are conclusively fixed and defined by the terms of their own written contract, and as substituting therefor an inquiry, necessarily speculative, into the mental reservations with which the parties made their bargain. To entertain such a doctrine is to substitute uncertainty for certainty, and to create rather than to avoid the necessity of litigation.<sup>41</sup>

It is not enough to bring this doctrine into operation that performance has become more difficult or dangerous<sup>42</sup> or unprofitable.<sup>43</sup>

<sup>40</sup> "Where parties have entered into a contract the performance of which is afterwards interrupted or prevented by circumstances not imposing legal liability for breach of contract on either party, the question, in the absence of any express provision in the contract, whether further performance is completely excused, the contract being at an end, or is suspended till the removal of the cause of interruption, or whether the interruption furnishes no excuse to the party prevented from performance, depends on the exact nature of the implied term, if any, in that particular contract, and whether, when the terms of that implication are settled, what has happened falls within those terms." Per Scrutton, L. J., in *Metropolitan Water Bd. v. Dick, K. & Co.* [1917] 2 K. B. (Eng.) 1.

If from the nature of the contract the parties must have made their bargain on the footing that a particular thing or state of things will continue to exist, a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such

a thing will not happen in any degree. Per Earl Loreburn, in *F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. (Eng.) at p. 403, 85 L. J. K. B. N. S. 1389, 115 L. T. N. S. 315, 32 Times L. R. 677.

The European War of 1914-1919, cannot, notwithstanding its magnitude, be considered such an unexpected event that of itself, without considering its consequences, it dissolves a contract with the performance of which it has interfered. *E. Hulton & Co. v. Chadwick & Taylor* (1918) 34 Times L. R. (Eng.) 230, 62 Sol. Jo. 329.

<sup>41</sup> For a very vigorous criticism of this doctrine, with an instructive analysis of the decisions in which it has been evolved, see an article by Mr. E. C. Mayers, on "The Need of Law Reform—The Doctrine of Frustration of Adventure," in 38 *Canadian Law Times*, pages 86, 151, and 223.

<sup>42</sup> Performance of a contract to deliver whisky at a certain place is not excused by the fact that it would have been exposed to risk of seizure by the military authorities. *Elsev v. Stamps* (1882) 10 Lea (Tenn.) 709.

In *Graves v. Miami S. S. Co.* (1899) 29 Misc. 645, 61 N. Y. Supp. 115, it was held not a defense to an action for breach of a contract to carry freight from Galveston to New York, that, after the making of the contract, war was declared between the United

Whether temporary interruption or impossibility to perform the contract will determine it depends upon whether such interruption or impossibility was one within the contemplation of the parties, or whether its extent is so great and so long as to make it unreasonable to require the parties to proceed; or, to express it in another way, whether the interruption to performance goes to the root of the mat-

ter or the consideration, so that it would render the carrying out of the rest of the contract a thing different in substance from what the parties have stipulated for.<sup>44</sup>

The rights of the parties are to be determined not according to the event, but in view of the circumstances existing at the time the promisor refuses or becomes unable to proceed.<sup>45</sup>

The courts are, however, entitled to

States and Spain, and, on account of the danger of loss of its steamers through seizure by the naval forces of Spain, the defendants discontinued the operation of its line of ships. The court said it was only where hostilities exist between the country to which the vessel belongs and the country for which it is bound that the contract of affreightment is dissolved; and that even had international complications rendered transportation more hazardous, the contract would have been unimpaired, and the defendant would have been compelled to submit to the increased peril.

The owners of a vessel are bound to perform the voyage for which they have chartered the vessel, or to pay damages for their failure to do so, notwithstanding the voyage would expose the vessel to the risk of being sunk by a submarine, where it appears that commerce was not suspended because of the submarine warfare, but on the contrary vessels owned by citizens of both neutral and belligerent countries sailed continuously in the waters in which that warfare was being waged. *Piaggio v. Somerville* (1919) — *Miss.* —, 80 So. 342.

The existence of a state of war does not affect the running of interest on an ascertained balance of account owing to the citizen of a neutral country, if during such time remittance might have been made with safety. *Crawford v. Willing* (1803) 4 *Dall.* (U. S.) 286, 1 *L. ed.* 836.

In *Ashmore v. Cox* [1899] 1 *Q. B.* (Eng.) 436, 68 *L. J. Q. B.* N. S. 72, 15 *Times L. R.* 55, 4 *Com. Cas.* 48, it was held that the defendant, who agreed to sell to the plaintiff 250 bails of Manila hemp, shipment to be made from a port in the Philippine Islands "by sailer or sailers . . . between May 1 and July 31, 1898," had assumed the absolute responsibility of complying with the contract as to the date and method of shipment, and was not ex-

cused from nonperformance by the fact that shipment by sailer between the dates named became, in a mercantile sense, impossible because of the Spanish-American War; it appearing, however, that there was a shipment between the dates named which would have satisfied the contract had it been made for or obtained by the defendant. And it was held that a tender of hemp shipped on September 15th by steamship, although the vessel was expected to arrive about the time the hemp would arrive if shipped on a sailer between the dates named in the contract, was not such a tender as the contract required, so as to constitute a defense to an action for damages.

See also, as supporting the statement made in the text, *Foster's Agency v. Romaine*, in note 62, *infra*.

<sup>44</sup> The mere circumstance that the contractors might lose money if required to resume performance after an interruption occasioned by an act of government will not suffice to terminate the contract. *Metropolitan Water Bd. v. Dick, K. & Co.* [1917] 2 *K. B.* (Eng.) 1, 115 *L. T. N. S.* 448, affirmed in [1918] *A. C.* 119, 8 *B. R. C.* 483, 117 *L. T. N. S.* 766, 87 *L. J. K. B.* N. S. 370, 23 *Com. Cas.* 148, 34 *Times L. R.* 113, 16 *L. G. R.* 1, [1917] *W. N.* 352, 82 *J. P.* 61.

<sup>45</sup> See observations of Scrutton, *L. J.*, in *Metropolitan Water Bd. v. Dick, K. & Co.* [1917] 2 *K. B.* (Eng.) 1, 115 *L. T. N. S.* 448, and in *Leiston Gas Co. v. Leiston-cum-Sizewell Urban Dist. Council* [1916] 2 *K. B.* (Eng.) 428, 8 *B. R. C.* 559, 85 *L. J. K. B.* N. S. 1759, 115 *L. T. N. S.* 172, 80 *J. P.* 385, 82 *Times L. R.* 588, 60 *Sol. Jo.* 554, 14 *L. G. R.* 922.

<sup>46</sup> Subsequent events must not be taken into consideration in determining whether a party was justified in refusing to proceed with the performance of his contract, the question being whether, in view of the circumstances existing at the time, the re-

take into account the real duration of the interruption as proved by the facts which have happened since the commencement of the action.<sup>46</sup>

The broad statement has been made that impossibility of performance due to a foreign war is no excuse,<sup>47</sup> but this is not unqualifiedly true. What is true is, that illegality of performance occasioned by the act of a for-

ign state is no excuse where the contract is not governed by the laws of such state, and that a foreign war will not exonerate the promisor unless he can show that immunity from such interference was an implied condition of his undertaking.<sup>48</sup>

A hostile blockade of a port of departure, preventing the performance of a contract of affreightment, has

been justified. *Liston v. The Carpathian* [1915] 2 K. B. (Eng.) 42, 84 L. J. K. B. N. S. 1135, 112 L. T. N. S. 994, 20 Com. Cas. 224, 13 Asp. Mar. L. Cas. 70, 31 Times L. R. 226, [1915] W. N. 102.

Commercial men must not be asked to wait till the end of a long day to find out, from what in fact happens, whether they are bound by a contract or not; they must be entitled to act on reasonable probabilities at the time when they are called upon to make up their minds. *Embiricos v. Reid* [1914] 3 K. B. (Eng.) 45, 83 L. J. K. B. N. S. 1348, 111 L. T. N. S. 291, 2 Asp. Mar. L. Cas. 513, 19 Com. Cas. 263, 30 Times L. R. 451.

When two nations formally proclaim the existence of a state of war between themselves, parties whose contracts are affected thereby are not bound to wait for a reasonable time to see whether the belligerents may think better of it and make peace, but may avail themselves of the rights reserved by them under their contracts in such circumstances. *The Styria* (1899) 41 C. C. A. 639, 101 Fed. 728, modified on other grounds in (1902) 186 U. S. 1, 46 L. ed. 1027, 22 Sup. Ct. Rep. 731.

The continuance of a state of war is too uncertain to be regarded as temporary. Per Cozens-Hardy, M. R., in *Metropolitan Water Bd. v. Dick, K. & Co.* [1917] 2 K. B. (Eng.) 1, 115 L. T. N. S. 448. See also, to the same effect, *ALLANWILDE TRANSPORT CORP. v. VACUUM OIL CO.* (reported herewith) ante, 15.

The time to ascertain whether the adventure has been frustrated by the requisitioning of a chartered steamship is when the requisition is made. *Heilgers & Co. v. Cambrian Steam Nav. Co.* (1917) 33 Times L. R. (Eng.) 349, affirmed in [1917] 34 Times L. R. 72.

Whether a time charter party is determined by a requisition of the vessel

by the government during its currency does not depend upon the actual duration of the time during which the vessel continues under requisition, but upon the probability at the time of the requisition that the charterer will be deprived of the use of the vessel during the remainder of the term. *Countess of Warwick S. S. Co. v. Le Nickel Société Anonyme* [1918] 1 K. B. (Eng.) 372, 8 B. R. C. 546, 118 L. T. N. S. 196, 87 L. J. K. B. N. S. 309, 23 Com. Cas. 231.

<sup>46</sup> *Metropolitan Water Bd. v. Dick, K. & Co.* [1917] 2 K. B. (Eng.) 1, 115 L. T. N. S. 448, affirmed in [1918] A. C. 119, 8 B. R. C. 483, 117 L. T. N. S. 766, 87 L. J. K. B. N. S. 370, 23 Com. Cas. 148, 34 Times L. R. 113, 16 L. G. R. 1, [1917] W. N. 352, 82 J. P. 61.

<sup>47</sup> See *Richards & Co. v. Wreschner* (1915) 156 N. Y. Supp. 1054, affirmed without opinion in (1916) 174 App. Div. 484, 158 N. Y. Supp. 1129; *Standard Silk Dyeing Co. v. Roessler & H. Chemical Co.* (1917) 244 Fed. 250.

<sup>48</sup> In an action for failure to deliver hemp sold by the defendants to the plaintiff, to be shipped on certain vessels before a specified date, it was held not a defense that the defendants had prepared the hemp for shipment, and, while it was being carried in the lighters to the place of loading, it was seized by the Russian government and confiscated as British property, and that the vessels which were to have taken it were obliged to put to sea to avoid the embargo. *Splidt v. Heath* (1809) 2 Campb. (Eng.) 57, note, 11 Revised Rep. 663. Lord Ellenborough said that the case was governed by *Atkinson v. Ritchie* (1809) 10 East, 530, 103 Eng. Reprint, 877, 10 Revised Rep. 372, set forth infra, which was likewise a case of extreme hardship, and as the defendants had absolutely engaged that the hemp should be shipped, they were liable for failure to perform the contract, from whatever cause it was due.

been held merely to suspend, and not to dissolve, the contract.<sup>49</sup>

The fact that a seller's contemplated source of supply is shut off by an interruption of the usual modes of transportation by war,<sup>50</sup> or by a governmental restriction on exportation,<sup>51</sup> will not excuse delay or failure to perform unless he can show that the obtaining of a supply from such sources was an implied condition of his obligation, and that the interruption of such supply rather than the depletion of his stock by subsequent sales was the cause of his default.<sup>52</sup>

It has been held that a contract for the sale of a quantity of sugar to be delivered at a German port either on board a vessel or at a designated warehouse, at the purchaser's option, cannot be considered as subject to the implied condition that it shall be possible to export the sugar, though such contract was entered into by the parties in ignorance of the fact that the German government had placed an em-

bargo on the export of sugar.<sup>53</sup> And a tender of sugar warehoused in Hamburg is effectual to close an executory contract for the sale of sugar f.o.b. Hamburg, although when the tender was made exportation of sugar had been prohibited by the German government; since the embargo might have proved merely to be a temporary measure and removed at once; or the buyer might have been content to take delivery in warehouse, and not export for a time.<sup>54</sup>

The war measures embodied in the rules of the Milling Division of the United States Food Administration constitute no defense to an action for the breach of a contract to purchase flour, such regulations not operating, nor being intended to operate, to invalidate prior contracts.<sup>55</sup>

It is no defense to an action for rent that the lessee was dispossessed by a hostile army; since, when a party by his own contract creates a duty or charge upon himself, he is bound to

<sup>49</sup> *Palmer v. Lorillard* (1819) 16 Johns. (N. Y.) 348; *Ogden v. Barker* (1820) 18 Johns. (N. Y.) 87.

<sup>50</sup> Where a purchaser of Finland birch timber to be delivered f.o.b. at a British port, under a contract made before the outbreak of war, was unaware that no stocks of Finland timber were held in England, and that the invariable practice was to ship Finland timber direct from Finnish ports, no condition can be implied that the contract was made subject to the seller's ability to obtain shipments of timber; and the sellers are liable in damages although their failure to deliver the timber in accordance with their bargain was due to the war. *BLACKBURN BOBEIN CO. v. T. W. ALLEN & SONS* (reported herewith) ante, 11, affirming [1918] 1 K. B. 540, 34 Times L. R. 266, 118 L. T. N. S. 222, 23 Com. Cas. 271.

In *Jacobs v. Credit Lyonnais* (1884) L. R. 12 Q. B. Div. (Eng.) 589, 53 L. J. Q. B. N. S. 156, 50 L. T. N. S. 194, 32 Week. Rep. 761, 1 Eng. Rul. Cas. 338, it was held that nonperformance of an English contract for the shipment of Algerian esparto to England was not excused by the fact that the shipper was unable to perform the contract, owing to war in Algeria, although, by the French law prevailing

in that country, the shipper would thereby have been excused.

<sup>51</sup> An embargo placed by the Canadian and British governments upon the exportation of grain sacks from Canada is no defense to an action for damages for the seller's delay in delivering them, where, though the seller's office was in Canada, the contract did not mention the place from which shipment was to be made. *Thomson & S. Co. v. Evans, Coleman, & Evans* (1918) 100 Wash. 277, 170 Pac. 578.

<sup>52</sup> A seller who has, at the time of entering into a contract for the sale of goods to be delivered in instalments from time to time, a quantity on hand more than sufficient to implement the contract, cannot be heard to complain that by reason of a cutting off of the supply by the war, and its sales to other buyers, it finds itself unable to meet the demands of the purchaser. *Standard Silk Dyeing Co. v. Roessler & H. Chemical Co.* (1917) 244 Fed. 250.

<sup>53</sup> *Smith, Coney, & Barrett v. Becker, G. & Co.* [1916] 2 Ch. (Eng.) 86, 8 B. R. C. 432, 84 L. J. Ch. N. S. 865, 112 L. T. N. S. 914, 31 Times L. R. 151.

<sup>54</sup> *Jager v. Tolme* [1916] 1 K. B. (Eng.) 939, 85 L. J. K. B. N. S. 1116, 114 L. T. N. S. 647, 32 Times L. R. 291.

<sup>55</sup> *J. C. Lysle Mill. Co. v. Sharp* (1918) — Mo. App. —, 207 S. W. 72.



make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.<sup>56</sup>

The basis of a pre-war contract to carry cement by sea from the Thames to the Forth at a freight which was fixed at a low rate in view of the fact that cargoes of coal were available for the return trip is not destroyed because, in consequence of war, the ports from which the coal was usually carried have been closed, leading to a congestion and consequent delay at the ports where coal could be loaded, and governmental restrictions have been on the movement of ships, occasioning further delay, which added some four days to the time usually occupied on the voyage, and the voyage is attended by danger of attack by submarines.<sup>57</sup>

The charterer of a British ship to carry cargo to such of certain European ports as he may designate is not justified, by the breaking out of war between Great Britain and Germany, in refusing to load a cargo, where it appeared that none of the named ports were blockaded, and that other vessels carried cargoes safely at about the same time, notwithstanding the war greatly increased insurance rates and disorganized the usual ar-

rangements by which exporters obtained pay for their goods.<sup>58</sup>

Where the master of a ship contracted to load a full cargo of goods at St. Petersburg for transportation to England, it was held not a defense to an action for a breach of the charter party, in that the ship sailed from St. Petersburg with only half a cargo, that the nonperformance was due to a bona fide apprehension, which was reasonable and well grounded, that the Russian government intended to lay an embargo on all British vessels, which might take effect immediately, and that the embargo was in fact laid six weeks later.<sup>59</sup>

The right of a broker negotiating a time charter to a commission upon the gross amount of the charter is not affected by the fact that the charter was thereafter nullified by the breaking out of war,<sup>60</sup> or by the requisitioning of the vessel by the government.<sup>61</sup>

Where, after the outbreak of the European war, the defendant, a musician, agreed to pay the plaintiff a commission for procuring for her an engagement for performances in Australia, it being provided that should the engagement not be fulfilled, owing to default on the part of the defendant other than illness, the commission should be payable as if the engagement had been fulfilled, it was held

<sup>56</sup> *Paradine v. Jane* (1647) *Aleyn*, 26, 82 Eng. Reprint, 897.

<sup>57</sup> *Associated Portland Cement Manufacturers v. William Cory & Son* (1915) 31 *Times L. R.* (Eng.) 442.

<sup>58</sup> *Furness W. & Co. v. Louis Miller & Co.* (1916) 232 *Fed.* 189.

<sup>59</sup> *Atkinson v. Ritchie* (1809) 10 *East*, 530, 103 Eng. Reprint, 877, 10 *Revised Rep.* 372. The court considered that there was nothing in the case to take it out of the general rule that one is liable on an absolute contract, notwithstanding an unexpected contingency interferes with performance.

Although the question was not directly presented for decision, *Lord Ellenborough*, in *Sjoerds v. Luscombe* (1812) 16 *East*, 201, 104 Eng. Reprint, 1065, was of the opinion that an embargo in a foreign port, which prevented a party from complying with an express, unqualified contract to fur-

nish a cargo at that port, would not relieve him from obligation.

<sup>60</sup> *Vellore S. S. Co. v. Steengrafe* (1915) 143 *C. C. A.* 514, 229 *Fed.* 394.

<sup>61</sup> Under a provision in a charter party that on defendant's signing (ship lost or not lost) there should be due to the broker through whom the charter party was effected a commission on the estimated gross amount of hire, and also providing that if the ship should be requisitioned by the owner's government the charter party should thereby be canceled, the broker may recover the stipulated commission, notwithstanding the ship has been requisitioned; and the contract may not be varied by proof of a custom that brokers should receive commission only on hire actually earned under the charter party. *Walford v. Les Affreteurs Reunis Société Anonyme* [1918] 34 *Times L. R.* (Eng.) 572, reversing (1918) 34 *Times L. R.* 355.

that the defendant was liable on the contract, notwithstanding her refusal to go to Australia for fear of submarine attacks on the voyage.<sup>62</sup>

An agreement by a firm of stock-brokers to pay half commissions on all business introduced by the other party, and providing that the latter should be entitled to draw on pay day of each settlement of the London Stock Exchange a certain sum on account, to which he was to be entitled whether his commission should amount to so much or not, has been held to be subject to an implied condition that the stock exchange should remain open; and accordingly, where the stock exchange was closed on account of the war, the brokers were held not bound to pay such minimum.<sup>63</sup>

A contract for the construction of a waterworks reservoir to be completed within six years, and involving an expenditure of approximately £670,000, is subject to an implied term or condition that the liability of performance shall cease in the event of lawful action of the government, the effect of which is to impose a delay more than temporary and of uncertain duration; so that where the action of the Minister of Munitions, under powers conferred upon him by law, in ordering the contractor to cease work and to dispose of a large portion of his equipment to the owners of certain munition factories, has occasioned a stoppage of indefinite duration, the contract is at an end.<sup>64</sup>

A contract of employment, first, for a preliminary period of twelve months,

and, if not then terminated, for five years from the end of the preliminary period, has been held not to be dissolved by the internment, for the period of one month, of the employee, who, though born in Germany, was released by reason of his being an Alsatian of French extraction with anti-German sympathies, the interruption thereby occasioned not being sufficient to cause a substantial frustration of the business engagement.<sup>65</sup>

Where the parties are shown to have contracted with reference to the existence of a state of war, there is, of course, no basis for reading into the contract an implied reservation in case of difficulty or impossibility of performance occasioned by war conditions.<sup>66</sup> Thus, it is no defense to an action on a charter party for nonperformance that the port of destination was in a state of blockade, if the defendant knew the fact at the time of entering into the charter party.<sup>67</sup> And performance of a contract made during war, the parties to which were mindful of its existence and contracted with reference to it, is not excused by an abnormal rise in ocean freights, rendering its performance unprofitable.<sup>68</sup> And it has been held that the disturbing, unsettled, and irregular conditions affecting cable service to European points due to the war will not relieve the cable company, in an action to recover the usual charges for transmitting and delivering messages, from proving the fact of delivery.<sup>69</sup>

In some cases conditions occasioned by war have been held to excuse non-

<sup>62</sup> *Foster's Agency v. Romaine* (1916) 32 Times L. R. (Eng.) 331.

<sup>63</sup> *Berthoud v. Schweder* (1915) 31 Times L. R. (Eng.) 404.

<sup>64</sup> *Metropolitan Water Bd. v. Dick, K. & Co.* [1918] A. C. (Eng.) 119, 8 B. R. C. 483, 87 L. J. K. B. N. S. 870, 23 Com. Cas. 148, 34 Times L. R. 113, 16 L. G. R. 1, 117 L. T. N. S. 766 [1917] W. N. 352, 82 J. P. 61.

<sup>65</sup> *Nordman v. Rayner* (1916) 33 Times L. R. (Eng.) 87.

<sup>66</sup> A contracting party cannot claim to have been released from its obligation by the breaking out of war, where the agreement contemplated the state

of war and the parties contracted with reference to its consequences. *Smith v. Morse* (1868) 20 La. Ann. 220.

<sup>67</sup> *Mederios v. Hill* (1832) 8 Bing. 231, 131 Eng. Reprint, 390, 1 Moore & S. 311, 5 Car. & P. 182, 1 L. J. C. P. N. S. 77.

<sup>68</sup> *Bolckow V. & Co. v. Compania Minera De Sierra Minera* (1916) 115 L. T. N. S. (Eng.) 745, 33 Times L. R. 111, 86 L. J. K. B. N. S. 439.

<sup>69</sup> *Commercial Cable Co. v. Philipp Bauer Co.* (1918) 102 Misc. 699, 169 N. Y. Supp. 450, reversing (1917) 100 Misc. 663, 165 N. Y. Supp. 399, which held that under the circumstances the

performance, on the ground that the promisor's undertaking must be regarded as subject to an implied qualification to that effect.

Thus a contract for a transatlantic passage is reasonably to be interpreted as subject to provisions relating to governmental direction and acts, as well as to interference by conditions of war, particularly if set forth on the ticket; and a passenger who ran the risk of a declaration of war, by his presence in a foreign country, cannot claim breach of contract, where the voyage was abandoned because of the mobilization of members of the crew, the restraint upon the sailing of boats that might be needed by the government, and a constructive seizure of the supply of coal.<sup>70</sup>

A contract between residents of Great Britain for the sale of a quantity of aluminium to be shipped by the seller to a foreign country at a price including the cost of freight, at a time when there was, to the knowledge of both parties, a governmental prohibi-

risk of delayed service and impossibility of delivery was assumed by the sender.

<sup>70</sup> *Foster v. Compagnie Francaise de Navigation à Vapeur* (1916) 237 Fed. 858.

<sup>71</sup> *Anglo-Russian Merchant Traders v. John Batt & Co.* [1917] 2 K. B. (Eng.) 679. It was said by Viscount Reading, Ch. J.: "The buyers contend that the implied obligation is that the sellers will obtain a license to ship, and that if they do not they will pay damages. That is to say, that the obligation to ship is absolute. In my opinion, if it were an absolute obligation, it would be contrary to the law of England which governs this case. There was at the time of making the contract, and at all material times, a prohibition against the export of aluminium except under a license. If a license cannot be obtained aluminium cannot be shipped, and I cannot see why the law should imply an absolute obligation to do that which the law forbids. A shipment contrary to the prohibition would be illegal, and an absolute obligation to ship could not be enforced. I cannot agree that, in order to give to the contract its business efficacy, it is a necessary implication that the sellers undertook an ab-

solute obligation to ship whether a license was or was not obtained. A party to a contract may warrant that he will obtain a license, but no such term can be implied in this case. The reasonable view of the contract, in my opinion, having regard to the statement in *The Moorcock* (1889) L. R. 14 Prob. Div. (Eng.) 68, 58 L. J. Prob. N. S. 73, 60 L. T. N. S. 654, 37 Week. Rep. 439, 6 Asp. Mar. L. Cas. 373, is that the sellers sold subject to their being able to ship under a license, and that they impliedly undertook to use their best endeavors to obtain a license. The umpire has found that they used their best endeavors, the failure to ship being due to their inability to obtain a license, and therefore there has been no breach of contract."

A provision in a charter party that the cargo shall be consigned to the Netherlands Overseas Trust imposes upon the charterer the obligation to obtain the consent of the trust to such consignment, without which the vessel would not be allowed by the British to pass.<sup>72</sup>

A purchase of advertising space in a program of international yacht races has been held to be subject to an implied condition that the races shall take place, and the advertiser is not liable where the races were called off on account of war.<sup>73</sup>

The doctrine of commercial frustra-

tion of the export of aluminium except on license granted by the British government, does not impose upon the seller an absolute obligation to ship or pay damages in default of shipment, but is subject to the implied condition that an export license should be obtained; and accordingly the seller is not liable where he has used reasonable diligence to obtain a license, but without success.<sup>71</sup>

<sup>72</sup> *The Malcolm Baxter, Jr.* (1918) 253 Fed. 486.

<sup>73</sup> *In Alfred Marks Realty Co. v. Churchills* (1915) 90 Misc. 370, 153 N. Y. Supp. 264, it was held that the publishers of a "Souvenir and Program of International Yacht Races" could not recover for the insertion of an advertisement in such publication, to be paid for "upon publication and delivery of one copy of the same," where the international yacht races referred to were officially called off because of

tion is applicable to a time charter party, and whether it is to be applied in a particular case depends upon the circumstances. The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charter party.<sup>74</sup> It has been held that the object of a charter party for a Baltic round at a certain rate of hire per month until redelivered, excepting arrests and restraint of princes, and providing that no voyage should be undertaken that would involve risk of seizure or capture; and that in the event of Great Britain or other European power being involved in war affecting the working of the steamer at the commencement or during the currency of the charter, the charterer should have the option of canceling the charter or insuring the steamer against all war risks for full value,—was frustrated so as to determine the charter party, where the

breaking out of the European War while the vessel was in the Gulf of Finland prevented her from completing her voyage for an indefinite length of time.<sup>75</sup>

Where the breaking out of war operates to increase the risk which the promisor has undertaken, performance is excused. Thus, a carrier may, upon the breaking out of war, properly discharge a contraband cargo at an intermediate port where to proceed will expose it to risk of seizure.<sup>76</sup> And a ship may be excused from proceeding to the destination designated by the charter or bill of lading where at the time of its turning back there were reasonable grounds for apprehension that to do so would expose it to the risk of capture, though the cargo, being the property of a neutral, would not run such risk.<sup>77</sup> And the charterers of a vessel are not entitled to recover compensation on account of delay in performing the voyage where

the European War, even though the publishers published and offered for sale copies of the so-called souvenir and program prior to the date fixed for the event, under the rule that, where the performance of an agreement depends upon the happening of an event over which neither party has any control, an implied condition will be read into the agreement to the effect that the contract shall be abrogated upon the nonhappening of such an event.

Another decision to the same effect is *Alfred Marks Realty Co. v. Hotel Hermitage Co.* (1915) 170 App. Div. 484, 156 N. Y. Supp. 179.

<sup>74</sup> See II. b, ante.

<sup>75</sup> *Scottish Nav. Co. v. W. A. Souter & Co.* [1917] 1 K. B. (Eng.) 222, 115 L. T. N. S. 812, 83 Times L. R. 71, 61 Sol. Jo. 85, 22 Com. Cas. 154, reversing the judgment of Sankey, J., in the case of the same name reported in [1916] 1 K. B. 675, and of Bailhache, J., in *Admiral Shipping Co. v. Weidener, H. & Co.* [1916] 1 K. B. (Eng.) 429.

<sup>76</sup> *Nobel's Explosives Co. v. Jenkins* [1896] 2 Q. B. (Eng.) 326, 65 L. J. Q. B. N. S. 638, 75 L. T. N. S. 163, 8 Asp. Mar. L. Cas. 181.

<sup>77</sup> *Duncan v. Koster* (1872) L. R. 4 P. C. (Eng.) 171, 41 L. J. Prob. N. S. 57, 26 L. T. N. S. 48, 8 Moore, P. C. C.

N. S. 411, 17 Eng. Reprint, 366, 20 Week. Rep. 421.

In *The Kronprinzessin Cecelie* (North German Lloyd v. Guaranty Trust Co.) (1917) 244 U. S. 12, 61 L. ed. 960, 37 Sup. Ct. Rep. 490, reversing (1916) 151 C. C. A. 518, 288 Fed. 668, which reversed (1916) 228 Fed. 946, it was held that performance of a contract of carriage from New York to Plymouth, England, evidenced by a bill of lading in the usual form, and not shown to have been entered into with a view to war, was excused, where the master of a German steamship, knowing war to be imminent, and having received a wireless message from the directors of the steamship company stating that war had broken out, turned back when distant from Plymouth about 1,070 miles, and he had then proceeded about as far as he could with coal enough to return if that should prove needful, although war had not in fact been declared, and if nothing unforeseen had happened he might, in fact, have delivered the shipment and escaped capture by the margin of a few hours.

It would seem that the probability must be so strong as to be equivalent to certainty. Compare cases in footnote 42, supra.

such delay was occasioned by a reasonable apprehension of capture.<sup>78</sup>

Of course, where the risk is not in fact increased, the rule is inapplicable. Thus, performance of a neutral's contract to carry to a blockaded port is not excused where the blockade is not actual and effective.<sup>79</sup>

Seamen signing for a peaceful commercial voyage are justified, under the principle above stated, in refusing to proceed to a belligerent port with a contraband cargo, where there is reasonable apprehension of capture en route;<sup>80</sup> and seamen who have engaged for a voyage at a time when risks of war were not in contemplation are discharged from the obligation to proceed where there is basis for a reasonable apprehension of loss

of life or liberty.<sup>81</sup> And where the master of a ship, the crew of which had agreed to serve on an ordinary trading voyage, had, without their knowledge, taken on contraband of war at a port of call, and the ship had been captured and confiscated, it was held that, as the shipowners had, through their agent, broken the contract of hiring by materially altering the character of the voyage, the service of the seamen was not "terminated," within the meaning of § 158 of the Merchant Shipping Act, when the ship was captured; and that the plaintiff, one of the crew, was entitled to recover his wages up to the date of his arrival at the home port, and damages for breach of the agreement.<sup>82</sup>

In accordance with the maxim that

<sup>78</sup> *Anderson v. The San Roman* (1873) L. R. 5 P. C. (Eng.) 301, 1 Asp. Mar. L. Cas. 603, 42 L. J. Prob. N. S. 46, 28 L. T. N. S. 381, 21 Week. Rep. 393.

<sup>79</sup> *Balfour, G. & Co. v. Portland & A. S. S. Co.* (1909) 167 Fed. 1010; and see also *Piaggio v. Somerville* (1919) — Miss. —, 80 So. 342, set out in note 42, *supra*.

<sup>80</sup> *Palace Shipping Co. v. Caine* [1907] A. C. (Eng.) 386, 97 L. T. N. S. 587, 76 L. J. K. B. N. S. 1079, 23 Times L. R. 731, 9 Ann. Cas. 526; per Lord Alverstone in *Lloyd v. Sheen* (1905) 93 L. T. N. S. (Eng.) 174, 10 Asp. Mar. L. Cas. 75; *Sibery v. Connelly* (1905) 94 L. T. N. S. (Eng.) 198, 70 J. P. 145, 22 Times L. R. 174, 10 Asp. Mar. L. Cas. 221.

In *O'Neil v. Armstrong* [1895] 2 Q. B. (Eng.) 418, 73 L. T. N. S. 178, 65 L. J. Q. B. N. S. 7, 14 Reports, 703, 8 Asp. Mar. L. Cas. 63, one who engaged to serve for a fixed sum as a member of a crew to navigate a warship, purchased by the Japanese government in Great Britain, to Japan, was held justified in leaving the ship before completing the voyage upon the breaking out of war between Japan and China, in as much as the consequences of such declaration of war would be to expose him, in the event of his continuing the voyage, to greater risks than those he had contracted to run; and that he was entitled to recover the stipulated sum notwithstanding the voyage was not completed.

<sup>81</sup> Seamen who have engaged for a voyage at a time when risks of war

were not in contemplation are discharged from the obligation to proceed where there is basis for reasonable apprehension of capture or of danger from mines. *Liston v. The Carpathian* [1915] 2 K. B. (Eng.) 42, 84 L. J. K. B. N. S. 1185, 112 L. T. N. S. 994, 20 Com. Cas. 224, 13 Asp. Mar. L. Cas. 70, 31 Times L. R. 226 [1915] W. N. 102.

A contract to employ a seaman for twelve months on board a certain British vessel, not shown to have been made in contemplation of other than ordinary risks, is violated where, upon the breaking out of war between Peru and Spain, the vessel was placed under the orders of a Peruvian, who directed and caused her to act in concert with two ships of war belonging to Peru and engaged in actual hostilities against Spain, and so exposed the crew to the danger at any moment of the loss of their liberty or of their lives. *Burton v. Pinkerton* (1867) L. R. 2 Exch. (Eng.) 340, 36 L. J. Exch. N. S. 137, 16 L. T. N. S. 419, 15 Week. Rep. 1139.

A seaman who signed articles for three years' service on a British vessel is justified, upon the breaking out of war between Great Britain and Germany, in refusing to continue to perform his contract where in doing so there was a reasonable probability that he would incur danger from German naval operations, the risk being other than that contemplated by his contract. *The Epsom* (1915) 227 Fed. 158.

<sup>82</sup> *Austin Friars Steam Shipping Co. v. Strack* [1905] 2 K. B. (Eng.) 315, 74

"freight is the mother of wages," a contract for the hire of a seaman is (in the absence of a statutory provision to the contrary) annulled when his ship is captured by an enemy,<sup>83</sup> though afterward ransomed;<sup>84</sup> but if the ship is recaptured or restored he is entitled to wages, provided he has remained on the ship.<sup>85</sup>

A seaman may recover for wages during the period of detention of the ship and imprisonment of the crew under a hostile embargo, on proof that the crew were restored to the ship and that she completed the voyage and earned the freight;<sup>86</sup> but where the detention of the vessel and her crew is

of indefinite duration, the contract of hiring is dissolved.<sup>87</sup>

Where a person promises to do one of two things in the alternative, and the outbreak of war renders one of the alternatives impossible of performance, he is not excused from performing the other.<sup>88</sup>

*III. Effect of provision in contract suspending or excusing performance in certain contingencies.*

*a. As excluding doctrine of commercial frustration.*

The presence in a contract of a provision suspending or excusing performance in certain contingencies

L. J. K. B. N. S. 683, 53 Week. Rep. 661, 93 L. T. N. S. 169, 21 Times L. R. 556, 10 Asp. Mar. L. Cas. 70.

<sup>83</sup> A contract for the hire of a seaman is annulled when his ship is captured by an enemy, but is revived by a recapture or by restitution, so as to entitle him to his wages, if he has remained on the ship. *Labatt, Mast. & S.* § 531, citing *Abbott, Shipping*, 14th ed. 262, 263; *MacLachlan, Merchant Shipping*, 4th ed. 235.

If a ship be totally lost or captured during the progress of the voyage, or such part of it on which freight is to become due, then the contract for wages is put an end to with it. *Anonymous* (1666) 1 Sid. 179, 82 Eng. Reprint, 1042; *Wiggins v. Ingleton* (1705) 2 Ld. Raym. 1211, 92 Eng. Reprint, 300; *Chandler v. Meade* (1705) 2 Ld. Raym. 1211, 92 Eng. Reprint, 300; *Hernaman v. Bawden* (1766) 3 Burr. 1844, 97 Eng. Reprint, 1129; *Yates v. Hall* (1785) 1 T. R. 73, 99 Eng. Reprint 979. But in *Molloy*, bk. 2, chap. 4, § 14, it is said that if a ship be taken in the course of her voyage, and afterwards recaptured and restitution made, and she proceed on her voyage, the contract is not determined. *Thompson v. Rowcroft* (1803) 4 East, 34, 102 Eng. Reprint, 742.

<sup>84</sup> *Wiggins v. Ingleton* (1705) 2 Ld. Raym. 1211, 92 Eng. Reprint, 300.

<sup>85</sup> See note 83, *supra*.

A mariner captured and taken out of the ship, which was afterward retaken and carried on to the port of destination, cannot recover wages, the contract having been terminated by the capture, and the freight having been ultimately earned by the subsequent services of the crew, in which he bore

no share. *The Friends* (1801) 4 C. Rob. (Eng.) 143.

<sup>86</sup> *Delmainer v. Winteringham* (1815) 4 Campb. (Eng.) 186.

In *Pratt v. Cuff* (1798) unreported, cited in 4 East, 43, 102 Eng. Reprint, 746, it was held that, freight having been earned, a temporary detention of the vessel did not preclude a seaman from recovering wages for the time of his imprisonment.

A hostile seizure of British ships by a foreign government under pretense of precaution against a supposed act of aggression by the British government does not put an end to the contract of a mariner for wages, even during the time of detention. *Beale v. Thompson* (1804) 4 East, 546, 102 Eng. Reprint, 940.

<sup>87</sup> The detention of a British ship in a German port at the time of the breaking out of war between Great Britain and Germany, by rendering further performance of their contract by seamen impossible, terminates their right to wages. *Horlock v. Beal* [1916] 1 A. C. (Eng.) 486, 85 L. J. K. B. N. S. 602, 114 L. T. N. S. 193, 32 Times L. R. 251, 60 Sol. Jo. 236, 21 Com. Cas. 201, Ann. Cas. 1916D, 670.

<sup>88</sup> Where an employer agreed that upon the withdrawal of the employee from her service she would pay her traveling expenses or secure a passage for her to her native country on board a first-class sailing vessel, the fact that by reason of a blockade of the port it has become impossible to engage the passage does not excuse her from performing the alternative of paying the employee's traveling expenses. *Jacquinet v. Boutron* (1867) 19 La. Ann. 30.

may give rise to one or the other of two questions: First, whether in accordance with the truism that no term or condition can be implied in the contract which is inconsistent with its express terms,<sup>89</sup> such provision excludes the possibility of dissolution of the contract by alteration of the circumstances under which it comes to be performed; and, second, whether such provision operates to excuse performance in the contingency which has arisen.

With respect to the first of these questions it has been held that "although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with that foundation."<sup>90</sup>

So, an exception in a charter party of "restraint of princes" does not extend to every restraint, however prolonged, and the effect of which is to frustrate the adventure.<sup>91</sup>

And a provision in a charter party, that in the event of Great Britain or any other European power being involved in war affecting the working of the chartered vessel at the commence-

ment or during the currency of the charter, the charterers shall have the option of canceling the charter or insuring the vessel against all war risks for full value, does not prevent the implication of a condition that the charter shall be void in case of commercial frustration of the object of the adventure by war.<sup>92</sup>

The doctrine of frustration of the adventure as terminating the contract is not excluded by the terms of a charter party, giving the charterers the option of canceling should the steamer not have been delivered by a certain date, and stipulating that should it be proved that the steamer through unforeseen circumstances could not be delivered by such date, the charterers, if required, should, within forty-eight hours after receiving notice thereof, declare whether they would cancel or would take delivery of the steamer, and also that the charterers should have the option of canceling the charter party should the steamer be commandeered by the government during the charter.<sup>93</sup>

A provision in a contract for the construction of a waterworks reservoir to be completed within six years, that if "in consequence of any unusual inclemency of the weather or general or local strikes or combination of workmen, or for want or deficiency of

<sup>89</sup> *Metropolitan Water Bd. v. Dick, K. & Co.* [1918] A. C. (Eng.) 119, 8 B. R. C. 483, 87 L. J. K. B. N. S. 370, 23 Com. Cas. 148, 34 Times L. R. 113, 16 L. G. R. 1, 117 L. T. N. S. 766 [1917] W. N. 352, 82 J. P. 61; *F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. (Eng.) 397, 85 L. J. K. B. N. S. 1389, 115 L. T. N. S. 315, 32 Times L. R. 677.

<sup>90</sup> *Per Lord Haldane in F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. (Eng.) 406.

A provision in a contract in general terms, inserted with the object of meeting delays and difficulties in performance, and preventing them from having the effect of dissolving the contract, though wide enough to cover an event which has occurred, will not prevent it from having the effect of dissolving the contract if it is of such a nature as substantially to frustrate

the objects of the parties or to render their obligations substantially different to those which they contemplated on entering into the contract. *Metropolitan Water Bd. v. Dick, K. & Co.* [1917] 2 K. B. (Eng.) 1, 115 L. T. N. S. 448, affirmed in [1918] A. C. 119, 8 B. R. C. 483, 117 L. T. N. S. 766, 87 L. J. K. B. N. S. 370, 23 Com. Cas. 148, 34 Times L. R. 113, 16 L. G. R. 1, [1917] W. N. 352, 82 J. P. 61.

<sup>91</sup> *Per Lord Haldane in F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. (Eng.) 397, 85 L. J. K. B. N. S. 1389, 115 L. T. N. S. 315, 32 Times L. R. 677.

<sup>92</sup> *Scottish Nav. Co. v. W. A. Souter & Co.* [1917] 1 K. B. (Eng.) 222, 115 L. T. N. S. 812, 33 Times L. R. 71, 61 Sol. Jo. 85, 22 Com. Cas. 154, reversing [1916] 1 K. B. 429, 85 L. J. K. B. N. S. 409, 114 L. T. N. S. 171.

<sup>93</sup> *Bank Line v. Arthur Capel & Co.* [1919] A. C. (Eng.) 435.

any orders, drawings, or directions, or by reason of any difficulties, impediments, objections, oppositions, doubts, disputes, or differences whatsoever and howsoever occasioned, the contractor shall in the opinion of the engineer (whose decision shall be final) have been unduly delayed or impeded in the completion of this contract, it shall be lawful for the engineer, if he shall so think fit, to grant an extension of time, does not cover a case in which the interruption is of such a character and duration as vitally and fundamentally to change the conditions of the contract, and which could not possibly have been in the contemplation of the parties to the contract when it was made, such as a suspension of work for an indefinite period by order of the government.<sup>94</sup>

*b. As covering situation occasioned by war.*

Whether a provision in a contract suspending or excusing performance in certain contingencies covers a case where war conditions have interfered with its performance depends upon the construction to be placed upon the language employed.

*1. In charter parties or bills of lading.*

The exception of "restraint of

princes" in a charter party does not excuse the owner from liability for nonperformance, though his refusal was founded upon a reasonable apprehension, justified by the event, of a restraint not then existing.<sup>95</sup> But if the restraint is actual and existing, refusal to perform will be justified, though the event proves performance possible.<sup>96</sup>

It has been said that the authorities seem to show that in the event of a restraint of princes the obligation of a shipowner (in the absence of any special provision) is to wait a reasonable time for the purpose of ascertaining whether the restraint is likely to be of such a duration as to render it impossible commercially to carry out the contract, and that the question of what is a reasonable time must depend upon the circumstances of each particular case.<sup>97</sup>

It has been held that the owners of a vessel as well as its charterers may be justified, under the restraint of princes clause, in treating the charter party as at an end where the vessel is requisitioned by the government, unless it appears that the compensation to be paid by the government therefor is intended to be a full equivalent for the going rate.<sup>98</sup>

<sup>94</sup> Metropolitan Water Bd. v. Dick, K. & Co. (Eng.) supra.

<sup>95</sup> Watts, W. & Co. v. Mitsui & Co. [1917] A. C. (Eng.) 227, 86 L. J. K. B. N. S. 873, 116 L. T. N. S. 353, 33 Times L. R. 362, 22 Com. Cas. 242, 61 Sol. Jo. 382.

In order to bring an action within the exception in a charter party of restraint of princes, the restraint must be an actual and operative restraint, and not a merely expected and contingent one; hence expectation of an embargo by reason of which the ship sailed before being fully loaded is no defense to an action for breach of an undertaking to load a full cargo. Atkinson v. Ritchie (1809) 10 East, 530, 103 Eng. Reprint, 877, 10 Revised Rep. 372.

<sup>96</sup> In Embiricos v. Reid [1914] 3 K. B. (Eng.) 45, 83 L. J. K. B. N. S. 1948, 111 L. T. N. S. 291, 2 Asp. Mar. L. Cas. 513, 19 Com. Cas. 263, 30 Times L. R. 451, it was held that the charterers of a Greek steamship under a charter

party excepting arrests and restraint of princes, rulers, and peoples, to carry grain from a port in the Sea of Azoff, were justified, upon the outbreak of war between Greece and Turkey before the expiration of the lay days while the vessel was loading, in throwing up the charter party, there being at the time no reasonable probability that Turkey would allow Greek ships to pass through the Dardanelles during the war; and this although, had the ship been loaded in her lay days or in her demurrage days, she might have taken advantage of the permission unexpectedly accorded by the Turkish government, for a limited time, to Greek ships to pass through the Dardanelles.

<sup>97</sup> Adamson v. Newcastle S. S. Freight Ins. Asso. (1879) L. R. 4 Q. B. Div. (Eng.) 462, 48 L. J. Q. B. N. S. 670, 41 L. T. N. S. 160, 27 Week. Rep. 818, 4 Asp. Mar. L. Cas. 150.

<sup>98</sup> Earn Line S. S. Co. v. Sutherland S. S. Co. (1918) 254 Fed. 126.



A charter party between "A, agents and owners, of the good screw steamer to be named of 1,500 tons dead weight and B. & Co., charterers," is one to supply tonnage, and not merely one to furnish a vessel of which the first parties are owners or agents; hence a requisition by the government of available vessels owned or controlled by the contractors is not such a prevention of performance as to entitle the contractors to the benefit of the exception of "restraint of princes."<sup>99</sup>

An exception of "restraint of princes" in a charter party justifies a vessel in refusing to load a cargo where, after the making of the contract and while it still remains wholly unperformed, the port of destination is blockaded; and the vessel is not bound to wait for more than a reasonable time to see whether the blockade will continue.<sup>100</sup> But the exception does not apply where the blockade of the port of destination existed when the charter party was entered into.<sup>101</sup>

An exception in a charter party of restraint of princes operates to protect the owners of a Swedish ship chartered for a period of six months for trading between certain ports all of which were outside of Sweden, from liability for refusal to perform, where by Swedish emergency legislation the ship was prohibited from carrying goods for freight between ports outside the Swedish Kingdom, the owners and master being rendered liable to imprisonment for any

breach of that prohibition, though the charter was a British contract, and the vessel was at the time of the refusal not within the power of the Swedish authorities.<sup>102</sup>

The exception in a bill of lading of "restraints of princes and rulers of people" justifies the refusal of the master of a neutral vessel to carry contraband to a belligerent port where to do so will expose it to the risk of seizure.<sup>103</sup> But a stipulation that the carrier shall not be liable for loss or damage occasioned by arrest or restraint of princes, rulers, or people, does not justify a refusal to perform because of the contraband character of the cargo, where the contract was entered into with full knowledge of the existence of the possibility of interception and seizure.<sup>104</sup>

An exception in a contract by a British subject to provide a ship (to be nominated) for a certain voyage, of "public enemies and restraint of princes," will relieve the contractor from liability where, after the breaking out of war between Great Britain and Germany, the voyage has become impossible without subjecting the ship and cargo to German control, thereby shutting out of the market the tonnage of Great Britain and her Allies and subjecting neutral shipowners to the possibility of German seizure of the cargo, in which case no freight would be earned, rendering it doubtful whether the freight could have been insured, even at a high rate.<sup>105</sup>

<sup>99</sup> *Dinham, F. & Co. v. Witherington* [1916] W. N. (Eng.) 154.

<sup>100</sup> *Geipel v. Smith* (1872) L. R. 7 Q. B. (Eng.) 404, 41 L. J. Q. B. N. S. 153, 26 L. T. N. S. 361, 20 Week. Rep. 332, 1 Asp. Mar. L. Cas. 268.

<sup>101</sup> See *Mederios v. Hill* (1832) 8 Bing. 231, 131 Eng. Reprint, 390, 1 Moore & S. 311, 5 Car. & P. 182, 1 L. J. C. P. N. S. 77, where the fact that the charter party contained the usual exception against the restraint of princes was apparently treated as immaterial.

<sup>102</sup> *Furness, W. & Co. v. Rederiaktiebolaget Banco* [1917] 2 K. B. (Eng.) 873, 117 L. T. N. S. 313, 62 Sol. Jo. 25.

<sup>103</sup> *The Styria* (1899) 41 C. C. A. 639, 101 Fed. 728.

There is a "restraint of princes"

within an exception contained in a bill of lading, where the breaking out of war renders the goods carried contraband, and there is a strong probability that if the voyage is continued they will be seized by warships of the opposing belligerent. *Nobel's Explosives Co. v. Jenkins & Co.* [1896] 2 Q. B. (Eng.) 326, 65 L. J. Q. B. N. S. 638, 73 L. T. N. S. 163, 8 Asp. Mar. L. Cas. 181.

<sup>104</sup> *Balfour, G. & Co. v. Portland & A. S. S. Co.* (1909) 167 Fed. 1010.

<sup>105</sup> *Phosphate Min. Co. v. Rankin, G. & Co.* (1916) 115 L. T. N. S. (Eng.) 211, 248. It was said by Bailhache, J.: "It is a question of degree, no doubt, and the dividing line between reasonable and unreasonable steps to avoid an excepted peril will be drawn at dif-

Carriers under a bill of lading excepting "restraints of princes" are not liable for damages resulting from their failure to perform, where the cargo carried was detained at an intermediate port by the authorities pending inquiries by them as to ownership and actual destination, and its export subsequently prohibited.<sup>106</sup>

A provision in a charter party that in the event of Great Britain or other European power being involved in war affecting the working of the steamer at the commencement or during the currency of the charter, the charterer shall have the option of canceling the charter or insuring the steamer against all war risks for its full value, does not enable the charterer to cancel the charter after the vessel has been exposed to the risk and has been detained indefinitely by a sovereign who has become involved in war, when the vessel is no longer insurable and when the charterer is unable to redeliver it to the owner, either immediately or within any reasonable time.<sup>107</sup>

A provision in a contract to carry goods by sea between certain British ports, making an exception in the case of "perils of the seas, enemies, pirates, arrests, and restraints of princes, rulers, and peoples," does not exonerate the carrier where, although restrictions causing delay were imposed by the government and the voyage was rendered dangerous by enemy submarines, the making of the voyage was not prohibited or rendered impossible.<sup>108</sup>

ferent points by different people, but the steps which the defendants would have had to take in this case seem to me well on the unreasonable side of the line, even after leaving altogether out of account, as I agree in this case I must, the general and enormous rise in freights."

<sup>106</sup> *East Asiatic S. S. Co. v. S. S. Tronto Co.* (1915) 31 Times L. R. (Eng.) 543.

<sup>107</sup> *Scottish Nav. Co. v. W. A. Souter & Co.* [1917] 1 K. B. (Eng.) 222, 115 L. T. N. S. 812, 33 Times L. R. 71, 61 Sol. Jo. 85, 22 Com. Cas. 154.

<sup>108</sup> *Associated Portland Cement Manufacturers v. William Cory & Son* (1915) 31 Times L. R. (Eng.) 442.

It has been held that the owner of a vessel which had deviated from her voyage and was afterward sunk by an enemy submarine cannot claim the benefit of an exception in the bill of lading of "King's enemies."<sup>109</sup> This is true, however, only where an unjustifiable deviation is regarded as doing away with the special contract altogether, leaving the rights of the parties to be governed by the ordinary rules applicable to the relation of carrier and shipper. As to whether it is to be so regarded, there is a difference of opinion.<sup>110</sup>

An exception in a bill of lading of "the King's enemies" protects the carrier from the consequences of a hostile seizure.<sup>111</sup>

It has been held that a charter party providing: "In the event of war, blockade, or prohibition of export preventing loading, this charter party to be canceled," became void, and not merely voidable, where in consequence of war the government closed the ports of loading mentioned in the charter party.<sup>112</sup>

A vessel chartered to carry cargo to a French port, which, after starting on its voyage and being forced back to the port of departure by stress of weather, is prevented from sailing for its port of destination by an order of the Federal Exportation Administrative Board, refusing clearances to sailing vessels destined to proceed through the war zone, is relieved of further obligation to carry the cargo, and may claim to retain prepaid

<sup>109</sup> *Morrison & Co. v. Shaw, S. & A. Co.* [1916] 2 K. B. (Eng.) 783, 115 L. T. N. S. 508, 32 Times L. R. 712.

<sup>110</sup> As to the effect of deviation upon the rights and obligations arising from a special contract of affreightment, see note in 2 B. R. C. 587, 612.

<sup>111</sup> *Russell v. Niemann* (1864) 17 C. B. N. S. 163, 144 Eng. Reprint, 66, 34 L. J. C. P. N. S. 10, 10 L. T. N. S. 786, 13 Week. Rep. 63, 24 Eng. Rul. Cas. 361.

<sup>112</sup> *Adamson v. Newcastle S. S. Freight Ins. Asso.* (1879) L. R. 4 Q. B. Div. (Eng.) 462, 48 L. J. Q. B. N. S. 670, 41 L. T. N. S. 160, 27 Week. Rep. 818, 4 Asp. Mar. L. Cas. 150.

freight, under a provision of the bill of lading requiring freight to be prepaid and that freight earned shall be irrevocable, vessel lost or not lost, notwithstanding there was no exception of "restraints of princes, rulers and peoples."<sup>113</sup>

The capture of a vessel abrogates any lien on its cargo for freight notwithstanding such cargo may have been shipped under bills of lading which specifically agreed that "freight is due on shipment and shall be considered as then earned and shall be paid on demand, ship or goods lost or not lost;" and that the shipowners "should have a lien and right of sale . . . over the goods shipped under this, not only for the freight and charges due thereon whether payable in advance or not, but also for all amounts in any wise to become payable to them under the provisions of this, although the same may not then

be ascertained or payable;" nor is such lien reinstated by the restoration of the vessel to its owners by the action of a neutral government, because of the captor's violation of its neutrality laws.<sup>114</sup>

The word "safe" when used in connection with "port," in the provision of a bill of lading exonerating the carrier should the port of discharge prove unsafe, implies that the port must be both physically and politically safe, and the action either of nature or man may render a port unsafe; and therefore the liability of a ship to be sunk or confiscated by enemy vessels on a voyage to a port may be taken into account, although the port itself is safe.<sup>115</sup>

The master of a vessel is not justified in discharging the cargo as being contraband of war, by provisions in a bill of lading permitting the discharge of the cargo at other ports than that

<sup>113</sup> *ALLANWILDE TRANSPORT CORP. v. VACUUM OIL CO.* (reported herewith) ante, 15, reversing in effect (1917) 247 Fed. 236.

The prepaid freight may be retained by the owners of a sailing vessel upon the frustration of the adventure by the Federal government's embargo on sailing vessels bound for the war zone, because of which such vessel never broke ground for the voyage, where the bill of lading contains provisions, "restraints of princes and rulers excepted," and "freight for the said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost." *International Paper Co. v. The Gracie D. Chambers* (U. S. Adv. Ops. 1918-19, p. 186), 248 U. S. 387, 63 L. ed. —, 39 Sup. Ct. Rep. 149.

A vessel owner may retain the prepaid freight where the adventure is frustrated by the refusal of the Federal government to issue an export license, without which the war vessels of the European Allies will not permit the vessel to proceed to destination, where the bill of lading provides that prepaid freight is to be considered as earned upon shipment of the goods, and is to be retained by the vessel owner, vessel or cargo lost or not lost, or if there is a forced interruption or abandonment of the voyage at a port of distress or elsewhere, and that, in

case the ship shall be prevented from reaching her destination by war or the hostile act of any power, the master may wait until the impeding obstacle be removed, or discharge the goods into any depot, or at any convenient port, or bring her cargo back to port of shipment, where the ship's responsibility shall cease, and that the carrier is absolved from loss by arrest and restraint of princes, rulers, or peoples. *Standard Varnish Works v. The Bris* (U. S. Adv. Ops. 1918-19, p. 187), 248 U. S. 392, 63 L. ed. —, 39 Sup. Ct. Rep. 150.

<sup>114</sup> *The Appam* (1917) 243 Fed. 230.

<sup>115</sup> *Palace Shipping Co. v. Jans S. S. Line* [1916] 1 K. B. (Eng.) 138, 85 L. J. K. B. N. S. 415, 115 L. T. N. S. 414, 32 Times L. R. 207, 21 Com. Cas. 270. In this case the court held that, notwithstanding the declaration by Germany that the waters surrounding Great Britain, including the whole of the English channel, was a military area, and that from February 18, 1915, every hostile or merchant ship within these waters would be destroyed, New castle was a safe port in respect of a voyage from Havre to that port, on the ground that the results of the declaration were insignificant and had not appreciably affected the strength or spirit of the British Merchant Marine.

A port is unsafe by reason of war

to which it is consigned in case the master shall consider it unsafe for any reason to enter or discharge cargo there, unless the facts show a reasonable necessity therefor.<sup>115</sup>

A vessel hired before the breaking out of the European War, under a charter party which provides that "no voyage be undertaken and no goods, documents, or persons shipped that would involve risk of seizure, capture, repatriation, or penalty by rulers or governments," is not bound to undertake a voyage which will subject it to the risk of being attacked and sunk by German submarines.<sup>117</sup>

Inability on the part of the owners of a vessel to obtain a crew for the voyage for which the vessel was chartered, because of German submarine activity, is within the provision of the charter party that "the owners shall not be liable for any delay in the commencement or prosecution of the voyage due to a strike or lockout of seamen . . . or dispute involving or preventing the engagement of the crew or part of the crew."<sup>118</sup>

An exception in a bill of lading: "Steamer not answerable for any neglect, default, or error in judgment of the pilot, master, crew, or other

within a provision in the bill of lading that "if the entering of, or discharging in, the port (of discharge) shall be considered by the master unsafe by reason of war . . . the master may land the goods at the nearest safe and convenient port," where to carry the goods to the port of discharge would expose them to the risk of seizure en route. *Nobel's Explosives Co. v. Jenkins* [1896] 2 Q. B. (Eng.) 326, 65 L. J. Q. B. N. S. 638, 75 L. T. N. S. 163, 8 Asp. Mar. L. Cas. 181.

<sup>115</sup> *The Styria* (1899) 93 Fed. 474, modified on other grounds in (1899) 41 C. C. A. 639, 101 Fed. 728, which is affirmed in part and reversed in part in (1902) 186 U. S. 1, 46 L. ed. 1027, 22 Sup. Ct. Rep. 731.

The discharge and warehousing at Port Empedocle, Sicily, by the master of an Austrian vessel bound from Trieste to New York via Sicilian ports, of sulphur shipped at that port, which had become contraband of war by reason of the outbreak of the war between

servants of the shipowners or charterers of the vessel or of their respective agents . . . in the navigation or management of the ship,"—does not cover the conduct of the master in delaying the ship at an intermediate port for reasons of safety.<sup>119</sup>

The provisions of a charter party that the owners will supply the ship in every way fitted for service, and will "maintain the vessel in a thoroughly efficient state in hull and machinery for and during the service," and that "in the event of loss of time from deficiency of men or stores, . . . for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume her service," do not have the effect to render the owners chargeable with loss of time and expense occasioned by an order of the British Admiralty, requiring her to be armed, and in waiting for gunners and ammunition, without which the French government refused to allow her to leave.<sup>120</sup>

Delay in unloading, by congestion owing to the war, is not covered by a charter provision that, "in case, of strikes, lockouts . . . or any other causes beyond the control of the con-

Spain and the United States, and by the Spanish Proclamation of April 23, 1898, without awaiting the result of the rumored efforts of the Italian government to induce the Spanish government to exempt sulphur from the list of the contraband of war, was a reasonable exercise of the discretion vested in him by the bills of lading, having due regard to the interests of the ship and cargo, both contraband and innocent. *The Styria* (1899) 41 C. C. A. 639, 101 Fed. 728.

<sup>117</sup> *Re Tonnevold* [1916] 2 K. B. (Eng.) 551, 85 L. J. K. B. N. S. 1758, 115 L. T. N. S. 311, 21 Com. Cas. 354.

<sup>118</sup> *William Bros. v. Naamlooze Vennootschap W. H. Berghuys Kolenhandel* [1915] 86 L. J. K. B. N. S. (Eng.) 334, 21 Com. Cas. 253.

<sup>119</sup> *The Renee Hyafil* (1916) 32 Times L. R. (Eng.) 660.

<sup>120</sup> *Radcliffe & Co. v. Compagnie Générale Transatlantique* [1918] W. N. (Eng.) 203, 34 Times L. R. 474.

signee" which should delay discharging, such time should not count in the unloading.<sup>121</sup>

*2. In contracts of sale.*

The construction of a provision in a contract of sale, purporting to exonerate the seller from liability for damage or delay occasioned by war, may be affected by the circumstance that the contract was entered into after the outbreak of war. Thus, it has been held that the seller of prussiate of soda, a German product, was not excused from performing his contract by a clause therein providing: "Sellers not liable . . . for losses or damage or delays due to causes beyond their control, including in such causes . . . war or insurrection," where, the contract having been entered into after the existence of war between Germany and Great Britain, the parties must have contemplated that Great Britain would attempt to prevent the exportation of German goods, or that Germany might forbid exportation; such clause being considered, under the circumstances, as having reference to war between Germany and the United States.<sup>122</sup> And even though the condition may be construed as covering the situation, it does not exonerate the seller where he had on hand or received after the beginning of the war more than enough goods to fully perform all his contracts, where, instead of applying them to such contracts, he apportioned such goods among his regular customers in proportion to the usual monthly requirements of each, regardless of whether the customer had a written contract, an oral contract, or no contract at all.<sup>123</sup>

About the only generalization to

which the decisions hereinafter reviewed lend themselves is that a provision in general language, purporting to exonerate the seller from the consequence of nonperformance where occasioned by contingencies for which he is not responsible, will not protect him from the abnormal rise in prices occasioned by war conditions.

Thus, a rise in the price of an article occasioned by a shortage of supply caused by war is not a hindrance to delivery within the meaning of a provision of a contract for the sale of a quantity of such article, that deliveries may be suspended pending any contingencies, such as war, preventing or hindering the manufacture or delivery of the article. To constitute prevention there must be physical or legal prevention; to constitute "hindering" there must be the same causes operating to a less degree, but economic unprofitableness will not do.<sup>124</sup>

A provision in a contract for the sale of coal to be delivered in monthly quantities, that "in case of war . . . or other hindrances intervening or interfering or affecting delivery," the sellers might at their option suspend partly or entirely any deliveries under the contract, does not entitle the sellers to suspend deliveries where war has occasioned a rise in the price of coal, where sufficient coal is procurable at the enhanced price.<sup>125</sup>

Sellers of wood pulp to be delivered in monthly quantities during a period of years are "hindered," within the meaning of a contract provision that "the sellers may suspend delivery under this contract pending any contingency beyond their control which prevents or hinders the delivery of the pulp, namely, . . . war," where, owing to war conditions, there has

<sup>121</sup> Hadjipateras v. Weigall & Co. [1918] W. N. (Eng.) 133, 34 Times L. R. 360.

<sup>122</sup> Standard Silk Dyeing Co. v. Roessler & H. Chemical Co. (1917) 244 Fed. 250.

<sup>123</sup> B. P. Ducas Co. v. Bayer Co. (1916) 163 N. Y. Supp. 32.

<sup>124</sup> Wilson & Co. v. Tennants (Lancashire [1917] 1 K. B. (Eng.) 208, affirmed on this point in [1917] A. C. 495, 8 B. R. C. 450, 86 L. J. K. B. N. S.

1191, 116 L. T. N. S. 780, 33 Times L. R. 454, 61 Sol. Jo. 575, 23 Com. Cas. 41, Ann. Cas. 1918A, 1; E. Hulton & Co. v. Chadwick (1918) 34 Times L. R. (Eng.) 230, 62 Sol. Jo. 329; DAVIDSON CHEMICAL CO. v. BAUGH CHEMICAL CO. (reported herewith) ante, 1.

<sup>125</sup> Instone & Co. v. Speeding M. & Co. (1915) 85 L. J. K. B. N. S. (Eng.) 1423, 114 L. T. N. S. 370, 32 Times L. R. 202.

been a general dislocation of the carrying trade, although it was always possible to obtain sufficient shipping to carry the pulp in sufficient quantity during the period in question.<sup>126</sup>

A shortage of an article occasioned by the fact of war with the country where such article is chiefly produced, rendering it impossible for the vendor to obtain sufficient to fulfil its contract obligations to its customers, and to supply ordinary demands, may be considered as "hindering" delivery thereof within the meaning of a provision in a contract for the sale of the quantity of such article, that deliveries may be "suspended pending any contingencies beyond the control of the sellers or buyers (such as . . . war . . . ) causing a short supply of labor, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article," notwithstanding other customers have acquiesced in the suspension of deliveries under their contracts, thereby leaving their quotas at the vendor's disposal.<sup>127</sup>

Where a contract for a supply of bunker coal, made after the commencement of the European War, followed a pre-war form which provided that "in the event of war, hostilities, or other hindrance of any kind whatever beyond the control of the suppliers, affecting the normal working

of the contract, the suppliers shall, during the continuance of those events and until normal conditions again prevail, be relieved from all obligations under the contract. If Great Britain or France shall be engaged in war with a European power, the contract is subject to cancellation by the suppliers;" but had attached to it a slip containing the following provision: "Notwithstanding the war clause in the attached contract, it is understood that the depots will supply during the present hostilities, so long and in such quantities as the port authorities will permit, and should circumstances arise to further interfere in any manner with the supply, shipment, carriage, or delivery of coals, this contract is subject to cancellation by the suppliers,"—it was held that the difficulty of obtaining vessels for the shipment of coal to the coaling depot, due to a physical scarcity and not merely to extra expense, was such an interference within the meaning of the foregoing contract provision as to entitle the suppliers to cancel.<sup>128</sup>

A provision in a contract for the sale of dyes known by the purchaser to be of German origin: "Sellers not to be held accountable for delays caused by strikes or for any contingencies beyond their control, or other unavoidable accidents, such as fire, etc.,"—exonerates the sellers where as

<sup>126</sup> *Peter Dixon & Sons v. Henderson, C. & Co.* (1918) 87 L. J. K. B. N. S. (Eng.) 683, reversing (1917) 117 L. T. N. S. 636, 23 Com. Cas. 70. The reasoning of the court of appeal in this case may be represented by the following excerpt from the opinion of Eve, J.: "If upon ordinary occasions I have three alternative means of reaching this building, and on a particular occasion I find that two of such means have been suddenly suspended, by reason of a sympathetic strike or for some other cause, and the third is so overcrowded as to preclude my using it, I should say those facts amount to a hindrance of my arrival here; none the less so, if, by reason of some gratuitous lift in a motor car, I ultimately reach my destination. The analogy may not be exact; but it indicates sufficiently the ground upon

which my conclusion is based. With regard to the argument pressed upon us that Messrs. Becker & Co., at the higher freights and under the circumstances aforesaid, could have obtained ships and delivered the pulp required by the respondents, it must be borne in mind that the mere fact that there was a possibility of surmounting the hindrance does not do away with or remove the hindrance. If the hindrance is unsurmountable, then it becomes prevention, and no longer hindrance."

<sup>127</sup> *Tennants (Lancashire) v. C. S. Wilson & Co.* [1917] A. C. (Eng.) 495, 8 B. R. C. 450, 86 L. J. K. B. N. S. 1191, 116 L. T. N. S. 780, 33 Times L. R. 454, 61 Sol. Jo. 575, 23 Com. Cas. 41.

<sup>128</sup> *Scheepvaart Maatschappij Gylsen v. North African Coaling Co.* (1916) 85 L. J. K. B. N. S. (Eng.) 1386, 114 L. T. N. S. 755, 13 Asp. Mar. L. Cas. 339.

a result of conditions arising from the existence of the state of war they are unable to obtain their usual supply of goods.<sup>129</sup> But it has been held that the contingency of foreign war and embargoes laid by foreign powers is not covered by a provision in a contract of sale in favor of the seller that "contingencies beyond our control, fires, strikes, accidents to our works or to our stock, or change in tariff, will allow us to cancel this contract or any part of the same at our option," the court saying: "We think the reasonable construction of this contract is to be found by applying to it the rule, *eiusdem generis*, and that the words, 'fire, strike, accidents to our works or to our stock, or change in tariff' (all of which events are or may be beyond the control of the parties), must be held to limit and qualify the 'contingencies beyond our control' and to confine the happenings which would justify the cancelation of the contract to those of a like nature to the ones enumerated, which an embargo is not."<sup>130</sup>

A provision in a contract for the sale of spelter, that "delays en route or other contingencies beyond our control to be sufficient excuse for any delay traceable to these causes," does not protect the seller from liability for failure to perform where in consequence of war his source of supply is

cut off, if he is able to procure spelter elsewhere, although at an abnormally high price.<sup>131</sup>

A provision in a contract by which sellers in Spain agreed to deliver iron ore to buyers in England, that "in the event of a European war, restraint of princes or governments, civil commotion, accidents, strikes, imminent hostilities preventing the carrying out of this contract, and all other causes . . . beyond the personal control of the seller, the contract to be suspended during that period at the seller's option," does not exonerate the seller from performance where, in consequence of a rise in freights, performance has ceased to be profitable.<sup>132</sup>

Under a clause in a contract for the sale of goods for export, that deliveries may be suspended pending contingencies beyond the control of the seller, the seller is exonerated where, during the time for delivery of certain instalments, there was a governmental prohibition, which did not exist at the time of making the contract, of the export of such goods without a license; nor were the sellers under any obligation, the contract being to deliver f. o. b. a vessel to be designated by the buyers at an English port, to use their best endeavors to obtain a license.<sup>133</sup>

A provision in a contract for a sup-

<sup>129</sup> *B. P. Ducas Co. v. Bayer Co.* (1916) 163 N. Y. Supp. 32.

<sup>130</sup> *Thaddeus Davids Co. v. Hoffmann-La Roche Chemical Works* (1917) 178 App. Div. 855, 166 N. Y. Supp. 179, reversing (1916) 97 Misc. 33, 160 N. Y. Supp. 973.

<sup>131</sup> *Greenway Bros. v. S. F. Jones & Co.* (1915) 32 Times L. R. (Eng.) 184.

<sup>132</sup> *Bolckow, V. & Co. v. Compania Minera De Sierra Minera* (1916) 115 L. T. N. S. (Eng.) 745, 33 Times L. R. 111, 86 L. J. K. B. N. S. 439.

<sup>133</sup> *H. O. Brandt & Co. v. H. N. Morris & Co.* (1917) 117 L. T. N. S. (Eng.) 196, Scrutton, J., said: "At the time that contract was made there was no prohibition on the export of aniline oil. That is some distinction from the case which has already been decided in this court (*Anglo-Russian Merchants Traders v. John Batt & Co.* (1917) 116 L. T. N. S. (Eng.) 805), in

which a contract was made at the time when there was an existing prohibition, and a question arose whose duty it was to provide the licenses, exportation not being possible without a license. In that case, which was a c. and f. contract, *Bailhache, J.*, had held that a man who had contracted to sell at a time when there was a prohibition of export except by license undertook to get the license or pay damages. This court held that, as there was a finding of fact that the seller had done all in his power to get a license, at any rate his obligation was not higher than that, and he was not therefore liable. In this case I think it becomes necessary to go further, and to decide whether in this f. o. b. contract the obligation to get a license in case there should, after the making of the contract, be a prohibition against export, except with a

ply of print paper to the effect that "all orders are subject to strike or lockout clauses and force majeure, fire, or breakdown," does not avail the seller where the only difficulty in the way of performance occasioned by the war interfering with the sources of supply is an increase in price.<sup>134</sup>

A provision in a c. i. f. contract for the sale of Japanese beans that should shipment be prevented by (inter alia) hostilities, "this contract or any unfulfilled part thereof may be canceled," does not exonerate the seller where shipping was obtainable, though at a very high price.<sup>135</sup>

A clause in a contract to sell and deliver a quantity of iron pyrites to be delivered during a period of years, suspending the seller's obligation to deliver "if war . . . or any other cause over which the sellers have no control should prevent them from shipping or exporting ore from the river Guadiana, Portugal, or delivering under normal conditions," does not exonerate the seller where the only obstacle in the way of performance is a rise in freights rendering performance unprofitable; the term "under normal conditions" having application to shipping and delivering, and not to transportation.<sup>136</sup>

A provision in a contract by which sellers in Spain agree to deliver iron ore to buyers in England, that "in case of strikes, combinations of workmen, accidents, war or any unavoidable total or partial stoppage of works or mines, the supplies of minerals now

contracted for may be wholly or partially suspended during the continuance thereof, and the time for delivery extended proportionately. In the case of partial stoppage of works or mines, the delivery is to be pro rata with other then-existing engagements,"—is to be read as if it was "in case of strikes, combinations of workmen, accidents, war, or any other unavoidable cause occasioning total or partial stoppage of works or mines," and hence does not exonerate the seller from performance of the contract where a rise in freights occasioned by war conditions renders it unprofitable.<sup>137</sup>

Where in consequence of the cutting off by war of the German demand for ore from certain Spanish mines, the mines were closed down, the case is within the provision of a contract for the supply of a quantity of ore of a quality obtainable only from such mines, that "in the event . . . of war . . . affecting . . . the mines . . . at which the ore was intended to be worked, the contract should, at the option of the party affected, be suspended wholly or partially according to the extent of the cause or occurrence during the continuance thereof," and this, although the seller at the time of giving notice of the suspension had on hand a quantity of ore which it might have appropriated toward the performance of the contract.<sup>138</sup>

A provision in a contract of sale of goods to be shipped from a foreign port between certain dates, that

license, lies upon the seller or buyer. In my view it lies upon the buyer. The buyer must provide an effective ship—that is to say, a ship that can legally, and as it is bound to by contract, carry the goods. When the buyer has done that, the seller may ship the goods he has contracted to ship. If that is so, the license to export is a buyer's matter. It is the sending of a ship out of the country after the goods are put on board, and it does not make it a seller's matter by a statutory prohibition of the goods being put on the quay if their export is prohibited. Putting on the quay is only subsidiary to the exporting, which is the real matter of the license. In my view, therefore, of the general question in a contract of

this description, it is for the buyer to get the license."

<sup>134</sup> *E. Hulton & Co. v. Chadwick & Taylor* (1917) 33 Times L. R. (Eng.) 863.

<sup>135</sup> *Produce Brokers v. Weiss & Co.* (1918) 118 L. T. N. S. (Eng.) 111, 86 L. J. K. B. N. S. 472, affirmed by court of appeal, see (1918) 145 L. T. Jo. 188.

<sup>136</sup> *Blythe & Co. v. Richards, T. & Co.* (1916) 85 L. J. K. B. N. S. (Eng.) 1425, 114 L. T. N. S. 753.

<sup>137</sup> *Bolckow, V. & Co. v. Compania Minera De Sierra Minera* (1916) 115 L. T. N. S. (Eng.) 745, 33 Times L. R. 111, 86 L. J. K. B. N. S. 439, affirming (1916) 114 L. T. N. S. 758.

<sup>138</sup> *Ebbw Vale Steel, Iron & Coal Co.*



"should the goods or any portion thereof not arrive in London, from loss or other unavoidable cause, this contract to be void for such portion," cannot, where it permits the seller to appropriate to the contract any shipment of proper quantity between the stipulated dates, be taken as excusing failure to ship between the stipulated dates occasioned by war, but has reference only to goods in fact shipped.<sup>139</sup>

The British sellers of vessels to the United States government were "prevented" from performing their engagement to deliver the ships in New York within the meaning of a provision in the contract of sale that, "if from blockade or any other cause arising from the United States becoming belligerents and preventing delivery of either of said steamers, this contract is to be null and void, but the vendor to retain the deposit as and for liquidated damages," where, in consequence of the outbreak of war between the United States and Spain before the ships sailed, the effect of delivery would be to expose the sellers to the penalties of the British Foreign Enlistment Act.<sup>140</sup>

A provision in a contract of sale performable by a tender of goods in a foreign port, that such goods must at the time of the tender "be free of all customs formalities required prior to export," does not prevent from being good a tender at a time when an embargo on the exportation of such goods has been laid by the government.<sup>141</sup>

In order to enable a seller of wheat in Great Britain to take advantage of a provision in a contract of sale that "in case of prohibition of export, blockade, or hostilities, preventing shipment or delivery of wheat to this country, the sellers shall have the option of canceling this contract or any unfulfilled part thereof," it is not nec-

essary that there should be an absolutely total prohibition of export of wheat to Great Britain, but it is sufficient if there is a prohibition of such an extent and of such force as that either a considerable source of supply of wheat to Great Britain is shut up thereby, or that a very considerable rise in the price of wheat in Great Britain should be occasioned by the prohibition.<sup>142</sup>

A provision incorporated into a contract of sale by reference to another contract "that in case of force majeure, as strikes or combinations of workmen or accidents, war, or mobilization, or want of raw material arising through suppliers of works not fulfilling obligations entered into, or any other occurrence which may partially or wholly interfere with the delivery, the same may be partially or wholly suspended during the continuance of any or either of these occurrences. In such cases, however, the 'association' are prepared to intrust other works with the executions of the orders, if at all possible,"—is not applicable to the case of a war between England and Germany.<sup>143</sup>

In one of the cases reported herewith,<sup>144</sup> it was held that a company which had entered into a contract to supply another during a period of years with sulphuric acid, which, in the contemplation of the parties, was to be manufactured from pyrites, was exonerated from liability for nonperformance, by a provision in the contract that "war, insurrections, or other uncontrollable causes, rendering buyers unable to receive or sellers unable to deliver, shall be good and sufficient reasons to make this contract inoperative during the period of . . . continuance of the difficulties," where, by reason of the German U-boat campaign, the seller was unable with reasonable diligence

v. MacLeod & Co. [1917] W. N. (Eng.) 109, affirming (1916) 32 Times L. R. 485.

<sup>139</sup> Ashmore v. Cox [1899] 1 Q. B. (Eng.) 436, 68 L. J. Q. B. N. S. 72, 15 Times L. R. 55, 4 Com. Cas. 48.

<sup>140</sup> United States v. Pelly (1899) 15 Times L. R. (Eng.) 166.

<sup>141</sup> Jager v. Tolme [1916] 1 K. B.

(Eng.) 939, 85 L. J. K. B. N. S. 1116, 114 L. T. N. S. 647, 32 Times L. R. 291.

<sup>142</sup> Ford & Sons v. Henry Leatham & Sons [1915] 84 L. J. K. B. N. S. (Eng.) 2101.

<sup>143</sup> Veithardt & Hall v. Rylands Bros. (1917) 86 L. J. Ch. N. S. (Eng.) 604.

<sup>144</sup> DAVISON CHEMICAL CO. v. BAUGH CHEMICAL CO. ante, 1.

to obtain sufficient pyrites to enable it to perform all its contract obligations; and this, although, upon finding that it would be unable to procure pyrites and notifying its customers that after the exhaustion of its accumulated stock of pyrites, it would not be able to make deliveries of the acid contracted for, and would have to take advantage of the clause in its contract above alluded to, and offered to manufacture acid from brimstone, provided its customers would agree to pay the increased cost of the brimstone acid, delivered in lieu of acid made from pyrites, all of the customers, except the plaintiffs, accepted such offer, and the seller did thereafter receive two cargoes of pyrites, both of which were used in the manufacture of acid, which was distributed among its customers, including the plaintiff.

### 3. In other contracts.

The right reserved by an opera company in a contract with a singer to be performed in the United States, to cancel the contract in case of war, entitles it to cancel it in case of a European war in which the United States is not engaged.<sup>145</sup>

The European War is a public calamity and casualty within the meaning of a contract between an opera company and a musician for the opera season, commencing in Boston, December, 1914, providing that "in case of riot, fire, railroad accident, or other casualties over which the party of the first part has no control, this contract may be canceled at the option of the party of the first part."<sup>146</sup>

A contract for the construction of a vessel to be completed by a fixed date, subject to an extension of time if the construction should be delayed by an unavoidable cause beyond the control of the builders, and providing that in case the builders should, in the event of France becoming engaged in a

European war, be unable to deliver the steamer within eighteen months from the date agreed by the contract for completion, "thereupon this contract shall become void and all money paid by the purchasers shall be repaid to them at 5 per cent," becomes void, and not merely voidable at the option of the purchasers, where, France having become involved in war, the failure of the builders to complete the steamer within eighteen months after the fixed date is due to causes beyond their control.<sup>147</sup>

A provision in an agreement for the lighting of streets that "in case of any default in lighting the lamps or any of them, or if the same shall remain not lighted or be suffered to go out during the times in which the same ought to be lighted as aforesaid from any cause whatever," the municipal corporation shall be at liberty to deduct a certain sum in respect of each unlighted lamp from any payment to be made by them, does not entitle the municipality to a deduction in the case of lamps unlighted because of governmental restraints; since the words, "from any cause whatever," must, in view of the whole contract, be taken as intended to be limited in fact to any cause within the lighting company's control, and as intended only to provide for default or negligence by the company.<sup>148</sup>

The question whether the action of the government in taking over the railways and adopting a scale of preference, in consequence of which a party was unable to get cars to carry his goods, was a "restraint of princes" within the meaning of an exception clause in the contract, was referred to but not decided in a Scotch case,<sup>149</sup> Lord Mackenzie remarking: "If this case is within 'restraint of princes' it would be an extension of the exception beyond that given under it in any of the cases cited to us."

<sup>145</sup> Re Boston Opera Co. (1918) 249 Fed. 271.

<sup>146</sup> Re Boston Opera Co. (1918) 249 Fed. 269.

<sup>147</sup> New Zealand Shipping Co. v. Sociétés des Ateliers et Chantiers [1919] A. C. (Eng.) 1, affirming [1917]

2 K. B. 717, 117 L. T. N. S. 71, 33 Times L. R. 545, 52 Sol. Jo. 322.

<sup>148</sup> Wycombe Borough Electric Light & P. Co. v. Chipping Wycombe Corp. (1917) 33 Times L. R. (Eng.) 489.

<sup>149</sup> Cazalet v. Morris & Co. [1916] S. C. 952, 53 Scot. L. R. 716. E. S. O.

## ELMO STATE BANK of Elmo, Kansas,

v.

C. M. HILDEBRAND, Impleaded, etc., Appt.

*Kansas Supreme Court — November 9, 1918.*

(103 Kan. 705, 177 Pac. 6.)

**Bank — excessive loan — effect.**

1. The fact that a bank has violated the provisions of the statute, prohibiting it from lending to one person or corporation more than 15 per cent of its capital stock and surplus, is not a defense available to one who is sued by the bank upon a promissory note.

[See note on this question beginning on page 59.]

**Evidence — admissibility.**

2. In an action on a promissory note given in payment of insurance policies, where the defense is failure of consideration because the insurance company was insolvent when the policies were issued, held, on the facts stated in the opinion, that the admission of certain testimony was not prejudicial error.

[See 14 R. C. L. 968.]

**Bills and notes — bona fide purchase — notice of set-off.**

3. The purchaser of a promissory note is not prevented from being a holder in due course by the knowledge of the fact that, as between the maker and payee, there may, before the note matures, arise a set-off or counterclaim in favor of the maker.

[See 3 R. C. L. 1065 et seq.]

**— notice of defect.**

4. A bank purchased farmers' notes before maturity, which it knew were given in payment of premiums on policies of insurance, and that in case of loss under the policies the makers would have a set-off or counterclaim against the notes. The insurance company was insolvent when the notes were executed. Held, on the facts stated in the opinion, there was suffi-

cient evidence to support a finding that the bank purchased without notice of any infirmity in the notes.

[See 3 R. C. L. 1071 et seq.]

**Evidence — hearsay — statement without knowledge.**

5. In an action upon a promissory note given in payment of insurance premiums, a letter of the receiver of the insurance company, purporting to state what was done with the note, in respect to which the receiver had no personal knowledge, is not admissible in evidence.

[See 10 R. C. L. 958 et seq.]

**— transfer of note.**

6. Prima facie, the indorsement and transfer of a note give the transferee a good title.

[See 3 R. C. L. 966 et seq.]

**Bills and notes — notice of defect in title.**

7. To constitute notice of infirmity in negotiable paper or defect in title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his act in taking the instrument amounts to bad faith.

[See 3 R. C. L. 1071-1072.]

Headnotes 1-4 by PORTER, J.

(Dawson, J., dissents.)

APPEAL by defendant Hildebrand from a judgment of the District Court for Shawnee County in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Monroe, McClure, & Monroe and S. M. Hutzel for appellant.

Messrs. Edwin Anderson and Frans E. Lindquist, for appellee:

There was nothing in the letter from Clay Hamilton, as receiver of the insurance company, which could, in the least degree, have prejudiced the rights of defendant Hildebrand.

State Sav. Asso. v. Hunt, 17 Kan. 532.

To constitute notice of infirmity in an instrument, or defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or such knowledge that his action in taking the instrument amounted to bad faith.

People's Bank v. Reid, 86 Kan. 245, 120 Pac. 339; Farnsworth v. Burdick, 94 Kan. 749, 147 Pac. 868.

Porter, J., delivered the opinion of the court:

The bank recovered judgment against C. M. Hildebrand on a promissory note, and he appeals.

Hildebrand gave his note for \$367.50 in payment of premiums for policies of insurance issued by the Topeka Mutual Live Stock Insurance Company upon live stock owned by him. He claims that there was no consideration for the note, and that the bank was not a purchaser in good faith. On September 9, 1915, at the time the policies were issued, the Topeka Mutual Live Stock Insurance Company was insolvent. The losses under Hildebrand's policies amounted to \$205, for which he never received anything. The state insurance department made an investigation of the company in February, 1915, and each month thereafter, and the reports on file in the office of the superintendent show that at no time after February, 1915, was the company solvent, and that its liabilities were \$64,000, and its assets practically nothing. Notwithstanding the insolvent condition of the company, it was permitted to do business until December, 1915, when an action was brought by the state, and the company placed in the hands of a receiver.

J. H. White, who organized the

company, was its president, and also president of the White Insurance Agency, which appears to have been a tradename under which the insurance company transferred its premium notes. The day following the issuance of the policies the note in question was indorsed by the insurance company to the White agency, and transferred the next day by that agency to the bank. At the same time seventy other premium notes, given by various farmers throughout the western part of the state, were transferred to the bank; thirty-five of these aggregated \$1,962.56, and thirty-six aggregated \$2,001.97. The vice president of the insurance company negotiated the delivery of the notes to the bank, and at the same time gave the bank two notes, signed by the White Insurance Agency, one for \$1,962.56, and the other for \$2,001.97, receiving from the bank certificates of deposit for like amounts. The bank claimed to hold the two notes of the insurance agency, indorsed by the insurance company, as collateral to the seventy-one farmers' or premium notes. The latter, as well as the two large notes, bore 10 per cent interest; the certificates of deposit which the bank gave in exchange for the notes bore 3 per cent interest. The bank had been in the business of purchasing the insurance company's premium notes in the same manner, and had already issued certificates of deposit to the amount of over \$4,000, in exchange for notes which, together with those issued at the time the Hildebrand note was purchased, amounted to over \$8,000; and this was 44 per cent of the bank's capital stock and surplus. The cashier testified that she knew the bank was permitted to loan upon the security of any one person or corporation no more than 15 per cent of the bank's capital stock and surplus, and knew the Hildebrand note represented the payment of premiums on live stock, and understood that if a loss occurred the maker would have a claim against the insurance company as a set-off

against the note, if held by the insurance company, and knew, also, that there would probably be losses under the policies.

In answer to special questions, the jury found that the bank acted in good faith and without knowledge of any infirmity in the paper.

The contentions of the appellant are: First, that there was error in the admission of testimony; second, that the court should have directed a verdict; third, that the court erred in refusing to give certain instructions.

The bank was permitted to introduce a letter written by Clay Hamilton, receiver of the insurance company, to Hildebrand, dated March 22, 1916. The letter was an apology for a former one, asking Hildebrand to pay a note which Hamilton found among the papers of the insurance company, and which, it seems, was given in renewal of the first premium note. The letter stated that the receiver, not knowing the earlier history of the transactions, assumed the original note had been surrendered to Hildebrand, and that there was due the company the amount stated in the first letter, but informed him that he would not be called upon to make any payment on that note. The portion of the letter objected to was the statement that the receiver, after making an investigation, had found that Hildebrand's note was sold to the White Insurance Agency, and later, by that agency, sold to the bank. The grounds of objection urged are that it was a statement of matters concerning which the receiver could have had no personal knowledge, which occurred before he became receiver, and that his testimony was hearsay, and necessarily derived from the books of the company,

**Evidence—  
hearsay—state-  
ment without  
knowledge.**

which would be the best evidence.

These were all good grounds for the objection to the admission of the letter as a whole. We are unable to discover for what purpose it was offered or admitted;

and, on the other hand, we are unable to discover that the defendant was prejudiced by the admission, and this notwithstanding a number—admissibility.

of the jurymen, on their voir dire examination, testified they were personally acquainted with the receiver, and notwithstanding the fact that his letter was referred to, in the argument of counsel for bank, as evidence that the cashier acted in good faith. There is no dispute as to the facts concerning the manner in which the bank became the holder of the note, so far as the fact of indorsement and transfer is concerned. Prima facie, the indorsement and transfer of the note gave the bank a good title. —transfer of note.

Nothing contained in the letter written by the receiver purported to throw any light whatever upon the good faith of the transaction between the bank and the insurance company, which was the only question at issue.

It is urged that the verdict of the jury, as well as the finding of fact that the bank acted in good faith, is contrary to the evidence, and especially the testimony of the cashier, to which we have referred. The argument is that, when a person knows there may be a set-off or counterclaim against the note by the time it matures, he cannot acquire the note free from an infirmity. The argument is not sound. Every purchaser of a promissory note knows that, as between the maker and the payee, there may, before the note matures, arise a set-off or counterclaim in favor of the maker; but this will not prevent the purchaser from being a holder in due course, nor is the fact, of itself, evidence of bad faith in purchasing. The cashier did not testify that she knew the company was insolvent, or that the note was given without consideration. No authorities are cited by the appellant in support of his

**Bills and notes  
—bona fide pur-  
chase—notice  
of set-off.**

contention, and we think none are necessary to show its fallacy.

The provision of the statute making it unlawful for a bank to loan more than 15 per cent of its capital stock and surplus upon the security of any one person or corporation (Gen. Stat. 1915, § 530) was not enacted for the benefit of a person

Bank—excessive loan—effect.

in the situation of the appellant. It

was to protect the rights of depositors and creditors of the bank that the law was enacted, as a measure of sound public policy. The insurance company, if sued upon notes executed to the bank, could not raise the defense that the bank had extended it a loan in excess of the authorized amount; and the special finding of the jury is that the bank purchased appellant's note in good faith, for value, and without notice of any fact that would put it on inquiry that the insurance company was insolvent. Besides, the general verdict is a finding that no loan was made to the insurance company; its notes having been taken merely as collateral security for the payment of appellant's note, and others purchased at the same time.

The appellant requested the following instruction, which was refused: "You are further instructed that if you find that at the time of the transaction between the plaintiff bank and the insurance company the insurance company was insolvent, and the note sued on was without consideration, and the circumstances surrounding the transaction were such as to justify the conclusion that the failure on the part of the bank to make inquiry as to the consideration for the notes then taken by it, including the note executed by the defendant Hildebrand, arose from a suspicion that such inquiry would disclose a want of consideration for such notes, and if inquiry would have disclosed such want of consideration, then the plaintiff bank would be charged with the knowledge of such want of

consideration as such inquiry would have revealed."

On this matter the court instructed that "to constitute 'notice' of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowl-

Bills and notes—notice of defect in title.

edge of the infirmity or defect, or knowledge of such facts, that his action in taking the instrument amounted to bad faith. What is 'bad faith' in a case of this kind is a question of fact for the jury, and in this connection the court instructs you that neither a suspicion of defect of title, knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or put him on inquiry, nor even gross negligence on the part of the taker, will affect his rights, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith."

The doctrine upon which the appellant relies is stated in 8 C. J. 505, taken from the opinion in *Goodman v. Simonds*, 20 How. 343, 367, 15 L. ed. 984, 942, as follows: "While he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand."

In the same section of *Corpus Juris*, however, it is stated that "certain facts are not, of themselves, sufficient to show bad faith in not making inquiry; yet it often happens that evidence thereof is admissible, and, together with evidence of other suspicious circumstances, sufficient to require the submission of the question of bad faith to the jury." Page 506.

The court submitted the question of bad faith to the jury in an instruction which correctly stated the law as applied to the evidence. *People's Bank v. Reid*, 86 Kan. 245, 120 Pac. 339. The appellant has not called our attention to any evidence which would have justified giving an instruction directing attention to

the failure of the cashier to make inquiries as to any particular fact. The cashier admits knowledge of certain facts, which of themselves would not, as a matter of law, make the bank a purchaser in bad faith, but which were proper circumstances to be considered by the jury, with all the facts and circumstances, in determining that question. We do not understand that

the evidence shows  
—notice of defect. there was any fact  
or circumstance to

cause the cashier to suspect that the insurance company was insolvent. Such is not the contention, and it is not suggested what inquiries she should have made which would have disclosed a want of consideration. If the company had not been insolvent, the issuing of the policies furnished a sufficient consideration for the note. On these facts it must be held there was sufficient evidence to support the finding of the jury that the bank acted in good faith, and the defendant, therefore, was not entitled to a directed verdict.

It is unfortunate for the appellant, and doubtless for many others, that a company organized and exploited, as this seems to have been, for the mere purpose of plundering the public, was permitted to continue so long in business; but, having put in circulation his negotiable promissory note, the appellant is compelled to pay, notwithstanding he received no consideration.

The judgment is affirmed.

Dawson, J., dissenting:

This was not a case where the infirmities of the note could only be ascertained by the plaintiff by an inquiry which it was not bound to make, nor governed by the legal principles pertaining thereto. The bank's own officer, acting for the bank in the acquisition of the note, candidly admitted that she knew the conditions and terms of the contract for which the note was given, and I think the maker was entitled to set up the same defenses as would have been available against the original payee.

A petition for rehearing having been filed, Porter, J., on January 11, 1919, handed down the following additional opinion (104 Kan. 10, 177 Pac. 526):

In a motion for rehearing, it is asserted the court entirely overlooked appellant's contentions, in determining that certain hearsay evidence was immaterial. The court overlooked nothing contended for by appellant in the original briefs, and adheres to the opinion that the letter from the receiver of the insurance company, although incompetent evidence, could not have prejudiced appellant by the statement that his note had been sold to the bank. All the evidence shows that it was transferred with others to the bank; and appellant has all along conceded that it was, although contending that it was held by the bank as collateral to other notes.

Appellant again argues his claim that the bank should have known there was something wrong, because an insurance company, which ordinarily has funds to invest, was parting with notes which, it is seriously contended, bore in the aggregate 20 per cent interest, and receiving in exchange a certificate of deposit bearing 3 per cent interest. While we had always supposed that collections of interest or principal of notes pledged as collateral security are applied upon the original indebtedness, instead of being used to swell the rate of interest on the principal debt, it was not deemed necessary to combat appellee's argument; and there was no suggestion in the opinion that it would not have been proper to have made the argument, for whatever it was worth, to the jury. We adhere to the opinion that the instruction on the question of bad faith correctly stated the law of the case, and that there were no circumstances in the evidence which would have justified an instruction directing special attention to the failure of the officer of the bank to make further inquiries.

The rehearing is denied.

## ANNOTATION.

**Bank: fact that loan by bank was excessive as a defense.**

**National banks.**

A person who has borrowed money from a national bank, and failed to pay it, cannot make the defense, when sued for it, that the bank had no right to loan the money, by reason of the act of Congress, providing that "the total liabilities to any association, of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in."

**United States.**—Union Gold Min. Co. v. Rocky Mountain Nat. Bank (1877) 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432 (see also Rose's Notes to this case); Shoemaker v. National Mechanics' Bank (1869) 2 Abb. 416, Fed. Cas. No. 12,801 (expressing a similar opinion); Stewart v. National Union Bank (1869) 2 Abb. 424, Fed. Cas. No. 13,435 (expressing a similar opinion); Wyman v. Citizens' Nat. Bank (1887) 29 Fed. 734; Re Edson (1902) 119 Fed. 487; The Seattle (1909) 95 C. C. A. 480, 170 Fed. 284 (expressing a similar opinion).

**Arkansas.**—Richeson v. National Bank (1910) 96 Ark. 594, 132 S. W. 913.

**Colorado.**—Union Gold Min. Co. v. Rocky Mountain Nat. Bank (1872) 1 Colo. 531.

**Iowa.**—Mills County Nat. Bank v. Perry (1887) 72 Iowa, 15, 2 Am. St. Rep. 228, 33 N. W. 341.

**Massachusetts.**—Corcoran v. Batchelder (1888) 147 Mass. 541, 18 N. E. 420.

**New York.**—Duncomb v. New York, H. & N. R. Co. (1881) 84 N. Y. 190.

**North Dakota.**—First Nat. Bank v. State Bank (1906) 15 N. D. 594, 109 N. W. 61.

**Oregon.**—Portland Nat. Bank v. Scott (1891) 20 Or. 421, 26 Pac. 276.

**Pennsylvania.**—Stephens v. Monongahela Nat. Bank (1878) 88 Pa. 157,

32 Am. Rep. 438; McCartney v. Kipp (1895) 171 Pa. 644, 38 Atl. 233.

There has been since some change in the statute by chap. 3516 of the Laws of 1906, 34 Stat. at L. 451, Comp. Stat. 1916, § 9761.

The foregoing cases from Massachusetts, New York, and Oregon follow, as bound by the decision of the Supreme Court of the United States in Union Gold Min. Co. v. Rocky Mountain Nat. Bank (1877) 96 U. S. 640, 26 L. ed. 648, 1 Mor. Min. Rep. 432, supra, and perhaps we are so to understand the Arkansas and Iowa cases. The Supreme Court case is also cited on this point in Maryland Trust Co. v. National Mechanics' Bank (1906) 102 Md. 608, 63 Atl. 70; Bank of Cadiz v. Slemmons (1877) 34 Ohio St. 142, 32 Am. Rep. 364; and in Weber v. Spokane Nat. Bank (1894) 12 C. C. A. 98, 29 U. S. App. 97, 64 Fed. 208. It is also cited in Smith v. First Nat. Bank (1895) 45 Neb. 444, 63 N. W. 796, to the point that such a loan is not void.

In Union Gold Min. Co. v. Rocky Mountain Nat. Bank (U. S.) supra, the court said: "We do not think it required by public policy, or that Congress intended, that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank."

The validity of notes taken by a cashier of a national bank, for loans in excess of the amount the bank could legally lend to one person, are not affected by the punishment of the cashier and the maker for depleting the assets of the bank in lending money without hope of its repayment, nor by the recovery by its receiver against the cashier's bondsman for his fraud and dishonesty. Re Edson (1902) 119 Fed. 487, supra.

In O'Hare v. Second Nat. Bank



(1874) 77 Pa. 96, it was held that an affidavit of defense, not alleging that the excess of indebtedness was known to the borrower, was no defense, it not thus appearing that there was any conspiracy to defeat the law. Followed in *Mapes v. Second Nat. Bank* (1875) 80 Pa. 163, cited in *Allen v. First Nat. Bank* (1889) 127 Pa. 51, 114 Am. St. Rep. 829, 17 Atl. 886.

The conspiracy question was disposed of in *Stephens v. Monongahela Nat. Bank* (1878) 88 Pa. 157, 32 Am. Rep. 438, *supra*, where the court said: "We have considered the offer as true, namely, that there was a conspiracy between the bank and the borrower to violate the statutory regulation. The question is whether the note is invalid on general principles of policy, and not one of equity and justice between the parties. The public good is the ground of relief to a defendant who proclaims his own turpitude in the wilful violation of a statute, and his shame in refusing payment of what he justly owes—not his worthiness. The bank is treated as a conspirator, but the fact is unmistakable that it was its officer. It is not the intendment of the statute to provide a way by which an unfaithful officer and dishonest stranger may empty the vaults of the bank, work its ruin, to the great loss of its shareholders and creditors, and the receiver of its money, wrapped in the mantle of public policy, escape liability."

#### State banks.

It is no defense to a bill of exchange that it was within the prohibition of the statute, providing that "it shall not be lawful for the president and directors of said bank to purchase or discount any draft or bill of exchange for a larger sum than \$5,000," as such provision is directory. *Bates v. Bank of Alabama* (1841) 2 Ala. 457, where the court said: "Nothing can be clearer to our minds than that the borrower must refund the money. Any other construction would place the entire capital of the bank at the mercy of a venal directory and profligate borrowers."

In *Nelson v. Leiter* (1901) 190 Ill. 414, 83 Am. St. Rep. 142, 60 N. E. 851,

the court said of the Illinois statute, which is similar to the provision heretofore quoted of the act of Congress: "There is no express declaration in the section that loans in excess of the statutory limitation shall not be collectable, and to so construe the section would be to defeat the very purpose which prompted the adoption of the section."

See also the reported case (*ELMO STATE BANK v. HILDEBRAND*, ante, 54).

A bond taken by a savings bank in excess of the amount which it is authorized to take by the statute of Iowa, limiting the amount of money that may be loaned to any person or firm, is not, for that reason, void; especially when it is not limited to indebtedness for borrowed money. *Benton County Sav. Bank v. Boddicker* (1898) 105 Iowa, 548, 45 L.R.A. 321, 67 Am. St. Rep. 310, 75 N. W. 632.

In sustaining a preference of a bank by an insolvent corporation, the Mississippi court said: "If the bank transcended its charter, and loaned a larger percentage of its capital to the mercantile company than its charter authorized it to lend to any one person, that was a matter between it and the state. This could in no way prevent the collection of the debt." *Fargason v. Oxford Mercantile Co.* (1900) 78 Miss. 65, 27 So. 877.

In affirming a judgment for a bank sued for conversion of stock, the Missouri supreme court stated that it was not necessary to go further than to hold that the bank's lien was good up to at least 25 per cent of the amount of its capital stock, and said: "The statute does not in terms declare void all contracts of loan to one person in excess of one fourth of the capital stock. It forbids a loan beyond that amount, but impliedly sanctions one to that limit. The transaction is not intrinsically immoral; and, whatever view may be taken as to such contracts when fully executed, it is obvious that, as the excess of the loan over the prescribed limit is readily severable from the part which is within that limit, the loan is valid, at least to the extent defined." *McClintock v. Central*

Bank (1898) 120 Mo. 127, 24 S. W. 1052.

It is no defense to a mortgage, given by a bank president to the bank to secure an indebtedness in excess of one fifth of the bank's capital stock, that the statute provided that "no corporation or banker to which this chapter is applicable shall: (1) Make any loan or discount to any person, company, corporation or firm or upon paper upon which any such person, company, corporation or firm may be liable to an amount exceeding the one fifth part of its capital stock actually paid in and surplus." *Dunn v. O'Connor* (1898) 25 App. Div. 73, 49 N. Y. Supp. 270.

It is no defense (by a maker) to a note that one of its indorsers, when it was discounted by the plaintiff bank, was a director of the bank, already indebted to it to an amount exceeding 8 per cent of its capital stock, although the statute provided that the debts due from any director as principal indorser or surety shall not exceed 8 per cent of the capital stock. *Richmond Bank v. Robinson* (1856) 42 Me. 589.

A banking law, restricting loans to 10 per cent of the capital of the bank, is no defense to an action on a renewal of a greater loan. *Farmers' Bank v. Burchard* (1860) 33 Vt. 346.

*Nelson v. Leiter* (1901) 190 Ill. 414, 83 Am. St. Rep. 142, 60 N. E. 851, supra, does not refer to the two following earlier Illinois cases, which do not seem in accord with the general doctrine of the subject.

It was held in *Penn v. Bornman* (1882) 102 Ill. 523, that a bank cannot recover from one of its directors loans on which he was guarantor or indorser, made in defiance of the statute declaring that "no director of said corporation shall be indebted to said corporation, either directly or indirectly, or individually, at any time, to an amount greater than seventy-five per centum of the capital stock held by such director in his own name, in good faith as his own." The court considered that there was a lack of power to create the indebtedness.

This case was followed in *Workingmen's Bkg. Co. v. Rautenberg* (1882) 103 Ill. 460, 42 Am. Rep. 26.

B. B. B.

## JOSEPHINE T. NASH

v.

BENNETT BENARI, Admr., etc., of Sarah Wood Lemon, Deceased.

*Maine Supreme Judicial Court — December 12, 1918.*

(— Me. —, 105 Atl. 107.)

**Judgment — against administrator — effect in other state.**

1. A judgment against an administrator in one state upon a claim against decedent for services is no bar to an action against the same person intrusted with the administration of decedent's assets in another state, upon the same claim, since there is no privity between the administrators in the different states.

[See note on this question beginning on page 64.]

**Executors and administrators — extent of jurisdiction.**

2. The representative capacity of one acting under letters of administration does not extend beyond the assets of which the court granting the letters has jurisdiction.

[See 11 R. C. L. 433.]

— authority of letters of administration.

3. Letters of administration are without extraterritorial force.

[See 11 R. C. L. 432.]

**Judgment — against administrator — full faith and credit.**

4. The full faith and credit clause of

the Federal Constitution does not require the enforcement of a judgment, recovered against an administrator appointed in one state, against him in his

representative capacity as administrator of assets of the same decedent in another state.

[See 15 R. C. L. 924 et seq.]

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Androscoggin County made during the trial of an action brought to recover for personal services rendered by plaintiff to defendant's intestate, which resulted in a verdict for plaintiff. *Overruled.*

The facts are stated in the opinion of the court.

Messrs. Tascus Atwood, Robert J. Curran, and Dana S. Williams, for defendant:

A judgment obtained in a foreign state is a bar to a second suit in another state.

Whiting v. Burger, 78 Me. 287, 4 Atl. 694; North Bank v. Brown, 50 Me. 214, 79 Am. Dec. 609; Sweet v. Brackley, 53 Me. 346; Mutual L. Ins. Co. v. Harris, 97 U. S. 331, 24 L. ed. 959; Peters v. Sanford, 1 Denio, 224; Nicholl v. Mason, 21 Wend. 339; Stevens v. Gayford, 11 Mass. 265; Creighton v. Murphy, 8 Neb. 349, 1 N. W. 138.

A judgment recovered by or against a personal representative in the state of his appointment may be made the basis of an action in another state, and is conclusive.

23 Cya. 1592; Lewis v. Adams, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833; Turley v. Dreyfus, 33 La. Ann. 885; Moore v. Smith, 116 N. C. 667, 21 S. E. 506; Brown v. Winstanley, 18 Ohio, 67.

Messrs. Payson & Virgin, for plaintiff:

A judgment against an administrator appointed in one state is not a bar to a suit on the same claim against an administrator of the same estate, appointed in another state.

Parsons v. Copeland, 33 Me. 370, 54 Am. Dec. 628; Sheldon v. White, 35 Me. 233; Aspden v. Nixon, 4 How. 467, 11 L. ed. 1059; Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337; McLean v. Meek, 18 How. 16, 15 L. ed. 277; Ela v. Edwards, 13 Allen, 48, 90 Am. Dec. 174; Low v. Bartlett, 8 Allen, 259.

Dunn, J., delivered the opinion of the court:

At the time of her death, intestate, the domicil of Sarah Wood Lemon was in Massachusetts. She there left property for administration, and she also left property to be administered in the state of Maine. Administrations were granted in the different states, first in

Massachusetts and later in Maine, to one Bennett Benari. He accepted the distinct trusts. Alleging that she had rendered personal services for the intestate in her lifetime, for which payment was not made, the plaintiff in the present case previously sued Mr. Benari, in his representative capacity, in Massachusetts. In that suit, in the superior court in Suffolk county, she recovered judgment against the estate of the decedent. That judgment remaining largely unsatisfied, she brought this action against Benari as administrator in Maine, counting on a claim differing only from that which formed the basis of her case in Massachusetts, in that it gives credit for payments there made on account, since the commencement of the original action. As special matter of defense in bar, supplemental to the general issue, and by way of brief statement under it, the state of Maine administrator invoked the judgment recovered against him as domiciliary administrator in Massachusetts. Plaintiff by counter brief statement replied that the suits were between different parties. Evidence of the Massachusetts judgment was excluded by the trial court, and an exception allowed.

The exclusion of the offered evidence was in accordance with the established doctrine of the courts of this country. Where administrations of the estates of the same intestate are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will fur-

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nish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for in contemplation of law there is no privity between him and the other administrator. Story, Conf. L. § 522; Aspden v. Nixon, 4 How. 467, 11 L. ed. 1059; Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337; Hill v. Tucker, 13 How. 458, 14 L. ed. 223; McLean v. Meek, 18 How. 16, 15 L. ed. 277; Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 757; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; Smith v. Madden (C. C.) 78 Fed. 833; Low v. Bartlett, 8 Allen, 259. As was said by Mr. Justice Virgin in Fowle v. Coe, 63 Me. 245: "The answer is that the administrations of the estates of the same decedents in different states, where there are creditors and property belonging to the same estate, are regarded as wholly independent of each other; . . . that there is no privity between the different administrations, but that each is sovereign within its own limits."

In the case at bar, the fact that one and the same person is administrator in both states does not alter the doctrine. The Massachusetts judgment is against the defendant

Executors and administrators—extent of jurisdiction.

in his representative capacity there. That representation does not extend be-

yond the assets of which the Massachusetts court that appointed him has jurisdiction. Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337. Letters of administration are without extra-territorial force. Story, Conf. L. § 512; Smith v. Guild, 34 Me. 443;

—authority of letters of administration.

Saunders v. Weston, 74 Me. 85; Smith v. Howard, 86 Me. 203,

41 Am. St. Rep. 537, 29 Atl. 1008; Brown v. Smith, 101 Me. 545, 115 Am. St. Rep. 339, 64 Atl. 915. The two administrations are entirely unrestricted by each other. Low v. Bartlett, 8 Allen, 259; Ela v. Edwards, 13 Allen, 48, 90 Am. Dec. 174. In Johnson v. Powers, 139 U.

S. 156, at page 159, 35 L. ed. 112, 113, 11 Sup. Ct. Rep. 526, Mr. Justice Gray, in delivering the opinion of the court, says: "A judgment recovered against the administrator of a deceased person in one state is no evidence of debt, in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased."

In Stacy v. Thrasher, supra, a judgment recovered in one state, on an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the circuit court of the United States, held within another state, against an administrator there appointed of the same intestate. In that case it was urged, as here, that the principle indicated was not applicable because of the provision of the

Constitution that full faith and credit shall be given in each state to the

Judgment—against administrator—full faith and credit.

public acts, records, and judicial proceedings of every other state. Const. U. S. art. 4, § 1. In speaking the speech of the court, Mr. Justice Grier said: "The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state liable to pay the same debt, he may be subject to a like judgment upon the same demand; but the assets in his hands cannot be affected by a judgment to which he is personally a stranger. . . . The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is res inter alios acta."

The ruling of the trial court was right.

Exceptions overruled.

## ANNOTATION.

**Judgment against executor or administrator qualified in one state as binding upon an executor or administrator of the same decedent, qualified in another.**

## I. Administrators in both states:

- a. In general, 64.
- b. Judgment at domicil of decedent, 68.
- c. Judgment elsewhere, 67.

## II. Where there is an executor:

- a. Different executors in the two jurisdictions, 67.
- b. Judgment against executor who has qualified in both jurisdictions, 68.

This note does not include judgments upon claims of beneficiaries.

## I. Administrators in both states.

## a. In general.

A foreign judgment against a foreign administrator affords no basis for an action against a domestic administrator of the same intestate.

**United States.**—Stacy v. Thrasher (1848) 6 How. 44, 12 L. ed. 337; McLean v. Meek (1855) 18 How. 16, 15 L. ed. 277; Johnson v. Powers (1890) 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525 (obiter) (see also Rose's Notes to these cases); Dent v. Ashley (1828) Hempst. 54, Fed. Cas. No. 3,809a.

**Alabama.**—Johnston v. McKinnon (1900) 129 Ala. 223, 29 So. 696.

**Arkansas.**—Turner v. Risor, 54 Ark. 38, 15 S. W. 18 (obiter).

**Illinois.**—McGarvey v. Darnall (1890) 134 Ill. 367, 10 L.R.A. 861, 25 N. E. 1005; Smith v. Goodrich (1897) 167 Ill. 46, 47 N. E. 316; Strauss v. Phillips (1901) 189 Ill. 21, 59 N. E. 560.

**Indiana.**—Slauter v. Chenowith (1855) 7 Ind. 211.

**Iowa.**—Creswell v. Slack (1885) 68 Iowa, 110, 26 N. W. 42.

**Maine.**—NASH v. BENARI (reported herewith) ante, 61.

**Missouri.**—First Nat. Bank v. Dowdy (1913) 175 Mo. App. 478, 161 S. W. 859.

**Montana.**—Braithwaite v. Harvey (1894) 14 Mont. 208, 27 L.R.A. 101, 43 Am. St. Rep. 625, 36 Pac. 38.

## II.—continued.

- c. Judgment against executor at domicil as against administrator elsewhere, 69.

- d. Judgment against administrator elsewhere as against executor at domicil, 70.

- e. Miscellaneous, 71.

## III. Miscellaneous, 71.

**New Hampshire.**—Taylor v. Barron (1857) 35 N. H. 484 (obiter).

**Pennsylvania.**—Brodie v. Bickley (1830) 2 Rawle, 431.

**South Carolina.**—King v. Clarke (1837) 2 Hill, Eq. 611.

**Tennessee.**—State use of Bank of Wayne v. Fulton (1898) — Tenn. —, 49 S. W. 297.

**Wisconsin.**—Price v. Mace (1879) 47 Wis. 23, 1 N. W. 336.

**Ireland.**—Tighe v. Tighe (1877) Ir. Rep. 11 Eq. 203.

The rule is also recognized in Re Grattan (1911) 78 N. J. Eq. 225, 78 Atl. 813, and Clarke v. Webster (1906) — Tex. Civ. App. —, 94 S. W. 1088.

The rule is particularly applicable where the only property in the second jurisdiction is real estate. Sargent v. Davis (1848) 3 La. Ann. 353.

As all of the aforesaid American cases, with the exception of Brodie v. Bickley (1830) 2 Rawle (Pa.) 431, concerned judgments of other states of the Union, it will be recognized that the "full faith and credit" clause of the United States Constitution does not affect the rule.

Such a judgment is not even evidence in the second suit. McLean v. Meek (1855) 18 How. (U. S.) 16, 15 L. ed. 277; Johnson v. Powers (1890) 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525 (see also Rose's Notes to these cases); McGarvey v. Darnall (1890) 134 Ill. 367, 10 L.R.A. 865, 25 N. E. 1005; Strauss v. Phillips (1901) 189 Ill. 21, 59 N. E. 560; Creswell v. Slack (1885) 68 Iowa, 110, 26 N. W.

42; *NASH v. BENARI* (reported herewith) ante, 61; *First Nat. Bank v. Dowdy* (1913) 175 Mo. App. 478, 161 S. W. 859; *King v. Clarke* (1837) 2 Hill, Eq. (S. C.) 611.

In *Stacy v. Thrasher* (1848) 6 How. (U. S.) 44, 12 L. ed. 337, supra, the court said of administrators in different states: "Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority."

In *Ingersoll v. Coram* (1903) 127 Fed. 418, the court said: "The law is settled beyond question that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction; so that no judgment by or against Harris as ancillary administrator in Montana could avail for or against an ancillary administrator appointed by the courts of Massachusetts, bringing a suit in that state or in this district, although the cause of action was identically the same."

In *McGarvey v. Darnall* (1890) 134 Ill. 367, 10 L.R.A. 861, 25 N. E. 1005, supra, the court said: "The doctrine is well settled that, if letters of administration are granted in different states to different persons, in respect to estate left by the same deceased person, there is no privity between such administrators, and that therefore a judgment against the administrator in one state is not competent testimony to show a right of action against either a domiciliary or ancillary administrator in another state, or to affect assets in such other state."

In *Story on Conflict of Laws*, it is said (§ 522): "Where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for in contemplation of law there

is no privity between him and the other administrator. It might be different if the same person were administrator in both states."

In *Tighe v. Tighe* (1877) Ir. Rep. 11 Eq. 203, it was held that a Cape Colony judgment against the administrators (called executors dative) of a decedent, there appointed, afforded no support to a claim in Ireland against an administrator there appointed. Counsel stated that, as regarded English or Irish authorities, the question was one of first impression. The court followed *Story*, Conf. L. § 522.

The rule applies, although the same person is the administrator appointed in both jurisdictions. *Johnson v. Powers* (1891) 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525 (obiter); *Johnston v. McKinnon* (1910) 129 Ala. 223, 29 So. 696; *NASH v. BENARI* (reported herewith) ante, 61; *Strauss v. Phillips* (1901) 189 Ill. 21, 59 N. E. 560; *State use of Bank of Wayne v. Fulton* (1898) — Tenn. —, 49 S. W. 297.

But, in *Lomas v. Hilliard* (1880) 60 N. H. 148, in holding that a Vermont judgment rejecting a claim against the estate of an intestate of Vermont was a bar to the claim in New Hampshire, the same persons being the administrators in both states, the court said: "If judgment had been rendered against the intestate previous to his death by a competent tribunal in another state, after a full and fair trial, there would be no doubt that his administrator in this state would be bound by it; and there seems to be no sound reason why, if the judgment had been rendered against his representative instead of him, the same representative would not be bound by it. He is, to be sure, the administrator and representative in Vermont by virtue of Vermont law, and in New Hampshire by virtue of New Hampshire law; but that distinction does not annihilate his identity. He is the same person in one state as in the other, and represents the same interests. He exercises his own individual judgment in both states in behalf of the same estate, and to say that an adjudication of a matter concerning the estate in one state, to

which he was properly a party, would not be binding on the parties in another state, because he happened to derive his representative character in both states from different sources, is, it seems to us, a technical refinement not often found in modern legal reasoning. It is not suggested that the assets of the estate would be any differently affected in one jurisdiction than in the other, although the proceedings in each state are had primarily with reference to the assets in that state; nor is it apparent how the same administrator could do any more or any less in his defense against the claim in this suit in one state than in the other." And see also *Creighton v. Murphy* (1879) 8 Neb. 349, 1 N. W. 138, *infra*. See also the doubt expressed in *Story, Conf. L. § 522, supra*.

That the suit resulting in the judgment was commenced in the decedent's lifetime does not alter the case. *Stacy v. Thrasher* (1848) 6 How. (U. S.) 44, 12 L. ed. 337; *First Nat. Bank v. Dowdy* (1913) 175 Mo. App. 478, 161 S. W. 859; *Braithwaite v. Harvey* (1894) 14 Mont. 208, 27 L.R.A. 101, 43 Am. St. Rep. 625, 36 Pac. 38; *King v. Clarke* (1837) 2 Hill, Eq. (S. C.) 611; *Carriagan v. Semple* (1888) 72 Tex. 306, 12 S. W. 178.

But the contrary was held in *Creighton v. Murphy* (1879) 8 Neb. 349, 1 N. W. 138, where a resident of Nebraska died pending an action against him in Iowa; administration was taken out on his estate in Nebraska, and the same person was appointed administrator in Iowa and appeared in the suit; and it was held that judgment therein against him in Iowa was conclusive upon him as administrator in Nebraska. The court said: "Whatever the rule may be as to judgments recovered against ancillary administrators upon claims filed after the death of the intestate, it cannot affect this case. Here, an action was commenced against Edward Creighton in his lifetime, and personal service was had on him, and he appeared and filed an answer to the petition, denying the facts stated therein. He died before the trial, but the cause of action survived. Had the court not authority,

upon the appointment of an administrator and the revivor of the action, to proceed with the case and render judgment? We think it had. The court had acquired jurisdiction, and the death of the defendant did not oust it of that jurisdiction. The court therefore had authority to revive the action against the administrator and to hear and determine the rights of the parties, and such judgment is conclusive as to the matters in issue. To require a plaintiff, who has established his claim after a tedious and expensive litigation in Iowa, to go through the same process in this state, would impose a burden upon him not required by the law."

*b. Judgment at domicile of decedent.*

Thus, a judgment of the state of his appointment against a domiciliary administrator affords no basis for an action in another state against an administrator there appointed. *McLean v. Meek* (1855) 18 How. (U. S.) 16, 15 L. ed. 277; *McGarvey v. Darnall* (1890) 134 Ill. 367, 10 L.R.A. 861, 25 N. E. 1005; *Smith v. Goodrich* (1897) 167 Ill. 46, 47 N. E. 316; *Strauss v. Phillips* (1901) 189 Ill. 21, 59 N. E. 560; *Creswell v. Slack* (1885) 68 Iowa, 110, 26 N. W. 42; *NASH v. BENARI* (reported herewith) ante, 61.

But in *Price v. Mace* (1879) 47 Wis. 23, 1 N. W. 336, the court said (obiter): "It seems hard to drive creditors, who had fairly litigated their claims against the principal administrator, to litigate them de novo against the ancillary administrator. Whether and how far judgments against the principal administrator, accompanied by proof that there are no assets in his hands to satisfy them, should be evidence in a court which had granted ancillary letters, might, perhaps, be regarded as a question not absolutely settled by the authorities. They leave such an effect of such judgments, however, in very great doubt."

In holding that a record of the domiciliary probate court, allowing a claim of the local administrator, was not evidence in a court of another state against persons alleged to hold there

real estate of the decedent, under conveyance alleged to have been made by him in fraud of his creditors, the court said: "A judgment recovered against the administrator of a deceased person in one state is no evidence of debt, in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased." *Johnson v. Powers* (1890) 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525 (see also *Rose's Notes* to this case).

The rule is particularly applicable where the only property in the second jurisdiction is real estate. *Sargent v. Davis* (1848) 3 La. Ann. 353.

In *Carrigan v. Semple* (1888) 72 Tex. 306, 12 S. W. 178, it was held that a judgment against an administrator in the state of the decedent's domicil, and where the administrator was appointed, is no basis for a suit in another state against another administrator there appointed, in the absence of a showing that the local administrator had assets in his hands which were ever assets in the hands of the first-mentioned administrator.

But it may be noted that in *Moore v. Fields* (1862) 42 Pa. 467, administrators appointed at the domicil in New York, who were dismissed and an account there stated against them, showing a balance which they were decreed to pay to their successor, were held liable to such successor, in a suit on such decree in Pennsylvania, where no letters had been taken.

#### *c. Judgment elsewhere.*

So, a judgment in another state against an administrator there appointed affords no basis for an action in the state of principal administration, against the administrator appointed there. *Stacy v. Thrasher* (1848) 6 How. 44, 12 L. ed. 337 (see also *Rose's Notes* to this case); *Turner v. Risor* (1890) 54 Ark. 33, 15 S. W. 13 (obiter); *Johnston v. McKinnon* (1900) 129 Ala. 223, 29 So. 696; *First Nat. Bank v. Dowdy* (1913) 175 Mo. App. 473, 161 S. W. 859; *Braithwaite v. Harvey* (1894) 14 Mont. 208,

27 L.R.A. 101, 43 Am. St. Rep. 625, 36 Pac. 38.

In *Commercial Bank v. Slater* (1874) 21 Minn. 174, the refusal to permit a suit against the administrator of the domicil, on a judgment recovered in another state against the administrator there appointed, was on the ground that the case was excluded by the Minnesota statute, which excluded all suits against an executor or administrator except those expressly provided for by the statute.

It may be noted that in *Jones v. Jones* (1855) 15 Tex. 463, 65 Am. Dec. 174, it was held that a Missouri judgment against an ancillary administrator there appointed affords no basis for a suit in Texas against the heirs or distributees, it not being alleged that any property had come to their hands which were assets in Missouri, although the Missouri suit was begun against the decedent. The court states that the judgment "gave no right of action against the administrator or the heirs in this state," but it does not appear that the administrator was a party.

#### *II. Where there is an executor.*

##### *a. Different executors in the two jurisdictions.*

A judgment against one of several executors in another jurisdiction was held admissible against another executor of the same testator in Louisiana, "for the purpose of showing that the demand had been carried into judgment in another jurisdiction, against one of the testator's executors, and that the others were precluded by it from pleading prescription or the Statute of Limitations upon the original cause of action." *Hill v. Tucker* (1851) 13 How. (U. S.) 458, 14 L. ed. 223; *Goodall v. Tucker*, 1851, 13 How. (U. S.) 469, 14 L. ed. 227 (see also *Rose's Notes* to these cases).

In *Hill v. Tucker* (U. S.) *supra*, the court said: "Though the executor's trust or appointment may be limited, or though there are several executors in different jurisdictions, and some of them limited executors, they are, as to the creditors of the testators, executors in privity, bearing to the credi-



tors the same responsibilities as if there was only one executor. The privity arises from their obligations to pay the testator's debts, wherever his effects may be, just as his obligation was to pay them. The executor's interest in the testator's estate is derived from the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions.

. . . All of them, then, having the same privity with each other and to the testator, and the same responsibility to creditors, though they may have been qualified as executors in different sovereignties, an action for a debt due by the testator, against any one of them in that sovereignty where he undertook to act as executor, places all of them in one relation concerning it; and, as to the remedies for its recovery, what one may plead to bar a recovery, another may plead, and that which will not bar a recovery against any of them applies to all of them.

. . . Notwithstanding the privity that there is between executors to a testator, we do not think that a judgment obtained against one of several executors would be conclusive as to the demand against another executor, qualified in a different state from that in which the judgment was rendered."

*b. Judgment against executor who has qualified in both jurisdictions.*

A judgment of a state court in favor of a creditor against an executrix, for the recovery of moneys against the estate, the parties being citizens of the state which was the domicile of the testator, and the court having jurisdiction of the parties and the subject-matter, is conclusive against the executrix in another state, in which she afterwards takes out letters testamentary, in a suit between the same parties for the same purpose. *Carpenter v. Strange* (1890) 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960, where the court said: "She was in privity with the decedent as to his property by the terms of the will, and the judgment against her as executrix in New York bound her in Tennessee,

upon the probate of the will and her qualification there."

In *Turley v. Dreyfus* (1883) 35 La. Ann. 510, it was held that "a judgment against the sole testamentary executor of a deceased person, who had qualified and was administering in that capacity in both Tennessee and Louisiana, rendered by a court of Tennessee, was binding on him in his capacity as testamentary executor in both states," that "the case was not affected by the death of the executor during the pendency of an appeal in the supreme court of Tennessee, and by the substitution of an administrator de bonis non contradictorily with whom the appeal was necessarily prosecuted," and that the judgment would support an action in Louisiana against such administrator, called dative testamentary executor.

In holding that a New Jersey executrix who had taken out ancillary letters testamentary in New York ought not to defeat a suit on the ground that a judgment against her would be ineffective, the court, while not determining the force of the judgment, said: "While we are not required for present purposes to decide upon its legitimate force and effect, and that question should be left until it arises, it is enough to say that the judgment may avail the plaintiff in two directions, even if it were certain that he could not reach assets here. If he should be driven to the forum of original probate jurisdiction, the case of *Hill v. Tucker*, 18 How. (U. S.) 458, 14 L. ed. 223, indicates that the judgment would be, at least, prima facie evidence of the indebtedness, and, if not conclusive, would at least bar the Statute of Limitations, which otherwise might apply." *Hopper v. Hopper* (1891) 125 N. Y. 400, 12 L.R.A. 237, 26 N. E. 457.

In *White v. Archbill* (1855) 2 Sneed (Tenn.) 588, holding that a judgment against an executor recovered in North Carolina, where he did not plead "fully administered," or no assets, was cause for a recovery thereon against him de bonis propriis in Tennessee, it seems probable that the executor was appointed in North Caro-

lina, and that no letters were granted in Tennessee.

But the judgment of removal of an executor by the court of the domicil of his testatrix is not conclusive upon the court of another state, which has admitted the will and granted letters to him. *American Missionary Asso. v. Hall* (1904) 138 Mich. 247, 101 N. W. 585.

It may be noted that a judgment in a state court against an executrix, declaring a deed from the testator to her of land in another state void as to a debt due from the testator to the plaintiff, but not directing a conveyance of the land, does not annul the title to the land, and is not binding upon the courts of the other state, so far as to compel them to surrender jurisdiction over the land, which is exclusively subject to the laws and jurisdiction of the courts of the latter state. *Carpenter v. Strange* (1890) 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960, *supra* (see also *Rose's Notes to this case*).

*c. Judgment against executor at domicil as against administrator elsewhere.*

The cases of this nature are not in harmony.

In *Latine v. Clements* (1847) 3 Ga. 426, it was held that one who has recovered a judgment against an executor appointed at the forum may recover on the judgment in Georgia against an administrator with the will annexed, there appointed.

In *Baldwin v. Rice* (1904) 44 Misc. 64, 89 N. Y. Supp. 738, it was held that a judgment in a suit begun in Texas against a husband, by the executor of his wife's estate there appointed, and after his death settled with his administrator appointed in Texas, is binding in New York against any representative of the wife's estate thereafter appointed in New York; but the decision of this question was not necessary to the result, and the judgment was modified on appeal by excluding the decision of this question (1905) 100 App. Div. 241, 91 N. Y. Supp. 1086, affirmed in (1905) 133 N. Y. 55, 75 N. E. 1096, which has reargument denied in (1906) 184 N. Y. 523, 76 N. E. 1088.

On the other hand, it was held in *Richards v. Blaisdell* (1909) 12 Cal. App. 101, 106 Pac. 732, that a judgment or allowance of claims against an executor in the state of his appointment affords no basis for a suit in another state against an administrator with the will annexed, appointed therein, nor is it evidence to establish the indebtedness, even if the California statute did not cover the matter. The court reviews the cases, considers *Hilton v. Tucker* (1851) 18 How. (U. S.) 458, 14 L. ed. 223, *supra*, and *Low v. Bartlett* (1864) 8 Allen (Mass.) 259 (*infra*, d), to be in harmony with its view, and states, *inter alia*: "The administration, though called ancillary to distinguish it from the administration of the last residence of the decedent, is wholly independent of it. . . . Considering the effect of § 1913, Code of Civil Procedure, upon the judgment of the Minnesota court, in the light of the rule declared by the cases above reviewed, if it be held that the exception therein as to executors and administrators has no bearing, we are still of the opinion that the judgment is not only not conclusive upon the California administrator with the will annexed, but that it cannot be the basis of an action against him, or even evidence to establish the indebtedness. This is the result, whether we accept the implied view of some of the cases that a proceeding to establish a claim against an estate is a proceeding in rem, having for its res the assets of the estate within the jurisdiction where presented, as distinguished from the entire estate, or the theory of the United States Supreme Court, that an action to establish a claim is in personam against the executor or administrator in the jurisdiction in which brought, which can be made payable only out of the assets of the estate in that jurisdiction."

A judgment in Ohio against an Ohio executor and, in the language of the judgment, to be paid there in due course of administration, is improperly allowed by an Illinois court as a claim against an administrator with

the will annexed in Illinois. *Rosenthal v. Renick* (1867) 44 Ill. 202.

*d. Judgment against administrator elsewhere as against executor at domicile.*

A judgment against an ancillary administrator in the state of his appointment is not evidence against the executor at the chief place of administration. *Low v. Bartlett* (1864) 8 Allen (Mass.) 259, where the court said, *inter alia*: "It is said that they are in privity with the testator, and that this creates a privity of estate between them. It is true that the executor is in privity with the testator in respect to the estate which he takes, which is merely the estate in Massachusetts, and within the jurisdiction of its courts; and the administrator is in privity with him in respect to the estate in Vermont, which he can administer upon. But as the privity relates to different property and different matters, and is limited to different jurisdictions, it does not aid the plaintiff. There is no privity between the estate in the hands of the executor and that in the hands of the administrator. Each must be administered separately and independently. . . . Another and a decisive objection to the plaintiff's position is, that if it were held to be valid, it would enable the foreign administrator to bind the estate in Massachusetts, by suffering the recovery of a judgment against him."

Where a nonresident defendant died during an arbitration, in an action which was continued to a decree against his administrator with the will annexed, appointed by the court of the forum, such decree was held to be of no effect upon the executors of the domicile of the deceased, although the stipulation for submission to arbitration provided that the arbitration should continue in case of the death of either party, and that his successors and legal representatives should be bound by the final award. *Brown v. Fletcher* (1908) 210 U. S. 82, 52 L. ed. 966, 28 Sup. Ct. Rep. 702, affirming (1906) 146 Mich. 401, 15 L.R.A. (N.S.) 632, 123 Am. St. Rep. 233, 109 N. W. 686. In this case the Michigan court

said: "Whatever may be the relations of two or more coexecutors, residing in different states, in each of which states the testator left property, and whatever the liability of a sole executor, who, for the purpose of administering the estate, secures his own appointment in a state other than that having primary probate jurisdiction, to admit in every jurisdiction the force and validity of a judgment properly pronounced against him in any jurisdiction, it is clear that the domiciliary executor and the estate in the state of decedent's domicile cannot be affected by the acts of a foreign administrator, or by any judgment or decree rendered against such foreign administrator in the state of his appointment. And the case is not changed because the suit in which the judgment is rendered against the foreign administrator was pending in the foreign jurisdiction at the time of the death of the testator."

In *Ela v. Edwards* (1866) 13 Allen (Mass.) 48, 90 Am. Dec. 174, where an executor of a Massachusetts estate took out ancillary administration in New Hampshire, and procured an allowance by the court thereof of a claim of his own against the estate, it was held that such allowance was not binding on the Massachusetts court.

In *Cherry v. Speight* (1866) 28 Tex. 503, the court stated that a judgment in Mississippi against a Mississippi administrator was no foundation for a suit in Texas against the executor of the decedent (apparently there appointed), where it was not alleged that any assets which were in the hands of such administrator had come to the possession of such executor.

But, on the other hand, it was held in *Tait v. Lewis* (1844) 7 Rob. (La.) 206, that where a defendant died during the pendency of an action against him in Virginia, and judgment was taken against his administrator there appointed, that this judgment was *prima facie* evidence in Louisiana against the executor of decedent appointed in Louisiana, and was sufficient to justify a judgment by default against such executor.

*e. Miscellaneous.*

A New York secured creditor of an Illinois estate, presenting its claim there, is bound by the decision of the Illinois court as to the rate of interest, in a suit by the Illinois executor in the Federal court in New York, where he has taken out ancillary letters. *Owsley v. Central Trust Co.* (1912) 196 Fed. 412.

The will of G., of Virginia, was there probated, and was also probated in Mississippi; letters of administration c. t. a. were granted in Virginia to S., and in Mississippi to B., who later died, leaving a will probated in Mississippi, where W. took letters as executor, and accounted in the chancery court in Mississippi for his testator as administrator c. t. a. of G., S., the said Virginia administrator of G. appearing in the suit. It was held that the Mississippi decree in this suit in favor of the Virginia administrator of G. was enforceable in Virginia against the administrator c. t. a. there appointed, of the estate of B. *Garland v. Garland* (1887) 84 Va. 181, 4 S. E. 334.

Reference may be here permitted to the following case: A purchaser at an administrator's sale in North Carolina gave bond with sureties; later the same administrator proved the will, took letters as executor, and thereafter sued the principal at law on the bond in Georgia and got judgment, and, pending an appeal, the principal sued the executor in equity, in Georgia, and got judgment against him, to the effect that the plaintiff was entitled to a share of the estate in right of his wife, and was, therefore, entitled to a set-off, and that the bond was satisfied, and the executor was enjoined from prosecuting the executor at law.

It was held that the Georgia judgment was no defense to the sureties, in an action by the executor against them in North Carolina. *Edney v. Edney* (1858) 57 N. C. (4 Jones, Eq.) 127.

*III. Miscellaneous.*

Where a judgment was recovered against an administrator in a court, whose judgment was no evidence that there were any assets in his hands, it was held that no suit on the judgment would lie against him in another state, where he was sued as one of the administrators appointed therein. *Coates v. Mackey* (1881) 56 Md. 416.

A woman residing in Illinois died leaving property and creditors in Arkansas, and an administrator there appointed recovered there a judgment against the decedent's husband, who later took letters in Illinois. It was held that the Arkansas administrator might sue the husband in Illinois on the judgment. *Moore v. Kraft* (1910) 103 C. C. A. 231, 179 Fed. 635.

A court of one state has no power to revoke the letters granted to an administrator in another state (*Chapman v. Fish* (1844) 6 Hill (N. Y.) 554), nor may it remove an executor appointed in another state (*Tillman v. Walkup* (1876) 7 S. C. 60).

In the interesting case of *Gilman v. Healy* (1887) 46 Hun, 310, 11 N. Y. Supp. 517, it does not appear that the decision rested on the fact that the judgments concerned were rendered in another state.

*Moore v. Smith* (1895) 116 N. C. 667, 21 S. E. 506, probably decided a question of interest on this subject, but, as it does not appear whether any letters were taken out in the foreign jurisdiction, the question decided is not clear.  
B. B. B.

OSCAR H. CARLSON et al., Plffs. in Err.,  
v.  
WILLIAM RENSINK et al.

*Colorado Supreme Court — June 3, 1918.*

(— Colo. —, 173 Pac. 542.)

**Fraud — relief — cancelation of note.**

1. A note given as boot upon an exchange of real estate may be canceled in an action for damages for fraud in misrepresenting the value of the property, where the defendant is insolvent and has concealed his property in fraud of creditors and placed it beyond his power to restore the property received, so that an action for damages is the only remedy open.

[See note on this question beginning on page 74.]

**Venue — change — action for fraud.**

2. The venue of an action for damages for fraud in the exchanging of real estate which is brought in the county where all parties reside cannot be changed to the county where the land is located which is the subject of the fraud.

**Bills and notes — innocent purchaser — overdue.**

3. One purchasing a note when it is long overdue cannot claim immunity as an innocent purchaser for value.

[See 3 R. C. L. 1045.]

**ERROR** to the District Court for the City and County of Denver, to review a judgment in favor of plaintiffs in an action brought to recover damages for alleged fraud and deceit of one of the defendants in an exchange of property, and for the cancelation of a note and trust deed given in the exchange of certain property. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Henry Howard, Jr., for plaintiffs in error.

Mr. John D. Milliken, for defendants in error:

The application for change of venue was properly denied.

Denver & R. G. R. Co. v. Cahill, 8 Colo. App. 163, 45 Pac. 285.

There is no evidence that plaintiffs had any means of knowledge except that imparted to them by defendant Carlson, and they had a right to rely upon his statement.

Hilliard, Vendors, pp. 342 et seq.; Cooley, Torts, p. 497; Bigelow, Fr. pp. 524 et seq.; Ross v. Sumner, 57 Neb. 588, 78 N. W. 264; Rasmussen v. Reedy, 14 S. D. 15, 84 N. W. 205; McGibbons v. Wilder, 78 Iowa, 531, 43 N. W. 520; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496; Davis v. Nuzum, 72 Wis. 439, 1 L.R.A. 774, 40 N. W. 497; Bird v. Kleiner, 41 Wis. 134; Cotzhausen v. Simon, 47 Wis. 103, 1 N. W. 473; Wilson v. Carpenter, 91 Va. 183, 50 Am. St. Rep. 824, 21 S. E. 243.

The court not only had the power,

but it was its duty, to rectify the wrongs done plaintiffs as far as possible.

Kayser v. Maugham, 8 Colo. 251, 6 Pac. 803; Pom. Rem. & Rem. Rights, §§ 76 et seq.; Bliss, Code Pl. § 171; Mullen v. McKim, 22 Colo. 474, 45 Pac. 416; Rubie Combination Gold Min. Co. v. Princess Alice Gold Min. Co. 31 Colo. 158, 71 Pac. 1121, 22 Mor. Min. Rep. 569.

If the cancelation of the note and trust deed was error, it is error without prejudice to Oscar H. Carlson, and he cannot complain.

Springhetti v. Hahnwald, 54 Colo. 383, 131 Pac. 266.

Bailey, J., delivered the opinion of the court:

This action was brought to recover damages for the alleged fraud and deceit of Oscar H. Carlson, one of the defendants, in a transaction involving an exchange of ranch property owned by him for Denver

city property owned by William and Johanna Rensink, plaintiffs, and for the cancelation of a note and trust deed for \$500 in favor of defendant, Hulda M. Carlson, Oscar's wife, given in the exchange of properties. That note was, after maturity, transferred to the other defendant, Anderson. The jury returned special findings to the effect that defendant Carlson showed plaintiffs other and different land than the tract owned by him, which was to be exchanged, with an intent to deceive and mislead them; that the land shown by Carlson was worth \$20 more per acre than the land which he actually owned and proposed to trade; that the other defendants knowingly and deliberately participated in the deception, and that the note in question was taken by Anderson to aid in the consummation of the fraud. That the moving cause of the deal was the false and fraudulent representations of Oscar.

Upon such findings the court entered judgment against Carlson in damages for the sum of \$1,410. The note and trust deed were ordered canceled, and the amount of the note deducted from the judgment, reducing same to \$910, in default of payment of which Carlson was ordered confined in the county jail for a period not to exceed four months. Defendant Anderson had foreclosed the deed of trust, and the certificate of purchase under the foreclosure was decreed to be the property of plaintiffs. Defendants bring the cause here for review.

Error is assigned on the refusal of the court to grant a change of venue to Arapahoe county for the reason that the land owned by Carlson and exchanged through the alleged fraud was situated in that county. The theory of defendants is that if a tort was committed it was committed in that county. The residence property exchanged by plaintiffs for the land is in the city and county of Denver. Both plaintiffs and all the defendants, at the time of the transaction, resided in

the latter county, and did so reside when this action was brought, and service of process was had therein.

In *Denver & R. G. R. Co. v. Cahill*, 8 Colo. App. 162, 45 Pac. 286, the following rule is announced: "In an action for a tort, which, is this case, the county where the defendant resides, and the county where the plaintiff resides and the defendant is served, and the county where the tort was committed, are equally proper counties for trial; and if the action is commenced in any one of these counties, the place of trial cannot be changed on the ground that the county designated is not the proper county."

Venue—change—  
action for  
fraud.

Under this decision it was not error to deny the application for a change of venue.

It is urged that there was no evidence to warrant the cancelation of the note and trust deed in the hands of defendant Anderson. It appears that he got the note more than two years after it became due, and that he traded "some other old and overdue paper" for it. The jury found that he secured the note as a part of the plan to defraud plaintiffs. In any event he took the note when it was long overdue and cannot, therefore, claim immunity as an innocent purchaser for value. Manifestly the judgment of the district court should not be disturbed upon this contention.

Bills and notes—  
innocent  
purchaser—  
overdue.

The cancelation of the note is also objected to for the reason that the cause of action is in damages, and such cancelation amounts to at least a partial rescission of the contract, and was therefore erroneously decreed.

It was alleged, and the testimony supports the claim, that Carlson was insolvent and had concealed his property in fraud of creditors; that the real estate conveyed to his wife, Hulda, by plaintiffs had been transferred and that it was beyond Carlson's power to restore it. And, further, that rescission had been

made impossible by the acts of the defendants themselves. In such circumstances plaintiffs could not elect as to remedy. They had but one, which was for damages. The cancellation of the note involves rather a question of relief than of remedy. There is but one remedy. The relief is twofold. Directing the cancellation of the note was merely a practical way, in view of the circumstances of the case, of applying relief under the only remedy that plaintiffs had. Damages had been

**Fraud—relief—  
cancellation of  
note.**

fixed at \$1,410, from which was deducted the face value of the outstanding \$500 note. It would be absurd to hold that this could not be properly done. This is not a judgment for both rescission and damages, nor an improper joinder of causes. It is simply an instance, such as is discussed in *Mullen v. McKim*, 22 Colo. 474, 45 Pac. 416, where this court, after quoting with approval from § 171 of Bliss on Code Pleadings, proceeds as follows: "In such cases, as is well stated by Professor Bliss, in seeking what is still called legal and equitable relief, or different kinds of relief, the plaintiff really does not unite different causes of action, for there is but one. He only seeks the twofold relief for the one wrong."

In *Marple v. Minneapolis & St. L. R. Co.* 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D, 1082, plaintiff brought action for damages after having accepted a sum of money from the railway company under contract of settlement. The amount so received was not tendered back to the company, but was deducted

from the damages awarded. In discussing this phase of the case the court said: "There are many cases in other states which hold . . . that substantial justice is secured and the spirit of the rule followed where no return or offer to return is made in the pleadings, but where the money received on the settlement is deducted from the amount of the recovery, in case there be a recovery for a greater sum. Some cases hold this on the ground that, where plaintiff was entitled to the money irrespective of the contract, it is inequitable that he should be required to pay it back as a condition of rescission; others, on the ground that equity will not compel the doing of a useless act, and will not permit a mere technicality to defeat justice. But the real ground of all the cases, we think, is that there is no reason for the strict application of the rule when substantial justice can be meted out in the final disposition of the case."

It appears that the judgment rendered is just, and that the cancellation of the note in effect amounts to no more or less than a partial liquidation of the damages awarded plaintiffs.

The instructions given fairly and correctly state the law of the case, and the assignments of error based upon a refusal to give instructions tendered by defendants are not well taken. The other assignments not specifically referred to are also without merit.

The judgment of the District Court is affirmed.

Hill, Ch. J. and Allen, J., concur.

## ANNOTATION.

### Relief as regards outstanding money obligation in action for damages for fraud in inducing contract.

The right in an action in damages for fraud, to the relief granted the plaintiff in the reported case (*CARLSON v. RENSINK*, ante, 72) by way of canceling the note given by him to the defendant, has not been raised in

many cases. There are cases, however, in which such relief has been granted. In *Barbour v. Flick* (1899) 126 Cal. 628, 59 Pac. 122, an action in damages based upon fraud and deceit in the exchange of real property, the

plaintiff was found to be damaged to the extent of \$15,000, and, as part of the recovery and remedy in the action, the plaintiff was held entitled to have his note and mortgage to the defendant for \$13,000 canceled and delivered out to the clerk, and to have judgment against the defendant for the sum of \$2,000 and costs. In answer to the objection that this was an attempt on the part of the plaintiff to rescind in part, and that partial rescission cannot be had, the court states that this is not an attempt to rescind in part, but that the plaintiff merely asks that the note and mortgage be canceled as a part of his recovery of damage against the defendant, and that, "if an action had been brought by the defendant to foreclose the mortgage, the plaintiffs would have been entitled to a cancellation of the mortgage and note on the same showing as a defense, as appears in their favor in the present action. There is in this state but one form of civil actions for the enforcement or prevention of private rights, and the redress or prevention of private wrong." Accordingly, the relief granted was sustained. In *Montgomery v. McLaury* (1904) 143 Cal. 83, 76 Pac. 964, where the action was of an ambiguous character, the court said: "This is not a mere action for money damages—the only re-

lief which a court of law can afford. It is an action to obtain, among other things, a decree canceling the mortgage on the Riverside land [the land purchased],—a species of relief which only a court of equity can afford,—and therefore it is the very case described in the caption to the findings of the court, viz.: 'A Case for Equitable Relief against Defendant for Fraudulent Exchange of Lands.'" And the court concludes that "in this case a part of the price by the respondents for the Riverside land was a note secured by a mortgage of that very land. If this note was for less than the sum in which they were defrauded by defendants in the exchange, they were entitled to have it and the mortgage canceled, as well as damages sufficient to fully compensate the injury. And it was proper, in order to avoid circuity of action, to seek all the relief appropriate to the case in one action."

The right of equity, in an action to have a land sale rescinded and the securities given for the purchase money delivered up and canceled, to assess damages on account of the fraud, and give complete relief to the plaintiff, was sustained in *Carroll v. Rice* (1844) Walk. Ch. (Mich.) 373.

W. A. E.

THOMAS S. PARK, Respt.,

v.

STATE OF NEVADA, Appt.

*Nevada Supreme Court — February 14, 1919.*

(— Nev. —, 178 Pac. 389.)

**Constitutional law — due process — forbidding possession of hide with marks defaced.**

1. A statute making possession of the hide of any cow, bull, steer, calf, or heifer, from which hide the ears have been removed or the brand defaced, a felony, deprives the owner of his property without due process of law.

[See note on this question beginning on page 81.]

**Statutes — validity — unjust and oppressive.**

2. A statute cannot be declared invalid because the court regards it as unjust and oppressive.

[See 6 R. C. L. 106, 107.]

**— justice within province of legislature.**

3. The justice, wisdom, and expediency of laws are within the exclusive province of the legislature.

[See 6 R. C. L. 107, 108.]



**Legislature — power — creation of offense.**

4. Acting within constitutional bounds the legislature is clothed with unlimited and absolute power to define statutory offenses and prescribe punishment for their violation, and in the exercise thereof may penalize acts which before were innocent.

[See 6 R. C. L. 156.]

**Constitutional law — police power — restriction of use of property.**

5. The legislature may, in the exercise of the police power, when the public interest demands it, define and declare public offenses, the effect of which restricts and regulates the use and enjoyment of property.

[See 6 R. C. L. 193.]

**— interference with property rights.**

6. The police power properly exercised does not violate any of the personal or property rights guaranteed by the Constitution.

[See 6 R. C. L. 195.]

**— what is valid exercise of police power.**

7. A statute enacted for the prevention of a public offense, which the legislature deems essential to declare and promote the public good, must be reasonably adapted to attain that end without unnecessarily invading personal or property rights before it can be held to be a valid exercise of the police power.

[See 6 R. C. L. 236 et seq.]

**Statute — doubtful effectiveness — effect.**

8. The court may weigh the fact that the effectiveness of a statute creating, for the public good, an offense out of a former innocent act, is doubtful in connection with the interference of property rights in determining the validity of the act.

[See 6 R. C. L. 240 et seq.]

**Constitutional law — destruction of use of property.**

9. Property can be as effectually destroyed by legislation limiting or prohibiting its use as by annihilating the substance or structure of the thing itself.

[See 8 R. C. L. 196, 197.]

**Property — hides of cattle.**

10. Hides of cattle constitute property.

[See 22 R. C. L. 37, 43.]

**Constitutional law — unreasonable exercise of police power.**

11. A statute destroying the property value of all hides in the state by making it a felony to have possession of a hide with the ears and brands removed, in order to prevent a few persons from stealing cattle, is not a reasonable exercise of the police power.

[See 6 R. C. L. 236 et seq.]

**— protection of public health and morals.**

12. The state may, under its police power, destroy anything that tends to undermine the public health and public morals.

[See 6 R. C. L. 206, 207.]

**APPEAL** by the state from an order of the Judicial District Court for Elko County sustaining a demurrer to an information charging defendant with unlawfully having in his possession a heifer's hide, from which the ears had been removed in violation of statute. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. E. P. Carville, Charles A. Cantwell, George B. Thatcher, Attorney General, Edward T. Patrick, and William McKnight, for the State:

The act in question is not unconstitutional.

State v. Brooken, L.R.A.1915B, 213, and note, 19 N. M. 404, 143 Pac. 479, Ann. Cas. 1916D, 136; Com. v. Alger, 7 Cush. 53; 8 Cyc. 863.

Messrs. Curler & Castle for respondent.

Ducker, J., delivered the opinion of the court:

An information was filed against

the respondent by the district attorney of Elko county under § 375½ of an act of the legislature of this state, entitled "An act to Amend an Act Entitled 'An Act Concerning Crimes and Punishments, and Repealing Certain Acts Relating Thereto,' Approved March 17, 1911, and Adding Another Section Thereto, to be Numbered 375½," approved March 15, 1915. Stat. 1915, p. 155.

The act which consists solely of said § 375½ reads: "It shall be unlawful for any person to have in his

possession any hide of any cow, bull, steer, calf or heifer, from which hide the ears have been removed . . . or the brand obliterated, defaced, or disfigured so that same cannot be readily recognized, and any person having such hide in his possession shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for any term not less than one year nor more than five years."

The information charges that the defendant, on the 3d day of June, A. D. 1917, or thereabouts, and before the filing of this information, at the county of Elko, state of Nevada, did then and there wilfully, unlawfully, and feloniously have in his possession a hide of a heifer, from which said hide the ears had been removed, all of which is contrary to the statute in such cases made and provided and against the peace and dignity of the state of Nevada.

A demurrer was interposed to the information upon the grounds:

First, that the facts stated in said information do not constitute a public offense; and

Second, that the facts stated in said information do not constitute a public offense in this, that the act of the legislature, entitled "An Act to Amend an Act Entitled 'An Act Concerning Crimes and Punishments, and Repealing Certain Acts Relating Thereto,' Approved March 17, 1911, and Adding Another Section Thereto, to be Numbered 375½," is unconstitutional and void.

The district court sustained this demurrer and made an order allowing the respondent to go without bail and releasing the sureties on his bail bond from further liability.

From this order sustaining the demurrer, the state appeals. The constitutionality of the act of the legislature under which the information is drawn is thus before this court for determination.

Respondent insists that this act comes in conflict with § 1 of the 14th Amendment to the Constitution of

the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

He asserts that the statute goes beyond the legitimate bounds of the police power of the state. He contends that the law is invalid in this respect, because it unnecessarily restricts the use of property in hides of live stock in this state to such an extent as to destroy its value for any practical use, and therefore deprives him of his property without due process of law.

There is no ground for dissent from the conclusion that in this enactment the evil sought to be reached is the larceny of cattle. Its purpose is obvious from the wording of the statute and the conditions prevailing in this state. The business of raising cattle is one of the principal industries of the state, and has to do with property of a kind commonly subject to the crime of larceny. Its value, the ease with which it can be moved from one locality to another, and its identity, destroyed by killing and skinning the animal, or by changing, mutilating, or removing the marks and brands, furnish the inducement for thieves. Particularly is the larceny of cattle a common crime in Nevada, where, as in other grazing states, large numbers of stock wander over wide expanses of range lands, unkept by herdsmen, and often unseen by the owner or his agents for long periods of time during the grazing season of the year.

These range conditions create favorable opportunities for the theft of cattle, as detection is difficult and often impossible, and the loss to stockmen is increased by the resultant acts of larceny.

When a stolen animal is killed it loses all marks of identity as soon as the hide bearing the earmarks

and brand is removed. The legislature, recognizing these conditions and the difficulty that generally follows in proving identity and ownership, passed the enactment under consideration for the purpose of supplementing the law of larceny of cattle.

That the statute is extremely drastic in its provisions cannot be denied. Acts theretofore generally innocent and properly and usefully exercised over property in hides of cattle have been declared to be a felony, and punishment prescribed. The mere possession of the hide of any cow, etc., with the ears or brand removed or changed as described in the statute, property inherently harmless and a valuable product of the cattle-raising business, is made a felony. There are no exceptions made or guilty intent required. The owner and the thief are placed in the same class by possession of the proscribed hide.

Statutes—  
validity—  
unjust and  
oppressive.

While we may consider the statute unjust and oppressive in these respects we may not for such reasons declare it invalid.

The justice, wisdom, and expediency of laws are within the exclusive province of the legislature.

—Justice within  
province of  
legislature.

The people, acting in a representative capacity. Acting within constitutional bounds the legislature is clothed with unlimited and absolute power to define statutory offenses and prescribe punishment

Legislature—  
power—  
creation of  
offense.

for their violation, and in the exercise thereof may penalize acts which before were innocent. In the exercise of the police power it may likewise, when the public interests demand it, define and declare public offenses, the effect of which restricts or regulates the use and enjoyment of private property.

Constitutional  
law—police  
power—restriction  
of use of  
property.

This power, properly exercised,

does not violate any of the personal or property rights guaranteed by the Federal and state Constitutions upon the recognized principle that an implied obligation rests upon every property holder to use it without injury to the rights of the community or to the equal property rights of others. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Com. v. Alger*, 7 Cush. 53.

—interference  
with property  
rights.

But a statute enacted for the prevention of a public offense which the legislature deems essential to declare to promote the public good must be reasonably adapted to attain that end, without unnecessarily invading personal or property rights, before it can be held a valid exercise of the police power. The statement of a rule which has been sanctioned by the weight of authority, and which appeals to us as a clear and logical expression of the elements to be weighed in reaching a correct conclusion as to the limits of the police power, is stated in 22 Am. & Eng. Enc. Law, 2d ed. 938: "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals, or general welfare, and that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend towards the accomplishment of the object for which the power is exercised."

—what is valid  
exercise of  
police power.

The purpose of the enactment may be conceded to be the prevention of the larceny of cattle, and there is a plain, substantial relation between its provisions and the object sought to be attained. But the effectiveness of the act, that is, the extent to which its provisions

are designed to accomplish its purpose, when closely scanned, is doubtful. And while the court may not substitute its judgment for the very extensive discretion of the lawmaking body in this regard, except in

Statute—  
doubtful  
effectiveness—  
effect.

cases where it is plainly apparent that an act is non-effective, we may

weigh this doubtful element in connection with the interdiction which, we believe, the act lays upon the use and enjoyment of private property.

Counsel insists that the provisions of the act will put an end to the killing of cattle in this state and the subsequent mutilation of hides to prevent identification by forcing thieves either to preserve the evidence of their larceny or force them to do entirely away with the hides, thus furnishing evidence of their guilt. But it seems quite as reasonable to conclude that the act, instead of causing larcenies of this character to be abandoned or diminished to any great extent, would persuade the thief to choose the lesser of the three incriminating circumstances stated, and destroy the hide.

A thief as a rule does not intentionally retain evidence of the crime in his possession, unless it be the property for which the crime is committed, or means for its commission. Especially is he less liable to do so when such possession is in itself a felony, as this act provides.

Cattle are stolen for the value of the carcass, and not for the hides, which sometimes contain marks of identification other than the artificial ones of earmarks and brands. Consequently, the more effectively the latter are destroyed the less is the risk of detection. The possession of a slaughtered animal without the hide may or may not be some evidence of guilt, depending entirely on other circumstances, but, even so, this is an element of risk always present in larcenies of this kind when such method of destroying evidence is pursued, and is not likely

to be avoided because other methods are made felonious.

Does this statute deprive a person of his property without due process of law against the guaranties of § 1, article 14, of the Federal Constitution, and § 8, article 1, of the Constitution of this state? We are of the opinion that it does. True, the statute under consideration does not work an active appropriation of hides from

Constitutional  
law—due  
process—  
forbidding  
possession of  
hide with  
marks defaced.

the owner, but it limits their use to an extent that destroys their value.

The inception of private property was in its use, and its value may be said to end there.

We acquire property for its use and enjoyment, and if these are denied us it is barren of an essential attribute. Property can be as effectually destroyed by legislation limiting or prohibiting

—destruction  
of use of  
property.

its use as by annihilating the substance or structure of the thing itself. 8 R. C. L. pp. 196, 197, and cases there cited.

Hides of cattle constitute property, and are a valuable product of the cattle-raising business, which is one of the principal

Property—  
hides of cattle.

industries in this state. Rawhide is used in a variety of ways by stockmen and others in making bridle reins and lariats, and in making and repairing various kinds of ranch equipment. Aside from the uses mentioned and which are sometimes crude, it is true, but by no means obsolete in this state, it is used for covering saddle trees, and, when converted into leather, for fully equipping the saddle. When converted into leather by the art of tanning its uses are many and diversified, and the manufacture of leather is a very important industry of the country.

It is clear from the restrictions laid upon hides of the animals mentioned in the statute that they cannot be utilized for any of these purposes in this state without violating its pro-

visions and subjecting the possessor to the penalty of a felony. And it is difficult to perceive how they can be used to obtain any benefit from the product, except by shipping it out of the state, for to devote the hide to any other use whatever would necessarily involve the removal of the ears and mutilation of the brand.

This appears to us to be an unnecessary invasion of property rights, and therefore an unreasonable exertion of the police power. It is not a regulation of the use of property, but a restriction that virtually amounts to a prohibition of its use without effecting proportionate ends conducive to the public welfare. Admittedly the number of hides mutilated for the purpose of evading detection for the crime of larceny are comparatively small to the great volume of hides legitimately taken from cattle, and from which the ears and brands are removed or the latter obliterated that the hide may be converted into articles of trade and used in various other ways. The instances where hides are mutilated are occasional and secret, while the necessity for doing so to devote them to useful purposes in fashioning and manufacturing articles of merchandise is general and universal. But because hides may be disfigured occasionally, to destroy evidence of larceny

**Constitutional law—unreasonable exercise of police power.**

of cattle, the statute entirely prohibits its the use of hides in this state. To prevent a few from illegal practices the many are deprived of the use of property.

The case at bar must be distinguished from those in which the property proscribed is harmful in its nature or tendency, such as intoxicating liquors, opium, and the like, the use of which, on account of their recognized noxious qualities, may be entirely prohibited. The preservation of the public health and public morals is vitally essential to the health and vigor

of the body politic, and by the law of self-preservation embodied in the police power it may destroy anything which tends to undermine them.

Counsel for appellant cite the case of *State v. Brooken*, 19 N. M. 404, L.R.A.1915B, 213, 143 Pac. 479, Ann. Cas. 1916D, 136. In this case the court held constitutional a statute which makes it a misdemeanor to hold under herd or otherwise interfere with the freedom of calves of neat cattle which are less than seven months old, except such young animals be accompanied with their mothers. The court held that the statute did not violate the state Constitution, securing to all persons the rights of acquiring, possessing, and protecting property. The court said: "The act neither denies the right to acquire, possess, nor protect property. It simply provides regulations which, under the peculiar conditions prevailing in this state, must be held reasonable for the exercise and enjoyment of the constitutional guaranties in this regard."

By the New Mexico statute, the owner of calves is not deprived of his property, nor is its use or salability affected in an appreciable way. He is simply required not to hold calves from their mothers until after they have reached a certain age. This is a reasonable regulation under the conditions existing in that state conducive to the larceny of young calves.

The case is easily distinguished from the case before us, wherein the statute considered prevents hides of cattle from being handled in this state at any time in a manner clearly necessary to derive any benefit from them, except such as may be obtained by sending them out of the state.

If the New Mexico statute required hides taken from cattle to be kept intact in some conspicuous place for a certain time, as was provided by a former statute of Nevada repealed by the legislature of 1913, the case of *State v. Brooken*

**—protection of public health and morals.**

would be more in point, but it has no application in this case.

We conclude that the act of the legislature of this state, entitled "An Act to Amend an Act Entitled 'An Act Concerning Crimes and Punishments, and Repealing Certain Acts Relating Thereto,' Approved March 17, 1911, and Adding

Another Section Thereto, to Be Numbered 375½," approved March 15, 1915, is unconstitutional and void.

The order of the District Court sustaining the demurrer to the information is affirmed.

Coleman, Ch. J., and Sanders, J., concur.

## ANNOTATION.

### Constitutionality of statute for prevention of larceny of live stock.

It is held in the reported case (*PARK v. STATE*, ante, 75) that a statute making possession of hides of cattle from which the ears have been removed or the brand defaced, a felony, deprives the owner of his property without due process of law.

In *State v. Brooken* (1914) 19 N. M. 404, L.R.A. 1915B, 213, 143 Pac. 479, Ann. Cas. 1916D, 136 (referred to in the reported case), it was held that a statute which prevents the holding under herd, or in any inclosure, unaccompanied by their mothers, of any calves of neat cattle under seven months of age, was not violative of any constitutional provision, and was sustainable under the police power, where such regulation appeared reasonably necessary to prevent the larceny of young animals; and that such part of the statute was valid, even if the Constitution were infringed by a later provision of the statute which authorized any inspector appointed by the cattle sanitary board of the state, who should receive notice of the violation of the law, to seize such live stock and sell the same, if ownership be not proved within ten days, he being authorized to do so without obtaining a search warrant, regardless of the fact that, in order to make such seizure, it might be necessary for him to enter upon a citizen's premises and break into buildings and inclosures.

In *Lacey v. Lemmons* (1916) 22 N. M. 54, L.R.A. 1917A, 1185, 159 Pac. 949, it was held that the portion of the above statute which authorized the seizure and sale of animals under seven months of age, if confined

in any of the ways mentioned in the section and unaccompanied by their mothers, and which required no notice, actual or constructive, to the owner, of such seizure and sale, was unconstitutional as authorizing the taking of property without due process of law. The court said: "In cases like the one at bar no controlling necessity exists to seize and sell cattle taken by a cattle inspector. When cattle situated as these were are seized, the claimant or owner should have an opportunity to assert his right thereto, by producing the evidence of their ownership before the cattle inspector, before the same are sold. He should have the right to institute and maintain a suitable action for their recovery, and, as before seen, the statute should require notice to him for that purpose."

In *State v. Randolph* (1917) 85 Or. 172, 166 Pac. 555, it was held that a statute was constitutional which provided that the brand on an animal is prima facie evidence that the animal belongs to the owner of the brand, provided it has been duly recorded, as provided by law, and that proof of the right of any person to use such brand shall be made by certified copy of the record or by the original certificate, and that parol evidence shall be inadmissible to prove the ownership of a brand. The court said: "The legislature can enact a statute making proof of one fact prima facie evidence of the main fact in issue, and the enactment of such a statute is but the declaration of a rule of evidence; and hence the statute making proof of a

recorded brand prima facie evidence that an animal bearing that brand belongs to the owner of the brand is a valid declaration of a rule of evidence, because the statutory evidentiary fact is closely related to and naturally tends to prove the main fact, the ownership of the animal. . . . The state has the power to alter rules of evidence. Stated in general terms, the accepted rule is that a person does not have a vested right in a rule of evidence; and, therefore, the legislature has power to alter or create any rule of evidence so long as it leaves a party a fair opportunity to establish his case or defense, and give in evidence all the facts legitimately bearing on the issues in the cause."

In reversing a conviction for larceny, where the statute provided that "parol evidence shall be inadmissible to prove the ownership of a brand," the court said: "Counsel for the state argue that the statute is absurd if taken in its literal meaning, and that it should be so construed as to permit parol evidence. This contention does not merit consideration, for the reason that the language is plain and unmistakable in its meaning and import, and the court has no authority to say that the legislature did not mean what they have clearly said. The subject is one over which they have plenary power. They might declare that any particular class of evidence shall be inadmissible to establish any particular fact or issue. They may prescribe the modes of proof and the manner of making proof, and the effect such proof shall have in the courts." *State v. Dunn* (1907) 13 Idaho, 9, 88 Pac. 235.

In *Senterfit v. State* (1874) 41 Tex. 186, an indictment was dismissed which charged the owner of cattle with driving them out of the county without having a certified copy of the marks and brands, or without having the same properly recorded, but the constitutionality of a statute of this character was not passed on.

In *Faith v. State* (1869) 32 Tex. 373, the court upheld the constitutionality of a statute which provided that, upon the sale, alienation, or transfer of cer-

tain animals therein named, the purchaser shall take a written conveyance descriptive of the animal so purchased or transferred, and, upon the trial of any person so charged with the theft of any animal of this character, the absence of this written conveyance shall be deemed prima facie evidence of "illegal possession." The court considered that, if anything, the statute mitigated the common-law rule, and stated further, "But this circumstance (absence of the written conveyance), resulting from the omission of a plain statutory duty, it seems, might have been given in evidence, even without the act under review."

In *Beyman v. Black* (1877) 47 Tex. 558, the court sustained the constitutionality of a statute (of 1874) providing for the inspection of cattle about to be driven, or after they had been driven, from a county, with the intention of being slaughtered or sold, with power of seizure, and making it a misdemeanor to sell uninspected hides, or to drive out of the county cattle, etc., uninspected, or to purchase animals or hides without obtaining a bill of sale from the owner, but the principal point of the case was that it did not appear that the statute prevented a purchaser, even though he had disobeyed the statute, from establishing his right to the property seized or slaughtered, if he really was the owner. It was further held that the act was not unconstitutional because its operation was, by its terms, suspended in many counties. A somewhat similar act was sustained in *Lastro v. State* (1878) 3 Tex. App. 363; and in *Walker v. Bowman* (1878) 1 Tex. App. Civ. Cas. (White & W.) 353.

It may be noted that a statute amending the Texas Penal Code as to thefts of cattle was sustained in *Haselmeyer v. State* (1877) 1 Tex. App. 690, as not obnoxious to the provisions of the Texas Constitution declaring that every law shall embrace but one subject, which shall be described in its title, and that no law shall be revised or amended by reference to its title.

B. B. B.

STATE OF NEW MEXICO

v.

A. B. SMITH.

*New Mexico Supreme Court — December 4, 1918.*

(— N. M. —, 176 Pac. 819.)

**Incompetent persons — test of sanity.**

1. The test of the question as to whether one about to be executed is sane or insane is whether or not such person, at the time of the examination, from the defects of his faculties, has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court. If he has, then he is sane; otherwise, he is insane, and should not be executed.

[See note on this question beginning on page 94.]

— writ de lunatico inquirendo — one awaiting trial.

2. Chapter 70, Code 1915, which provides for the issuance by a district judge of a commission in the nature of a writ de lunatico inquirendo, to inquire into the lunacy or habitual drunkenness of any person within this state, or having real or personal estate therein, has no application to a person in the custody of the law awaiting execution for a capital offense, or as to a convict undergoing imprisonment for crime. Said statute was enacted solely for the purpose of protecting the civil and property rights of insane persons and habitual drunkards, and for the care of indigent persons by the various counties. Hence, an adjudication by a district court, under such statute, that a person who has been tried and convicted for the crime of murder and sentenced to death is a person of unsound mind, is void, and does not have the effect to stay the execution.

[See 8 R. C. L. 251, 252.]

**Criminal law — suggestion of insanity — inquiry.**

3. The common law forbids the trial, sentencing, or execution of an insane person for a crime while he continues in that state. Where a person has been convicted of a crime and sentenced to death, and, pending the

execution, a suggestion is made to the court so passing sentence that the accused has become insane, and the court is satisfied from such suggestion that there is a question as to the sanity of such party, the court will, as a matter of humanity, make such investigation as may be necessary to become informed as to the sanity or insanity of such party.

[See 14 R. C. L. 607.]

— stay of execution.

4. The court has the power to grant a stay of execution in such a case for the purpose of enabling it to inquire into the sanity of one about to be executed.

— trial of question of sanity.

5. The trial of the question of the sanity of a convict, suggested after the verdict and sentence, is, at common law, in the discretion of the judge, without an absolute right on the convict's part to have the issue tried before a court and a jury. In this jurisdiction, there being no statute upon the subject, it is within the province of the court, upon the suggestion of the insanity of one awaiting execution under a death sentence, to adopt such method as to the court seems best suited to enable it to arrive at the truth of the question.

[See 14 R. C. L. 607.]



**Evidence — sufficiency.**

6. Evidence examined, and held, that petitioner is now sane within the rule above stated, and that his execution should not be further stayed.

**— insanity — sufficiency.**

7. One suffering from delusions upon the subject of water power and hydraulics, and from hallucinations of persecution, is not shown to be so

insane that a sentence of death passed upon him should not be carried out, where he has sufficient intelligence to understand the nature of the proceedings against him, and his impending fate and execution, and understands, knows, and is able to allege any fact that might exist, tending to show that he should not be executed.

[See 8 R. C. L. 251, 252.]

PETITION by defendant for a stay of execution of his sentence to death, until he should be restored to his reason, after affirmance of a judgment of the District Court for Dona Ana County convicting him of murder. *Stay denied.*

The facts are stated in the opinion of the court.

Mr. A. M. Edwards for petitioner.

Messrs. Harry Patton, Attorney General, and C. A. Hatch, Assistant Attorney General, for the State.

Roberts, J., delivered the opinion of the court:

Petitioner A. B. Smith, alias Dashley, was tried and convicted in the district court of Dona Ana county of murder in the first degree, and was sentenced to be hanged. He appealed to this court, and on the 15th day of July, 1918, the judgment of the district court was affirmed (State v. Smith, — N. M. —, 174 Pac. 740), and a new judgment was entered in this court, sentencing the petitioner as required by law and directing that the sentence be executed on the 13th day of August, 1918. Thereafter the governor of the state granted said petitioner a reprieve until the 25th day of October, 1918. The petitioner was removed from the jail of Dona Ana county and placed in the state penitentiary at Santa Fe for safe-keeping, and has been confined in the penitentiary continuously since the judgment was entered in the district court of Dona Ana county. On the 10th day of August, 1918, there was issued out of the district court of Santa Fe county a writ de lunatico inquirendo under the provisions of chapter 70, Code 1915, to inquire into the sanity of said Smith, alias Dashley; and upon such inquiry it was adjudged and decreed by judgment of said court that said Smith, alias Dash-

ley, was a person of unsound mind. On the 18th day of October, 1918, petition was filed by said Smith in this court setting up such adjudication, and the further fact that said Smith, alias Dashley, was at such time a person of unsound mind, and asking this court to stay the execution of such sentence of death until said petitioner should be restored to his reason. At the same time this court heard evidence of four physicians as to the sanity or insanity of the petitioner, and the evidence of the warden and assistant warden of the state penitentiary, and, not being advised as to the law in the premises or sufficiently informed as to the facts, an order was entered staying the execution of said sentence until the 29th day of November, 1918. Subsequently a further stay was granted until the 17th day of December, 1918.

At the time of filing the petition, petitioner requested the court to hear evidence and to grant him a stay of execution and further time, in order that he might have the opportunity of taking the depositions of some witnesses in other states as to his alleged insanity. He also filed objections to the court hearing evidence on the question, claiming that the result of the investigation conducted by the district court of Santa Fe county was binding and conclusive upon this court. He further moved, in the event the court de-

cided to conduct an investigation, that he be allowed the right to a jury trial upon the question of his sanity or insanity. On the 25th day of November, 1918, the court heard further evidence upon the question of the alleged insanity of the petitioner, and argument of counsel upon the various questions of law and questions of fact presented.

The first question logically arising for consideration is as to the effect of the adjudication by the district court of Santa Fe county that petitioner was insane at the time of the hearing in said court. In this connection it is, perhaps, advisable to say that at the trial upon the indictment in the district court of Dona Ana county, insanity was not interposed as a defense. The investigation by the district court of Santa Fe county was instituted and conducted under the provisions of chapter 70, Code 1915. The first section (3378) provides: "It shall be lawful for any district judge in this state to issue a commission, in term or vacation time, in the nature of a writ de lunatico inquirendo, to inquire into the lunacy or habitual drunkenness of any person within this state, or having real or personal estate therein. Such commission shall issue in the county in which such person, who is alleged to be a lunatic or habitual drunkard, shall be or reside for the time being. If such person shall be absent from the state, the commission shall issue in the county wherein he last had his residence, or in which his property is situated, and shall be executed therein."

Section 3379 provides the form of the commission; § 3380 has to do with the petition upon which the inquiry is instituted; and §§ 3381 to 3386, inclusive, provide the manner of conducting the investigation. The contents of these sections need not be stated, and it is sufficient to say that the hearing was conducted in conformity with the provisions of such sections. Section

3387 reads as follows: "It shall be lawful for the court, after the return of the inquisition as aforesaid, notwithstanding any traverse of the same that may be pending, to make such orders touching the care and custody of the person, and the management and safe-keeping of the estate of any person, so found to be a lunatic or habitual drunkard, as it shall think necessary and proper."

Section 3388 provides for the appointment of a committee. Section 3393 reads as follows: "The committee of said person found to be a lunatic or habitual drunkard, shall have the management and control of his person and estate, and shall from time to time apply so much thereof as may be necessary for support and maintenance of himself and family, and for the education of his minor children."

Section 3406 reads: "Whenever, under a provision of this chapter, a person is found, upon inquisition to be a lunatic or habitual drunkard, and neither himself nor his friends have sufficient personal or real estate for the maintenance of said lunatic or habitual drunkard, he shall be supported at the expense of the county of which he is a resident; but the committee of such poor lunatic or habitual drunkard, shall in all respects conform to the provisions of this chapter."

The remaining sections of the chapter have to do with the management of the estate, reports to the court, etc.

The attorney general contends that this chapter has no application to a person in the custody of the law awaiting execution for a capital offense, or as to a convict undergoing imprisonment for crime, but that it was enacted solely for the purpose of protecting the civil and property rights of insane persons, and for the care of indigent persons by the various counties. The statute was enacted in 1856, long prior to the establishment of the New Mexico Insane Asylum by the legis-

lature in 1889. With this contention of the attorney general we agree. There is nothing in the statute showing that it was intended to have any ap-

**Incompetent  
persons—writ  
de lunatico  
inquirendo—  
one awaiting  
trial.**

plication whatever to persons in the custody of the law, undergoing confinement or awaiting execution for crimes. To give to it the effect claimed by petitioner would be to create a conflict of jurisdiction over the person of one awaiting execution for crime. Here the petitioner is under sentence of death pronounced by the supreme court for the crime of murder. The sheriff of Dona Ana county must carry the sentence into execution. By an adjudication of lunacy by the district court of Santa Fe county, it is sought to destroy the effect of the sentence pronounced by this court. A brief consideration of the statute will show that it was not intended to have the application contended for by the petitioner. Section 3387 of the statute gives to the district court conducting the investigation the power to make such orders for the care and custody of the person so found to be a lunatic as it shall think necessary and proper. Section 3393 gives to the committee of such insane person the management and control "of his person and estate." A named individual is in confinement awaiting execution for a capital offense, under judgment of a court of competent jurisdiction. The defendant is placed in some other county, as here, in the state penitentiary for safe-keeping. A district court, under this statute, assumes jurisdiction to hear and determine the question of the lunacy of such defendant. Under the statute it would be the duty of the court to appoint a committee of the person and estate of such lunatic, and the statute gives the committee the custody of such person. Clearly we think it was not the intention of the legislature to confer upon a district court power, by this statute, to conduct such investigation in such

cases, and turn the custody of a person in confinement over to a committee. A similar question was presented in the case of *Ferguson v. Martineau*, 115 Ark. 317, 171 S. W. 472, Ann. Cas. 1916E, 421. In this state, under a similar statute, conferring upon the probate court the jurisdiction to conduct the investigation, one Arthur Hodges was convicted of murder in the first degree. After conviction, and while awaiting execution of the sentence, an inquiry was instituted in the probate court under the statute as to the sanity of the said Hodges. The result of the investigation was an adjudication of his insanity. After the adjudication an application was made to the chancery court for an injunction against the commissioners of the Arkansas penitentiary, restraining them from executing Hodges on the date set for his execution. The chancery court granted the petition, and issued an order enjoining the commissioners from executing Hodges. The commissioners applied to the supreme court for a writ of prohibition directed to the judge of the chancery court and to the judge of the county and probate courts theretofore assuming jurisdiction, prohibiting them from interfering with the execution of Hodges on the date set for the same. The judge of the probate court set up in response to the petition that the writ of prohibition should not issue for the reason that the probate court had jurisdiction to conduct the investigation, and that such jurisdiction had been lawfully exercised. The court in disposing of this branch of the case said: "It is further insisted that the chancery court had jurisdiction to issue the injunction ancillary to or in aid of the jurisdiction of the probate court to enable it to enforce its orders. The chancery court has no such jurisdiction; but, if it were conceded that the chancery court had such jurisdiction, the injunction could not properly issue in aid of the probate court's jurisdiction, for the probate court itself was without

jurisdiction. The statute under which the respondents claim that the probate court has jurisdiction, to wit, § 4003 of Kirby's Digest, is as follows: 'If any person shall give information in writing to such court that any person in his county is an idiot, lunatic, or of unsound mind, and pray that an inquiry thereof be had, the court, if satisfied that there is good cause for the exercise of its jurisdiction, shall cause the person so charged to be brought before such court and inquire into the facts by a jury, if the facts be doubtful.' This statute was enacted solely for the purpose of protecting the civil and property rights of insane persons, as is clearly shown by the section itself and the other sections of the same chapter (chap. 83, Kirby's Dig.). It has no reference whatever to determining the issue of the sanity of one who has been convicted and sentenced to be executed for a criminal offense, and who is already in the custody of the law for that purpose."

In the case *Re Lang*, 77 N. J. L. 207, 71 Atl. 47, Lang had been convicted of murder in the first degree and sentenced to death. A proceeding was instituted before the judge of the court of common pleas, under a statute "concerning the commitment of an insane person into institutions for the cure and treatment of the insane of this state, their confinement therein, and their support while so confined." The jury found the petitioner to be sane, and the matter was removed to the supreme court by certiorari. The court refused to disturb the finding, and an appeal was taken to the court of error and appeals from the judgment of the supreme court. The court affirmed the judgment, but said: "The judgment of the supreme court is affirmed, for the reasons set out in the opinion delivered in that court. It is not to be assumed, from the fact of this affirmance or from any language in the opinion adopted, that this court decides that the question of the insanity of a person who is in confinement awaiting exe-

cution under a capital sentence can be tested by a proceeding taken under § 13 of the Act of 1906 (Pamph. Laws, p. 722). This question was not argued and not considered." 76 N. J. L. 829, 72 Atl. 1118.

In a later case, *Re Herron*, 77 N. J. L. 315, 72 Atl. 133, the supreme court of New Jersey held that the insanity of a person who is in confinement, awaiting execution under a capital sentence, could not be tested by a proceeding taken under § 13 of the Act of July 5, 1906 (Pamph. Laws 1906, p. 722). The court said:

"Now, as already remarked, in those cases where it is only a question whether a convict shall be imprisoned in a penitentiary or an asylum, the existence of this power thus put into the hands of a single medical expert, and the failure of the legislature to indicate any type of insanity, the restoration to which type shall return the prisoner to his former place of imprisonment, matters little, or not at all; but where a sentence is not to imprisonment, but a sentence to death, it seems impossible to believe that the legislature, under language so general in character, with no allusion to this exceptional situation, intended that the sentenced person should be immune from punishment."

As remarked by the supreme court of New Jersey, in considering the statute there in question, if the legislature intended that the power of removal, under § 13, to the insane asylum, extended to persons under sentence of death, why was not some provision made for a reprieve or stay of the sentence, or why was not some provision made that the application under § 13 should operate as a stay, coupled with the power of removal? Under our statute no provision is made for staying execution in a capital case, where a proceeding is instituted to investigate the sanity of a person or for the granting of a reprieve, or for the execution of the sentence upon the restoration of the person to sanity. In fact, the statute is silent upon all such questions, and not a

word or sentence has any reference whatever to a person awaiting execution, or undergoing imprisonment under sentence imposed by a court. For these reasons we are compelled to conclude that the district court of Santa Fe county had no jurisdiction of power to conduct the investigation into the question of the sanity or insanity of the petitioner. This being true, this court was not required to suspend the execution of the death sentence upon the filing in this court of a certified copy of such adjudication; and the petition asking the court to so stay the execution must be denied.

All the courts hold, so far as we are advised, that the common law forbids the trial, sentencing, or execution of an insane person for a crime, while he continues in that state. Many of the states have statutes to that effect. Cases discussing the question and supporting our view are: *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; *State v. Vann*, 84 N. C. 722; *Bulger v. People*, 61 Colo. 187, 156 Pac. 800; *Davidson v. Com.* 174 Ky. 789, 192 S. W. 846. In the case of *State ex rel. Lyons v. Chretien*, 114 La. 81, 38 So. 27, the court, while holding that it was discretionary with the court, upon suggestion of the insanity of one about to be executed, to take action in the premises, held that in such a case the defendant had no legal right to such action, but that it was a question of humanity. In the case of *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87, the Supreme Court of the United States, in discussing the rule in such a case at common law, said: "In other words, by the common law, if, after conviction and sentence, a suggestion of insanity was made, not that the judge to whom it was made should, as a matter of right, proceed to summon a jury and have another trial, but that he should take such action as, in his discretion, he deemed best."

And it quoted from the case of

*Laros v. Com.* 84 Pa. 200, where a suggestion of insanity was made after verdict as follows: "The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation."

In 4 Bl. Com. p. 396, the author says: "Another cause of regular reprieve is, if the defendant becomes non compos between the judgment and the award of execution; for regularly, as was formally observed, though a man be compos when he commits a capital crime, yet if he becomes non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution; for 'furiosus solo furore punitur,' and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege why execution should not be awarded against him; and if he appears to be insane, the judge in his discretion may and ought to reprieve him."

In view of the foregoing, and as a matter of humanity, this court felt that the judgment of the district court of Santa Fe county, filed in this court as stated, was a sufficient suggestion to the court that the question of the sanity or insanity of the petitioner should be investigated, as a matter of humanity; and in order that the court might have time to hear the evidence, and to give to petitioner ample time to produce such evidence as might be available in support of his alleged insanity, a stay of execution was granted him as set out in the statement of facts. That the court had the power to grant the stay for this purpose is supported by the authorities. *Bulger v. Peo-*

Criminal law—  
suggestion of  
insanity—  
inquiry.

—stay of  
execution.

ple, 61 Colo. 187, 156 Pac. 800; Miller's Case, 9 Cow. 730; Fufts v. State, 2 Sneed, 232; State v. Vann, 84 N. C. 722; Parker v. State, 135 Ind. 534, 23 L.R.A. 859, 35 N. E. 179.

The question of the right of the petitioner to a trial by a jury in this court of the question of his alleged insanity must likewise be resolved against him. 16 Am. & Eng. Enc. Law, 622. In the case of Nobles v. Georgia, supra, the Supreme Court of the United States held that a trial of the question of the insanity of a convict, suggested after the verdict and sentence, is, at common law, in the discretion of the judge, without an absolute right on his part to have the issue tried before a court and jury. In the case of State v. Nordstrom, 21 Wash. 403, 53 L.R.A. 584, 58 Pac. 248, the court held that where, after sentence of death upon a prisoner, his insanity is alleged, and the court has satisfied itself of the prisoner's sanity, either from its own examination or from that of a commission appointed for the purpose, the action of the court in refusing the prisoner a trial in which he would have the right to be represented by counsel and to examine witnesses was not reviewable on appeal, and approved of the action of the lower court.

In the case of Ex parte Schneider, 21 D. C. 433, Schneider had been convicted of murder in the first degree and sentenced to death, and the judgment had been affirmed by the supreme court of the District of Columbia. A petition was filed in the court by the prisoner and counsel, stating that Schneider "is now insane," and an order was asked postponing his execution, and that the court should institute proceedings to ascertain the truth of this averment. The matter was certified to the general term, which passed an order postponing the execution and directing a method which seemed best suited to prosecute the inquiry. The method adopted was that the court itself decided to hear the evidence as to the alleged in-

sanity of the party, and appointed a commission of experts to examine the person so awaiting execution, and heard the evidence pro and con on the question. In the present state of our law in this jurisdiction, we are of the opinion that it is within <sup>—trial of question of sanity.</sup> the province of the court, upon the suggestion of the insanity of the person awaiting execution under a death sentence, to adopt such method as to the court seems best suited to enable it to arrive at the truth of the question. We decided to hear the evidence upon the question as to the alleged insanity of Smith in open court, and fixed a day for such hearing. The evidence was heard as heretofore stated, and we are now confronted with the question of weighing the same and deciding as to whether Smith should pay the penalty for his crime, or whether the execution of the sentence should be further stayed.

First, as to the law in the case: No plea of insanity was interposed as a defense to the prosecution in the trial court, nor was such a plea interposed prior to the judgment. The court instituted inquiry, as stated, because of a doubt entertained as to the sanity of the accused. The law upon the question as to the degree of insanity which would justify the court in giving to the prisoner a stay of execution may be briefly stated as follows:

If the prisoner has not at the present time, from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court, then he would not be sane and should not be executed. On the other hand, if he

Incompetent  
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of sanity.

fully understands all the facts relative to the crime for which he was tried and the purpose for which he is about to be punished, and can intelligently set forth any fact which may exist as to why the judgment should not be carried into execution, and comprehends his situation and his surroundings, then he would be sane within the law, and subject to execution.

In *Re Lang*, 77 N. J. L. 207, 71 Atl. 47, the court approved of the following instruction given to the jury, where the question of the insanity arose after conviction: "If, therefore, a person sentenced for a crime is capable of understanding the nature and object of the proceedings going on against him, if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner, he is, for the purpose of undergoing punishment, deemed to be sane, although on some other subjects his mind may be deranged or unsound. If the prisoner has not at the present time, from the defects of his faculties, sufficient intelligence to understand the nature of these proceedings against him, and his impending fate and execution, the jury ought to find that he is not sane, and upon such finding he may be ordered to be kept in custody until his disability is removed."

In the case of *State v. Helm*, 69 Ark. 167, 61 S. W. 915, the supreme court of Arkansas was called upon to consider the degree of insanity which would exempt one from punishment, after verdict, and before judgment. In that state they had a statute on the subject, which the court, however, held was simply declaratory of the common law. The court said: "We therefore conclude and decide that, if a person convicted of a crime is, by reason of a disease of the mind, unable to understand the nature of the indictment upon which he was convicted, his plea thereto, and the verdict thereon, when explained to him by the court, and is unable to compre-

hend his own condition in reference to such proceeding, and by reason thereof might not make known to the court or the attorneys in charge of his defense the facts within his knowledge, if any, which would show that judgment should not be pronounced against him, he is, as to the pronouncing of such judgment, to be deemed insane, within the meaning of the statute."

In the case of *Lee v. State*, 118 Ga. 764, 45 S. E. 628, the question was raised, as in this case, after judgment. The court approved a charge given by the lower court to the effect that before the prisoner could be found insane it should be shown that he would not know he would deserve punishment for doing a wrong act, and would not comprehend the reason why he was being punished. In the case of *Ex parte Schneider*, 21 D. C. 433, the court held that, on a petition for an order suspending the execution of a criminal alleged to be insane, the court is required, before it can nullify the verdict of the jury and the judgment and sentence, to find that the prisoner is actually insane, so as to be wholly unconscious of his situation. In the case of *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216, the court considered a statute which declared: "No insane person can be tried, sentenced to any punishment, or punished for any crime or offense, while he continues in that state."

The court stated that this statute was in strict conformity with the common-law rule on the subject. After considering many cases on the subject, the court said: "With these lights before us, the construction of the statute which forbids the trial of any insane person cannot be attended with much difficulty. A state of general insanity, the mental powers being wholly perverted or obliterated, would necessarily preclude a trial; for a being in that deplorable condition can make no defense whatever. Not so, however, where the disease is partial, and confined to some sub-

ject other than the imputed crime and the contemplated trial. A person in this condition may be fully competent to understand his situation in respect to the alleged offense, and to conduct his defense with discretion and reason."

In a recent case in California, *People v. Lawson*, — Cal. —, 174 Pac. 885, the court said: "The evidence on the question of insanity was amply sufficient to support the conclusion that the defendant was sane within the meaning of the law applicable. That he was not perfectly poised mentally may be freely conceded. Such, however, is not the test. There was no substantial showing to the effect that his mind was in such a condition that he did not rightly comprehend his own condition with reference to the proceedings against him, that he had been convicted of a crime punishable by death, and was before the court for the purposes of judgment on that conviction, or that he was then unable to present in a rational have, either on motion for new trial manner any defense that he might or to the pronouncing of judgment. Under the well-settled rule in this state, it was incumbent on the defense to show this by a preponderance of evidence. The burden of proof was upon him."

No cases to the contrary of this rule have been cited by counsel for petitioner.

Tested by this rule, we will proceed to examine the evidence and ascertain whether the petitioner is insane to such an extent that he should not undergo the punishment decreed.

Petitioner's sister, Mrs. N. Jacco, of Berkeley, California, testified that from 1898 to 1900 her brother, the petitioner, lived a neighbor to her in Butte, Montana, for six months; that on one occasion while living in Butte petitioner acted as though he were of unsound mind. She said they were having labor trouble in Butte, and the militia had been called out; they were all sitting in the yard, when her brother be-

came very excited, ran into the house, and got a shotgun; he said he knew the soldiers were going to kill his baby, a child three months old; her husband took the gun from him; that her brother later went to Alaska, returning from there in 1908 or 1909; that when he returned from Alaska he came to her home in Sacramento; that he was a complete wreck, the doctor stating that he was in the worst stages of syphilis; that he had no control over the different parts of his body, and detailing other symptoms which would indicate presence of the disease stated; that he had been almost constantly in trouble of various kinds since he returned from Alaska; had served a term in the penitentiary at San Quentin; that he had an exaggerated idea of his own importance; that he would not talk to his sister about anything but water power; that he talked about a water wheel, saying that he was going to put in electric power all over the state; that he always talked up in the millions of dollars; that he made a great number of drawings of his scheme, and that he had never had any connection with machinery or irrigation in his life; that he had at one time advertised for someone to go into the butcher business with him, but that he had no money and had never been in the butcher business in his life. This, in substance, was the effect of the sister's testimony, elaborated, however, much more extensively than above set out.

The deposition of Dr. W. A. Cusick, of Salem, Oregon, was taken. The doctor testified that he had been practising for a great number of years; that he was eighty years of age; that his practice had been general, but more particularly confined to the diseases of the nervous system; that he made an examination of A. B. Smith in the courthouse at Salem, Oregon, about seven years ago; Smith had been arrested for larceny; that the result of his examination was that he came to the conclusion at that time that Smith was not responsible for his acts in



connection with the crime with which he was charged; that he regarded him as a mental derelict, otherwise a congenital paranoiac; that Smith's comprehension, owing to his mental condition, would be more or less indefinite, and he doubted if he could rightfully understand any proceedings against him; he also had doubts if he could present any matter in a rational manner; that Smith would be likely to misjudge a question of fact, whether it was associated with his cause under consideration or otherwise; that Smith was not a monomaniac, but a paranoiac, irrational on all subjects.

Joe Melugin likewise testified by deposition to the effect that he was the keeper of the cell house at the state penitentiary in which Smith was confined during the months of June, July, and August, 1918; that in his opinion Smith was suffering from a form of insanity; that he would take small pieces of tobacco and wrap them up and conceal them about his cell; that he would also take all the small pieces of string and twine he could get, and wrap them up and hide them about his cell. When the witness asked what he was doing it for, he stated that sometimes even a small string might make a million dollars for a person; that in discussing his former dealings he always talked in large numbers, seldom speaking in amounts of less than \$100,000; that he spent a great deal of his time drawing what he called plans for some machinery for perpetual motion.

The superintendent of the state penitentiary, Thomas Hughes, and the assistant warden, Pat Dugan, both testified. Hughes stated that he saw Smith on an average of once a week during all the time that he had been confined there, which was for several months; that he talked with him frequently; and that Smith appeared perfectly rational at all these times. He had discussed with him fully the transaction of the killing of Sheriff Stephens by the escaped prisoners from the Dem-

ing jail, of which Smith was one, and that he gave him a very rational account of the affair. He told the superintendent, however, that he (Smith) did not have a gun and did not fire a shot, and that he could not understand, therefore, why he should receive the same punishment as that meted out to Starr, who confessedly had fired the shot that killed Sheriff Stephens. He gave it as his judgment that Smith was a rational-minded man.

Dugan testified that he saw Smith almost every day, talked with him frequently, and that Smith appeared to be a very intelligent man. Smith had likewise told him about the trouble, and gave a very lucid and connected account thereof. Both witnesses testified that after the affirmance of the judgment of the lower court, when Smith knew that his execution was but a matter of days, he became very nervous and excited, and seemed to fear death very much. Neither witness had talked to Smith on the subject of water wheels or water power.

The three doctors who examined Smith and testified at the hearing in the district court were produced, namely, Dr. Diaz, Dr. Knapp, and Dr. Umler. These physicians were all general practitioners, neither of whom had made a special study of mental diseases. They testified that Smith was a paranoiac; that they had made two examinations of him, and had led him out upon the subject of water power and irrigation, and that he had described to them some wonderful invention which he claimed to have perfected, which would revolutionize the water power system of the country, and that he was being persecuted by the governor of the state of California and other men, who desired to prevent him from perfecting his great invention; that Smith also had delusions of grandeur, and imagined that he was being persecuted; that on other subjects he appeared to be rational, and talked in an intelligent and rational manner.

Dr. Diaz stated that Smith had

delusions and hallucinations on some subjects, while probably on others he was normal; that he seemed to be normal in everything except upon the subject of water power and hydraulics, and the hallucinations of persecution; that upon most subjects he talked reasonably; that it was his opinion that Smith understood and appreciated what was taking place in court at the time of the hearing; that Smith did not seem to realize and understand for what purpose he was being punished. He did not know whether Smith would have the knowledge of right and wrong on subjects disassociated from his hallucinations. In answer to questions by the court, Dr. Diaz stated that he appeared to be normal on all subjects except water and his hallucinations of persecution.

Dr. Umberhine testified that along certain lines disassociated from these delusions Smith seemed to be normal, but that along certain other lines he would not be; that the fact that he had delusions upon the subject of water power would not necessarily indicate that he was insane generally, and had no knowledge of right and wrong; that he could have a rational idea of right and wrong; that Smith realized what was taking place at the time of the present hearing, but that he did not realize it like a normal man would; that Smith did realize and understand the extent of his punishment, and what it was being done for; that the two examinations he made as to Smith's sanity were not enough to enable him to form an opinion as to Smith's responsibility in respect to the crime with which he was charged.

Dr. Knapp testified that he did not think Smith was able to take care of his own affairs, but that he did realize what he was charged with, and that he realized his present situation; that he knew what he was being punished for, and that his execution would be a punishment; that he realized what it was for; that it was the penalty for the crime with which he was charged;

that he thought Smith would be able to carry on ordinary business affairs and that in most cases he would consider him normal; that he thought Smith was normal on subjects aside from the delusions mentioned; that his delusions would not interfere with his ability to distinguish as between right and wrong in connection with the crime with which he was charged; that he might commit a crime of the character with which he was charged without realizing that he was doing a wrongful act.

Dr. Elder, who was present at the hearing in this court, and who later made an examination of Smith in connection with Dr. Massie, at the request of the attorney general, testified that in his judgment a true paranoiac was not responsible in any direction; that he did not believe that he would appreciate the fact that his punishment was retribution, and not persecution; that, from the extent of his examination of Smith, he found nothing that would indicate that Smith did not fully appreciate and comprehend his present situation. He was not prepared to say that Smith was a paranoiac from the examination which he had made, but stated that, if a man has delusions and the other deficiencies that a paranoiac has, he is not responsible in any direction; that is, a man cannot be insane in one direction and perfectly sane on any other question; that he made intelligent answers to all questions propounded to him by the witness and Dr. Massie.

Dr. J. A. Rolls testified that the fact that Smith had been a hard drinker, and had suffered with syphilis, did not indicate that he was a paranoiac; that the result of a brain disease caused by syphilis would be what is known as paresis, and not paranoia; that nothing had been stated at the time of the hearing at which the doctor testified that would lead him to believe that Smith was an insane man.

Dr. J. A. Massie testified that he was the prison physician, and had

made an examination of Smith; that he gave him clear answers to all questions that were asked of him; that he was extremely nervous and evidently very much afraid; that he thought that Smith comprehended and realized his position in regard to his impending execution; that he had sufficient intelligence to realize what he was being punished for; that in his opinion, based upon what he had read in the different medical works on the subject of paranoia, outside of his delusions, he is able and competent of conducting business, and that his sense of right and wrong, outside of that one delusion, is practically normal; that a man abnormal on the subject of water, and who has committed a crime having nothing to do with the delusion, would be capable of conducting his defense; that Smith appreciates his position to-day, that he is under sentence of death. And he named many medical works which hold that on all questions outside of the delu-

sion they have a proper sense of right and wrong.

The above constitutes a synopsis of all the evidence submitted to the court. We have carefully considered the same, and are of the opinion that Smith is

sane, and that he <sup>Evidence—  
sufficiency.</sup>

has sufficient intelligence to understand the nature of the proceedings against him and his impending fate and execution, and that he under-  
stands, knows, and <sup>—insanity—  
sufficiency.</sup>

is able to allege any fact which might exist tending to show that he should not be executed. Under the authorities hereinbefore referred to, his execution should not be stayed, but the judgment which the law has pronounced should be carried out.

For the foregoing reasons, the court must decline to stay the execution.

Hanna, Ch. J., and Parker, J., concur.

### ANNOTATION.

#### Test of present insanity which will prevent trial for crime or punishment after conviction.

The question whether a deaf-mute may be placed on trial for, or punished after conviction of, a crime, though somewhat analogous, is not within the scope of the note. The question under annotation is, of course, distinct from the question of mental capacity at the time of the offense, as affecting guilt.

#### Insanity precluding trial for crime.

In order to raise a doubt as to the sanity of one about to be tried on a criminal charge, it is said in *State v. Arnold* (1861) 12 Iowa, 479, that there must be a question whether at the time there is such mental impairment, either under the form of idiocy, intellectual or moral imbecility, or the like, as to render it probable that the accused cannot, as far as may devolve upon him, have a full, fair, and impartial trial.

This involves an inquiry whether

the accused is mentally competent to make a rational defense. *Freeman v. People* (1847) 4 Denio (N. Y.) 9, 47 Am. Dec. 216; *People v. Lake* (1855) 2 Park. Crim. Rep. (N. Y.) 215; *Guagando v. State* (1874) 41 Tex. 626; *People v. Nyhan* (1918) 171 N. Y. Supp. 466; *Frith's Case* (1790) 22 How. St. Tr. (Eng.) 311 (holding that no man shall be called upon to make his defense at a time when his mind is in that situation as not to appear capable of so doing; for, however guilty he may be, the inquiry into his guilt must be postponed to that season when, by collecting together his intellects and having them entire, he shall be able so to model his defense as to ward off the punishment of the law); *People v. West* (1914) 25 Cal. App. 369, 143 Pa. 793 (holding that on an inquiry under Cal. Penal Code, § 1368, as to the sanity of one accused of

crime, the question to be submitted to the jury is whether the accused is mentally competent to make a rational defense, and not as to his responsibility for the crime charged; which would involve an inquiry whether he knew the difference between right and wrong, and could distinguish the quality and consequences of his act.

It may be inquired whether the accused, by reason of insanity, is able to comprehend his position. *State v. Peacock* (1887) 50 N. J. L. 34, 11 Atl. 270. Or whether he has mind and discretion which would enable him to appreciate the charge against him and the proceedings thereon. *Jordan v. State* (1911) 124 Tenn. 81, 34 L.R.A. (N.S.) 1115, 135 S. W. 327. Or whether he is mentally capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands. *Ibid.*; *State v. O'Grady* (1896) 5 Ohio S. & C. P. Dec. 654 (holding the test of sanity in an inquiry as to whether one indicted for murder, and who is alleged to be insane, should be placed on trial, is whether he is sane enough to recall the events of his life, and to represent to counsel the facts which ought to be stated and presented to a jury upon trial of the indictment); *United States v. Chisolm* (1906) 149 Fed. 284 (holding that a person, though not entirely sane, may be put upon trial in a criminal case, if he rightly comprehends his own condition with reference to the proceedings, and has such possession and control of his mental powers, including the faculty of memory, as will enable him to testify intelligently and give his counsel all the material facts bearing upon the criminal act charged against him, and material to repel criminating evidence).

But evidence of mere incapacity to fully understand and comprehend his legal rights, and to make known in the most succinct and intelligent manner, to his counsel, all the facts material to his defense, is not sufficient ground for refraining from proceeding to trial. *State v. Arnold* (1861) 12 Iowa, 479.

So, it is said in *Taylor v. Com.*

(1885) 109 Pa. 262, that while a slight departure from a well-balanced mind may be pronounced insanity in medical science, yet such a rule cannot be recognized in the administration of the law, when a person is on trial for the commission of a crime.

In *Re Buchanan* (1900) 129 Cal. 330, 50 L.R.A. 378, 61 Pac. 1120, the supreme court held that there is a difference between the medical view of insanity, and the view upon which the California statute, requiring a suspension of proceedings against an insane criminal, is founded; and that the question must be determined with reference to the latter, which merely reenacts the common law, and recognizes no form of insanity except that which manifests itself in mental deficiency or in mental derangement.

If a person arraigned for a crime is capable of understanding the nature and object of the proceedings going on against him, and rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner, he is, for the purpose of being tried, to be deemed sane, although on some other subjects his mind may be deranged or unsound. *Freeman v. People* (1847) 4 Denio (N. Y.) 9, 47 Am. Dec. 216; *People v. Rhinelander* (1884) 2 N. Y. Crim. Rep. 335; *Jordan v. State* (1911) 124 Tenn. 81, 34 L.R.A. (N.S.) 1115, 135 S. W. 327.

"It is impossible," says the court in *United States v. Chisolm* (Fed.) *supra*, "to lay down any fixed rule, as a matter of law, as to any particular state of facts which will unerringly demonstrate sanity, or the contrary condition of the human mind, or the degree of aberration which, when found to exist, exempts an accused person from criminal responsibility, or unfits him to rationally aid in his defense when arraigned for a crime.

. . . But whether or not an individual's departure from general rules governing human action demonstrates such aberration of mind as exempts him from criminal responsibility, or shows unfitness on that account to be placed on trial, depends upon the circumstances of the particular case; and

is to be gathered not merely from the act for which he is arraigned, but must also be determined and tested in view of every other fact and circumstance which sheds light upon the condition of the defendant's mind at the period as to which the inquiry is directed."

In *Com. v. Braley* (1804) 1 Mass. 103, the prisoner indicted for the murder of his wife, upon being arraigned to plead, said that he did not know what to say; that it appeared to him she was still alive; it seemed to him he had seen her since; and added that he was guilty of what he had done, but did not know what he had done; whereby the court submitted to a jury the question whether the prisoner neglected or refused to plead to the indictment against him for murder, of his free will or malice, or whether he did so neglect by the act of God, and, upon the jury finding the latter alternative, the court did not proceed to try the prisoner, who was remanded.

In *Com. v. Hathaway* (1816) 13 Mass. 299, one indicted for murder pleaded not guilty on his arraignment, but showed strong marks of mental derangement, and a jury was impaneled by the direction of the court to try and determine whether he was sane or not. During the examination the prisoner often interrupted the witnesses by wild and incoherent remarks, and from his whole manner disclosed that he was under the influence of a religious frenzy. The jury returned their verdict that he was not of sane memory, and he was remanded to prison.

In the following cases, under the circumstances stated, the mental condition of the accused was found to be such as to preclude his being placed on trial:

The prisoner, when called upon to plead, in *Ley's Case* (1828) 1 Lewin, C. C. (Eng.) 239, broke out into incoherent declamations as though his mind was disordered, and a jury was, in consequence, impaneled to try whether his not pleading was the effect of malice or by reason of insanity, and the court charged them that

if there was a doubt as to the prisoner's sanity, and a surgeon had testified that it was doubtful, they could not say that he was in a fit state to be put upon his trial.

In *Reg. v. Goode* (1837) 7 Ad. & El. (Eng.) 536, the prisoner, when called upon to plead, showed clear symptoms of insanity in his demeanor, and, upon his not pleading, an inquest was taken to determine his sanity, and the court, after examining witnesses and in view of the conduct of the prisoner, did not think it necessary to ask him whether he wished to cross-examine the witnesses or to say or prove anything for himself, since it was clear that this would be a mockery and waste of time, and a useless prolongation of the painful proceeding.

A man who is convinced that a "blower and wireless" are being operated on him, who perverts and imagines noises and voices of people, who is urged by influences and voices of his own insane creation to protect himself, and who believes that his wife, whom he murdered, was killed by men who sought also to destroy him, is not in a mental condition to appreciate the proceedings of a trial, and undertake his defense. *People v. Nyhan* (1918) 171 N. Y. Supp. 466.

The reason of the rule prohibiting the trial of one accused of crime while he is insane is stated to be his incapacity to make a just defense. *Freeman v. People* (1847) 4 Denio (N. Y.) 9, 47 Am. Dec. 216; *State v. Helm* (1901) 69 Ark. 167, 61 S. W. 915. This has led to an extension of the rule to analogous cases, where the incapacity of the accused to aid in his defense arose from intoxication.

It is ground for a new trial that one upon trial for felony was so stupid from intoxication as not to be able to understand the peril of his condition, or the facts of his case, and could not communicate with his counsel with intelligence, or assist them in their defense of him, or avoid the repugnance, and perhaps the prejudice, which must have resulted from his debased and disgraceful condition. *Taffe v. State* (1861) 23 Ark. 34. The court said: When it was ascertained

that the accused was not able to make such defense as he could or might have made in the use of his right reason, and whether this inability was owing to drunkenness or to any cause beyond his control, the law is the same.

But a person who has no delusions, but is more than ordinarily intelligent, with memory unimpaired, and who appreciates exactly the nature of the criminal charge against him, and his relation to the proceeding, and who, so far as mental operation is concerned, is as sane as men are ordinarily, though, on account of a serious illness resulting from indulgence in the excessive use of intoxicating drink, his brain is affected so as to change his character, whereby he has lost ambition, become aimless and trifling, and has deteriorated in moral character, while his appetite for intoxicants has become uncontrollable at frequent intervals, so that, if at liberty, he will inevitably take to drinking, and when under the influence of intoxicants will be dangerous, is not insane within the meaning of the statutes providing for the suspension of proceedings against insane criminals. *Re Buchanan* (1900) 129 Cal. 330, 50 L.R.A. 378, 61 Pac. 1120.

In *Kinloch's Case* (1746) 18 How. St. Tr. (Eng.) 395, the court refers to the case put by Lord Hale (1 Hale, P. C. 35), that "in case a man in a phrenzy happen by some oversight to plead to his indictment, and put himself on his trial; and it appeareth to the court on his trial that he is mad; the judge in discretion may discharge the jury of him, and remit him to gaol to be tried after the recovery of his understanding." The court then observes: The common sense and feeling of mankind, the voice of nature, reason, and revelation, all concur in this plain rule, that no man is to be condemned unheard; and consequently no trial ought to proceed to the condemnation of a man who, by the providence of God, is rendered totally incapable of speaking for himself, or of instructing others to speak for him.

This ancient rule was applied in *United States v. Chisolm* (1906) 149 3 A.L.R.—7.

Fed. 284, where the court, on a suggestion of the insanity of the accused, suspended the trial and submitted to the jury the question whether the prisoner, at the time, was possessed of sufficient mental power and had such understanding of his situation as to readily comprehend his condition with reference to the proceedings against him, and such coherency of ideas, control of the mental faculties, and the requisite power of memory as would enable him to testify in his own behalf, if he so desired, and otherwise to properly and intelligently aid his counsel in making a rational defense.

But in *Reg. v. Southey* (1865) 4 Fost. & F. (Eng.) 864, where the insanity of the defendant on trial for murder was not suggested until after the case had been opened and the first witness examined, the court permitted the trial to proceed, but submitted to the jury, as one of the questions for their determination, whether the accused was then sane and in a fit state to be tried.

#### **Insanity precluding judgment or punishment for crime.**

If a person convicted of a crime is, by reason of a disease of the mind, unable to understand the nature of the indictment upon which he is convicted, his plea thereto, and the verdict thereon, when explained to him by the court, and is unable to comprehend his own condition in reference to such proceeding, and by reason thereof might not make known to the court or his attorneys in charge of his defense, the facts within his knowledge, if any, which would show that judgment should not be pronounced against him, he is, as to the pronouncing of such judgment, to be deemed insane within the meaning of the statute providing that insanity may be shown as a legal cause why judgment should not be pronounced. *State v. Helm* (Ark.) *supra*. In this case the court condemned as erroneous an instruction which authorized the jury to find the defendant insane, if they found from the preponderance of the evidence that he could not "intelligently reason," since it is reasonably calculated to induce the jury to believe

that he should be possessed of more intelligence and mental capacity at the time judgment is pronounced against him, as a prerequisite to such proceeding, than is necessary.

The test of the question as to whether one about to be executed is sane or insane, as laid down in the reported case (*STATE v. SMITH*, ante, 83), is whether or not such person, at the time of the examination, from the defects of his faculties, has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any facts which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court. If he has, then he is sane; otherwise, he is insane, and should not be executed.

The provisions of N. J. Pamph. Laws, pp. 715, 722, concerning the commitment to asylums of criminal lunatics under sentence, do not establish a different test of insanity than that laid down by the common law, which is, whether the prisoner is capable of understanding the nature and object of the proceedings going on against him, or rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner. If so, he is, for the purpose of undergoing punishment, deemed to be sane, although on some other subjects his mind may be deranged or unsound. *Re Lang* (1908) 77 N. J. L. 207, 71 Atl. 47, affirmed in (1909) 76 N. J. L. 829, 72 Atl. 1118.

On a suggestion of the insanity of one convicted of murder and arraigned for judgment, the test to be applied in an inquiry as to his sanity, authorized by Cal. Penal Code, is whether the mind of the accused is in such a condition that he does not rightly comprehend his own condition with reference to the proceedings against him, or that he has been convicted of a crime punishable by death, and is before the court for the purpose of judg-

ment on that conviction, or that he is then unable to present in a rational manner any defense that he might have, either on motion for a new trial or to the pronouncing of judgment. *People v. Lawson* (1918) — Cal. —, 174 Pac. 885.

A charge that before one convicted of murder, and who is alleged to have become insane since his conviction and sentence, could be found insane, it should be shown that he would not know he would deserve punishment for doing a certain act, and, if punishment therefor should be inflicted upon him, would not comprehend the reason why he was being punished, was approved in *Lee v. State* (1903) 118 Ga. 764, 45 S. E. 628.

If the trial court is satisfied that one tried, convicted and sentenced for crime was insane at the time of the trial, or that his mind was affected to such an extent that he was not in a condition to make a defense to the charge, it can award a new trial, notwithstanding the sentence, and the judgment and sentence can be vacated. *Humphreys v. State* (1897) — Tex. Crim. Rep. —, 39 S. W. 679.

The rule is laid down in *Ex parte Schneider* (1893) 21 D. C. 433, that the verdict of a jury convicting accused of the crime of murder, the judgment, and sentence of the court will not be nullified on an inquiry as to the sanity of the accused, unless it be shown that the latter is actually insane, so as to be unconscious of his situation. In this case the facts that the accused, about the time of his sentence, neglected his personal appearance and became slovenly and unkempt; that he refused to eat because of an alleged delusion that his food was poisoned; that he asserted that he could not sleep; and also expressed unfounded beliefs and seemed to be afflicted with delusions, were wholly insufficient to justify postponing the execution, in view of contradictory testimony and the probability that the accused was feigning insanity.

The refusal of the trial judge to direct an inquisition into the sanity of one convicted of murder is not an abuse of discretion, where it appeared

that the prisoner had once before had "prison psychosis," from which he rapidly recovered when the cause of immediate apprehension had been removed, and since his conviction had had a second attack, which in all probability would disappear rapidly if the causes of its existence were removed. *Gonzales v. United States* (1913) 40 App. D. C. 450. The court stated: "What would be the result in any case almost, where a man has committed a murder and is sentenced to be hanged, and knows that if he appears sufficiently terrified and peculiar, and shows sufficient signs of being crazy because he is going to be hanged, that he will not be hanged? How many cases would there be where they would not have prison psychosis?"

That the court on the trial of an issue as to the sanity of one under sentence for murder, and brought before it that a new date might be set for the execution of the sentence, submitted to the jury the question whether the mental condition of the prisoner was such that he could not understand the meaning of punishment, and whether he was now sane or insane, instead of submitting to them whether the defendant, by reason of a disease of the mind, was unable to understand the nature of the indictment upon which he was tried and convicted, his plea thereto and the verdict thereon when explained to him by the court, and was unable to comprehend his own condition in reference to such proceeding, and whether by reason

thereof he might make known to the court or his attorneys in charge of his defense, the facts within his knowledge, if any, which would show that judgment should not be pronounced against him, especially in view of the fact that his counsel had stated that the defendant was precluded from communicating to him facts relating to after-discovered evidence, is held not erroneous in *State v. Bethune* (1911) 88 S. C. 401, 71 S. E. 29, on the ground that it had not been made to appear that the accused was prejudiced thereby.

On an inquiry under the Oklahoma statute as to the sanity of one convicted of a criminal offense, the proper question for the jury is whether the accused is mentally competent to make a rational defense, and not whether he is able to distinguish between right and wrong. *Marshall v. Territory* (1909) 2 Okla. Crim. Rep. 136, 101 Pac. 139.

In an inquisition as to the sanity of one convicted of crime, the question for the jury sworn to try the issue is stated, in the charge of the court in *United States v. Lancaster* (1877) 7 Biss. 440, Fed. Cas. No. 15,555, to be, whether the defendant was so far insane as to be incapable of realizing the peril in which he was placed, and taking such steps as a prudent man under the circumstances would have taken to prepare for his trial, and whether that insane condition still continues. A. W. R.

## FARMERS' NATIONAL BANK, Plff. in Err.,

v.

JOHN E. JOHNSTON.

*Oklahoma Supreme Court—November 19, 1918.*

(— Okla. —, 176 Pac. 236.)

### Evidence — of existence of bank.

1. Parol evidence is competent to prove the existence of a national bank, where its existence is called in question collaterally.

[See note on this question beginning on page 101.]

Headnotes 1 and 2 by HARDY, J.



**Bank — right to sue.**

2. A national bank, even in the process of liquidation, may sue and be sued in its own name until its affairs are completely settled.

[See 3 R. C. L. 648.]

**Evidence — proof of incorporation.**

3. In a direct action by the state for the purpose of determining the alleged right of a corporation to transact business, strict proof of due incorporation is required.

[See 7 R. C. L. 102.]

**ERROR** to the District Court for Sequoyah County to review a judgment in favor of defendant in an action brought to recover the amount of a check, alleged to be due and unpaid. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. McCombs & McCombs, for plaintiff in error:

The existence of the plaintiff corporation was admitted under the pleadings.

Western Roofing Tile Co. v. Deibler, 30 Okla. 347, 120 Pac. 579.

Before a defendant can raise the corporate existence of a plaintiff, he must make same an issue, either by a plea in the nature of an abatement, or by a special plea in his answer, to the effect that the plaintiff is not a corporation.

Jantzen v. Emanuel German Baptist Church, 27 Okla. 473, 112 Pac. 1127, Ann. Cas. 1912C, 659; Boyce v. Augusta Camp, 14 Okla. 642, 78 Pac. 322; Leader Printing Co. v. Lowry, 9 Okla. 89, 59 Pac. 242; Union Cement Co. v. Noble, 15 Fed. 502; South Yuba Water Co. v. Rosa, 80 Cal. 333, 22 Pac. 222; Ontario State Bank v. Tibbits, 80 Cal. 68, 22 Pac. 66; Southern P. R. Co. v. Purcell, 77 Cal. 69, 18 Pac. 886; Exchange Nat. Bank v. Capps, 32 Neb. 242, 29 Am. St. Rep. 433, 49 N. W. 223; Willis & Bro. v. Smith, 17 Tex. Civ. App. 543, 43 S. W. 325; Imperial Ref. Co. v. Wyman, 3 L.R.A. 503, 38 Fed. 574; Miller v. Campbell Commission Co. 13 Okla. 75, 74 Pac. 507; 10 Cyc. 1351.

Where a national bank, organized under the National Banking Act, goes into liquidation, it does not cease to exist as a corporate body, but may sue and be sued in its own name until its affairs are finally wound up.

Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Bank of Bethel v. Pahquioque Bank, 14 Wall. 383, 20 L. ed. 840.

Messrs. W. L. Curtis and Thomas J. Watts for defendant in error.

Hardy, J., delivered the opinion of the court:

The Farmers' National Bank commenced an action against John E. Johnston upon a postdated check drawn on the Sallisaw Bank & Trust Company in favor of Edwards & Company, and by them indorsed to the Farmers' State Bank, which latter institution was converted into the Farmers' National Bank. When the check was presented, payment was refused and the check protested.

The answer of defendant contained a specific denial of the corporate existence of plaintiff, which was duly verified. At the trial, plaintiff proved by oral testimony the existence of plaintiff as a national bank and the conduct of a general banking business by it, and also offered evidence as to the ownership of the check sued upon. At the close of the evidence, verdict was instructed for defendant. This was error. It was proper to prove the corporate existence of plaintiff by parol evidence. Section 5112, Rev. Laws 1910, **Evidence—of existence of bank.** makes exemplifications of the books

of any department of the government of the United States, or any papers filed therein, admissible in evidence in the same manner and with like effect as the originals, when attested by the officer having custody of such originals, and 3 Fed. Stat. Anno. p. 27, Comp. Stat. 1916, § 1497, declares that copy of the incorporation certificate of any national banking association, duly

(— Okla. —, 176 Pac. 236.)

certified by the Comptroller of the Currency and authenticated by his seal of office, shall be sufficient evidence, in all courts and places within the jurisdiction of the United States, of the existence of the association. It is contended that this statute makes the character of proof, therein declared to be prima facie proof of the existence of such corporation, the exclusive method by which such fact may be established. The statute does not so declare, nor has it been generally so held by the courts.

—proof of incorporation.

In a direct action by the state for the purpose of determining the right of an alleged corporation to transact business, strict proof of due incorporation is required. *Zane, Banks & Bkg.* § 23. But where the existence is called in question collaterally, that rule does not apply. *Higbee v. Aetna Bldg. & L. Asso.* 26 Okla. 327, 109 Pac. 236, Ann. Cas. 1912B, 223. And in a majority of cases it is held that parol proof of corporate existence is sufficient to sustain a verdict. *Way v. Butterworth*, 106 Mass. 75; *Farmers' & D. Bank v. Williamson*, 61 Mo. 261; *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834; *Pacific Drug Co. v. Hamilton*, 71 Wash. 469, 128 Pac. 1069; *Goldberg B. & Co. v. Dimick*, 169 Cal. 187, 146 Pac. 672. There are a number of authorities cited by counsel which merely hold that evidence of the character made prima facie by statute is sufficient to prove the corporate existence of a corporation. These authorities, with but one exception, do not hold that other evi-

dence may not be offered. Sections 3682 and 3715, Rem. & Ball. Code of Washington, which is similar to our statute (Rev. Laws 1910, § 1229), provides for making prima facie proof of corporate existence and payment of the license fee by the certificate of the secretary of state. It is held by the supreme court of that state that this method of establishing the fact is not exclusive, and this rule was applied to an action by a national bank. *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834.

It appeared that after suit was commenced the Farmers' National Bank was placed in process of voluntary liquidation, and at the time of the trial its affairs had not been finally wound up. This did not affect its right to maintain the action. A national bank, even though <sup>Bank—right to sue.</sup> in process of liquidation, may sue and be sued in its own name until its affairs are settled. *Oklahoma City Nat. Bank v. Ezzard*, — Okla. —, L.R.A.1918A, 411, 159 Pac. 267; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693. And this is also true where a receiver has been appointed therefor by the Comptroller of the Currency. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 840; *Chemical Nat. Bank v. Hartford Deposit Co.* 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. Rep. 439.

The judgment is therefore reversed, and the cause remanded for a new trial.

Petition for rehearing denied.

## ANNOTATION.

### Mode of proving corporate existence of national bank.

- I. In general, 101.
- II. Parol proof, 102.
- III. State statutes, 103.

#### I. In general.

The authority is to the effect that the corporate existence of a national

bank may be proved by the certificate of the Comptroller of the Currency, authorizing it to do business, given pursuant to the provisions of the National Banking Act, which require him to examine all applications and, upon a finding of a right to commence busi-

ness, to give a certificate to that effect; it being also provided by the Federal statutes that every certificate issued by the Comptroller of the Treasury in pursuance of law shall be received in evidence in all places and courts, and that copies shall be evidence equally with the originals, and, further, that such certificates shall be "legal and sufficient" evidence of such corporate existence.

**United States.**—*Casey v. Galli* (1877) 94 U. S. 673, 24 L. ed. 168; *Clement v. United States* (1906) 79 C. C. A. 243, 149 Fed. 305, certiorari denied in (1907) 206 U. S. 562, 51 L. ed. 1189, 27 Sup. Ct. Rep. 795.

**Alabama.**—*Hanover Nat. Bank v. Johnson* (1890) 90 Ala. 549, 8 So. 42.

**California.**—*Merchants' Nat. Bank v. Weston* (1917) 34 Cal. App. 693, 168 Pac. 587.

**District of Columbia.**—*Keyser v. Hitz* (1883) 2 Mackey, 473.

**Illinois.**—*Mix v. National Bank* (1878) 91 Ill. 20, 38 Am. Rep. 44.

**Massachusetts.**—*Washington County Nat. Bank v. Lee* (1873) 112 Mass. 521; *Tapley v. Martin* (1874) 116 Mass. 275; *Merchants' Nat. Bank v. Glendon Co.* (1876) 120 Mass. 97; *Weitzel v. Brown* (1916) 224 Mass. 190, 112 N. E. 945.

**Michigan.**—*Thatcher v. West River Nat. Bank* (1869) 19 Mich. 196.

**Minnesota.**—*First Nat. Bank v. Kidd* (1873) 20 Minn. 234, Gil. 212; *First Nat. Bank v. Loyhed* (1881) 28 Minn. 396, 10 N. W. 421.

**New York.**—*National Bank v. Phoenix Warehousing Co.* (1875) 6 Hun, 71; *Merchants' Exch. Nat. Bank v. Cardoza* (1872) 3 Jones & S. 162.

**Oklahoma.**—*FARMERS' NAT. BANK v. JOHNSTON* (reported herewith), ante, 99.

**South Dakota.**—*Citizens' Nat. Bank v. Great Western Elevator Co.* (1900) 13 S. D. 1, 82 N. W. 186.

**Washington.**—*National Bank v. Gal-land* (1896) 14 Wash. 502, 45 Pac. 35.

And since the Federal statutes authorize a deputy comptroller of the currency to exercise the powers and discharge the duties attached to the office of Comptroller during a vacancy in that office, or during the absence or

inability of the Comptroller, a certificate of an acting comptroller given by a deputy while legally performing the duties of the Comptroller's office, meets the requirements of the statute, and is sufficient evidence of the corporate existence of the bank. *Keyser v. Hitz* (1889) 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290 (see also *Rose's Notes* to this case); *Weitzel v. Brown* (1916) 224 Mass. 190, 112 N. E. 945. To the same effect is *Clement v. United States* (1906) 79 C. C. A. 243, 149 Fed. 305, certiorari denied in (1907) 206 U. S. 562, 51 L. ed. 1189, 27 Sup. Ct. Rep. 795.

The certificate of the Comptroller of the Currency is conclusive evidence as to the completeness of the organization of a national bank, at least, as against collateral attack. *Casey v. Galli* (1877) 94 U. S. 673, 24 L. ed. 168 (see also *Rose's Notes* to this case); *Clement v. United States* (1906) 79 C. C. A. 243, 149 Fed. 305, certiorari denied in (1907) 206 U. S. 562, 51 L. ed. 1189, 27 Sup. Ct. Rep. 795; *Keyser v. Hitz* (1883) 2 Mackey (D. C.) 473; *Thatcher v. West River Nat. Bank* (1869) 19 Mich. 196; *Citizens' Nat. Bank v. Great Western Elevator Co.* (1900) 13 S. D. 1, 82 N. W. 186. And see *Columbia Nat. Bank v. Mathews* (1898) 29 C. C. A. 491, 56 U. S. App. 636, 85 Fed. 934; *Brown v. Tillinghast* (1899) 35 C. C. A. 323, 93 Fed. 326; and *Bailey v. Tillinghast* (1900) 40 C. C. A. 98, 99 Fed. 801, which affirmed (1897) 86 Fed. 46. It is not necessary to produce the articles of incorporation in court. *First Nat. Bank v. Walker* (1915) 27 Idaho, 199, 148 Pac. 46, holding that it was error to rule that the corporate existence of a national bank could be proved only by its articles of incorporation. Nor is a certified copy of the bank's charter necessary. *State v. Williams* (1899) 152 Mo. 115, 75 Am. St. Rep. 441, 53 S. W. 424.

## II. Parol proof.

It has been held that the fact that the Federal statute declares that the certified and authenticated certificate of the Comptroller of the Treasury

shall be sufficient evidence, in all courts and places, of the corporate existence of a national bank, does not exclude other methods of proving such existence, or, in other words, that the statute does not establish an exclusive method by which the corporate existence of a national bank may be established. See the reported case (*FARMERS' NAT. BANK v. JOHNSTON*, ante, 99), where, in applying this rule, the court held that where the corporate existence of a national bank was called in question collaterally it could be proved by parol evidence. But see *First Nat. Bank v. Randall* (1880) 1 Tex. App. Civ. Cas. (White & W.) 545, where, in discussing the question of the right to prove the corporate existence of a national bank by evidence that it was exercising banking functions, and that its officers called it a national bank, the court said that the act of Congress prescribing a mode of proving the organization of national banks is not in derogation of any state law, and that, on principle, such a bank ought to be held to the law organizing it as to evidence of its existence.

And without reference to the Federal statutory provisions as to the method of proving the corporate existence of a national bank, it has been held that the de facto existence of such a corporation may be proved by parol evidence. Thus, in *Yakima Nat. Bank v. Knipe* (1893) 6 Wash. 348, 33 Pac. 834 (approved in *National Bank v. Galland* (1896) 14 Wash. 502, 45

Pac. 35), an action by an indorsee national bank upon a note, it was held that the corporate existence of the bank could be prima facie established by parol proof that it was carrying on a general banking business as a national bank, under the name by which it brought suit. And, upon the theory that a national bank is a public institution and its corporate existence a matter of public record, it has been held that, in a suit collaterally involving such corporate existence, it is sufficient to prove a de facto existence by parol evidence that it is carrying on a general banking business, as a national bank organized under the laws of the United States. *First Nat. Bank v. Walker* (1915) 27 Idaho, 199, 148 Pac. 46. And for the purpose of prosecuting one for a crime committed against a national bank, it has been held that the corporate existence of the bank is prima facie proved by unobjected-to parol evidence of the de facto existence of the bank. *Re Van Campen* (1868) 2 Ben. 419, Fed. Cas. No. 16,835.

### III. State statutes.

It was held in *New York Nat. Exch. Bank v. Jones* (1880) 9 Daly (N. Y.) 248, that state statutes making it unnecessary, in suits by or against any corporation created under its laws, to prove corporate existence in the absence of a denial thereof, do not apply to national banks so as to dispense with proof of such existence.

G. J. C.

## STATE OF CONNECTICUT

v.

JAMES NEWMAN, Appt.

*Connecticut Supreme Court of Errors—July 27, 1916.*

(91 Conn. 6, 98 Atl. 346.)

**Husband and wife — refusal of support — criminal responsibility — justification.**

1. One cannot be convicted of unlawfully refusing to support his wife if she left him without just cause.

[See note on this question beginning on page 107.]

**Trial — question for jury — desertion of husband.**

2. The jury must determine in a prosecution against a man for unlawfully neglecting or refusing to support his wife, who has left him, whether or not she had a reasonable excuse for so doing.

[See 13 R. C. L. 1190-1192.]

**Husband and wife — justification for leaving husband.**

3. Any improper conduct upon the part of the husband which would defeat the purpose of the marriage relation will justify the wife in leaving him, although such conduct may not have been intolerable cruelty or adultery.

**Evidence — sufficiency — failure to furnish support.**

4. The evidence necessary to sustain a prosecution for failure to furnish wife's support is altogether different from that necessary in an action brought directly in the name of or for the benefit of the wife.

[See 13 R. C. L. 1191.]

**Appeal — error in charge — nonprejudicial error.**

5. There can be no reversal for failure, in isolated portions of the instructions, properly to state the degree of proof necessary to support an issue, if, upon the entire charge, the jury could not have been misled upon that subject.

[See 2 R. C. L. 256.]

**Criminal law — failure to support wife — instructions.**

6. Instructions in a prosecution for refusal of wife's support that if accused has proved that the parties are living apart from the sole fault of the wife, by sufficient evidence to raise a reasonable doubt whether the refusal to support was or was not unlawful, the verdict should be not guilty, is sufficiently favorable to accused if it follows instructions that the state "must satisfy you beyond a reasonable doubt, not only that accused has neglected and refused to support his wife, but that he has refused unlawfully," and that refusal is itself unlawful unless excused.

[See 13 R. C. L. 1188-1190.]

**APPEAL** by defendant from a judgment of the District Court of Waterbury, convicting him of unlawfully neglecting and refusing to support his wife. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Kennedy & Coleman, for appellant:

Nothing short of maltreatment of the wife by her husband, or intolerable cruelty on his part toward her, or infidelity on his part, can legally justify the wife's withdrawal from the home and abandonment of her husband.

*People v. Pettit*, 74 N. Y. 320, 3 Am. Crim. Rep. 56; *People ex rel. Douglass v. Naehr*, 30 Hun, 461, 1 N. Y. Crim. Rep. 513; *State v. Schweitzer*, 57 Conn. 532, 6 L.R.A. 125, 18 Atl. 787; 14 Cyc. 635.

There is no desertion or failure to support if the wife, without justifiable cause, refuses to live with her husband, or refuses a valid request to return.

*Shaw v. Shaw*, 17 Conn. 193; 1 Nelson, Marr. & Div. p. 160; *Bayne v. People*, 14 Hun, 181; *People ex rel. Douglass v. Naehr*, 30 Hun, 461.

The court should have instructed the jury that the defendant need not prove his defense to any higher or

greater degree than by a preponderance of the evidence.

*State v. Schweitzer*, 57 Conn. 532, 6 L.R.A. 125, 18 Atl. 787.

The court should have charged the jury respecting the effect of the wife's refusal to return to her husband unless the condition she imposed was complied with by him.

*Johnson v. Cooke*, 85 Conn. 680, 84 Atl. 97, Ann. Cas. 1913C, 275.

The instructions as to fault were not correct, or adapted to the issue, or sufficient for the guidance of the jury.

*Berman v. Kling*, 81 Conn. 406, 71 Atl. 507; 1 Nelson, Marr. & Div. p. 160.

Mr. Clayton L. Klein for the State.

**Roraback, J.**, delivered the opinion of the court:

This is a complaint under the Public Acts of 1905, chapter 214, p. 410, charging the defendant with unlawfully neglecting and refusing to support his wife, who had separated from him. It is undisputed

that Elizabeth Newman is the wife of the accused and that he has not supported her. This, as the defendant claims and has offered evidence to prove, was owing to the fault of the wife. This charge was contradicted by the wife and by other witnesses.

The act upon which this prosecution is based, in part, provides: "Every person who shall unlawfully neglect or refuse to support his wife or children shall, upon conviction, be deemed guilty of a felony and shall be imprisoned not more than one year, unless he shall show to the court before which the trial is had, that, owing to physical incapacity or other good cause, he is unable to furnish such support: Provided, that in case of conviction for the offense aforesaid, the court before which such conviction is had, may, in lieu of the penalty herein provided, accept from the person convicted a bond to the treasurer of the town in which such conviction is had, or in case of conviction on appeal, to the treasurer of the town in which conviction is originally had, with good and sufficient surety, conditioned for the support of the wife, child, or children, as the case may be, or for the payment of such sum towards such support as the court may find the necessities of the case and the ability of such person may require."

The defendant requested the court to instruct the jury as follows: "No conduct on the part of the defendant in this case, except adultery or conduct toward and treatment of his wife which amount to intolerable cruelty, can justify or excuse her abandonment of him or her refusal to cohabit and live with him."

This request was properly refused. The terms of the statute, "who shall unlawfully neglect or refuse to support his wife," should be put upon broader ground than that claimed for them by the defendant. The statute in question is general in its terms, embodying no exceptions,

and, when interpreted fairly, it furnishes no justification for the defendant's contention that this action cannot be maintained unless it appears that the husband has been guilty of adultery or intolerable cruelty. It may be stated that there is no universal proposition that governs the general questions involved in this case. What is a reasonable excuse to justify the wife in leaving her husband, and what conduct of the wife will justify the husband in refusing to support his wife, under the circumstances of a given case, are questions for the jury. *Com. v. Ham*, 156 Mass. 485-487, 31 N. E. 639, 9 Am. Crim. Rep. 1. Of course, any improper conduct upon the part of the husband, which would defeat the purpose of the marriage relation, would justify the wife in separating from her husband, although such conduct might not be intolerable cruelty or adultery. Upon this subject the judge properly instructed the jury as follows: "You should carefully consider all the evidence and circumstances surrounding this accused and his wife generally, and decide whether the departure of the wife from the home was due to her sole fault or due to the fault of the accused. If you believe from the evidence that the wife of the accused left him without just cause, as I have defined just cause for you, then you should find the accused not guilty. If you believe from the evidence beyond a reasonable doubt that this accused has unlawfully neglected or refused to support his wife, then you should find him guilty. You should carefully consider all of the evidence before you, and decide whether the wife left the home of the accused for justifiable reasons, as defined to you, or whether she left without justifiable cause, and for some reason which

*Trial-question for jury—description of husband.*

*Husband and wife—justification for leaving husband.*

*—refusal of support—criminal responsibility—justification.*

does not appear here." The court had previously said to the jury: "If the separation between the parties, the breach of the marital relation between them, the denial of the benefits of the marriage relation to the husband, occurred by the sole fault of the wife, or substantially by her sole fault, she could not compel him to support her while by her own fault the marital relation continued to be broken and the benefits of it denied to the husband. But if the fault was a common fault, in which to a substantial extent they both concurred, and by reason of quarrels and bickerings in which they were both responsible in a valid sense, I think he would not be relieved from the primary duty which the law casts upon him of the support of his wife." It also appears that almost one page of the record is filled with instructions of the court, which embody the exact language of the defendant's requests upon this subject. These declarations correctly state well-recognized principles of law relating to this question, and, when read in connection with other portions of the charge upon this point, correctly and fully define the rule applicable to the character and necessary degree of proof in the present case.

It is to be observed that this proceeding is not instituted in the name of the wife, but that it is a criminal prosecution, in the name of the state. The evidence necessary to sustain a prosecution like the present one is altogether different from that in an action brought directly in the name of and for the benefit of the wife. *State v. Karagavoorian*, 32 R. I. 477, 79 Atl. 1113, Ann. Cas. 1912D, 1092.

It is also to be noticed that in the case of *Belden v. Belden*, 82 Conn. 611, 74 Atl. 896, which was an action by the wife to compel her husband to furnish support, this court said: "An offer by a husband to

provide support for his indigent wife at his own home, where she had already suffered, and was likely to continue to suffer, such personal indignities, humiliations, and abuse as to make her life there unendurable, was no defense to the husband in an action against him upon the statute; a proffer of support under such conditions being one that the law would not countenance or recognize."

The eighth, ninth, and tenth assignments of error are criticisms of single, detached sentences of the charge. These portions of the charge, when considered separately, may appear open to the criticism that they improperly state the degree of proof required of the defendant to justify a refusal, upon the defendant's part, to support his wife. But when we regard the entire charge of the court upon this point, we think that the jury could not have been misled upon the subject referred to in these three assignments.

A discussion of the eleventh assignment of error involves a consideration of the question raised by the three assignments just referred to. The eleventh assignment is as follows: "But if he has proved such facts, that is to say, if he has proved that the parties are living apart from the sole fault of the wife, and her refusal to bear the burdens of the marital relation resting upon her, and has proved such facts by a sufficient amount of evidence to raise in your mind a reasonable doubt whether the refusal to support her was or was not unlawful, then the state has failed to prove its case beyond a reasonable doubt, and your verdict should be, 'Not guilty.'" The following passage from the charge, which immediately preceded the instructions just referred to, illustrates the manner in which the court treated this subject. It had just stated:

Appeal—error  
in charge—  
nonprejudicial  
error.

Evidence—  
sufficiency—  
failure to fur-  
nish support.

"Here, as in every criminal case, gentlemen, the state must make out the facts which are charged beyond a reasonable doubt. It must satisfy you beyond a reasonable doubt, not only that the accused has neglected and refused to support his wife, but that he has refused unlawfully. But, as I have said, the refusal is in itself unlawful, or the neglect is itself unlawful, unless excused. The defendant must prove some set of facts which justifies his neglect, or you must find the refusal unlawful."

These instructions were sufficiently favorable to the defendant upon this point, and accord with the declarations of this court in the case of *State v. Schweitzer*, 57 Conn. 532, 540-543, 6 L.R.A. 125, 18 Atl. 787, which was a criminal prosecution for the neglect and refusal of the husband to support his wife.

*Criminal law—failure to support wife—instructions.*

There is no error.

In this opinion the other Judges concur.

## ANNOTATION.

### Criminal responsibility of husband for abandonment or nonsupport of wife, who refuses to live with him.

- I. In general, 107.
- II. Husband's right to select home, 109.
- III. Offer of home by husband, 109.
- IV. Offer to provide home under another's roof, 110.

#### I. In general.

At common law a husband is not required to support his wife where she, without just cause, refuses to live with him. When he in good faith offers to support and maintain her in a home of his reasonable selection, it is her duty to live with him; and her refusal to accept his offer relieves him from any legal obligation to provide for her. See *Kilpatrick v. People* (1917) — Colo. —, 170 Pac. 956; *Spencer v. State* (1907) 132 Wis. 509, 122 Am. St. Rep. 989, 112 N. E. 462, 18 Ann. Cas. 969, and cases generally in this note.

Generally, under statutes punishing abandonment or neglect to support a wife, a husband is not liable where the wife without just cause refuses to live with him.

**Colorado.**—*Kilpatrick v. People*, supra.

**Illinois.**—*Foster v. People* (1901) 101 Ill. App. 84.

**Michigan.**—*People v. Kellogg* (1919) — Mich. —, 171 N. W. 410.

**Missouri.**—*State v. Greenup* (1888) 30 Mo. App. 299; *State v. Brinkman* (1890) 40 Mo. App. 284; *State v. Bruening* (1894) 60 Mo. App. 51;

V. Duty of wife to offer to return, 112.

VI. Sufficiency of cause for leaving husband, 112.

VII. Refusal to receive wife who left without cause, 114.

*State v. Burton* (1913) 171 Mo. App. 345, 157 S. W. 831.

**New York.**—*People ex rel. Kehlbeck v. Walsh* (1877) 11 Hun, 292; *Bayne v. People* (1878) 14 Hun, 181; *People v. Pettit* (1878) 74 N. Y. 320, 3 Am. Crim. Rep. 56; *People ex rel. Douglass v. Næhr* (1883) 30 Hun, 461; *Lutes v. Shelley* (1886) 40 Hun, 197; *People ex rel. Feeney v. Dershem* (1903) 78 App. Div. 627, 79 N. Y. Supp. 612; *People ex rel. Demos v. Demos* (1906) 115 App. Div. 410, 100 N. Y. Supp. 968; *People v. Flewellyn* (1908) 111 N. Y. Supp. 621; *People ex rel. Public Charities Comr. v. Duffin* (1910) 68 Misc. 290, 125 N. Y. Supp. 71; *People ex rel. Boettcher v. Boettcher* (1910) 141 App. Div. 531, 126 N. Y. Supp. 301.

**Pennsylvania.**—*Com. v. Wylukus* (1895) 8 Kulp, 137.

**Texas.**—*Verse v. State* (1917) — Tex. Crim. Rep. —, 193 S. W. 308.

**Canada.**—*Rex v. Sidney* (1900) 5 Sask. L. R. 392.

The New York cases above cited were decided under a statute which makes the wife's liability to become a public charge a condition of the husband's criminal responsibility, and in



some of them the failure of the prosecution to establish that condition was an alternative ground for the decision.

While the husband was found guilty of nonsupport in the reported case (*STATE v. NEWMAN*, ante, 103), the court observed that the husband would not be guilty, under the statute, of unlawfully neglecting and refusing to support his wife, if she left him and continued away from his home without just cause.

So, it is stated in *Kilpatrick v. People* (Colo.) supra, that where it has been established that the wife left the husband without an adequate excuse, refused without reasonable ground to return to him, and that he offered and was willing to support her if she returned, he cannot be convicted of wilful nonsupport under a statute providing that "any man who shall wilfully neglect, fail, or refuse to provide reasonable support and maintenance for his wife," etc., "shall be deemed guilty of a felony."

And so it was stated in *People ex rel. Public Charities Comr. v. Duffin* (1910) 68 Misc. 290, 125 N. Y. Supp. 71, that the mere omission of a husband to pay his wife money for a period of eighteen days after the expiration of a bond given for her support upon conviction, while she was of her own volition living apart from him, did not constitute abandonment under a statute rendering guilty as a disorderly person one who abandons his wife without adequate support, leaving her in danger of becoming a public charge, the court stating that, before a husband can be lawfully convicted of this offense, it must appear that he actually and wilfully deserted his wife. It must be established that he left her, that he withdrew from her the aid and protection which were her due by virtue of the marital relation, and that his conduct in these regards arose neither from her consent, her agreement, nor her procurement, but was the outward manifestation of an attempted evasion by him of his marital obligations.

So, under a statute defining criminal abandonment of wife, the court in *People ex rel. Demos v. Demos*

(1906) 115 App. Div. 410, 100 N. Y. Supp. 968, refused to sustain a conviction, where it was improbable that the wife had any reasonable grounds which justified her in refusing to live with her husband, and there was no proof that there was any imminent danger of her becoming a public charge, she having been able to provide for herself, or having relatives who did so.

The fact that a wife refuses to live with her husband, however, is generally no defense, where her reasons for leaving the house of her husband's selection are justifiable. *STATE v. NEWMAN* (reported herewith), ante, 103; *State v. Baurens* (1906) 117 La. 136, 41 So. 442; *People ex rel. Scherer v. Walsh* (1884) 33 Hun (N. Y.) 345; *Com. v. Dean* (1902) 21 Pa. Super. Ct. 641; *People v. Paaschen* (1918) 195 Misc. 417, 174 N. Y. Supp. 406.

But it was held in *State v. Kretzkamp* (1915) 87 N. J. L. 80, 93 Atl. 697, that where a wife, by reason of the cruel treatment of her husband, leaves him, her abandonment cannot be construed to be a constructive abandonment of her by him, so as to warrant his indictment and conviction as a husband who deserts or wilfully refuses or neglects to maintain his wife. And it is stated in *Stanbrough v. Stanbrough* (1878) 60 Ind. 275, that to show that a wife had to leave her husband for cause does not make out a case of abandonment by the husband, under statute providing "for the relief and support of married women, when deserted by their husbands," etc.; see also *Milbourne v. State* (1903) 161 Ind. 364, 68 N. E. 684, where the *Stanbrough* Case is commented upon, and the word "abandon" in a similar statute construed as meaning a physical and not a constructive abandonment.

Where a husband's offer of a home is insincere and fraudulent, with a view to evade the statute, the wife's refusal to accept the offer is no defense to a prosecution for abandonment and failure to support. *People v. Frederick* (1894) 78 Hun, 36, 9 N. Y. Crim. Rep. 214, 28 N. Y. Supp. 1002, affirmed in (1894) 143 N. Y. 667, 39 N.

E. 21; *People v. Paaschen* (N. Y.) supra; *Jenness v. State* (1899) 103 Wis. 553, 79 N. W. 759; *Baskins v. State* (1914) 75 Tex. Crim. Rep. 537, 171 S. W. 723.

It is held in *Draper v. Com.* (1913) 115 Va. 941, 79 S. E. 322, that it is no defense to a prosecution for nonsupport that the wife, after separation because of the husband's misconduct, took service and supported herself.

### *II. Husband's right to select home.*

It was stated in *People ex rel. Douglass v. Naehr* (1883) 30 Hun (N. Y.) 461, that a husband could not be adjudged a disorderly person in that he neglected and refused to support his wife, within the meaning of the statute (Act of 1871, as amended 1882), where, because of a quarrel, she left him to reside with a daughter in another city, having refused his offer to provide her a separate house in the city she left. The court observed that the wife is entitled to reasonable support; it is her duty, as well as right, to live with him in such proper place as he provides; he is entitled to determine not only the place, but their style of living, and it is her plain duty to follow him wherever his interest, necessity, or reasonable wish may lead; it is only when he neglects her, or refuses to properly provide, or maltreats her, or is guilty of infidelity to her, that she is justified in refusing her submission to his reasonable requirements in this respect. It is difficult to find in the act anything more than authority for a criminal proceeding against the husband who so unreasonably neglects or refuses to perform existing legal obligations towards his wife that she has become, or is likely to become, a public burden. Neither was this statute intended to apply to a case where a wife capriciously, and without cause, refuses to accept reasonable provision for her support at the place which the husband may have selected, even though she is liable to become a public burden.

So, the court in *People ex rel. Feeney v. Dershem* (1903) 78 App. Div. 627, 79 N. Y. Supp. 612, refused to sustain a conviction under the stat-

ute, where the wife testified that her husband had offered to give her a flat "uptown," but that she did not take it, and was not willing to live with him. The court observed that the statute did not afford a civil remedy for the support of the wife, but was designed to prevent her from becoming a charge upon the public purse; that an essential fact to be established was the danger of such charge. "If," says the court, "it should appear upon the rehearing that the husband had in good faith offered to maintain his wife, who was unwilling to occupy a home with him, and that she had capriciously or unreasonably refused a fair provision for her keep, then he is without the purview of the statute. If, on the other hand, the offer was a mere formality, without good faith, or made under such conditions as assured its rejection, it would not, of course, shield him from the statute."

So, a conviction under the Support Statute as a disorderly person was not sustained in *People v. Flewellyn* (1908) 111 N. Y. Supp. 621, where a wife refused the husband's offer to support her in a place other than in the home of her parents, where he was staying, the court stating that it is the duty of a wife to go with her husband to the home which he provides, if that home is suitable for their station in life. It does not lie with the wife to say where that home shall be, and if the defendant in this case did not choose, for reasons of his own, to reside with his wife and support her while she was staying with her own people, then it was her duty to go with him to the place where he was willing to support her, and make a home for him, as well as to aid him in making a home for her.

### *III. Offer of home by husband.*

Where a husband purposely abandoned his wife, but, before means left with her were exhausted, repeatedly requested her to come to him, offering to provide for her, a conviction was not sustained in *State v. Greenup* (1888) 30 Mo. App. 299, although good cause for the abandonment was

not shown. The court said that had he persisted in his separation from her without soliciting her to return to him, and without providing her with additional means, the evidence would present a stronger appearance of a criminal abandonment and refusal of support; though, the cause of the abandonment remaining undisclosed, it would still be insufficient to sustain a conviction; but when he solicited her to return to him, promising good treatment, and even sent a messenger to bring her, he then put himself right before the law, even if wrong before, and her refusal to return to him, not adequately explained, puts her, and not him, in the wrong.

Where, however, one by letter offered to support his wife and child and furnish them transportation to the point where he was then at work, the letter, however, being silent as to the place where he required his wife to go, the court, in *People v. Harris* (1891) 38 N. Y. S. R. 316, 14 N. Y. Supp. 830, observed that it appeared to have been fairly a question for the magistrate to determine whether the letter was written in good faith, and with the intention to carry out the offer made, or whether it was written with a plan in view to bring himself within the rule laid down in the case of *Lutes v. Shelley* (1886) 40 Hun (N. Y.) 197, *infra*. In affirming a conviction of accused of being a disorderly person, in abandoning his family without providing means for their support, the court held the defense insincere, and not supported by trustworthy evidence.

So, a husband was held properly convicted of wife abandonment in *People v. Paaschen* (1918) 105 Misc. 417, 174 N. Y. Supp. 406, where the home offered to the wife by accused consisted of two rooms in a hotel, which were not in keeping with their station and standing in life. The court observed that had accused offered the complainant suitable rooms and support, unaccompanied by threats of a malicious nature, and under circumstances reasonable and fair, although they were not to her taste and wishes, it would have been

her duty to go there. But the law never guarded "bad faith" to such an extent as to permit a husband to compel a wife to go where he would "get her," in order to accomplish some motive of his own. When the husband is guilty of infidelity to the wife, she is justified in not following him wherever his interest or necessity may lead.

So, under a statute providing punishment for one who, being of sufficient ability, unreasonably refuses or neglects to provide for his wife, a conviction was sustained in *Jenness v. State* (1899) 103 Wis. 553, 79 N. W. 759, where a husband, capable of earning sufficient to support himself and family, left his wife living with her father, and went to another state, after which, he testified, he wrote to her, asking her to come to him, but sent no money.

Where, in a prosecution for abandonment, accused relied upon his wife's misconduct as a defense, it was stated in *Hopkins v. State* (1905) 126 Wis. 104, 105 N. W. 223, that, the evidence tending to prove that they lived together eight years without his providing any house or home, an instruction to the effect that if the wife, "being offered a comfortable house by him," "without legal excuse," refused to live with him, then she forfeited her right to support, but not so as to the minor child or children, who were still entitled to maintenance and support from the father, was erroneous as misleading.

#### IV. Offer to provide home under another's roof.

In *Foster v. People* (1901) 101 Ill. App. 84, the court concluded that there was no abandonment without good cause within the meaning of the statute, where it was in evidence that the husband's father was able and willing and had offered to care for both his son and wife during her last sickness, but she clung to the natural desire to be with her brother, the court stating that while it was true that the husband neither provided for his wife at her brother's home, nor discharged his obligations to her, this alone would not be an abandonment of

the wife, if it was the understanding between husband and wife that the husband, who was poor and without means, was not to remain as a charge upon the wife's brother, however much the brother might have been imposed upon or deceived by the arrangement.

In holding a husband not guilty of being a disorderly person under statute, in that he neglected and refused to support his wife, the court, in *People v. Kellogg* (1919) — Mich. —, 171 N. W. 410, stated that the test in such cases appears to be whether such a case is established as would entitle a third person to recover against the husband for necessities furnished the wife. During cohabitation the assent of the husband is presumed; but, if they are living apart, the burden is upon the person furnishing the necessities to show that the circumstances are such as to render the husband liable. "Measured by this test, we think counsel's point is well taken that a case was not made for the jury. It was stated by defendant, and concurred in by the wife, that defendant had theretofore offered to support her and her child if she would return to his home. The wife makes no complaint that she was cruelly treated by either her husband or his parents. The wife's complaint, in substance, is that it was disagreeable to remain in the home with the old people. The reasons given for this are a series of disagreeable remarks and little criticisms on the part of defendant's (husband's) mother and father, which were never serious enough to provoke a quarrel. The home was a large and commodious one, and defendant was an only child, who was assisting his father in the operation of the farm. No complaint is made against the defendant, except that on several occasions, when these annoyances were called to his attention by his wife, he approved of them. It could hardly be claimed that a showing no more serious than this would entitle one who had furnished the wife necessities while living separate from her husband, to have the question submitted

to a jury to determine whether she was justified in leaving."

Where there was no evidence of a criminal intent to abandon and fail to support a wife, a conviction of wife abandonment under statute was not sustained in *State v. Burton* (1913) 171 Mo. App. 345, 157 S. W. 831, the wife having of her own accord left the temporary abode selected by her husband, with his parents, where they were apparently living together pleasantly; and the wife's complaint seeming to be that her husband went visiting without telling her of his going, and that, although she went away from home in his absence, and then, within a week, replevied the furniture given both of them by his father, still it was the husband's duty to hunt her up, and not hers to say anything to him.

So, there was no breach of a bond given upon conviction of one as a disorderly person for neglecting to support his wife and children in *People v. Pettit* (1878) 74 N. Y. 320, 3 Am. Crim. Rep. 56, where the husband offered the wife a home in the house of his parents, which she declined to accept for the reason that the parents were disagreeable, and the father intemperate and abusive, the court stating that the statute was designed to enforce actual physical support only, not to interfere with marital relations, and, when such support is tendered, there is much force in the position that the husband cannot be convicted in this quasi criminal proceeding for refusing or neglecting to furnish it.

So, under a statute punishing as a disorderly person one who abandons his wife, a conviction was, in *Lutes v. Shelley* (1886) 40 Hun (N. Y.) 197 (action on undertaking made upon conviction for failure to support wife), said to be unwarranted where the wife refused the husband's offer of a home in a family consisting of man, wife, and a son eighteen years of age in another county, although her reasons for not accepting the place offered were that she was in poor health; had lived in the city for many years; had no relatives or acquaint-

ances in the county of the selected abode, and that no physician resided there. It is simply a question whether he remained a disorderly person within the meaning of the statute, after the undertaking was made, observed the court, which depends upon the continuance of his neglect to provide for his wife. It does not appear that their condition in life has been such heretofore, or that the means of the defendant are such now, as to characterize the place the husband offered to provide as unreasonable, or such as to shock the sense of propriety, or that to require the wife to live there would be harsh or cruel treatment in the sense which is applied to those terms in such relation. In this case, the husband's offer to support his wife in the home selected was apparently made in good faith.

Where, however, in a prosecution for wife abandonment and failure to support, the husband's defense was that his wife had declined his offer to support her at his father's house, he being unable to support her at any other place, the court in *People v. Frederick* (1894) 78 Hun, 36, 9 N. Y. Crim. Rep. 214, 28 N. Y. Supp. 1002, affirmed in (1894) 143 N. Y. 667, 39 N. E. 21, in affirming conviction, stated that whether the wife, after trying three times unsuccessfully to obtain admission to the house of accused's father, should have made another attempt, was, under the evidence, a question for the magistrate; that he could very well find, under the circumstances of the case, that accused's offer was insincere, and made with intent to evade the provisions of the statute.

So where, upon a trial for abandonment after seduction and marriage, the husband claimed that because he was only eighteen or nineteen years old he had to live with his parents, and had the right to require his wife to live there also, notwithstanding that his mother and other members of his parents' family treated her in such a way as to make it unendurable for her to live there, the court in *Baskins v. State* (1914) 75 Tex. Crim. Rep. 537, 171 S. W. 723, stated that there was a

reasonable inference from his conduct and treatment of her, and failure and refusal to protect her and to provide for her, in connection with his mother's treatment of her, that such was part of his scheme to drive her away from him, and thereby abandon her and leave her, and by such cruelties and outrages make their living together insupportable, thereby leaving her and forcing her to leave him under the very terms of the statute; that he had no right to designate his father's and mother's home as his, and, under the circumstances shown in the records, to compel her to live there with him.

#### *V. Duty of wife to offer to return.*

Under a New York statute (1871) relating to persons who abandon or threaten to abandon their families in the county of Kings, it was stated in *People ex rel. Kehlbeck v. Walsh* (1877) 11 Hun (N. Y.) 292, that to sustain a conviction the abandonment must be such as to leave the wife without adequate support, and a burden on the public. In this case there was no abandonment of a wife by her husband, but merely a refusal to support her away from his home, and a desire that her abandonment of him should continue, where she went to his place of employment, requested of him support, and he ordered her away, disowning her, the court stating that it was her duty to offer to return and live with him, under circumstances showing her willingness to discharge her duties as a wife, and then a rejection of such offer by him might be deemed an abandonment. See also *People v. Kellogg* (1919) — Mich. —, 171 N. W. 410; *State v. Greenup* (1888) 30 Mo. App. 299; *Com. v. Wylukus* (1895) 8 Kulp (Pa.) 137.

#### *VI. Sufficiency of cause for leaving husband.*

It is stated in the syllabus of *State v. Baurens* (1906) 117 La. 136, 41 So. 442, that it is the duty of the husband to provide for the support of his wife, who is in necessitous circumstances, at the matrimonial domicile, and that obligation is not discharged if, by reason of his cruel treatment,

the wife is compelled to find shelter with her minor children, at the residence of her father in a neighboring parish.

In *People ex rel. Scherer v. Walsh* (1884) 33 Hun (N. Y.) 345, certiorari to review a decision of a police justice in a proceeding by wife against husband for abandonment and refusal to support, the court stated that there is no rule of law requiring a wife to remain under the roof of a brute, in constant danger of life and limb, under pain of starvation. It was, therefore, competent for the relator [wife] to show that she had reasonable cause to leave the house where she was in imminent danger of suffering personal violence at the hands of her husband. If this testimony had been received, the offense of which the accused was charged would have been clearly made out under the statute.

In *Com. v. Dean* (1902) 21 Pa. Super. Ct. 641, against the objection that there was an omission to set forth a desertion by the husband, in accordance with the statute, an order for support was sustained, upon the wife showing that her husband had abused her in such a manner that she was compelled to leave him, and had since failed and refused to contribute anything to her support, the court observing that, as to the purpose of the statute, treatment by the husband which justified the wife in leaving him is equivalent to desertion on his part, and gives her the same right of support that she would have if he deserted her.

In *Com. v. Wylukus* (1895) 8 Kulp (Pa.) 137, however, the charge of desertion against the husband consisted, not in his having actually left his wife, but in having in effect separated himself from her without reasonable cause, by means either of cruel and barbarous treatment endangering her life, or by offering such indignities to her person as to render her condition intolerable and life burdensome, and thereby forcing her to withdraw from his house and family. The rule in such case, observes the court, is that the causes which will justify a wife in withdrawing from the home of her

husband must be such as to entitle her to a divorce. Here, the husband was able and willing to provide for his wife if she came and lived with him, but he declined to associate with certain of their neighbors, who, he alleged, were the cause of domestic difficulties between them. In dismissing a prosecution for desertion the court stated that the facts did not warrant the wife in entirely and permanently withdrawing from her home, or justify her in refusing to return to him after his offer to receive and care for her.

So, a conviction for wife abandonment was not sustained in *State v. Brinkman* (1890) 40 Mo. App. 284, where the wife left the husband while he was at work, without notice or warning to him of her intention, the only excuse by her for such conduct being that he refused to pay his bills. The court observed that the state failed to show by satisfactory proof that the husband, with criminal intent, abandoned his wife without a good cause; the reasons assigned by her for leaving her house were insufficient to justify her in the course pursued.

So, where a husband took his wife to live with his parents, but because of a quarrel with his mother she left the same day, going to her father, where she was cared for as a member of the family in the same manner that she had been cared for prior to the marriage, the evidence was, in *Verse v. State* (1917) —Tex. Crim. Rep. —, 193 S. W. 303, said to be insufficient to sustain a conviction for wife desertion, under a statute making a husband's wilful desertion of a wife in destitute or necessitous circumstances a misdemeanor, the evidence not showing a wilful desertion on the part of the husband, nor that the wife was in necessitous circumstances.

In *Rex v. Sidney* (1900) 5 Sask. L. R. 392, a wife in a fit of anger left her house on a cold night, taking her ten-year-old son with her, apparently to go to a neighbor's home a mile and a half distant, but, having lost her way, both were frozen to death. The charge brought against the husband was a neglect to provide necessities for wife and child. The necessities

claimed to have been omitted by accused were that he, knowing of the departure of his wife and son from his house at a time when the temperature was 37 degrees below zero, did not follow them and see that they did not suffer death or grievous bodily harm from exposure. Accused testified that the reason he did not follow them was that he had learned from experience that when his wife became cranky the best thing to do was to leave her alone, as it only aggravated her the more to follow her and seek to persuade her to return. It was held that the husband was not criminally liable where the wife, having the exercise of free will, chose to leave the shelter provided for her by her husband and to go out into the cold, where she was frozen to death.

*VII. Refusal to receive wife who left without cause.*

It is stated in *State v. Bruening* (1894) 60 Mo. App. 51, that the statute contemplates an actual abandonment without cause, and not a constructive desertion, as where a husband refused to take his wife back or support her after she left him without cause.

But in *Com. v. Boetcher* (1890) 8 Pa. Co. Ct. 544, it was held that a husband could be prosecuted for his refusal to support his wife where, within a year and a half, she repented and showed a disposition to return, but he refused to receive her, the court stating that, even if she went away originally with a view not to return, the law allowed her two years as a *locus penitentiae*. J. D. C.

AMOS A. GALT et al.

v.

CARSON HILDRETH and FRANKLIN STATE BANK.

*Nebraska Supreme Court—June 3, 1916.*

(100 Neb. 15, 158 N. W. 366.)

**Judgment — in favor of some obligors — effect.**

1. The defense successfully made by one of the signers and indorsers of a note, if not made on purely personal grounds, will bar a future action by the same plaintiff on the same obligation against another joint defendant.

[See note on this question beginning on page 124.]

**Compromise — binding effect.**

2. A settlement of a matter in controversy between the officers and directors of a bank on the one hand, and other persons interested as alleged debtors in the transaction on the other hand, where no fraud is alleged or proved, is binding on all parties to such settlement.

[See 5 R. C. L. 895.]

**Contract — sale of bank stock — enforcement.**

3. Where, in making a sale of bank stock, the president of the bank agreed to pay to the purchaser notes held by the bank on a given date amounting to \$3,000, to be selected by the purchaser, the contract may be

enforced after the purchaser has exercised his right of selection.

**— agreement to guarantee profits.**

4. An agreement on the part of the seller of bank stock to pay to the purchaser three fifths of the difference between the profits of the bank for a designated year, and \$3,000 net profit, is an enforceable agreement.

[See 7 R. C. L. 277.]

**Bank — profits — guaranty fund.**

5. In estimating the amount of the net profits, the guaranty fund required by the banking department to be set apart under the banking laws of the state may be deducted from the gross profits.

[See 3 R. C. L. 381, 382.]

Headnotes 1-5 by BARNES, J.

On Petition for Rehearing.

**Pleading — claim — excessive judgment.**

6. Judgment cannot be entered for a greater sum than is claimed in the petition.

[See 8 R. C. L. 615, 616.]

**Judgment — in favor of some obligors — defense to merits.**

7. Defenses that notes were without consideration and were not intended to be enforced, and that the holder released the liability of defendants because of surrender of property to him, are to the merits, and not personal,

within the rule that a judgment in favor of some obligors to a note will bar a subsequent action against others generally liable thereon.

[See 15 R. C. L. 949 et seq., 1031.]

**Estoppel — in favor of stranger to suit — effect.**

8. Fraud in selling bank stock by false representations as to liability on notes held by the bank does not estop the one making the representations from defending against such liability in a suit by the bank.

[See 7 R. C. L. 275; 10 R. C. L. 732.]

CROSS APPEALS from a judgment of the District Court for Lancaster County in favor of defendant Hildreth, in part only, in an action brought to recover a balance alleged to be due on a contract for the purchase of bank stock, defendant appealing from so much of the judgment as held him liable, and plaintiffs and the defendant bank appealing from so much as found in favor of defendant Hildreth. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Messrs. Flansburg & Flansburg, for defendant Hildreth:

Where all parties to a contract are engaged in its performance, with full knowledge of its terms, and before any controversy has arisen as to its meaning a practical construction is put upon it by the parties themselves, such construction will be enforced by the courts, in subsequent litigation between them.

School Dist. v. Estes, 13 Neb. 52, 13 N. W. 16; State ex rel. Seth Thomas Clock Co. v. Cass County, 60 Neb. 566, 83 N. W. 733; Fiscus v. Wilson, 74 Neb. 444, 104 N. W. 856; Jobst v. Hayden Bros. 84 Neb. 735, 50 L.R.A. (N.S.) 501, 121 N. W. 957; Sibert v. Hostick, 91 Neb. 255, 135 N. W. 1054; Cady v. Travelers Ins. Co. 93 Neb. 634, 142 N. W. 107.

Where a guaranty is executed independent of the note and, after the note is signed, delivered to and accepted by the payee, the consideration moving to the maker of the note is not sufficient to support the guaranty; and the guaranty, being collateral, is not binding on the guarantor unless there is a new and independent consideration for such a guaranty.

Kansas Mfg. Co. v. Gandy, 11 Neb. 448, 38 Am. Rep. 370, 9 N. W. 569; Barnes v. Van Keuren, 31 Neb. 165, 47 N. W. 848; Jackson v. Jackson, 7 Ala. 791; Lewin v. Berry, 15 Colo. App. 461, 63 Pac. 121; Richner v. Kreuter, 100 Ill. App. 548.

A guaranty made without consideration is void, and the guarantor cannot be held.

Newton Wagon Co. v. Diers, 10 Neb. 284, 4 N. W. 995.

Taking the title to the Curtis premises for the bank, and at the same time guaranteeing the payment of the \$2,000 note for the bank, united the two transactions so that the bank would take the real estate burdened with every condition.

D. M. Osborn Co. v. Jordan, 52 Neb. 465, 72 N. W. 479; Hawver v. Omaha, 52 Neb. 734, 73 N. W. 217; Green v. Lancaster County, 61 Neb. 473, 85 N. W. 439; Peterson v. Ramsey, 78 Neb. 235, 110 N. W. 728; Fenimore v. White, 78 Neb. 520, 111 N. W. 204.

Where a bank is primarily liable as guarantor, it is not entitled to hold the note which another guaranteed, if the guaranty was for the bank on behalf of the bank; and by receiving the property it was discharged to the bank.

Home Sav. Bank v. Shallenberger, 82 Neb. 507, 118 N. W. 76; Drexel v. Pusey, 57 Neb. 30, 77 N. W. 351.

The liability of partners for firm debts is a joint liability, and a judgment against one of the partners or in his favor will bar a subsequent action against the others.

Tootle v. Otis, 1 Neb. (Unof.) 360, 95 N. W. 681; Crosby v. Jeroloman, 37 Ind. 264; Gaut v. Reed, 24 Tex. 46, 76 Am. Dec. 94; Exchange Bank v.



Ford, 7 Colo. 314, 3 Pac. 449; Wann v. McNulty, 7 Ill. 355, 43 Am. Dec. 58.

A successful defense made by one of several debtors sued jointly against, if the defense was not on a purely personal ground, will bar a future action by the same plaintiff on the same obligation against another of the debtors.

Brant v. Barnett, 10 Ind. App. 653, 38 N. E. 42; Spencer v. Dearth, 43 Vt. 98; Crosby v. Jeroloman, 37 Ind. 264; Hunt v. Terril, 7 J. J. Marsh. 67; Miller v. Longacre, 26 Ohio St. 291; Nevill v. Hancock, 15 Ark. 511; Secor v. Sturgis, 16 N. Y. 548; Hill v. Morse, 61 Me. 541; Mann v. Edwards, 34 Ill. App. 473; Wren v. McLaren, 48 Mich. 197, 12 N. W. 41.

Where the obligation is joint and several, the creditor can elect either to sue and recover separately of each of the debtors, or all jointly; but he cannot do both. A separate judgment against all or any bars a subsequent joint action; and a joint judgment against all will bar subsequent suits.

Sutherland v. Holliday, 65 Neb. 9, 90 N. W. 937; Beltzhoover v. Com. 1 Watts, 126; Downey v. Farmers & M. Bank, 13 Serg. & R. 288; Sessions v. Johnson, 95 U. S. 347, 24 L. ed. 596; Pullington v. Killen, 65 Ga. 575.

The general rule is, that where several persons indorse in succession a promissory note, the act of each, respectively, imports a several and successive, and not a joint, obligation, whether done for accommodation or for value; unless there be an agreement aliunde different from that evidenced by the indorsement.

Wolf v. Hostetter, 182 Pa. 292, 37 Atl. 988; Dunn v. Wade, 23 Mo. 207; Porter v. Huie, 28 L.R.A. (N.S.) 1039, note.

Guarantors cannot be joined with the makers of a note, as such contracts are separate.

Mowery v. Mast, 9 Neb. 445, 4 N. W. 69; Barry v. Wachosky, 57 Neb. 534, 77 N. W. 1080; Anderson v. Hall, 4 Neb. (Unof.) 494, 94 N. W. 981.

The bank could not hold Hildreth now, because the prior and subsequent indorsers were released by the jury, and the bank has taken from him the right to pursue them, so he is likewise discharged.

Peterson v. Nichols, 71 Wash. 656, 129 Pac. 373; Stockmeyer v. Oertling, 35 La. Ann. 467; Turner v. Thom, 89 Va. 745, 17 S. E. 323; Andrews v. Murray, 33 Barb. 354.

Messrs. Stewart & Stewart, for plaintiffs and defendant bank:

Hildreth was liable as guarantor on the notes in question.

Gund v. Ballard, 73 Neb. 547, 103 N. W. 309; McDowell v. First Nat. Bank, 73 Neb. 307, 102 N. W. 615; German-American Bank v. Stickle, 59 Neb. 321, 80 N. W. 910; Belleville & St. L. R. Co. v. Leathe, 28 C. C. A. 279, 53 U. S. App. 718, 84 Fed. 103; Geary v. Bangs, 138 Ill. 77, 27 N. E. 462; Augir v. Ryan, 63 Minn. 873, 65 N. W. 640; Hearn v. Boston & M. R. Co. 67 N. H. 320, 29 Atl. 970; Griffith v. Fields, 105 Iowa, 362, 75 N. W. 325; Greene v. Merchants' & P. Bank, 73 Miss. 542, 19 So. 350; Van Valkenburgh v. Milwaukee, 43 Wis. 574; Littlefield v. Huntress, 106 Mass. 121; National Citizens Bank v. Bowen, 109 Minn. 473, 124 N. W. 241; Western Bank v. Coldewey, 120 Ky. 776, 83 S. W. 629.

Hildreth was liable for the expense of litigation.

McDowell v. First Nat. Bank, 73 Neb. 307, 102 N. W. 615; Stearns v. Lawrence, 28 C. C. A. 66, 54 U. S. App. 532, 83 Fed. 738.

Hildreth would have no right to plead the Statute of Limitation.

First Nat. Bank v. Straight, 75 Minn. 396, 78 N. W. 101.

Hildreth, having induced plaintiffs by his acts and representations to purchase the stock, is now estopped from claiming a different condition of facts that would be to his advantage, and to the detriment of the plaintiffs.

Lydick v. Gill, 68 Neb. 273, 94 N. W. 109; Given v. Times-Republican Printing Co. 52 C. C. A. 40, 114 Fed. 92, 189 U. S. 513, 47 L. ed. 924, 23 Sup. Ct. Rep. 851; Jones v. Bolles, 9 Wall. 364, 19 L. ed. 734, 5 Mor. Min. Rep. 444; Chicago, M. & St. P. R. Co. v. Hoyt, 89 Wis. 314, 62 N. W. 189; Chicago & G. T. R. Co. v. Miller, 91 Mich. 166, 51 N. W. 981; Chicago & G. T. R. Co. v. Turner, 79 Mich. 133, 44 N. W. 174; Dwyer v. Salt Lake City, 19 Utah, 521, 57 Pac. 535, 6 Am. Neg. Rep. 400; Sickles v. Herold, 15 Misc. 116, 36 N. Y. Supp. 488.

The payment of the \$1,500 in question was not voluntary, and would never have been paid by the bank had Hildreth consented to convey the Curtis land and leave the matter of his reimbursement for his alleged advances for future adjustment.

First Nat. Bank v. Sargent, 65 Neb. 594, 59 L.R.A. 296, 91 N. W. 595; Gund

v. Ballard, 73 Neb. 547, 103 N. W. 309; Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839.

From the net profits as shown by the books there should be deducted losses on bad paper, both principal and interest, and in addition the \$1,500 paid to Hildreth February 5, 1913, for alleged advancements on the Curtis farm if a valid claim against the bank should be treated as an expense item and deducted from the earnings of that year.

Park v. Grant Locomotive Works, 40 N. J. Eq. 121, 3 Atl. 162; 29 Cyc. 672; 23 Am. & Eng. Enc. Law, 189; Welsh v. Canfield, 60 Md. 469; McClusky v. Klosterman, 20 Or. 111, 10 L.R.A. 785, 25 Pac. 366; Dykman v. Keeney, 34 App. Div. 145, 54 N. Y. Supp. 1.

Barnes, J., delivered the opinion of the court:

This was an action brought in the district court for Lancaster county by Amos A. Galt and Reuben P. Galt against Carson Hildreth and the Franklin State Bank, to recover a balance alleged to be due on the following contract: "Carson Hildreth hereby gives the parties of the second part the privilege on January 1, 1913, of selecting notes to the value of \$3,000 out of the notes on hand belonging to the bank in the regular loans and discounts on November 10, 1911, and the said Carson Hildreth agrees to pay the bank the face value with accrued interest from November 10, 1911, to January 1, 1913, on said notes. It is further agreed that, if the net profits of the bank for the calendar year 1912 shall not equal \$8,000, after allowing salaries to the amount of \$3,600, the said Carson Hildreth shall make good to the said second parties three fifths of the amount of the deficiency; but if the net profits of the bank exceed \$8,000, then the second parties agree to pay to the said Carson Hildreth one half of the three fifths of said excess. It is further agreed that the said Carson Hildreth is to be retained as president of the said bank at a salary of \$50 per month to the end of the calendar year 1912."

Plaintiffs' amended petition al-

leged that the liability of Hildreth was to make good three fifths of the deficit in the net profits of the bank for the year 1912, which was alleged to be \$5,000. The plaintiffs further alleged that they had selected certain notes, among which was a note made by one Curtis to the bank for \$2,100, which they insisted Hildreth should pay to the bank, and, in order that a recovery might be had in the suit, the Franklin State Bank was named as a party defendant.

To the amended petition the bank filed an answer and cross petition, by which it adopted the contract between the Galts and Hildreth, which provided for the selection by the Galts of \$3,000 out of the notes on hand belonging to the bank in the regular loans and discounts on November 10, 1911, and which Hildreth, by his contract, agreed to pay, with accrued interest from November 10, 1911, to January 1, 1913.

The cross petition alleged that only \$514.70 was paid on March 12, and \$502.50 on February 5, 1913, on the Curtis note, leaving due the bank \$2,301.17 with interest from January 1, 1913, at 7 per cent per annum. Hildreth by his answer alleged that he paid \$514.70 on March 12, 1912, and later on, in a settlement of the Curtis matters with the bank, he took up the note for \$2,100, and a note for \$152.50, which notes had been selected by plaintiffs under the contract, making in all a payment of \$2,767.20, leaving a balance only of \$232.80, and that plaintiffs had not selected any note of that amount, but, when so selected, Hildreth by his answer alleged he would pay the same under the contract. By his answer to the bank's first cause of action, Hildreth alleged that the bank had settled with him in relation to the Curtis transaction. He alleged that the title to the Curtis land was taken to himself for the benefit of the bank to secure the debt of \$2,100; that the directors of the bank met on or about February 5, 1913,

and agreed to exchange the Curtis land of 280 acres, free and clear of encumbrances, with one Deichen, for a mortgage of \$5,000 of said Curtis land to be executed by Deichen to the bank, and a transfer to the bank of the 160 acres of land owned by Deichen at an agreed valuation of \$7,000, with a \$1,000 mortgage thereon. Hildreth further alleged that he had made advances on account of the Curtis matters, which he estimated at \$1,576.46, without interest, and which did not include his personal expenses, admitted that he had received some rents from the Curtis farm, and alleged that it was finally by the directors agreed that he should receive \$1,500 for his claim out of the profits of the transaction, and in order to obtain possession of the two Curtis notes, which plaintiffs had requested him to pay to the bank, he paid \$502.50 to the bank in settlement of the balance of its claim against Curtis; that the aggregate of its claim, without interest, amounted to \$11,502.50; that the proceeds of the Deichen transaction yielded the bank \$11,000; that said transaction was completed, and that he paid the bank \$502.50 in full settlement of the Curtis account, receiving \$1,500 out of the profits from the bank, and thereupon conveyed the premises at the request of the bank to Deichen, and received the Curtis notes for \$2,100 and \$152.50 uncanceled, while at the same time all of the other Curtis notes were canceled and paid, and the Curtis land which had secured their payment was transferred by him to Deichen; that the settlement was full and complete so far as all of the Curtis notes were concerned.

It was alleged in the cross petition of the bank that Hildreth, in June, 1909, had guaranteed the payment of the Curtis notes at the time he sold certain of the bank stock to other individuals. As to that guaranty, Hildreth alleged that he had agreed that if any loss accrued to the stockholders on account of such notes he would make their

share good to them without loss. He further alleged that at the settlement of the Curtis matter it was estimated that the bank would suffer a loss of \$1,000, and that he paid to the stockholders, to whom his guaranty was made, that sum in settlement of their demand.

By the bank's cross petition it sought to recover from defendant Hildreth for and on account of a note for the sum of \$887.75, due July 6, 1904, with interest, which was signed by Carson Hildreth, W. H. Chaney, and Thomas Gettle. It was alleged that Hildreth, in violation of his duty, failed to pay that note, but instituted a suit by the bank thereon, causing himself to be sued, together with the other makers, that Gettle and Chaney answered separately for themselves, denying their liability, and setting up as defenses to the action that the note was executed by them without consideration, and, further, that they had been released and discharged by the defendant, subject to the execution thereof, from all liability thereon. Upon trial, a verdict of the jury was rendered without special findings in their favor, and judgment was rendered thereon by the court. It is further alleged that defendant Hildreth prosecuted an appeal to the supreme court from that judgment, where the same was affirmed; that Hildreth did not answer in that action, but was in default, and therefore the judgment in that case did not release him from his liability for the payment on said note. Answering this cause of action, Hildreth denied that the bank had loaned him any money; admitted the execution of the note; admitted the guaranty indorsed by Gettle, Chaney, Doherty, and Hildreth; admitted the bringing of the suit in Franklin county in which the liability of Gettle, Doherty, Chaney, and Hildreth was alleged to be that of joint makers; admitted that Doherty, Gettle, and Chaney filed answers; admitted the execution and delivery of said note, but alleged that the Franklin

State Bank and the other defendants had been interested as creditors in the management of a brickyard which was turned over to them, the bank to the extent of \$1,000, Gettle, \$500, Chaney, \$200, and Doher, \$200, secured by chattel mortgages which were superior to that of the bank; that it was agreed that the mortgages should be released, which was done, the bank agreeing to operate said property and pay the claim of the bank and the other creditors pro rata out of the profits. The answer alleged that the Franklin State Bank requested defendants to sign the note in suit as evidence of its interest in said property, and for its convenience; that it was also agreed that said note was of no force or effect except for the convenience of said bank in carrying its interest in said property on its books as a resource expressed in an item as a promissory note, rather than as a resource in an item of personal property; that the defendants received no money or credit, nor did any consideration whatever move from the plaintiff bank to the defendants or anyone else for the same, and that the defendants received no benefit or consideration for signing said note.

There was a further plea of the Statute of Limitation. Replies were filed denying the allegations of the answer, and it was stipulated that the cause should be tried to the court on those issues. A trial was had, and the court by its decree found all of the issues in favor of defendant Carson Hildreth, and against the bank upon all causes of action set out in its cross petition, "other than the right of said bank to compel specific performance of the condition of said contract for the payment by said Hildreth of certain promissory notes owned by said bank November 10, 1911, and to be designated by plaintiffs. The court finds that said plaintiffs designated the notes of C. P. Curtis, \$2,100, F. T. Burnham, \$500, and Clement Chase, \$500, of which the \$500 Chase note has been by said Carson

Hildreth duly paid; and that said bank, as to the \$2,100 Curtis note, has by its own act placed it beyond its power to enforce collection thereof. The court finds that it is the right of the plaintiffs to designate \$2,500 of notes, including the \$500 Burnham note, owned by said bank on November 10, 1911, within twenty days from the entry of this decree, and, upon failure of said Carson Hildreth to pay notes so selected by plaintiffs to the said bank, in the amount of \$2,500, with interest thereon from November 10, 1911, within forty days from the date of this decree, then defendant Franklin State Bank shall have judgment against said Carson Hildreth for said amount. The court further finds that, by the terms of the contract hereinbefore mentioned, the defendant, Carson Hildreth, agreed to pay said plaintiffs three fifths of any deficiency in the net earnings of said bank for the year 1912, under the sum of \$8,000. The court finds that the net earnings, as aforesaid, amounted to the sum of \$5,562.10, and that plaintiffs are entitled to recover from the defendant Carson Hildreth, on account of such deficit, the sum of \$1,607.78." Judgment was entered on the findings, from which Hildreth appeals. Cross appeals were likewise taken by the Galts and the bank from the decree which found in favor of Hildreth on the other issues.

The cross appellants, Galt and the Franklin State Bank, each complain of the finding and decree of the trial court that Hildreth was not liable as guarantor for the payment of the Curtis notes. They contend that the finding on that question is not sustained by the evidence. The record discloses that in 1909 Hildreth was the owner of the majority of the stock of the bank; in fact, was the owner of the bank. At that time the bank had among its assets the note of C. P. Curtis for \$2,100, secured by mortgage on his 280-acre farm. Hildreth had indorsed the note or guaranteed its payment.

Curtis was largely indebted to other persons, and as a matter of precaution he was induced to make a deed of the farm to Hildreth, in order to prevent other creditors from obtaining liens thereon. Hildreth took the title to hold for the benefit of the bank. Certain persons had purchased some stock in the bank, and Hildreth at that time guaranteed that he would make good any loss they might sustain by reason of the transaction. In November, 1911, the Galts purchased a majority of the stock of the bank, and obtained from Hildreth the guaranty and agreement which is set out in the first part of this opinion. The Galts then took possession of the bank, and thereafter, with the directors, conducted its business. A short time before the meeting of the directors, which was held in February, 1913, an opportunity occurred for the bank to exchange the 280 acres of land, the title to which was held by Hildreth, with one Deichen, for 160 acres of land owned by him, on which there was a mortgage for \$1,000, and obtain the difference in value between the two tracts. Curtis and one Mahin, his attorney, went to Franklin, and the exchange was made. Hildreth, acting for the bank, conveyed the 280-acre farm to Deichen, and he executed a mortgage thereon for \$5,000 in favor of the bank. The Deichen land was conveyed to the bank at the agreed value of \$7,000, there still being a mortgage on the land for \$1,000. In order to even up the values, Curtis executed a note for \$2,000 to Mahin, which Hildreth guaranteed. When the directors of the bank met on February 3, 1913, the matter of the Curtis deal came up for consideration. The evidence shows that the transaction was approved and adopted. The value of the Curtis land was agreed to be \$11,500. Hildreth gave the bank his check for \$502.50, and surrendered all claims on the Curtis land, and was exonerated from all charges as to rents which he might have collected while he had possession of it. He was al-

lowed \$1,500 for advances made by him on account of the transaction, and the whole matter was closed up. The minutes of the meeting are as follows:

Special Directors' Meeting, February 3, 1913.

Meeting held to consider a proposition to trade the farm belonging to the bank near Gaylord, Kansas, to Mr. Deichen for his 160-acre farm near Reamsville, Kansas. It was voted to make the trade along the lines outlined in the option given by Mr. Deichen to the bank.

(Signed) R. P. Galt, Secy.

The old notes were then canceled, with the exception of the Curtis note for \$2,100, and the small note for \$152.50. Those notes were not canceled, and Hildreth took possession of them without objections by anyone. Hildreth testified to the foregoing facts, and his evidence was corroborated by the testimony of the directors, and in part by the Galts themselves. We are therefore of opinion that the evidence was sufficient to sustain the finding of the trial court on that issue.

Compromise—  
binding effect.

Appellant Hildreth contends that the court erred in allowing the cross appellants to select notes, other than the Curtis notes, to the amount of \$3,000, and require him to pay the same. On this question it may be said that the contract hereinbefore referred to does not mention any particular notes. It is an agreement on Hildreth's part to pay notes held by the bank on January 1, 1912, to the amount of \$3,000, with interest thereon. The Curtis notes having been paid in the manner above stated, the Galts were at liberty to select other notes to the amount which Hildreth had agreed to pay. We are therefore of opinion that the court was right in its judgment on that question.

Contract—sale  
of bank stock—  
enforcement.

—agreement to  
guarantee  
profits.

Hildreth also contends that in estimating the net profits of the bank

for the year 1912 the court erred in deducting the sum of \$723.06, which was the guaranty fund charged by the state against the bank under the existing banking laws. This sum was required to be set apart and segregated from the funds of the bank. The bank held it as a reserve fund for the payment of assessments under the provisions of the law, the state requiring it to be kept on hand at all times subject to call. This being so, we are unable to say that it was error

**Bank—profits—  
guaranty fund.**

for the court to deduct that amount from the profits of the bank. The parties on both sides are strenuous in their contentions as to the question of what should be considered as net profits for the year 1912, but, after considering all of their claims and the evidence contained in the record, we have concluded to adopt the finding of the trial court on that question.

This brings us to the consideration of the question of the liability of Hildreth to pay the bank the disputed items of the so-called brickyard notes.

It appears that the bank commenced an action on one of the brickyard notes, making Hildreth and all of the other joint makers defendants. The other defendants filed answers setting up as their defenses that there was no cause for the note; that the bank had taken over the brickyard and had conducted it for a time; that the enterprise had failed, and the bank had made certain payments on the notes out of the profits of the transaction, and therefore they were relieved from liability on the note. Hildreth filed no answer, but gave testimony on the trial which, if believed by the jury, would have authorized a judgment in favor of the bank. The jury found for the defendants, and judgment was rendered in their favor on the verdict. The bank appealed to this court, where the judgment was affirmed. *Franklin State Bank v. Chaney*, 94 Neb. 1, 142 N. W. 537. The bank

then brought another action on one of the notes against another of the signers, and the same defense was pleaded. The jury found for the defendants, and judgment was rendered on the verdict. The bank appealed, and again the judgment was affirmed. *Franklin State Bank v. Gettle*, 96 Neb. 60, 146 N. W. 1017.

It is contended by the bank that the judgment in those cases did not release Hildreth's liability on the notes, because he did not answer in those cases. There is some conflict in the authorities, but in *Chase v. Miles*, 43 Neb. 686, 62 N. W. 35, it was said: "A judgment rendered by a court which had jurisdiction of the parties and of the subject-matter, as between such parties, conclusively settled all questions litigated."

In *Upton v. Betts*, 59 Neb. 724, 82 N. W. 19, it was held: "A matter in issue, covered, either generally or specifically, by the decree of the court, cannot be again litigated without a modification or vacation of that decree."

In the cases of the bank against Hildreth and others, no judgment was rendered against him. If Hildreth was an indorser and guarantor, that is, if he was an indorser with enlarged liability, the bank could not now sue him because the judgment—  
in favor of some obligors—effect.  
prior and subsequent indorsers were released by the jury and the judgments of the court in the actions on these notes. We are therefore of opinion that the district court was right in holding that the bank was not entitled to a judgment for the balance of the brickyard notes.

Without further discussion of the issues involved in this suit, the judgment of the District Court is affirmed.

Sedgwick, J., concurs in the conclusion.

Morrissey, Ch. J., and Letton, J., not sitting.

A motion for rehearing having

been granted, the following *Per Curiam* response was handed down on December 9, 1916 (100 Neb. 422, 160 N. W. 870):

This is a hearing upon questions presented in motions for rehearing. The issues and the evidence are stated in the first opinion. *Galt v. Hildreth*, 100 Neb. 15, ante, 114, 158 N. W. 366. At the time the plaintiffs purchased from defendant Hildreth a controlling interest in the Franklin State Bank, he guaranteed that if the net profits of the bank for the year 1912 should not be \$8,000 he would pay plaintiffs three fifths of the difference between that sum and the net profits. He also agreed that plaintiffs might select notes in the bank of the face value of \$3,000, and that he would pay the same to the bank.

The Galts brought this action against Hildreth to recover three fifths of the difference between the actual profits and the guaranteed profit. The bank was made a party defendant, and filed a cross petition, in which it sought to enforce against Hildreth his liability upon the note clause of the contract, and also sought to collect from him the amounts due on notes alleged to have been made, indorsed, and guaranteed by him. The trial court found that there was due from Hildreth to plaintiffs upon the profit clause of the contract, \$1,607.78. This was affirmed by this court, and is adhered to, except that plaintiffs should have interest thereon at the rate of 7 per cent per annum from January 1, 1913.

The remaining questions relate to the causes of action pleaded in the bank's cross petition against Hildreth. The contract between plaintiffs and Hildreth provided that plaintiffs should have the right to select notes of the face value of \$3,000, and Hildreth agreed to pay to the bank "the face value with accrued interest from November 10, 1911, to January 1, 1913, on said notes." Hildreth contends that the

recovery allowed upon this clause of the contract is excessive. The evidence shows that March 12, 1912, Hildreth paid a note of \$500. This would leave notes of the face value of \$2,500 to be selected. In the settlement of the matters relating to the Curtis land, Hildreth gave his check for \$502.50, and it was agreed that this should apply upon his liability under the note clause of the contract. The cross petition of the bank alleges that there was due under the note clause the sum of \$2,301.17, and prayed judgment for such sum, "with interest thereon from January 1, 1913, at the rate of 7 per cent per annum." The district court decreed that plaintiffs should select notes of the face value of \$2,500, and that, in case Hildreth failed to pay the same within forty days, the bank should have judgment against him for \$2,500, with interest thereon from November 10, 1911. This was error. The decree should have been for \$2,301.17, <sup>Pleading—</sup>claim—excessive <sup>judgment.</sup> with interest at 7 per cent per annum from January 1, 1913.

It is also contended by the bank that the rule announced in the 5th paragraph of the syllabus in the former opinion is not applicable to the facts. It was held: "The defense successfully made by one of the signers and indorsers of a note, if not made on purely personal grounds, will bar a future action by the same plaintiff on the same obligation against another joint defendant." *Galt v. Hildreth*, 100 Neb. 15, ante, 114, 158 N. W. 366.

In its cross petition the bank seeks to recover upon the so-called "brickyard" notes, known as the "Chaney" note and the "Gettle" note. Hildreth was one of three makers of the Chaney note and one of four indorsers of the Gettle note. In former actions brought by the bank against all the makers and indorsers, judgments for all the defendants, except Hildreth, who

made no answer, were affirmed in this court. *Franklin State Bank v. Chaney*, 94 Neb. 1, 142 N. W. 537; *Franklin State Bank v. Gettle*, 96 Neb. 60, 146 N. W. 1017. Hildreth filed no answer in those actions because he was representing the bank in the litigation, and was to be its principal witness. His default was entered. After the judgments for the answering defendants were affirmed, the bank moved for judgment against Hildreth upon the default. Hildreth obtained leave of court to file an answer pleading the judgment in favor of his comakers and coindorsers as an adjudication in bar of the bank's claims. The second and third causes of action set forth in the bank's cross petition in the present case are upon the notes involved in the two cases mentioned. Upon the trial of the present case it was stipulated that the original actions upon the brickyard notes should be consolidated with this case. The bank contends that the judgments in those actions are not conclusive of Hildreth's nonliability, because it does not appear that the judgments were founded upon a defense that was not personal to the prevailing defendants. One defense pleaded was that the notes were delivered to the bank merely to evidence its interest in the brickyard property, it having released its claim thereto, and that the notes were without consideration and were never intended to be enforced. The other defense was that, after the delivery of the notes, the makers and indorsers surrendered to the bank: all claim to the brickyard property, and that the bank thereupon released them from any and all liability upon the notes. *Ibid*.

Each of these defenses was a de-

fense upon the merits, and was not a defense personal to the pleaders. If the first defense was established, there was never

any liability upon the notes. If the notes were delivered merely to evidence the interest of the bank in the property, and with the understanding that they were not to be enforced, there was no liability either on the part of Hildreth or the other makers and indorsers. If the plea of release was established, all the makers and indorsers were released. If the brickyard property was surrendered to the bank in consideration of the release of the defendants in the actions on the notes, it was a satisfaction and payment. The release of those makers and indorsers also released Hildreth. *Scofield v. Clark*, 48 Neb. 711, 67 N. W. 754; *Huber Mfg. Co. v. Silvers*, 85 Neb. 760, 133 Am. St. Rep. 689, 124 N. W. 148.

It is also contended that Hildreth is estopped to plead his nonliability on the notes, because at the time the Galts purchased stock in the bank its records indicated that he was liable thereon, and that he so represented. The action upon the notes is brought by the bank. This is not an action by the Galts to recover for misrepresentation in the sale of the stock. Facts constituting an estoppel operating in favor of the bank were neither pleaded nor proved.

Estoppel—  
in favor of  
stranger to  
suit—effect.

It follows that the former adjudications released Hildreth from liability on the brickyard notes.

Except as herein modified, the judgment of affirmance is adhered to.

Former opinion modified.



## ANNOTATION.

### Judgment in favor of less than all parties to contract as bar to action against other parties.

- I. Introductory, 124.
- II. View that judgment is bar, 124.
- III. View that judgment is not bar, 125.

#### I. Introductory.

This note, in discussing the effect of a judgment in favor of less than all of the parties to a contract as a bar to a subsequent action against the other parties, is confined to a discussion of the effect of such a judgment as an adjudication or estoppel. The effect of the adjudication, considered merely as a release of one of the parties to a joint obligation, is not included.

The effect of a judgment against less than all of the parties to a contract, as a bar to an action against the other parties, is discussed in the note in 1 A.L.R. 1601.

#### \* II. View that judgment is bar.

In some jurisdictions it is held that, if an action is brought against less than all of the parties to a contract and a judgment is rendered in their favor, it is available as an adjudication of the merits in favor of the other parties to the contract, and bars an action against them for the same cause of action. *Taylor v. Sartorius* (1908) 130 Mo. App. 23, 108 S. W. 1089; *Townsend v. Riddle* (1822) 2 N. H. 448; *Reynolds v. Pittsburgh, C. & St. L. R. Co.* (1876) 29 Ohio St. 602; *Brown v. Johnson* (1857) 13 Gratt. (Va.) 644; *Spencer v. Dearth* (1870) 43 Vt. 98. See dictum in *Hill v. Morse* (1873) 61 Me. 541. And see the reported case (*GALT v. HILDRETH*, ante, 114).

In *Brown v. Johnson* (1857) 13 Gratt. (Va.) 644, it was held that a judgment on the merits in favor of one joint obligor on a bond was conclusive in favor of the other, the court saying: "If a verdict and judgment for the plaintiff against one of several who are jointly bound may be admitted in evidence in an action against another as a bar, it would seem to

be a necessary corollary (if the deduction be not a fortiori) that a verdict and judgment against the plaintiff in the former action, upon an issue going to the merits and ascertaining that the plaintiff never had any cause of action against that defendant, would be admissible as a bar to a subsequent action against another so jointly bound."

In *Taylor v. Sartorius* (1908) 130 Mo. App. 23, 108 S. W. 1089, it appeared that an action was brought against some members of a partnership on a firm contract, and the defendants had judgment therein. It was held that this judgment barred an action against the other partners, the court saying: "If respondent recovers from appellant, the latter might recover contribution from her cosigners, thereby nullifying the verdict given in their favor in respondent's suit against them."

In *Spencer v. Dearth* (1870) 43 Vt. 98, a judgment in favor of a surety on a note on a plea of payment was held to be conclusive in an action against the principal maker. The court said: "A rule that would not allow a judgment in favor of one of the makers of the note, upon such defense, as a legal bar to a recovery against another maker of the same note, would compel each maker of the note, in a suit subsequently tried against him, to litigate the same question or questions which had been adjudicated in the former suit or suits, irrespective of the former adjudication or its result, by which the plaintiff would have had the advantage of two or more trials in different suits, but of the same matter, and if he should finally prevail against one of such makers he would have had only one trial and judgment upon the matters involved."

In *Reynolds v. Pittsburgh, C. & St. L. R. Co.* (1876) 29 Ohio St. 602, it appeared that a joint contract for the

carriage of goods was made by two railroad companies. The shipper sued one of them for a breach, and the defendant had judgment. It was held that the adjudication barred a subsequent action against both.

In *Townsend v. Riddle* (1822) 2 N. H. 448, a judgment in favor of one of two makers of a joint and several note was held to bar an action against the other.

But if the defense is one personal to the party first sued, the judgment in his favor does not inure to his co-obligors. *Rocky Mount Loan & T. Co. v. Price* (1904) 103 Va. 298, 49 S. E. 73. In that case it appeared that one joint obligor, sued separately, prevailed on a plea of non est factum. The court said: "The rights of the obligee and the liability of the other obligors were not affected by the fact that the name of one of the obligors may have been forged. The plea of non est factum bars the action only as to him who pleads it, and does not affect the liability of the other defendants in a case like this."

So, in *Hill v. Morse* (1873) 61 Me. 541, it was held that a person seeking the benefit of a judgment in favor of a co-obligor must show that it was rendered on grounds which were not personal to the then defendant. The court said: "There is no doubt that if any fact was necessarily decided for the defendant in the former suit, which would be as well a defense to this defendant, that the plaintiff in this suit, when it is shown, would be estopped by it. But while it appears in this case that the former action was tried upon the plea of the general issue, it does not appear upon what ground of defense, under that plea, the verdict and judgment were rendered. There is no evidence introduced to show that the defendant prevailed upon any facts which went to the merits of the case, or were an extinguishment of the cause of action, or that the facts involved in that judgment were such as would be available to the defendant as a bar to this action if the same were proved here. Non constat, that the former defendant may not have prevailed upon some

personal defense, such as infancy or many others allowable under the general issue, which could not be available to the present defendant." See to the same effect, *Phillips v. Ward* (1863) 2 Hurlst. & C. 717, 159 Eng. Reprint, 297, 33 L. J. Exch. N. S. 7, 9 Jur. N. S. 1182, 9 L. T. N. S. 345, 12 Week. Rep. 106.

### III. *View that judgment is not bar.*

In several jurisdictions the view obtains that a judgment in favor of less than all of the parties to a contract does not bar an action against the others on the same cause of action. *Larison v. Hager* (1890) 44 Fed. 49; *McLelland v. Ridgeway* (1847) 12 Ala. 482; *State Bank v. Robinson* (1853) 13 Ark. 214; *Owingsville & Mt. S. Turnp. Road Co. v. Hamilton* (1899) 21 Ky. L. Rep. 815, 53 S. W. 5; *Lindsay v. Gager* (1896) 11 App. Div. 93, 42 N. Y. Supp. 851. And see *Eastman v. Winship* (1833) 14 Pick. (Mass.) 44. Compare *Hunt v. Terril* (1831) 7 J. J. Marsh. (Ky.) 67; *French v. Neal* (1833) 24 Pick. (Mass.) 55.

In *Larison v. Hager* (1890) 44 Fed. 49, it appeared that a firm made a contract for the purchase of land. An action was brought thereon against all the partners, but only two were served. On the trial judgment was rendered for the defendants. In a subsequent action against another partner, it was held that the judgment was not available to him as a bar. The court said: "There is no privity between Hager and the defendants sued in the judgment pleaded by him in bar, so that he can take advantage of it. As a general rule a judgment will not operate as an estoppel unless the benefit derived from it is mutual; that is, a judgment cannot be used as evidence against a person when the opposite verdict would not have been evidence for him. In the record of the judgment pleaded by Hager the parties thereto are not the same as in this case, and he is not prejudiced, and can derive no advantage by it. If Larison had succeeded in the suit in Dakota, and obtained judgment against Wilbur and Nickeus, he could not enforce it against Hager, who was

not within the jurisdiction, and was not served with process."

In *McLelland v. Ridgeway* (1847) 12 Ala. 482, it was held that a judgment in favor of one partner on a defense of payment did not work an estoppel in favor of the other partner.

In *Owingsville & Mt. S. Turnp. Road Co. v. Hamilton* (1899) 21 Ky. L. Rep. 815, 53 S. W. 5, it appeared that a contract with a turnpike company gave the use of the road toll free to the other party and his family. After the death of that party one of his children defeated an action for tolls on the ground that the contract inured to him and his brothers. It was held that the judgment did not bar a like action against another of the children.

In *Lindsay v. Gager* (1896) 11 App. Div. 93, 42 N. Y. Supp. 851, it appeared that a former employee of a firm sued the surviving partner to recover for services. The defendant recovered judgment. It was held that the judgment did not bar a claim against the estate of the deceased partner, the court saying: "I do not see how the individual liability of O. A. Gager could have been an issue in that action. The question there was whether the firm were liable."

In *State Bank v. Robinson* (1853) 13 Ark. 214, it was held that, where separate actions are brought against the principal and a surety on a bond, a judgment in favor of the principal is not available as a bar of the action against the surety.

In *Eastman v. Winship* (1833) 14 Pick. (Mass.) 44, an action against the maker and two indorsers of a note, it was held that a third indorser was a competent witness, the court saying: "He will be still liable to the plaintiff, whether he recovers judgment against the defendants or not; and it is clear that the judgment in this suit cannot be given in evidence in an action against the witness."

But in *Hunt v. Terril* (1831) 7 J. J. Marsh. (Ky.) 67, it was held that a judgment in favor of one of the heirs of a warrantor of title was a bar to a subsequent action against another heir.

In *French v. Neal* (1834) 24 Pick. (Mass.) 55, it was held that a judgment for the defendant on the merits in an action against one of two joint contractors, the nonjoinder of the other not being pleaded in abatement, barred an action for the same cause against the two jointly. W. A. S.

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JONES & COMPANY, Plff. in Err.,

v.

C. W. HANCOCK & SONS et al.

*Virginia Supreme Court of Appeals—June 10, 1915.*

(117 Va. 511, 85 S. E. 460.)

**Affidavit — verification — corporation — president as agent.**

1. The mere fact that one signing an affidavit verifying a plea of a corporation is its president is not alone sufficient to establish agency, within the provisions of a statute requiring the affidavit of the corporation or its agent.

[See note on this question beginning on page 132.]

**Pleading — amendment — when permitted.**

2. After an office judgment entered upon a declaration and supporting affidavits has become final, the court is without power to admit evidence as a basis for amending the pleading so

as to show a proper affidavit to the plea.

[See 21 R. C. L. 575 et seq.]

**Writ — service on corporation — time.**

3. Service upon the president in the county in which the suit was brought

of process against the corporation need not be shown to have been ten days before the return day when the statute requires such service only

when it is against an agent of the corporation or in a county or corporation other than that in which the action is brought.

**ERROR** to the Law and Chancery Court of the City of Norfolk to review a judgment in favor of plaintiffs in an action brought to recover the price of goods alleged to have been sold and delivered by them to defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Kenneth S. Jones and William H. Moreland for plaintiff in error.

Messrs. Wingfield & Hoag for defendants in error.

Whittle, J., delivered the opinion of the court:

The defendants in error, partners, who were plaintiffs below, brought an action of assumpsit against the plaintiff in error, a corporation, to recover the price of goods alleged to have been sold and delivered by the plaintiffs to the defendant at its request. The account was filed with the declaration, accompanied by the affidavit of one of the plaintiffs, made in accordance with § 3286 of the Code, and an office judgment duly entered thereon. At the succeeding term of the court, on June 17, 1914, the defendant appeared and filed pleas of non-assumpsit and set-off, whereupon the office judgment was set aside. These pleas were sworn to by the president of the corporation, but it does not appear that they were verified by any agent of the defendant as required by § 3286.

On July 13, 1914, the court, on motion of the plaintiff, struck out the pleas because they were not verified by such affidavits as the statute prescribed, and likewise sustained the plaintiffs' motion to annul its former order setting aside the office judgment.

It is quite clear under the decisions of this court that the affidavit of the president of the corporation, in the absence of any averment therein of his agency, or any other evidence on the subject, is not a sufficient compliance with the stat-

ute which requires the affidavit of the plaintiff or his agent to the plea.

In other words, the fact that affiant is president does not, per se, import such agency. Reference to decisions of this court on the subject obviates the necessity for further discussion. *Merriman Co. v. Thomas*, 103 Va. 24, 48 S. E. 490; *Taylor v. Sutherlin-Meade Tobacco Co.* 107 Va. 787, 14 L.R.A. (N.S.) 1135, 60 S. E. 132; *Clement v. Adams Bros.-Paynes Co.* 113 Va. 547, 75 S. E. 294.

The effect of the court's ruling in striking out the defendant's pleas was to reinstate the office judgment and by force of the statute, § 3237, it became final on July 1, 1914, which was the fifteenth day of the term. *Grigg v. Dalsheimer*, 88 Va. 508, 510, 13 S. E. 993; *Price v. Marks*, 103 Va. 18, 48 S. E. 499. After that time the court was without power to admit evidence as the basis for amending the pleadings, and rightly so held. *Enders v. Burch*, 15 Gratt. 64.

Objection was made to the service and return of the original summons in the case, because it did not show that it was served on an agent and ten days before the return day. Code, §§ 3225, 3227.

The record does show that the defendant is a corporation and that the writ was served on its president in the city of Norfolk where he resides. By § 3225, process against a corporation is required to be served on the president if he is in the county or corporation wherein the

*Affidavit—  
verification—  
corporation—  
president as  
agent.*

*Pleading—  
amendment—  
when per-  
mitted.*

action is brought. And by § 3227, process is only required to be served ten days before the return day when service is on an agent, or in a county or corporation other than that in which the action is brought.

In this instance, as observed, the service was not on an agent or in another county or corporation. Hence, service at any time before or on the return day was sufficient.

The remaining assignments are without merit and do not call for special notice.

The judgment of the Court of Law and Chancery of the city of

Norfolk is plainly right and must be affirmed.

#### NOTE.

The necessity of showing the authority or qualifications of affiant in an affidavit made in behalf of a corporation is the subject of the annotation beginning at page 132. The view taken in the reported case (*JONES & Co. v. HANCOCK*, ante, 126), that the mere fact that one signing the affidavit is an officer of that corporation is not alone sufficient to establish his agency or authority to make the affidavit, is supported by other cases cited at page 134 of that annotation.

W. O. WAKELY, for Use of R. A. Wakely, et al.,  
v.

SUN INSURANCE OFFICE of London, England, Appt.

*Pennsylvania Supreme Court — July 1, 1914.*

(246 Pa. 268, 92 Atl. 136.)

#### Affidavit — by agent — necessity of showing authority.

1. An affidavit of defense to an action on an insurance policy, made by the state agent of the insurance company, is insufficient, which fails to show why it was not made by an officer of the corporation, and that the agent had special knowledge of the facts, or information and belief, and expectation to be able to prove them.

[See note on this question beginning on page 132.]

#### Pleading — action on policy — affidavit of defense.

2. An affidavit of defense to an action on an insurance policy which merely states wilful overvaluation of the property insured, without stating any facts tending to support such averment, is insufficient.

[See 14 R. C. L. 1050.]

#### — proofs of loss — satisfactory.

3. The mere statement in an affidavit of defense to an action on an insurance policy, that the proofs of loss were not satisfactory, is not sufficient where the statement avers the furnishing of proofs of loss agreeably to the terms of the policy.

[See 14 R. C. L. 1337, 1423.]

#### Insurance — waiver of objection to proofs.

4. Delay for eight months in object-

ing to the proofs of loss under an insurance policy waives such objection.

[See 14 R. C. L. 1351.]

#### Pleading — failure to produce books.

5. An affidavit of defense to an action on an insurance policy because of failure to produce books and papers is insufficient if they are not alleged to relate to the insurance involved.

[See 14 R. C. L. 1340; 21 R. C. L. 464 et seq.]

#### — insurance — successive fires.

6. An affidavit of defense to an action on an insurance policy, setting up that a portion of the property was destroyed by a fire subsequent to that for which claim is made, is insufficient if the statement of claim avers that no claim was made for property destroyed by the second fire.

#### — based on idle gossip.

7. An affidavit of defense made by

the state agent of an insurance company to an action on a policy of fire insurance setting up concealment of material facts concerning the value of

the building, which was based simply on the idle gossip of the village, is insufficient.

[See 14 R. C. L. 1050.]

APPEAL by defendant from a judgment of the Court of Common Pleas for Tioga County in favor of plaintiff, for want of sufficient affidavit of defense, in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Dunsmore & Edwards, for appellant:

Where an affidavit of defense is based upon information and belief of matters not within the knowledge of the affiant, the affiant must not only aver the information, but his belief in the truth of it, and his belief in his ability to prove the same at the trial of the cause.

Endlich, Affidavits of Defense, §§ 342, 363, 364; Black v. Halstead, 39 Pa. 64; Newbold v. Pennock, 154 Pa. 591, 26 Atl. 606; Tilli v. Vandegrift, 18 Pa. Super. Ct. 487; Moore v. Susquehanna Mut. F. Ins. Co. 196 Pa. 30, 46 Atl. 266; Barker v. Fairchild, 168 Pa. 246, 31 Atl. 1102; Leibersperger v. Reading Sav. Bank, 30 Pa. 531; Thompson v. Clark, 56 Pa. 33; McPherson v. Allegheny Nat. Bank, 96 Pa. 139; Kaufman v. Cooper Iron Min. Co. 105 Pa. 542.

Messrs. Chester H. Ashton, Walter Sherwood, and Edward H. Owlett, for appellee:

The affidavit of defense is clearly insufficient.

Griel v. Buckius, 114 Pa. 190, 6 Atl. 153; Bushong v. Edwards, 52 Pa. Super. Ct. 376; Cummins v. German American Ins. Co. 197 Pa. 61, 46 Atl. 902.

Mestrezat, J., delivered the opinion of the court:

This is an appeal from the judgment entered by the court below, for want of a sufficient affidavit of defense, in an action on a policy of fire insurance on a building and its contents.

The affidavit avers substantially that: (1) The plaintiff concealed and misrepresented a material fact concerning the value of the building; (2) the plaintiff has not furnished satisfactory proofs of loss; (3) the plaintiff has refused and neglected to produce for examina-

tion, all books of accounts, bills, invoices, and other vouchers, at Knoxville; and (4) the property described in the policy was but partially destroyed January 11, 1912, and was further destroyed by a later fire, notice of which was not given to the defendant nor claim made for insurance under the contract.

1. The alleged misrepresentation and concealment is as to the value of the building; the affidavit averring that it was not of the value of \$2,000, at which it was insured, and was not worth more than \$1,500, and that plaintiff thereby obtained insurance in excess of that which he otherwise would have been able to secure had the defendant known the true value of the building, and therefore the policy is void. There are no facts stated in the affidavit from which the court could determine the truth of the alleged concealment and misrepresentation. The affidavit does not disclose what the plaintiff said, to whom the value was stated, nor when the misrepresentation was made. The concealment and misrepresentation are based on the fact that the building was insured for \$2,000, and the defendant's allegation that the plaintiff knew it was not worth that amount. Why does the defendant's agent, making the affidavit, aver that the plaintiff knew the house was not of its insured value? He gives no facts from which the court or a jury could find the plaintiff had such knowledge. There is no averment in the affidavit of any declaration or act on the part of the plaintiff which discloses such knowledge. There is nothing in the affidavit to show that the house was

not worth \$2,000 when it was insured, or that the plaintiff knew or believed it was not of that value, save the simple declaration of the affiant, who does not aver that he has any knowledge of the value of the property, nor that he believes his statement to be true or expects to prove it. The building was in existence at the time it was insured; presumably was seen and examined by the defendant's agent, who had every opportunity to ascertain, and presumably did ascertain, its insurable value. In the absence of an averment of specific facts disclosing concealment and misrepresentation by the plaintiff as to the value of the house at the date of the insurance, the simple statement by the affiant that it was not of that value, and the plaintiff knew it, is not sufficient to prevent judgment.

**Pleading—  
action on  
policy—affidavit  
of defense.**

2. The affidavit avers that the plaintiff has not furnished defendant satisfactory proofs of loss of the items of merchandise contained in the policy. The fire occurred on January 11, 1912, and the plaintiff's statement avers "that on February 1st the assured, W. O. Wakely, furnished the defendant company with a particular statement of said loss, under oath agreeable to the terms of said policy, and had previously notified defendant's agent at Elkland, Pennsylvania, of the fire on January 12, 1912."

The affidavit does not deny this averment, but simply alleges that the proofs were not satisfactory. It does not aver that they do not meet the requirements of the policy, which is specifically alleged in the statement. It does not specify wherein the proofs furnished are not satisfactory, nor does it aver that the defendant had suggested to the plaintiff that the proofs are unsatisfactory, or wherein they are not satisfactory. The proofs of loss were delivered to the defendant within the time stipulated in the policy, and, as we must

**—proofs of loss  
—satisfactory.**

assume, in good faith, as a compliance with the provisions of the policy, and it was the duty of the company to give immediate notice to the assured of its objection to the proofs, pointing out the defects, etc. (*Gould v. Dwelling House Ins. Co.* 134 Pa. 570, 19 Am. St. Rep. 717, 19 Atl. 793); and, if the company neglected to do so, its silence will be held a waiver of such defects in the proof, and they must be considered as having been duly made according to the conditions of the policy (*Girard L. Ins. Annuity & Trust Co. v. New York Mut. L. Ins. Co.* 97 Pa. 15; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. 385, 30 Am. Dec. 90). The first notice the plaintiff had that the proofs were not satisfactory, so far as the record discloses, was contained in the affidavit of defense filed eight months after the proofs were furnished. If they were defective or not in conformity with the policy, it was then too late to assert the fact.

**Insurance—  
waiver of  
objection to  
proofs.**

3. The affiant further avers that, since the fire, the plaintiff has refused to produce for examination "all books of account, bills, invoices, and other vouchers, or certified copies thereof, if the originals be lost," whereby the policy became void. It is not averred that the books of account, etc., were necessary to enable the company to make a defense to an action on the policy. We must assume that the notice or request to produce the books, etc., was substantially in the language used in the affidavit, and, if so, it was entirely too indefinite to charge the plaintiff with neglect in declining to comply with the request. The affidavit does not aver that the books desired by the defendant and refused by the plaintiff related to the insurance out of which this controversy arises, and, under the well-settled rule, no such intentment can be made. We must assume that the affiant stated the case in

**Pleading—  
failure to  
produce books.**

his favor as strongly as he could, and therefore that he could not truthfully aver in the affidavit of defense that the books, etc., which the plaintiff refused to produce, were those relating to this insurance. The plaintiff was, of course, justified in declining to furnish any other books or papers for the defendant's inspection.

4. The fourth and last defense, as averred in the affidavit, is, that the property described in the policy "was not wholly destroyed on January 11, 1912, as alleged in the plaintiff's statement of claim, but was only partially destroyed at that date, and was further destroyed by a subsequent fire in the same premises, notice of which said subsequent fire was never given to the defendant by the said plaintiff, nor any claim made for insurance under said contract of said defendant," and that "defendant avers and expects to be able to prove that the amount of personal property burned (in the fire of January 11th) was not \$3,792.11, as averred in the plaintiff's statement, but of a much less value, the exact amount of which affiant is unable to state." This averment is clearly defective. The statement of claim does not allege that the property was wholly destroyed by the fire of January 11th, which occasioned the loss sued for, but that "a fire occurred, totally destroying the buildings insured under said policy, and a large part of the merchandise covered by said policy was destroyed." The items of merchandise totally destroyed, and those which were damaged, but not totally destroyed, by the fire of January 11th, are set forth in the statement, and it is averred therein, and not denied in the affidavit of defense, that the defendant, by its state agent, A. D. Lundy, agreed to the estimated loss on the damaged goods. If it be conceded that there was a subsequent fire and it destroyed some of the merchandise insured, as affiant

avers, it does not follow that the loss in the subsequent fire is claimed in this suit, but precisely the opposite inference arises, in view of the averment in the affidavit that notice of the subsequent fire was not given the defendant, nor any claim made for insurance under the policy. The defendant, therefore, is not injured, and sets up no legal defense to the claim in suit, if this averment of its affidavit be taken as verity. It should be observed that, except as attacked inferentially in this part of the affidavit of defense, the particular items of merchandise destroyed and the value thereof, as set out in the statement of claim, are not specifically challenged, and, as above suggested, the loss on the damaged, but not totally destroyed, items, is admitted by the defendant's agent. The general averment, therefore, that defendant expects to be able to prove that the personal property destroyed was worth much less than \$3,792.11, does not sufficiently meet the positive and specific averment of the loss of the items set out in the statement.

The company's state agent, who makes the affidavit of defense, does not, so far as the affidavit discloses, do so on his personal knowledge of the matters therein averred, and he does not aver that the affidavit is made upon information, nor that he believes the loss caused by the fire is what he alleges. If he had such information, he does not disclose the fact nor its source, and if it were simply the idle gossip of the village, as it may be, so far as the affidavit shows, it would certainly not be a sufficient reason to warrant the court in refusing judgment.

The affidavit of defense is made by A. D. Lundy, who swears that "he is the state agent for the state of Pennsylvania," of the defendant corporation. He does not aver that he has personal knowledge of the alleged facts set out in the affidavit,

—insurance—  
successive  
fires.

—based on  
idle gossip.



nor that, as an officer of the company, his duties require him to have knowledge of such matters, but that it is his duty to make the affidavit of defense, "inasmuch as no officers of the company better able to do so are resident within the state of Pennsylvania." This may be true, and yet he may not be the proper officer to make the affidavit, nor have sufficient personal knowledge of the matters alleged to be a defense as would warrant the averment in the affidavit "that the said defendant has a full, just, and true defense to the whole of the plaintiff's claim." The affidavit avers that the affiant is the state agent of the corporation, but does not aver directly that he is an officer of the corporation, nor does the affidavit disclose that he, as an officer, is acquainted with the facts, and therefore could swear to them positively as of his own knowledge. If an affidavit is made by an agent of a corporation, it should aver why it is not made by an officer of the corporation (*Citizens' Natu-*

*ral Gas Co. v. Waynesburg Natural Gas Co.* 210 Pa. 137, 59 Atl. 822), and the agent should show that he has special knowledge of the facts, if the affidavit is made from his personal knowledge, and not from information and belief. If a party making an affidavit does not have personal knowledge of the facts, the established form is for the affiant to aver that he is informed, believes, and expects to be able to prove them. In the case at bar the affiant does not disclose what knowledge, or opportunities for knowledge, he had of the matters set up in the affidavit, and in only one instance there-  
Affidavit—by agent—necessity of showing authority.  
 in does he aver that he is informed, believes, and expects to be able to prove the alleged facts.

A careful examination of the affidavit of defense does not disclose a defense to the plaintiff's claim, and therefore the learned court below was right in making the rule absolute and entering judgment against the defendant. Judgment affirmed.

### ANNOTATION.

#### Necessity of showing authority or qualification of affiant in affidavit made in behalf of corporation.

- I. In general, 132.
- II. View that authority may be inferred from official character, 133.
- III. View that authority must be shown, 134.
- IV. Authority shown aliunde, 138.
- V. Showing that affiant is the officer or agent he purports to be, 139.
- VI. Necessity of showing sources of knowledge or information of affiant:
  - a. Officers, 140.
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- VII. Necessity of showing that affiant was officer at the time the transaction arose, 143.
- VIII. Necessity of showing why the affidavit was not made by the party, or an officer of the corporation, 144.

#### I. In general.

When an affidavit is required of a corporation there must be some show-

ing that it is made on behalf of the corporation.

Thus, an affidavit made by the agent of a corporation, that an appeal bond executed by him, apparently on behalf of the corporation, was in fact executed by him without any right or authority from the corporation, was held to be insufficient, as the denial must appear to be the act of the corporation, or otherwise it might happen that a stranger would deny what was admitted by the real party in interest; and, therefore, the affidavit should show that the agent had authority from the company to make the denial. *Barrett Min. Co. v. Tappan* (1873) 2 Colo. 124.

In *Phonoharp Co. v. Stobbe* (1897) 20 Misc. 698, 46 N. Y. Supp. 678, it was held that a verification of the complaint in an action by a foreign

corporation, which was signed by an individual, without purporting to be an officer or agent of the corporation, was a mere nullity.

In *Orchard v. Smith* (1917) — Mo. —, 193 S. W. 574, it was held that proceedings on behalf of a corporation, for bringing in the unknown heirs to the property in question, were insufficient, where the affidavit on behalf of the corporation was made by one who refrained from stating that he occupied any position charging him with the duty of ascertaining the names of such parties.

And in *Silver Peak Mines v. Hanchett* (1897) 80 Fed. 990, the court said that an affidavit for an attachment, which was headed: "Silver Peak Mine, a corporation, the plaintiff above named, by M. A. Murphy, its attorney, being duly sworn, says," was open to criticism, and that the form of the affidavit of the complaint, which was headed: "M. A. Murphy, being duly sworn on behalf of the plaintiff in the above-entitled action," was much better; but held that the point was clearly technical, and went simply to the form and not to the substance of the affidavit, the true interpretation being that the affidavit was that of the attorney for the corporation, which was sufficient.

*II. View that authority may be inferred from official character.*

In some cases, a showing that the affiant is an agent or officer of the corporation is regarded as a sufficient showing of authority to make the affidavit.

**Alabama.**—*Birmingham Realty Co. v. Barron* (1907) 150 Ala. 232, 43 So. 346.

**California.**—*Old Settlers Invest. Co. v. White* (1910) 158 Cal. 236, 110 Pac. 922.

**District of Columbia.**—*International Seal Co. v. Beyer* (1909) 33 App. D. C. 172.

**Indiana.**—*Fremont Cultivator Co. v. Fulton* (1885) 103 Ind. 393, 3 N. E. 135.

**Maine.**—*Casavant & C. Co. v. Smith* (1916) 115 Me. 168, 98 Atl. 577.

**Michigan.**—*Forbes Lithograph Mfg.*

*Co. v. Winter* (1895) 107 Mich. 116, 64 N. W. 1053.

**Missouri.**—*Remington Sewing Mach. Co. v. Cushen* (1880) 8 Mo. App. 528; *White Sewing Mach. Co. v. Betting* (1893) 53 Mo. App. 260.

**Nebraska.**—*Moline, M. & S. Co. v. Curtis* (1893) 38 Neb. 520, 57 N. W. 161.

**New Jersey.**—*New Brunswick S. B. & Canal Transp. Co. v. Baldwin* (1834) 14 N. J. L. 440.

Thus, in *International Seal Co. v. Beyer* (1909) 33 App. D. C. 172, involving the sufficiency of the disclosure of a corporation as garnishee, the court said: "We think it may be presumed, in the absence of evidence to the contrary, that the secretary and treasurer of a corporation, who recites in the affidavit that he is secretary or treasurer, is acting for the corporation, and within the scope of his authority."

In *Old Settlers Invest. Co. v. White* (1910) 158 Cal. 236, 110 Pac. 922, it was held that where the statute makes no provision as to who shall make the affidavit when a corporation is a party to a chattel mortgage, and it does not require the person who makes it for the corporation to declare on oath his official position or relation, it is sufficient if the affiant is described as secretary of the corporation, in the introductory statement describing the person who made the affidavit.

In *Fremont Cultivator Co. v. Fulton* (1885) 103 Ind. 393, 3 N. E. 135, an affidavit for attachment by a corporation, which recited that affiant was its secretary, was held sufficient, as the recital was sufficient evidence, prima facie, that he was its secretary, and, being such secretary and making the affidavit as such, it will be presumed in the absence of anything to the contrary, that he made the affidavit in plaintiff's behalf, under a statute which does not require a sworn statement in the affidavit that affiant is agent, attorney, or officer of the plaintiff, and makes the affidavit in its behalf.

In *Casavant & C. Co. v. Smith* (1916) 115 Me. 168, 98 Atl. 577, under a statute prescribing that the oath

required for the arrest of a debtor on civil process may be made by an agent or attorney of the creditor, where an affidavit was made for a corporation creditor by one who described himself in the affidavit as "clerk of the corporation, and its agent and manager," it was held that those words afford a presumption of authority to make the oath.

And an affidavit of account, in a suit in a justice's court, by a corporation, which stated that the affiant was the treasurer of the corporation, sufficiently showed his authority to make the affidavit. *Forbes Lithograph Mfg. Co. v. Winter* (1895) 107 Mich. 116, 64 N. W. 1053.

In *Remington Sewing Mach. Co. v. Cushen* (1880) 8 Mo. App. 528, where an objection was made to an affidavit in a replevin suit by a corporation, that the affiant was merely described as agent for plaintiff, the court said: "It is undoubtedly more correct that the fact of agency should be stated and sworn to, instead of being added thus by way of description, but the point is not jurisdictional."

In *White Sewing Mach. Co. v. Betting* (1893) 53 Mo. App. 260, in which it was held that a recital in an affidavit, that it was made by affiant "as agent of and in behalf of" a corporation, was sufficient, the court said: "The better reason and weight of authority make it sufficient, if it appear with reasonable certainty from the affidavit or any part of the record that the affiant acted as agent."

Where it was stated in the body of an affidavit for garnishment that the affiant was president of the corporation, and the affidavit was signed by him with the abbreviation "Pres." after it, the affidavit was sufficient. *First Nat. Bank v. Graham* (1889) — Tex. App. —, 22 S. W. 1101.

In *Ex parte Sargeant* (1845) 17 Vt. 426, where an affidavit for a body execution was objected to on the ground that there was no evidence that the person making it was president of the corporation, as he purported to be, the court said: "We have only to say, there is no evidence that he was not. The clerk who issued the execution

must have been satisfied as to his authority; and it is at least *prima facie* to be taken that he was such officer, and so made it appear to the clerk issuing the execution."

### III. *View that authority must be shown.*

Other cases hold that the authority of the officer or agent to make the affidavit on behalf of the corporation must appear, a mere showing that affiant is an officer or agent being insufficient.

**Alabama.**—*Decatur, C. & N. O. R. Co. v. Crass* (1892) 97 Ala. 519, 12 So. 43; *Hutson v. Illinois C. R. Co.* (1914) 186 Ala. 436, 65 So. 62.

**Georgia.**—*Central of Georgia R. Co. v. Dickerson* (1914) 15 Ga. App. 293, 88 S. E. 942.

**Massachusetts.**—*Mahone v. Manchester & L. R. Corp.* (1872) 111 Mass. 72.

**Minnesota.**—*Dodge v. Northwestern Union Packet Co.* (1868) 13 Minn. 458, Gil. 427.

**Nevada.**—*Quigley v. Central P. R. Co.* (1876) 11 Nev. 350, 21 Am. Rep. 757.

**New Jersey.**—*North Penn Iron Co. v. Boyce* (1904) 71 N. J. L. 434, 58 Atl. 1094.

**New York.**—*Meton v. Isham Wagon Co.* (1838) 15 N. Y. Civ. Proc. Rep. 259, 4 N. Y. Supp. 215.

**Pennsylvania.** — *Galashevsky v. Camden F. Ins. Asso.* (1916) 63 Pa. Super. Ct. 511.

**Virginia.** — *Taylor v. Sutherlin-Meade Tobacco Co.* (1908) 107 Va. 787, 14 L.R.A.(N.S.) 1135, 60 S. E. 132; *Damron v. Citizens' Nat. Bank* (1911) 112 Va. 544, 72 S. E. 153; *Clement v. Adams Bros.-Paynes Co.* (1912) 113 Va. 547, 75 S. E. 294; *JONES & Co. v. HANCOCK* (reported herewith) 126.

**Wisconsin.**—*Wiley v. C. Aultman & Co.* (1881) 53 Wis. 560, 11 N. W. 32.

**Canada.**—*Freehold Loan & Sav. Co. v. Bank of Commerce* (1879) 44 U. C. Q. B. 284.

In Alabama, the statute concerning garnishment provides that "no person shall answer on behalf of any corporation, any process of garnishment, unless he shall make affidavit that he is the duly authorized agent of the cor-

poration to make such answer," and under such statute no valid judgment could be rendered against the corporation garnishee upon an answer by an agent which did not contain an affidavit of the agent's authority to make it, unless the answer was adopted or ratified by the corporation by some appropriate method. *Decatur, C. & N. O. R. Co. v. Crass, and Hutson v. Illinois C. R. Co. (Ala.) supra.*

In *Central of Georgia R. Co. v. Dickerson (1914) 15 Ga. App. 293, 82 S. E. 942*, it was held that an answer in a garnishment proceeding, purporting to be the answer of a corporation, made by its attorney and merely signed at the end by him as attorney at law for the corporation, was insufficient, as it must appear that the person making the answer for the corporation had authority to answer on its behalf, and to bind it by his answer, while the answer as made was nothing more than the mere answer of the attorney, the designation, "attorney at law," etc., being merely *descriptio personæ*.

In *Mahone v. Manchester & L. R. Corp. (1872) 111 Mass. 72*, the court, in holding that an affidavit for removal of a case to the Federal courts in which the affiant averred and said that he was the acting and assistant superintendent of the corporation was insufficient because it did not appear that he had authority to make the affidavit, said: "When, as in this case, the petitioner for removal is a corporation, the petition may doubtless be signed and the affidavit made by some person authorized to represent the corporation. But the authority of any person assuming to represent it must appear. No officer of a corporation, unless specially authorized, has power to bind the corporation, except in the discharge of his ordinary duties."

In *Dodge v. Northwestern Union Packet Co. (1868) 13 Minn. 458, Gil. 427*, the court expressed its doubt as to whether a corporation could bring itself within the requirements of an affidavit for the removal of a cause to a Federal court because of local prejudice, and held that at any rate the making of such an affidavit, not

being ordinarily one of the powers or duties of the secretary of the corporation, in the absence of proof, the court had no right to presume that the affidavit was not made on his own motion, instead of by authority of the corporation.

In *State v. Washoe County (1869) 5 Nev. 317*, it was held that an affidavit on behalf of a railroad company, required by statute to be made by the "president, secretary, general superintendent, or managing agent of the corporation," in which the affiant was merely described as "John Corning of the Central Pacific Railroad Company," was insufficient in that it did not show that he was one of the persons competent to make it under the statute, as it should affirmatively appear that he was such person, and he should also swear to that fact.

In *Quigley v. Central P. R. Co. (1876) 11 Nev. 350, 21 Am. Rep. 757*, it was held that an affidavit for removal of a case to a Federal court was insufficient, although the affiant deposed that he was the second vice president of the corporation and that the president and vice president were absent and unable to make the affidavit, because he failed to show that he had authority from the corporation to make the affidavit, and therefore the fact stated in the affidavit was a mere individual belief of the officer, and did not answer the positive requirements of the statute that the affidavit must be made by a party to the suit.

In *North Penn Iron Co. v. Boyce (1904) 71 N. J. L. 434, 58 Atl. 1094*, it was held that an affidavit on behalf of a corporation for an attachment was insufficient, under a statute which authorized an attachment to issue, "where the plaintiff, his agent, or attorney, shall make affidavit 'where the affidavit was made by the secretary of the corporation without authority being shown for making the affidavit, the statutory duty of the secretary of a corporation being 'to record all the votes of the corporation and directors, and perform such other duties as shall be assigned him,' plainly not extending to the making of

an affidavit upon which litigation is to be instituted.

In *Meton v. Isham Wagon Co.* (1838) 15 N. Y. Civ. Proc. Rep. 259, 4 N. Y. Supp. 215, under a statute providing that where a party is a domestic corporation pleadings must be verified by an officer thereof, it was held that a verification made by one who swore that he was the general manager of the defendant corporation, nothing being stated in the affidavit as to the duties which devolved upon, or were performed by, the affiant, the affidavit was insufficient.

Under a statute providing that if the defendant be a corporation the affidavit may be made by the principal officer, or any agent or employee having knowledge of the necessary facts, an affidavit made by one who averred that he was special agent of the corporation, having knowledge of the necessary facts, was insufficient because it did not aver that he was an officer of the corporation, or define the scope of his agency to embrace the authority or duty to make the affidavit, or give any reason why it was not made by an officer of the corporation. *Galashevsky v. Camden F. Ins. Asso.* (1916) 63 Pa. Super. Ct. 511.

In *JONES & Co. v. HANCOCK* (reported herewith) ante, it was held that an affidavit filed with a declaration in assumpsit was insufficient, where it was made by the president of the corporation, but without any averment therein of his agency or any other evidence on the subject, such affidavit not being in compliance with a statute which requires the affidavit of the plaintiff or his agent to be filed, as the fact that affiant was president did not, per se, import such agency.

In *Wiley v. C. Aultman & Co.* (1881) 53 Wis. 560, 11 N. W. 32, where the sufficiency of an affidavit for an attachment was questioned, under a statute providing that the affidavit shall be made by the plaintiff or someone in his behalf, it was contended that an affidavit made by a corporation which could not make an affidavit in person need not show upon its face that the person making it was either

the agent, attorney, or officer of the corporation, and that it is made upon behalf of the corporation, but that if either of those facts is disputed by the person against whom the writ was issued it may be proved by evidence, as any other fact. The court held, however, that the affidavit ought to show upon its face the facts showing the affiant's knowledge, or at least that the relation of the affiant to the plaintiff was such as would authorize the court to presume that he had the knowledge that would justify him in making the affidavit, and that the affidavit was defective in failing to show that the person making it occupied the relation of agent, attorney, or officer or that he had any knowledge of the amount of the indebtedness of the defendant, and also in failing to state that it was made on behalf of the corporation.

In *Mintz v. Tri-County Natural Gas Co.* (1918) 259 Pa. 477, 108 Atl. 285, it was held that an affidavit of defense in behalf of a corporation was insufficient, where it was made by the superintendent of the corporation, but it was not stated that he was an officer, or why the affidavit was not made by an officer of the corporation.

In *Yeier v. Hanover F. Ins. Co.* (1916) 63 Pa. Super. Ct. 258, it was held that an affidavit of defense, made by one who stated that he was the adjuster and authorized representative or agent of the defendant for the purpose of making the affidavit of defense, was insufficient, because it did not state that he was an officer of the corporation, or why the affidavit was not made by an officer.

And in *Yeier v. Camden F. Ins. Asso.* (1917) 66 Pa. Super. Ct. 571, an affidavit of defense was held insufficient, which described the affiant as "special agent of the above-named defendant, having knowledge of the necessary facts hereinafter set forth."

In *Taylor v. Sutherlin-Meade Tobacco Co.* (1908) 107 Va. 787, 14 L.R.A. (N.S.) 1135, 60 S. E. 132, it was held that the words "secretary and treasurer," appended to the signature of an affidavit for attachment on behalf of a corporation, were insufficient to

show that the affidavit was within the requirements of a statute that it must be executed by plaintiff, his agent, or attorney, as the court cannot take judicial knowledge of the fact that the secretary and treasurer of a corporation is, by virtue of his office, agent of the corporation, in contemplation of the Attachment Statute. And this view was not affected by the fact that a different statute provided that service of process may be made upon the president, treasurer, or other chief officer.

Nor was the Attachment Statute complied with by affidavits which were merely signed by individuals with the titles, "vice president," and "director," respectively appended to their names, as correct practice requires that the affidavit aver that the affiant is the plaintiff, his agent, or attorney. *Dameron v. Citizens' Nat. Bank* (1911) 112 Va. 544, 72 S. E. 153.

Where an account to be filed with a mechanic's lien is required to be verified by the oath of the "claimant or his agent," a verification by the president of a corporation, in which he is merely described as the president, is insufficient, as the president is not, by virtue of his office, the agent of the corporation to make such an affidavit; and unless the affidavit avers that he is in fact the agent of the corporation for that purpose the lien is not perfected. *Clement v. Adams Bros.-Paynes Co.* (1912) 113 Va. 547, 75 S. E. 294.

In *Freehold Loan & Sav. Co. v. Bank of Commerce* (1879) 44 U. C. Q. B. 284, an affidavit which was made for a corporation by one described as the manager was held to be insufficient, under a statute which directs that the affidavit shall be that of the mortgagee or of the agent of the mortgagee, if such agent is aware of all the circumstances connected therewith and is properly authorized in writing to take such mortgage, and that a copy of such authority shall be registered therewith, because no written authority to him was attached to or registered with the mortgage; the manager not standing in the same position as the president of a corporation, but

being regarded as a mere agent with certain specified executive functions. The court distinguishes *Bank of Toronto v. McDougall* (1865) 15 U. C. C. P. 475, on the ground that in that case the affidavit was made by the president of the corporation, his act being that of the corporation and not of a mere agent. The *Freehold Loan & Sav. Co.* Case was followed, on similar facts, in *Green & Sons Co. v. Castleman* (1894) 25 Ont. Rep. 113.

But in *Shawnee Commercial & Sav. Bank Co. v. Miller* (1902) 24 Ohio C. C. 198, it was held, under a statute providing that the affidavit for an attachment may be made by the plaintiff, his agent, or attorney, that an affidavit was sufficient when made on behalf of a corporation by one who, being sworn, said that he was a director and agent of the corporation, without stating or showing that he was authorized to make the affidavit.

And the authority of an agent to make an affidavit of defense for a corporation is sufficiently shown, by an allegation in the affidavit that he is the district agent of the company, that the defendant is a corporation of another state, in which state the executive officers reside, that he has full authority to make the affidavit, and that there is not sufficient time to have the affidavit executed by an officer of the company at the home office, and returned, that none of the executive officers reside in the state, and that he is thoroughly acquainted with the facts. *Giordano v. St. Paul F. & M. Ins. Co.* (1916) 63 Pa. Super. Ct. 233.

In *Citizens Natural Gas Co. v. Waynesburg Natural Gas Co.* (1904) 210 Pa. 137, 59 Atl. 822, it was held that an affidavit of defense on behalf of a corporation was sufficient, where it was averred that the persons making the affidavit were the only persons having any knowledge of the facts set forth in the pleading, that the corporation had no corporate officers, as it had been merged into another corporation, and that they were the owners of all the capital stock.

In *Shaft v. Phoenix Mut. L. Ins. Co.* (1876) 67 N. Y. 544, 23 Am. Rep. 138, where the person verifying a petition

on behalf of a corporation swore that he was the general manager and agent of the corporation, the court said that it went far to show that he had the authority to make the affidavit, and when in addition it appeared that the affidavit was produced and formally procured by the attorneys of record for the corporation, acting authoritatively, the sanction and authority of the corporation were impressed upon it.

Under a statutory provision whereby an affidavit for an attachment on behalf of a corporation must be verified by the chief officer or agent who may be found in the county, an affidavit of the vice president was *prima facie* sufficient, in the absence of an averment by the other party that he was not, at the time, the chief officer in the county. *Kentucky Jeans Clothing Co. v. Bohn* (1898) 104 Ky. 387, 47 S. W. 250.

In *Re Close* (1895) 106 Cal. 574, 39 Pac. 1067, an affidavit signed by one who swore in the affidavit that he was vice president of the corporation was sufficient, under a statute providing that when a corporation is a party, "the verification may be made by any officer thereof."

In *Re St. Lawrence & A. R. Co.* (1892) 133 N. Y. 270, 31 N. E. 218, it was held that verification of a petition for condemnation by the attorney for the petitioner, who stated in the verification that he "is its duly authorized attorney and agent, appointed by the plaintiff to verify petitions and pleadings in behalf of the plaintiff, for the institution of condemnation proceedings and otherwise, and is the agent of the plaintiff for the purpose of acquiring the real estate described in the foregoing petition," was sufficient to show that he was an officer of the corporation, under a Code provision that the petition on behalf of a corporation must be verified by "an officer thereof."

In *Yost v. Commercial Bank* (1892) 94 Cal. 494, 29 Pac. 858, it was held that, where it appeared in the body of an affidavit that the person who signed it was secretary of the corporation, it was unnecessary to add

further descriptive words to the word, "secretary," appended to his signature.

#### IV. *Authority shown aliunde.*

It is held in some cases that the authority of the agent to make the affidavit may sufficiently appear outside of the affidavit. *Melcher v. Scruggs* (1880) 72 Mo. 406; *Kearney v. Lindell R. Co.* (1884) 15 Mo. App. 576; *Bauer Grocery Co. v. Smith* (1895) 61 Mo. App. 665; *New Brunswick S. B. & Canal Transp. Co. v. Baldwin* (1834) 14 N. J. L. 440; *Yellow Pine Co. v. Atlantic Lumber Co.* (1897) 21 Misc. 164, 47 N. Y. Supp. 79, affirmed in (1897) 22 App. Div. 629, 50 N. Y. Supp. 1135; *Nason Mfg. Co. v. Craft Refrigerating Mach. Co.* (1894) 81 Hun, 578, 30 N. Y. Supp. 1031; *Erie Boot & Shoe Co. v. Eichenlaub* (1889) 127 Pa. 164, 17 Atl. 889.

Thus, in *Melcher v. Scruggs* (Mo.) *supra*, it was held that an affidavit for appeal by a corporation was sufficient, though it did not show it was made by an agent of the corporation, where it was made by a person whose deposition was read in the case in which he testified that he was the business manager of the corporation.

In *Bauer Grocery Co. v. Smith* (1895) 61 Mo. App. 665, it does not appear whether or not plaintiff was a corporation, but it was there held that, where the reasonable inference from the record was that the person who signed an affidavit for attachment was one of the attorneys who brought the suit, there was a sufficient showing of agency.

In *New Brunswick S. B. & Canal Transp. Co. v. Baldwin* (1834) 14 N. J. L. 440, it was held that an affidavit for an appeal on behalf of a corporation was sufficient if made by the president, and that it sufficiently appeared that he was president, although such fact was not sworn to but was recited by the justice at the beginning of the affidavit, and the appeal bond, which was one of the documents in the case, was signed by the same person, as president, with the seal of the corporation affixed, this being sufficient to convince the court that the affiant was presi-

dent, which was all that was necessary.

In *Yellow Pine Co. v. Atlantic Lumber Co.* (1897) 21 Misc. 164, 47 N. Y. Supp. 79, affirmed in (1897) 22 App. Div. 629, 50 N. Y. Supp. 1185, it was held that a defect in an affidavit for attachment, in which the person deposing was merely described as vice president of the corporation, without a direct averment that he was such officer, was remedied by a correct verification to the complaint.

In *Nason Mfg. Co. v. Craft Refrigerating Mach. Co.* (1894) 81 Hun, 578, 30 N. Y. Supp. 1031, it was held that a defect in an affidavit, in that it failed to fully show that the matters were true of the affiant's own knowledge, was remedied by a proper averment in the verification to the complaint which accompanied the affidavit, and was referred to in it.

In *Erle Boot & Shoe Co. v. Eichenlaub (Pa.)* supra, a defective averment as to the authority of the affiant making an affidavit on behalf of a corporation was held to have been cured, by a proper averment in a supplementary affidavit.

See also *Clark's Cove Fertilizer Co. v. Stever* (1899) 29 Misc. 571, 62 N. Y. Supp. 249, in which the court looks to a statement in the complaint as supplying an omission in the affidavit of verification and *White Sewing Mach. Co. v. Betting* (1893) 53 Mo. App. 260, in which the court said, obiter, that the showing of authority is sufficient, if it appears from the affidavit or any part of the record.

However, in *Cope v. Minnesota Type Foundry Co.* (1897) 20 Mont. 67, 49 Pac. 387, it was held that the body of a chattel mortgage could not be looked to for the facts to support the affidavit thereto, by showing that the corporation was domiciled in another state, so as to justify the making of the affidavit by an agent.

*V. Showing that affiant is the officer or agent he purports to be.*

Aside from the question of the authority of a particular officer to act for a corporation in making an affidavit, the sufficiency of the showing that the affiant is in fact the officer he

purports to be is raised in some of the cases, which hold that the official capacity of the affiant should be shown by his oath, and not merely by recital of the fact in the unsworn parts of the affidavit, or by a descriptive title attached to his signature. *Blake Crusher Co. v. Ward* (1874) Fed. Cas. No. 1,505; *Steinbach v. Leese* (1865) 27 Cal. 295; *Wilmington Sash & Door Co. v. Taylor* (1911) 2 Boyce (Del.) 528, 82 Atl. 86; *St. Joseph's Polish Catholic Beneficial Soc. v. St. Hedwig's Church* (1901) 3 Penn. (Del.) 229, 50 Atl. 535; *Blades Lumber Co. v. Kent & W. Lumber Co.* (1899) 2 Marv. (Del.) 302, 43 Atl. 174; *State v. Washoe County* (1869) 5 Nev. 317.

Thus, in *Blake Crusher Co. v. Ward* (Fed.) supra, the court, in holding that the verification by an agent of a corporation of a bill for a preliminary injunction was insufficient, said: "When the bill is signed by an agent or officer of a corporation complainant, or by an agent or solicitor of the complainant, it should appear that the person made oath that he was such agent, officer, or solicitor."

And in *Steinbach v. Leese* (1865) 27 Cal. 295, a description of deponent in an affidavit of publication, as "principal clerk in the office of the California Chronicle," before the words, "deposes and says," was held insufficient, in that he did not swear that that was his position.

And in *Remington Sewing Mach. Co. v. Cushen* (1880) 8 Mo. App. 529, and *Jeary v. American Exch. Bank* (1902) 2 Neb. (Unof.) 657, 89 N. W. 771, it is said to be the better practice to swear to the fact of agency.

However, in *Old Settlers Invest. Co. v. White* (1910) 158 Cal. 236, 110 Pac. 922; *Fremont Cultivator Co. v. Fulton* (1885) 103 Ind. 393, 3 N. E. 135; *White Sewing Mach. Co. v. Betting* (1893) 53 Mo. App. 260, and *New Brunswick S. B. & Canal Transp. Co. v. Baldwin* (1834) 14 N. J. L. 440, where the question was directly raised and decided, it was held to be sufficient if the affidavit merely recited that the affiant was an officer of the corporation, without such statement appearing in the sworn part of the affidavit.



And in other cases, in which the statement that the affiant was an officer of the corporation appeared in the affidavit merely as recital, and not under oath, the showing of authority was held to be sufficient, although the court did not discuss the question as to whether the statement that affiant was an officer should appear in the sworn part of the affidavit. *International Seal Co. v. Beyer* (1909) 33 App. D. C. 172; *Birmingham Realty Co. v. Barron* (1907) 150 Ala. 232, 43 So. 346; *Casavant & C. Co. v. Smith* (1906) 115 Me. 168, 98 Atl. 577; *Forbes Lithograph Mfg. Co. v. Winter* (1895) 107 Mich. 116, 64 N. W. 1053; *Moline, M. & S. Co. v. Curtis* (1893) 38 Neb. 520, 57 N. W. 161.

*VI. Necessity of showing sources of knowledge or information of affiant.*

*a. Officers.*

It is generally held that when an officer of a corporation makes an affidavit in its behalf, it is not necessary that he should state the sources of his knowledge, or information and belief. *Central of Georgia R. Co. v. Dickerson* (1914) 15 Ga. App. 293, 82 S. E. 942; *National Park Bank v. Whitmore* (1886) 40 Hun (N. Y.) 499; *American Exch. Nat. Bank v. Voisin* (1887) 44 Hun (N. Y.) 85; *Essex County Nat. Bank v. Johnson* (1891) 21 N. Y. Civ. Proc. Rep. 321, 16 N. Y. Supp. 71; *Manufacturers' Nat. Bank v. Hall* (1891) 60 Hun, 466, 21 N. Y. Civ. Proc. Rep. 131, 15 N. Y. Supp. 208, affirmed without opinion in (1892) 129 N. Y. 663, 30 N. E. 65; *Duryea, W. & Co. v. Rayner* (1895) 11 Misc. 294, 32 N. Y. Supp. 247; *Henry v. Brooklyn Heights R. Co.* (1904) 43 Misc. 589, 89 N. Y. Supp. 525, affirmed without opinion in (1904) 97 App. Div. 631, 89 N. Y. Supp. 1106; *Commercial Nat. Bank v. Hutchison* (1882) 87 N. C. 22; *Andrews v. Blue Ridge Packing Co.* (1903) 206 Pa. 370, 55 Atl. 1059.

Thus, in *Central of Georgia R. Co. v. Dickerson* (1914) 15 Ga. App. 293, 82 S. E. 942, it is held that, where a corporation is summoned as a garnishee, the answer must be made either by one of its servants or agents who has actual, personal knowledge of

the state of its dealings with the defendant, or by an officer of the corporation to whom such knowledge will be imputed by law.

So where, in an affidavit for an attachment, a positive statement is made by an officer of the corporation making the affidavit, that the corporation is entitled to recover the sum mentioned, it is not necessary for him to show when and from whom the information was derived. *National Park Bank v. Whitmore* (1886) 40 Hun (N. Y.) 499.

In *American Exch. Nat. Bank v. Voisin* (1887) 44 Hun (N. Y.) 85, which involved the sufficiency of an affidavit for an attachment made by the cashier of a bank, it was held that, being the fiscal officer of the corporation within the line of whose duty its loans and overdrafts would in the usual course of business be made, he may be presumed from the tenor of the affidavit to have had actual knowledge of the facts, which he stated in positive terms. The court distinguished *Marine Nat. Bank v. Ward* (N. Y.) *infra*, on the ground that in that case the affidavit was not made by any person either appearing to have, or who, it could be presumed, had, knowledge of the existence of the indebtedness or of the facts out of which it might have arisen.

In *Essex County Nat. Bank v. Johnson* (1891) 21 N. Y. Civ. Proc. Rep. 321, 16 N. Y. Supp. 71, it was held that the position of the president of a bank was such that he would be presumed to have knowledge in reference to claims which might exist against the corporation, which he represented at the time of the commencement of an attachment, so that his affidavit, stating that there are no counterclaims to the cause of action known either to the plaintiff or deponent, was sufficient, without a statement that the affidavit was made on affiant's personal knowledge.

The affidavit of the president of a corporation, wherein he swears positively to the sale and delivery of goods by the corporation to defendant, imports personal knowledge, and is sufficient, *prima facie*, to warrant an at-

tachment. *Manufacturers' Nat. Bank v. Hall* (1891) 60 Hun, 466, 21 N. Y. Civ. Proc. Rep. 131, 15 N. Y. Supp. 208, affirmed without opinion in (1892) 129 N. Y. 663, 30 N. E. 65.

In *Duryea, W. & Co. v. Rayner* (1895) 11 Misc. 294, 32 N. Y. Supp. 247, it was held that an objection that the verification of a complaint was defective, because made by the president of the plaintiff corporation without a statement of the sources of his knowledge regarding the matters in suit, was without force, where the verification was in the usual form required in the case of a verification made by a party.

In *Henry v. Brooklyn Heights R. Co.* (1904) 43 Misc. 589, 89 N. Y. Supp. 525, affirmed without opinion in (1904) 97 App. Div. 631, 89 N. Y. Supp. 1106, it was held that, under the Code provision, an officer of a domestic corporation is to be considered a party for the purposes of verification, and therefore it is not necessary that such officer should give the source of his information, any more than an individual party or member of a partnership.

In *Commercial Nat. Bank v. Hutchinson* (1882) 87 N. C. 22, it was held, under a Code provision requiring that agents and attorneys, when swearing to pleadings for their principals or clients, should disclose their knowledge and its sources, that an officer of a corporation who verified a complaint was not required to disclose his knowledge and its sources, the court saying: "It can act only through its officers and other agents, and it is only by a fiction, because of their actual knowledge, that it can be said to know anything. When such an officer swears that he has knowledge of the facts set forth in the complaint, and that they are truly stated therein, he has done all, it would seem, that can be done, and certainly all that need to be done."

And in *Andrews v. Blue Ridge Packing Co.* (1903) 206 Pa. 370, 55 Atl. 1059, where an affidavit of defense was made by the business manager of a corporation, it was held that, as such officer, he must be presumed to be

acquainted with the facts, and as he took the responsibility of swearing positively, as of his own knowledge, it was unnecessary for him to set forth his information and belief.

But where an officer makes the statements contained in his affidavit simply upon information and belief, he should show when and from whom his information is derived, and why the affidavits of the informant are not produced. *Marine Nat. Bank v. Ward* (1885) 35 Hun (N. Y.) 898.

And in *Geneva Non-Magnetic Watch Co. v. Payne* (1888) 5 N. Y. Supp. 68, it was held that an affidavit for an attachment, made on behalf of a corporation by the secretary, was defective, because it in no way appeared that the secretary of the company possessed any knowledge of the accounts between plaintiff and defendants, which enabled him to state that the amount claimed was due over and above all counterclaims known to the plaintiff, the court basing its decision upon earlier cases, in which an affidavit was made by an agent for an individual.

While in *Marshall Field Co. v. Oren Ruffcorn Co.* (1902) 117 Iowa, 159, 90 N. W. 618, where an answer on behalf of a corporation, denying its signature to certain notes, was verified by the secretary of the company, the court said that, while it is probable the officer should show knowledge of the facts in order to enable him to deny the signature, where the answer was said, in the abstract before the court, to have been duly verified by the secretary, without setting out the verification, it would be presumed to have been sufficient in that respect.

#### *b. Agents or attorneys.*

Where an affidavit is made on behalf of a corporation by one who is merely its agent or attorney, his personal knowledge of the matters sworn to will not be presumed, and therefore the means and sources of his information should be shown. *Columbia Screw Co. v. Warner Lock Co.* (1903) 138 Cal. 445, 71 Pac. 498; *Kokomo Straw-Board Co. v. Inman* (1889) 53 Hun, 39, 5 N. Y. Supp. 888; *Weehawken*

Wharf Co. v. Knickerbocker Coal Co. (1898) 24 Misc. 683, 53 N. Y. Supp. 982; Robinson v. Ecuador Development Co. (1900) 32 Misc. 106, 65 N. Y. Supp. 427; American Trading Co. v. Bedouin Steam Nav. Co. (1905) 48 Misc. 624, 96 N. Y. Supp. 271; Mintz v. Tri-County Natural Gas Co. (1918) 259 Pa. 477, 103 Atl. 285; WAKELY v. SUN INS. OFFICE (reported herewith) ante, 128; Galashevsky v. Camden F. Ins. Asso. (1916) 63 Pa. Super. Ct. 511; Quesenberry v. People's Bldg. L. & Sav. Asso. (1898) 44 W. Va. 512, 30 S. E. 73. See also Banks v. Gay Mfg. Co. (1891) 108 N. C. 282, 12 S. E. 741, and Erie Boot & Shoe Co. v. Eichenlaub (1889) 127 Pa. 164, 17 Atl. 889, *supra*.

Thus, where an affidavit on behalf of a corporation, to procure an order for publication of summons, was made by the attorney for the corporation, who, after reciting the fact of the debt, stated that "the matters and things hereinbefore alleged concerning the indebtedness of said defendant to plaintiff are stated upon information received from the said plaintiff," was insufficient, as it did not state that the facts were within the knowledge of affiant, but on the contrary showed that they were not within his knowledge, and even then there was no statement that he believed the matters and things to be true. Columbia Screw Co. v. Warner Lock Co. (1903) 138 Cal. 445, 71 Pac. 498.

In Weehawken Wharf Co. v. Knickerbocker Coal Co. (1898) 24 Misc. 683, 53 N. Y. Supp. 982, it was held that an affidavit for an attachment, made on behalf of a corporation by its attorney, was insufficient, because it did not show that affiant had any personal knowledge as to the matter of counterclaim, nor, if the allegations were deemed to be made upon information and belief, was the information or source thereof disclosed.

In Quesenberry v. People's Bldg. L. & Sav. Asso. (1898) 44 W. Va. 512, 30 S. E. 73, it was held that an affidavit of defense, which was made by the attorney for a corporation, was not sufficient, because the affidavit called for personal knowledge of the ac-

counts between the parties, and he did not show that he was personally cognizant of the facts; but, on the contrary, the affidavit clearly showed that it was not made upon his personal knowledge.

Under a Code provision that the verification of a pleading must be made by a party, except that where the party is a domestic corporation it must be made by an officer, and where it is a foreign corporation it may be made by the agent of, or the attorney for, the party, an officer of a foreign corporation is an agent thereof, in law, and within the meaning of the Code, and the secretary of such a corporation may verify a pleading; but to do so, he must comply with another section of the Code, which provides that an agent must set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge. Robinson v. Ecuador Development Co. (1900) 32 Misc. 106, 65 N. Y. Supp. 427.

In American Trading Co. v. Bedouin Steam Nav. Co. (1905) 48 Misc. 624, 96 N. Y. Supp. 271, it was held that in order to obtain a warrant of attachment on the ground that defendant is a foreign corporation, it is necessary for plaintiff to show, not merely to allege, that defendant is a foreign corporation, and that such fact may be said to be shown if it is positively alleged by some person who may be deemed to have personal knowledge upon the subject, so that his statement can be accepted as evidence of the fact; but that where the affidavit was made in behalf of the plaintiff corporation, by one who swore that he was in its employ as manager for its hemp department, such statement would lend no color to the statement that he had personal knowledge of the fact and place of incorporation of the defendant, and in the absence of submission of evidence which would prove to the court, at least *prima facie*, that defendant was a foreign corporation, the court would regard affiant's statement, that he had personal knowledge of that fact, as so improbable that it would conclude he made the state-

ment inadvertently, and without precise appreciation of its effect.

In *Mintz v. Tri-County Natural Gas Co.* (1918) 259 Pa. 477, 103 Atl. 285, it was held that an affidavit, made by the chief accountant of the corporation, in which he neither claimed to be an officer who would naturally possess a knowledge of the facts averred in the affidavit, nor attempted to state the sources of his information, was insufficient.

In *Galashevsky v. Camden F. Ins. Asso.* (1916) 63 Pa. Super. Ct. 511, the court held that an affidavit of defense, made by one who styled himself as special agent of the defendant corporation, was defective, because, among other things, while he averred material facts, he did not disclose his knowledge or opportunity for knowledge of the matters set forth.

But in *Globe Yarn Mills v. Bilbrough* (1892) 2 Misc. 100, 21 N. Y. Supp. 2, affirming (1892) 22 N. Y. Civ. Proc. 186, 19 N. Y. Supp. 176, it was held that where the person who made the affidavit for attachment on behalf of a corporation was the one who acted for the treasurer of the corporation, and conducted the negotiations and completed the transactions with the defendant, he stood, not in the position of an attorney, but of a principal, and his affidavit as to counterclaims and offsets, being positive and absolute, and not upon information and belief, and stating that he got the instrument sued upon from the corporation's treasurer to whose order they were payable, was sufficient, as against an objection that there was no showing by competent and adequate evidence that the plaintiff was entitled to the sum stated, over and above all counterclaims.

*VII. Necessity of showing that affiant was officer at the time the transaction arose.*

In New York, the question has been raised as to whether an officer who makes an affidavit on behalf of a corporation should show that he was such officer at the time the transaction arose.

In *E. & H. T. Anthony & Co. v. Fox* (1900) 53 App. Div. 200, 65 N. Y. Supp.

806, it was held that where a complaint was verified by one who swore that he was secretary and treasurer of the plaintiff corporation, that he had read the complaint and knew the contents thereof, and that the same was in all respects true, of his own knowledge, except as to the matters stated to be upon information and belief, and that all the material allegations of the complaint were true, of his personal knowledge, was sufficient, without pleading that he was secretary and treasurer of the corporation at the time the transaction arose.

In *Manufacturers' Nat. Bank v. Hall* (1891) 60 Hun, 466, 21 N. Y. Civ. Proc. 131, 15 N. Y. Supp. 208, affirmed without opinion in (1892) 129 N. Y. 663, 30 N. E. 65, while there was a difference of opinion among the judges as to whether an affidavit positively sworn to by the president of a corporation, reciting the sale and delivery of goods to a defendant, was prima facie sufficient to warrant the granting of an attachment, or whether it should be shown further that he was connected with the active business and with the books or accounts of the corporation in such a way as to justify an inference of knowledge of its pecuniary affairs, or whether he should state that he had any knowledge of the financial affairs of the corporation, the judges were agreed that an affidavit was insufficient, where it was made by the president of the corporation, without stating that he held such position at the time the goods were sold.

In *Barstow Stove Co. v. Darling* (1894) 81 Hun, 564, 30 N. Y. Supp. 1033, an affidavit made by the manager and agent of the plaintiff corporation was held sufficient, over an objection that it failed to show that he was such manager and agent at the time of the transaction involved, where the affidavit contained a positive assertion of personal knowledge on the part of the affiant.

And in *Nason Mfg. Co. v. Craft Refrigerating Mach. Co.* (1894) 81 Hun, 578, 30 N. Y. Supp. 1081, it was held that an affidavit was sufficient as against a similar objection, where the

affiant verified a complaint which accompanied the affidavit, and was referred to in it, and therein asserted that the matter was true of his own knowledge.

In *Central Nat. Bank v. Ft. Ann Woolen Co.* (1893) 57 N. Y. S. R. 316, 24 N. Y. Supp. 640, affirmed without opinion in (1894) 76 Hun, 610, 27 N. Y. Supp. 1114, which is affirmed in (1894) 143 N. Y. 624, 37 N. E. 827, the court holds that the affidavit of the president of plaintiff's corporation was sufficient, although it did not recite that he was president at the time the transaction arose, where, from a careful examination of the affidavit, the court is satisfied that it sufficiently indicated that the affiant was president at the time of the transaction, and is familiar with the financial affairs of the corporation, this fact distinguishing the case from *Manufacturers' Nat. Bank v. Hall* (1891) 60 Hun, 466, 15 N. Y. Supp. 208.

In *Yellow Pine Co. v. Atlantic Lumber Co.* (1897) 21 Misc. 164, 47 N. Y. Supp. 79, affirmed in (1897) 22 App. Div. 629, 50 N. Y. Supp. 1135, the court held that an objection to an affidavit for an attachment, made by the vice president of the plaintiff, on the ground that the affiant did not disclose his means of knowledge of the facts, and the nonexistence of counterclaims, and did not state that he was vice president of the company at the time of the occurrence of the event out of which the cause of action arose, was not valid, where the affiant stated that he derived his knowledge and information from the provisions of the written instrument upon which the action was brought, and from an examination of the books of the corporation, and from conversation with the employees, even if it might be inferred or presumed that he was not such officer at the time the transaction arose; for it appeared from the facts which he did state that he proceeded to obtain the information evidenced by the books and the reports of the employees, before he made the affidavit for attachment.

Where one, who was secretary of a corporation at the time the account in

question accrued, made affidavit that the amount stated was due to the corporation, over and above all counterclaims existing in favor of the defendant, and a similar statement was made by the present secretary, the affidavits were held to be sufficient, under a statute which provides that, in an attachment proceeding to recover damages for a breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him, the affidavit having been objected to on the ground that it did not appear that, at the present time, the former secretary was an officer of the corporation, and he could not know whether any counterclaim had arisen since he ceased to be an officer, and that the present secretary had no personal knowledge of the contract set forth in the complaint. *E. W. Bliss Co. v. Opera Glass Supply Co.* (1891) 60 Hun, 438, 21 N. Y. Civ. Proc. Rep. 136, 15 N. Y. Supp. 6.

*VIII. Necessity of showing why the affidavit was not made by the party, or an officer of the corporation.*

Where an affidavit on behalf of a corporation is made by an officer thereof, it is not necessary that the affidavit set forth the reasons why it is not made by the party, under statutes providing, generally, that when an affidavit is made by an agent or attorney, the affiant should state why it is not made by the party. *Scott Stamp & Coin Co. v. Leake* (1908) 9 Cal. App. 511, 99 Pac. 731; *Hornick v. Union P. R. Co.* (1911) 85 Kan. 568, 38 L.R.A. (N.S.) 826, 118 Pac. 60, Ann. Cas. 1913A, 208; *Robinson v. Ecuador Development Co.* (1900) 32 Misc. 106, 65 N. Y. Supp. 427; *Commercial Nat. Bank v. Hutchison* (1882) 87 N. C. 22.

Thus, in *Scott Stamp & Coin Co. v. Leake* (Cal.) supra, it was held that an affidavit made by the treasurer of a corporation need not set forth the reason why it was not made by the party, under a statute providing that, when an affidavit to a claim against an estate is made by a person other than the claimant, the reason therefor must be set forth, as the affidavit in such case is not made by a third person,

but by the corporation itself, through one of its authorized officers, which is the only way a corporation can act.

In *Hornick v. Union P. R. Co.* (1911) 85 Kan. 568, 38 L.R.A. (N.S.) 826, 118 Pac. 60, Ann. Cas. 1913A, 208, it is held, under a statute providing that "when a municipal or other corporation is a party, the verification may be made by an officer thereof, his agent, or attorney," that a pleading may be verified by an attorney for a corporation, without setting forth why the verification was not made by the corporation itself, another statutory provision that when the verification is made by an agent or attorney, he shall state the reason why it is not made by the party himself, being held to apply to natural persons only.

Where the secretary of a foreign corporation, as its agent, verifies a pleading, under a Code provision that where a foreign corporation is a party the verification may be made by the agent of, or attorney for, the party, he need not set forth the reason why it is not made by the party, for that would be senseless in the case of a corporation, which cannot take an oath. *Robinson v. Ecuador Development Co.* (1900) 32 Misc. 106, 65 N. Y. Supp. 427.

In *Commercial Nat. Bank v. Hutchison* (N. C.) supra, it was held that the president of a corporation who verified a complaint on its behalf was not required to state why the corporation had not made the verification, under a statute providing that agents and attorneys who verify a pleading should state the reasons why it was not made by the party, the court saying: "A corporation can take no oath, and can therefore make no verification; and it would be idle for its officer to explain why it has not done so."

But when, under such a statute, an affidavit is made on behalf of a corporation by an agent or attorney, as distinguished from an officer, the affidavit should show why it was not made by an officer of the corporation. *Columbia Screw Co. v. Warner Lock Co.* (1903) 138 Cal. 445, 71 Pac. 498; *Northern Lake Ice Co. v. Orr* (1898)

102 Ky. 586, 44 S. W. 216; *Cope v. Minnesota Type Foundry Co.* (1897) 20 Mont. 67, 49 Pac. 387; *Banks v. Gay Mfg. Co.* (1891) 108 N. C. 282, 12 S. E. 741; *WAKELY v. SUN INS. OFFICE* (reported herewith) ante, 128; *Erie Boot & Shoe Co. v. Eichenlaub* (1889) 127 Pa. 164, 17 Atl. 889; *Galashevsky v. Camden F. Ins. Asso.* (1916) 63 Pa. Super. Ct. 511; *Kelly v. Singer Mfg. Co.* (1895) 4 Pa. Dist. R. 440.

Under a statute providing that when a pleading is verified by the attorney or any other person, except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties, an affidavit on behalf of the corporation, made by its attorney, was defective in failing to state why it was not made by plaintiff, or some officer thereof. *Columbia Screw Co. v. Warner Lock Co.* (Cal.) supra.

Under a statute providing: "The affidavit of an agent or attorney must state the absence from the county of the party or parties for whom it is made, and the fact that the affiant is agent or attorney," an affidavit made for a corporation by an attorney must show that he was authorized to make it, by a statement that the officer or agent, who would be required to verify it if in the county, was absent therefrom. *Northern Lake Ice Co. v. Orr* (1898) 102 Ky. 586, 44 S. W. 216.

Under a statute providing that an affidavit required to be attached to a chattel mortgage may, in case any party is absent, be made by the agent or attorney of such party, the absence of a party must be clearly set forth in the affidavit itself before an agent can make the oath required; and where a corporation is a party to a chattel mortgage, the absence of the corporation must be set forth, it being insufficient if it merely appears that the corporation is organized under the laws of another state. *Cope v. Minnesota Type Foundry Co.* (1897) 20 Mont. 67, 49 Pac. 387.

In *Banks v. Gay Mfg. Co.* (1891) 108 N. C. 282, 12 S. E. 741, it was held that, under a Code provision that "when a corporation is a party the

verification may be made by any officer thereof," the verification could not be made by a mere agent, and the court said, further: "Besides, if the answer of a corporation could be verified by an agent, the affidavit is not sufficient, in that it does not set forth his knowledge or the grounds of his belief on the subject, and the reason why it was not made by the party. When the verification is by an officer of the company, this is not required, for the officer speaks for and is the mouthpiece of the corporation."

The decision in the reported case (*WAKELY v. SUN INS. OFFICE*, ante, 128) is followed in *Galashevsky v. Camden F. Ins. Asso.* (1916) 63 Pa. Super. Ct. 511, in which it was held that an affidavit of defense, made by one who styled himself as the special agent of the defendant, was insufficient because, among other defects, he did not give any reason why it was not made by an officer of the corporation.

In *Erie Boot & Shoe Co. v. Eichenlaub* (1889) 127 Pa. 164, 17 Atl. 889, it was held that an objection against an affidavit of defense by a corpora-

tion, that it was made by a mere stockholder, without setting out any special knowledge of the facts or any reason why it was not made by an officer or director, was well taken, but its effect was obviated by an averment in a supplementary affidavit that the affiant was the manager of the business of the company.

In *Clark's Cove Fertilizer Co. v. Stever* (1899) 29 Misc. 571, 62 N. Y. Supp. 249, under a Code provision for the verification of pleadings, which provided that where the party is a foreign corporation, the verification may be made by the agent of, or the attorney for, the party, it was held that a recital in a verification that "the reason why this verification is not made by the plaintiff is because he does not reside in the county of Columbia, and is a corporation," while inartificially drawn, was, in effect, a declaration that the plaintiff was a foreign corporation, and was sufficient, especially as the complaint contained the statement that the plaintiff was a foreign corporation.

R. L. S.

FRANK M. DOWLER, By Guardian ad Litem, Appt.,

v.

JOSEPH JOHNSON, Respt.

*New York Court of Appeals—December 10, 1918.*

(225 N. Y. 39, 121 N. E. 487.)

#### Officers — liability for acts of subordinates.

1. Public officers are not liable for the negligence of their subordinates unless they co-operate in the act complained of, or direct or encourage it.

[See note on this question beginning on page 149.]

#### Municipal corporation — speed ordinances — exemption of firemen.

2. Officers and men of a fire department are exempt from the ordinary limitations established by ordinance with respect to speed only so far as such exemption is expressly provided.

[See 19 R. C. L. 1117, 1118.]

#### Master and servant — liability of superintendent of fire department — respondeat superior.

3. The superintendent of a fire de-

partment is not liable, on the theory of respondeat superior, for the negligence of a fireman driving his automobile under his assignment of duty, upon recommendation of the fire chief.

[See 18 R. C. L. 786 et seq.]

#### — acquiescence in negligent act.

4. Ratification of a negligent act of a servant may be equivalent to command by the master, and co-operation of the master may be inferred from

acquiescence, where there was power to restrain.

[See 18 R. C. L. 801.]

**Negligence — driver of automobile — liability of passenger.**

5. A superintendent of a fire department who permits his car to be driven

at excessive speed by a fireman assigned to duty as his driver, after reasonable opportunity to protest, may be found to have approved of the unlawful speed so as to be liable for injuries thereby inflicted upon a traveler on the highway.

[See 20 R. C. L. 158 et seq.]

**APPEAL** by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming, by a divided court, a judgment of a Trial Term, Part III., for New York County, dismissing the complaint in an action brought to recover damages for personal injuries, alleged to have been caused by the negligent driving of defendant's automobile. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Herbert C. Smyth and James B. Mackie, with Mr. Julius M. Lowenstein, for appellant:

Defendant was, in law, liable under the rule of respondeat superior.

Maximilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; People ex rel. Croker v. Sturgis, 91 App. Div. 286, 86 N. Y. Supp. 687; People ex rel. Clifford v. Scannell, 74 App. Div. 406, 77 N. Y. Supp. 704, affirmed in 173 N. Y. 606, 66 N. E. 1114; People ex rel. Hart v. Fire Comrs. 82 N. Y. 358; People ex rel. Kent v. Fire Comrs. 100 N. Y. 82, 2 N. E. 613; Reed v. Metropolitan Street R. Co. 58 App. Div. 87, 68 N. Y. Supp. 539; Higgins v. Western U. Teleg. Co. 156 N. Y. 75, 66 Am. St. Rep. 527, 50 N. E. 500, 4 Am. Neg. Rep. 320.

Public officers are liable personally to third persons who are injured by their personal negligent conduct.

Murphy v. Emigration Comrs. 28 N. Y. 134; Story, Agency, § 320; Day v. Reynolds, 23 Hun, 131; Hartwell v. Riley, 47 App. Div. 154, 62 N. Y. Supp. 317; Bryant v. Randolph, 183 N. Y. 70, 30 N. E. 657; Bennett v. Whitney, 94 N. Y. 302; Litchfield v. Bond, 186 N. Y. 66, 78 N. E. 719; Robinson v. Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; McCarthy v. Syracuse, 46 N. Y. 194; Smith v. Rochester, 92 N. Y. 473, 44 Am. Rep. 393; People v. Canal Bd. 55 N. Y. 390; St. Peter v. Denison, 58 N. Y. 416, 17 Am. Rep. 258; Hover v. Barkhoff, 44 N. Y. 113; Adsit v. Brady, 4 Hill, 630, 40 Am. Dec. 305; Wright v. Shanahan, 149 N. Y. 495, 44 N. E. 74; Terhune v. New York, 88 N. Y. 247, 42 Am. Rep. 248.

Mr. Terence Farley, with Mr. William P. Burr, for respondent:

A public officer is not liable for the

acts or omissions of official subordinates, appointed by him, or working under his direction, if they are not in his private service, but may themselves be considered as officers of the municipality or state, unless such officer personally directed the performance of the act complained of, or personally cooperated in the negligence from which the injury resulted, if he exercised reasonable care in the selection of the subordinates.

22 R. C. L. 487; Murphy v. Emigration Comrs. 28 N. Y. 134; Cardot v. Barney, 63 N. Y. 281, 20 Am. Rep. 533; Donovan v. McAlpin, 85 N. Y. 185, 39 Am. Rep. 649; Walsh v. New York & B. Bridge, 96 N. Y. 427; Bieling v. Brooklyn, 120 N. Y. 98, 24 N. E. 389; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; Brissac v. Lawrence, 2 Blatchf. 121, Fed. Cas. No. 1,888; United States v. Brodhead, Fed. Cas. No. 14,654; Rubens v. Robertson, 38 Fed. 86; Mister v. Brown, 59 Fed. 912; Riggin v. Brown, 59 Fed. 1006; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 65 L.R.A. 397, 54 C. C. A. 608, 117 Fed. 439; Dunlop v. Munroe, 7 Cranch, 242, 3 L. ed. 329; The Eleanor, 2 Wheat. 345, 4 L. ed. 257; Robertson v. Sichel, 127 U. S. 507, 32 L. ed. 203, 8 Sup. Ct. Rep. 1286; Bigby v. United States, 188 U. S. 406, 47 L. ed. 523, 23 Sup. Ct. Rep. 468; District of Columbia v. Petty, 229 U. S. 593, 57 L. ed. 1343, 33 Sup. Ct. Rep. 881; Casey v. Scott, 82 Ark. 362, 118 Am. St. Rep. 80, 101 S. W. 1152, 12 Ann. Cas. 184; Merritt v. McFarland, 4 Cal. App. 390, 88 Pac. 369; Ely v. Parsons, 55 Conn. 83, 10 Atl. 499; Huey v. Richardson, 2 Harr. (Del.) 206; Barker v. Chicago, P. & St. L. R. Co. 243 Ill. 482, 26 L.R.A.



(N.S.) 1058, 134 Am. St. Rep. 382, 90 N. E. 1057; *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157; *Scott County v. Fluke*, 34 Iowa, 317; *Bowden v. Derby*, 97 Me. 536, 63 L.R.A. 223, 94 Am. St. Rep. 516, 55 Atl. 417, 14 Am. Neg. Rep. 305, 99 Me. 208, 58 Atl. 993, 17 Am. Neg. Rep. 239; *Anne Arundel County v. Duvall*, 54 Md. 350, 39 Am. Rep. 393; *McKenna v. Kimball*, 145 Mass. 555, 14 N. E. 789; *Foster v. Metts*, 55 Miss. 77, 30 Am. Rep. 504; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Ford v. Parker*, 4 Ohio St. 576; *Conwell v. Voorhees*, 18 Ohio, 523, 42 Am. Dec. 206; *Schroyer v. Lynch*, 8 Watts, 453; *Clough v. Worsham*, 32 Tex. Civ. App. 187, 74 S. W. 350; *Sawyer v. Corse*, 17 Gratt. 230, 94 Am. Dec. 445; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Tracy v. Cloyd*, 10 W. Va. 19; *Lane v. Cotton*, 1 Ld. Raym. 646, 1 Salk. 17, 91 Eng. Reprint, 1332, 17, 12 Mod. 472, 88 Eng. Reprint, 1458; *Whitfield v. Le Despencer*, Cowp. pt. 2, p. 754, 98 Eng. Reprint, 1344; *Nicholson v. Mouncey*, 15 East, 384, 104 Eng. Reprint, 890, 13 Revised Rep. 501; *Holroyd v. Breare* (1819) 2 Barn. & Ald. 473, 106 Eng. Reprint, 439, 21 Revised Rep. 361; *Hall v. Smith*, 2 Bing. 156, 130 Eng. Reprint, 265, 9 J. B. Moore, 226, 2 L. J. C. P. 113; *Tinsley v. Nassau*, 2 Car. & P. 582, Mont. & M'Arth. 52; *Humphreys v. Mears*, 1 Mann. & R. 187, 6 L. J. K. B. 89; *Duncan v. Findlater*, 6 Clark & F. 894, 7 Eng. Reprint, 934, Maclean & R. 911, 9 Eng. Reprint, 339; *Bradley v. Carr*, 3 Mann. & G. 221, 133 Eng. Reprint, 1123, 3 Scott, N. R. 523; *Holliday v. St. Leonard*, 11 C. B. N. S. 192, 142 Eng. Reprint, 769, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. Rep. 694; *Mersey Docks & Harbor Bd. v. Penhallow*, 7 Hurlst. & N. 329, 158 Eng. Reprint, 500; *Raleigh v. Goschen* [1898] 1 Ch. 73, 67 L. J. Ch. N. S. 59, 77 L. T. N. S. 429, 46 Week. Rep. 90; 23 Am. & Eng. Enc. Law, 2d ed. 382; *McQuillin, Mun. Corp.* §§ 548, 2424, 2621; 2 *Shearm. & Redf. Neg.* 6th ed. §§ 319, 321; *Story, Agency*, § 319; *Story, Bailm.* 9th ed. §§ 461, 462; *Whart. Neg.* 2d ed. §§ 288-297.

**Cardozo, J.**, delivered the opinion of the court:

The defendant in 1913 was the fire commissioner of the city of New York. On March 20 of that year he left fire headquarters in one of the department's automobiles, to

inspect some new fire houses in Brooklyn. The automobile was driven by a fireman assigned to that duty by the commissioner, upon the recommendation of the fire chief. While so driven, it collided with another automobile, and the plaintiff was injured. The complaint charges that at the time of the collision the automobile carrying the defendant was driven under his orders, and that it was driven negligently and at excessive speed. The officers and men of the fire department are not exempt from the ordinary limitations in respect of speed, unless they are "proceeding to a fire" (Charter of New York [Laws 1901, chap. 466], § 748), or "responding for emergency work in case of fire, accident, public disaster, or impending danger" (Code of Ordinances of N. Y. chap. 24, art. 2, § 17, subd. 6).

*Municipal corporation—speed ordinances—exemption of firemen.*

The plaintiff's counsel, in opening the case, stated that the defendant's car was going at the rate of 50 miles an hour. He was about to offer evidence of the negligence charged, when he was checked by a ruling of the court that, no matter what the action or negligence of the chauffeur might be, the defendant was not liable. The record is very informal, and the plaintiff's offer of proof is not as definite as we might wish; but we think there is no doubt in respect of the ruling which the court intended to make. The court's view was that, because the relation between the defendant and the driver was not that of master and servant, no speed, however excessive, could tend to fasten upon the defendant a liability for the wrong. The complaint was dismissed, and on appeal to the appellate division the judgment was affirmed by a divided court.

We think there was error in refusing to give the plaintiff an opportunity to unfold his case. We see no repugnancy between the complaint and the opening. None certainly can be found in the mere

relation that subsisted between the defendant and the driver. We do not doubt the rule invoked by counsel for the defendant, and sustained by superabundant citations, that public officers are not liable for the negligence of their subordinates unless they co-operate in the act complained of, or direct or encourage it. *Lane v. Cotton*, 1 *Ld. Raym.* 646, 91 *Eng. Reprint*, 1332; *Bailey v. New York*, 3 *Hill*, 531, 538, 38 *Am. Dec.* 669; *Cardot v. Barney*, 63 *N. Y.* 281, 20 *Am. Rep.* 533; *Robertson v. Sichel*, 127 *U. S.* 507, 32 *L. ed.* 203, 8 *Sup. Ct. Rep.* 1286; *Ely v. Parsons*, 55 *Conn.* 83, 10 *Atl.* 499; *Story, Agency*, § 319. That is, at least, the general rule, and if it is subject to any other qualifications they are not now material.

But here the very question is whether the defendant did direct or encourage the negligent act, or personally co-operate in it. Undoubtedly he is not liable for the negligence of the driver on the theory of respondeat superior. The relation between them was not that of master and servant. If he had been out of the car at the time of the accident, no one would suggest that he must answer for the driver's wrong. Even his presence in the car would be insufficient of itself, and in all circumstances, to charge him with liability. There must have been command or co-operation. *De Carvalho v. Brunner*, 223 *N. Y.* 284, 287, 119 *N. E.* 563; 1 *Cooley, Torts*, 3d ed. pp. 213, 244. But ratifica-

tion may be equivalent to command, and co-operation may be inferred from acquiescence, where there is power to restrain. The charge is that this car was going at the rate of 50 miles an hour. The charge is that it was going under the defendant's orders. If the defendant permitted such a speed to be maintained, and this after reasonable opportunity for protest, a jury might find his silence the equivalent of approval. Many circumstances would have to be weighed. Chief among them, perhaps, would be the duration of the offense and the opportunity to restrain it. There was the right to restrain here, for the driver was subject to the defendant's orders (*Charter N. Y. City*, § 728); but the right is of no importance, unless the omission to exercise it was unreasonable. We cannot say whether the inference of such an omission is legitimate till the whole story has been told. We must see the whole picture. For the purpose of this appeal, it is enough that the defendant is not exonerated as of course, because the man at the helm was not his servant. One cannot let oneself be driven at breakneck speed through city streets, and charge the whole guilt upon the driver, who has done one's tacit bidding.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

*Hiscock, Ch. J., and Collin, Cuddeback, Pound, Crane, and Andrews, JJ., concur.*

### ANNOTATION.

#### Responsibility of public officer for negligence of subordinate in operation of vehicle.

A careful search discloses no decision except the reported case (*DOWLER v. JOHNSON*, ante, 146), wherein is discussed the responsibility of a public officer for the negligence of a

subordinate in the operation of a vehicle.

It will be observed that the defendant in that case was sued individually, and not in his official capacity, and

Officers—liability for acts of subordinates.

—acquiescence in negligent act.

Negligence—driver of automobile—liability of passenger.

Master and servant—liability of superior—tendent of fire department—respondent superior.

the court holds that if he was personally negligent in allowing his chauffeur, who was under his control, to drive the car at a high rate of speed through the streets of a city he would be liable for that negligence; and that his acquiescence in such a rate of speed, as constituting negligence, was a question which should have been submitted to the jury.

It may be laid down, however, as a general rule, that, in the language of the reported case (*DOWLER v. JOHNSON*), "public officers are not liable for the negligence of their subordinates unless they co-operate in the act complained of, or direct or encourage it," since the relation of master and servant does not exist, and the rule of respondeat superior does not apply. Judge Story in his work on Agency, 9th ed. § 319, states the rule as follows: "It is plain that the government itself is not responsible for the misfeasance, or wrongs, or negligences, or omis-

sions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests; and, indeed, laches are never imputable to the government. Our next inquiry, therefore, is whether the heads of its departments, or other superior functionaries, are in a different predicament. And here the doctrine is now firmly established (subject to the qualifications hereinafter stated) that public officers and agents are not responsible for the misfeasances or positive wrongs, or for the nonfeasances or negligences, or omissions of duty of the subagents, or servants, or other persons properly employed by and under them, in the discharge of their official duties."

H. B.

GEORGE HEGGIE

v.

ELIZABETH HAYES.

*Tennessee Supreme Court — February 3, 1919.*

(— Tenn. —, 208 S. W. 605.)

#### **Limitation of actions — seduction — when runs.**

1. The Statute of Limitations does not begin to run against a cause of action for seduction, in case of a series of illicit acts under promise of marriage, until the last illegal act under the promise.

[See note on this question beginning on page 155.]

#### **Pleading — time of contract.**

2. The time of the contract must be pleaded in an action to recover damages for breach of marriage contract.

[See 4 R. C. L. 162, 163.]

#### **— necessity of videlicet.**

3. The time of a marriage contract need not be laid under a videlicet in order to prove another time in an action for breach of promise to marry.

[See 4 R. C. L. 163.]

#### **— variance.**

4. There is no fatal variance in proving a time of contract different from that laid in the complaint, in an action to recover damages for breach of marriage contract.

[See 21 R. C. L. 608 et seq.]

#### **— curing misstatement by verdict.**

5. A misstatement of time in a declaration is cured by the verdict.

[See 21 R. C. L. 614 et seq.]

#### **— variance in time of seduction.**

6. Proof of a seduction at a time different from that laid in the declaration is an immaterial variance.

[See 21 R. C. L. 611.]

#### **— act before marriage promise — effect.**

7. A promise of marriage existing concurrently with a series of acts of sexual intercourse between the parties prevents defendant in an action for seduction from referring the Statute of Limitations to his first unlawful

act, although it occurred before the promise of marriage was made.

[See 17 R. C. L. 808.]

**Appeal — finding on motion for new trial.**

8. A finding by the trial judge on conflicting evidence offered upon motion for new trial is binding on appeal.

[See 2 R. C. L. 202.]

**New trial — right to shift ground.**

9. Defendant cannot, after conceding the good character of plaintiff in an action for seduction and trying the case on that theory, shift his ground upon motion for new trial and attempt to prove her unchastity.

**CROSS PETITIONS for Writs of Certiorari to review a judgment of the Court of Civil Appeals, affirming in part a judgment of the Circuit Court for Hamilton County in plaintiff's favor in an action brought to recover damages for breach of promise to marry and seduction; defendant objecting to the judgment allowing recovery against him, and plaintiff objecting to so much of the judgment as directed a remittitur of part of the verdict. Affirmed.**

The facts are stated in the opinion of the court.

**Mr. W. B. Miller, for defendant:**

While it is unnecessary to allege a promise of marriage on a day certain, yet when specifically alleged the proof must conform, at least within reasonable certainty.

3 Enc. Pl. & Pr. 686; *Paris v. Strong*, 51 Ind. 343; *Spellings v. Parks*, 104 Tenn. 353, 58 S. W. 126; *Memphis Street R. Co. v. Berry*, 118 Tenn. 581, 102 S. W. 85; *May v. Illinois C. R. Co.* 129 Tenn. 521, L.R.A.1915A, 781, 167 S. W. 477, Ann. Cas. 1916A, 218.

If the plaintiff declares with specification, and the proof does not reasonably conform, there is a fatal variance.

3 Enc. Pl. & Pr. 686; *Paris v. Strong*, 51 Ind. 343; *Vance v. Jones*, Peck (Tenn.) 329; 4 Cyc. 356; *East Tennessee Coal Co. v. Daniel*, 100 Tenn. 72, 42 S. W. 1062; *American Lead Pencil Co. v. Nashville, C. & St. L. R. Co.* 124 Tenn. 57, 32 L.R.A.(N.S.) 323, 134 S. W. 613; *Cincinnati, N. O. & T. P. R. Co. v. Roddy*, 182 Tenn. 568, L.R.A. 1916E, 974, 179 S. W. 143.

A material variance between pleading and proof is available, on an assignment that there is no evidence to sustain the verdict.

*Paris v. Strong*, 51 Ind. 343; 3 Enc. Pl. & Pr. 686; *East Tennessee Coal Co. v. Daniel*, 100 Tenn. 65, 42 S. W. 1062; *Memphis Street R. Co. v. Berry*, 118 Tenn. 581, 102 S. W. 85.

In a suit for pure seduction without continuando or other exception pleaded to avoid bar by limitation, the Statute of Limitations "begins to run from the act of seduction."

*Davis v. Young*, 90 Tenn. 304, 16 S. W. 473; *Wood, Limitations*, 3d ed. § 186; *Wilhoit v. Hancock*, 5 Bush, 570; *Davis v. Boyett*, 120 Ga. 649, 66 L.R.A.

258, 102 Am. St. Rep. 118, 48 S. E. 185, 1 Ann. Cas. 386; *Dunlap v. Linton*, 144 Pa. 339, 22 Atl. 819; *Bradshaw v. Jones*, 103 Tenn. 338, 76 Am. St. Rep. 655, 52 S. W. 1072.

If plaintiff would avoid bar of the statute, he must negative its application, either in his original pleading or by a replication when it is set up.

13 Enc. Pl. & Pr. 220, 221, 233, 238; *Gross v. Disney*, 95 Tenn. 595, 82 S. W. 632; *Whaley v. Catlett*, 103 Tenn. 347, 53 S. W. 131; *Jenkins v. De War*, 112 Tenn. 684, 82 S. W. 470; *Davis v. Young*, 90 Tenn. 303, 16 S. W. 473.

Proof of rape will not support an action by a woman for her seduction.

*De Haven v. Helvie*, 126 Ind. 83, 25 N. E. 874; *Bradshaw v. Jones*, 103 Tenn. 334, 76 Am. St. Rep. 655, 52 S. W. 1072; *Koenig v. Nott*, 8 Abb. Pr. 384; 33 Cyc. 1521; *Cole v. Hubble*, 26 Ont. Rep. 279; *Brown v. Dalby*, 7 U. C. Q. B. 160; *Vincent v. Sprague*, 3 U. C. Q. B. 283.

It is reversible error for court or jury to disregard testimony which is not contradicted, impeached, or discredited.

*Gleason v. Prudential F. Ins. Co.* 127 Tenn. 30, 151 S. W. 1030; *Frank v. Wright*, 140 Tenn. 535, 205 S. W. 434.

Defendant was entitled to a new trial, for newly discovered material evidence.

*Potter v. Coward*, Meigs, 22; *Demonbreun v. Walker*, 4 Baxt. 199.

Messrs. Thompson, Williams, & Thompson and J. H. Daly for plaintiff.

**Green, J., delivered the opinion of the court:**

This suit was brought for breach of promise and seduction. There

was a judgment below in favor of plaintiff for \$5,000 for the breach of promise of marriage, and \$11,000 for seduction. The court of civil appeals affirmed so much of the judgment as related to the breach of promise, but directed a remittitur of \$8,000 on that portion of the judgment relating to seduction, and entered a total judgment of \$8,000.

Both sides have filed petitions for certiorari, the plaintiff in error insisting that there should have been no recovery against him at all, and the defendant in error complaining of the remittitur suggested by the court of civil appeals, which she accepted under protest. The case has been argued in this court.

We have discussed the facts of this case orally, and do not find it necessary to embody them in this opinion, and shall only consider herein the questions of law raised by the parties.

It is conceded by the plaintiff in error that there was some evidence below of a marriage contract between the parties, and of a breach of that contract, and that there was some evidence below of seduction, but it is maintained that these matters were not proved as alleged in the declaration, or, in other words, that there was no evidence to sustain the verdict of the jury as the case was laid.

The first count of the declaration alleges a contract entered into between the parties whereby they mutually agreed to marry each other, and that this contract was entered into October 1, 1915. The plaintiff below averred that she had continued unmarried and ready and willing to marry the defendant below, and on divers days had requested that the compact be fulfilled, but that the defendant below refused, and still refuses, to carry out said contract.

Proof introduced tended to show that the contract of marriage was entered into between the parties in September, 1912, instead of in October, 1915, as averred in the dec-

laration, and it is urged that there is a fatal variance between the pleading and the proof.

This argument is not well taken. The alleged variance relates only to the matter of time.

While it is true that, in personal actions, the rule of the common law is that the time must

Pleading—time  
of contract.

be stated, nevertheless, as said by Mr. Stephen: "The time is considered in general as forming no material part of the issue, so that one time may be alleged and another proved. The pleader therefore assigns any time that he pleases to a given fact." Stephen, Pl. \*292.

Mr. Stephen goes on to say that the time should be alleged under a videlicet unless the pleader wishes to be held to prove such time strictly.

—necessity of  
videlicet.

We suppose, however, that in modern pleading a videlicet is not strictly required. This is only a matter of form.

The modern rule is thus stated by Mr. Shipman: "In all matters, generally speaking, save those previously mentioned, time is considered as forming no material part of the issue, so that the pleader, when required to allege a time for any traversable fact, is not compelled to allege it truly, and may state a fact as occurring at one time and prove it as happening at a different time. The reason of the rule is that as a day is not an independent fact or substantive matter, but a mere circumstance or accompaniment of such matter, it obviously cannot in its own nature be material, and can only be made so, if at all, by the nature of the fact or matter in connection with which it is pleaded. Therefore, if a tort is stated to have been committed, or a parol contract made, on a particular day, the plaintiff is in neither case confined in his proof to the day as laid, but may support the allegation by proof of a different day, except that the day as laid in the declaration and as proved must both be prior to the commence-

ment of the suit." Shipman, Common-Law Pl. p. 391.

That a parol contract may be laid as of one day and proved as of another has been the rule since *Shandois v. Simson*, Cro. Eliz. pt. 2, p. 880, 78 Eng. Reprint, 1104.

"Time is usually immaterial and need not be proved as laid, but when material as a matter of description, strict proof is necessary." 31 Cyc. 706.

It is not suggested that there was more than one contract of marriage between the parties to this case, so that the time or date of this contract is not material as a matter of description nor for any other reason.

So, under the authorities above cited, we must hold that the variance between the time averred and the time proved is immaterial.

To the same effect is *May v. Illinois C. R. Co.* 129 Tenn. 521, L.R.A. 1915A, 78, 167 S. W. 477, Ann. Cas. 1916A, 213.

In addition, this court has held that an omission to lay any time in a declaration is cured by the verdict (*Nashville L. Ins. Co. v. Mathews*, 8 Lea, 499); and the general rule also is that a misstatement of time in a declaration is cured by the verdict (31 Cyc. 776).

The quotation made by plaintiff in error from 3 Enc. Pl. & Pr. 186, to the effect that the time and place of the promised marriage need not necessarily be averred, but, when pleaded, the proof must conform to the time and place alleged, relates to the time and place of the execution of the contract, and not to the time and place when the contract of marriage was entered into. Other authorities cited in the brief of plaintiff in error do not require comment. Most of them are not in point, and, if any do conflict with the above views, we are not willing to follow them.

The next proposition advanced in behalf of plaintiff in error is quite similar. Seduction was al-

leged to have occurred on October 1, 1915, whereas the proof tended to show that it occurred in September, 1912, and it is urged that there is no evidence to prove the case laid in the declaration. We think the authorities just cited are conclusive of this contention.

The plaintiff in error then relies on the Statute of Limitations, which was pleaded by him. The proof shows that the seduction occurred in September, 1912, and this suit was not brought until September 21, 1916, and it is insisted that the suit is accordingly barred by the twelve-month Statute of Limitations.

As heretofore stated, the first count of the declaration alleges a contract of marriage entered into October 1, 1915, and continuing up until January 1, 1916. The second count of the declaration alleges a seduction on the date mentioned, and that on divers other days and times between that date and the commencement of this suit the improper relation was renewed.

The proof of the plaintiff below tended to show a contract of marriage entered into the day after the first illicit act, and improper relations existing between her and the defendant below from this time up until within twelve months of suit. During all the time this unlawful relation continued, the parties were under a contract of marriage.

Such being the case, under the rule laid down in *Davis v. Young*, 90 Tenn. 303, 16 S. W. 473, the Statute of Limitations would not begin to run against such a plaintiff until the last illegal act had under the promise of marriage.

The declaration in this case is inartificial, but it was not challenged and, considered as a whole, it does aver a seduction and a continuous unlawful relation under a contemporaneous contract of marriage. It does not make any differ-

Limitation of actions—seduction—when runs.

—curing misstatement by verdict.

—variance in time of seduction.

ence that the contract of marriage was not entered into prior to the first unlawful act. If it existed thereafter concurrently with the il-

~~licit intercourse,~~  
~~—act before marriage~~ such contract of  
~~promise—effect.~~ marriage was suffi-

cient to prevent the defendant below from referring the Statute of Limitations to his first unlawful act.

Davis v. Young, *supra*, has been expressly approved in *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341, where the trial judge charged that "seduction was a continuous act, and, if by several and continuous acts, promises, and artifices the defendant kept up his illicit intercourse" until within the statutory limit of suit, the action would not be barred. This was commended as in accord with *Davis v. Young*, *supra*, and that authority extended to suits brought by the female as well as by her father.

It is furthermore insisted that the plaintiff's testimony shows a case of rape, and not a case of seduction. It is true that some of her language may bear this construction, but when her entire testimony is considered, together with the circumstances she details, it refutes any idea of rape.

It is finally urged that it was reversible error for the trial judge to disregard the testimony offered in behalf of the defendant below on a motion for a new trial, and to refuse a new trial in view of the evidence offered on this hearing.

The principal affidavits were from two men, who made oath that they themselves had enjoyed the sexual favor of plaintiff below, prior to the time of her charge of seduction against the defendant below. Some other affidavits were offered tending to reflect on the woman.

The learned trial judge ruled that such statements of men, voluntarily made with reference to a woman's character, were not entitled to credit, and such men were not entitled to be believed.

However this may be, there was evidence offered on the motion for

a new trial tending to contradict many of the statements contained in the aforesaid affidavits, and the finding of the trial judge on these controverted facts is, of course, binding upon us.

*Appeal—finding on motion for new trial.*

Beyond all this, however, and as a conclusive answer to the contention of plaintiff in error in this respect, it appears that upon the trial of this cause his attorney conceded and stated to the jury that defendant in error was a woman of good reputation up to the time of the institution of this suit. The case was tried on that theory, and no proof was offered on the trial tending to besmirch her character.

Such being the state of the case, it was not permissible for the defendant below to undertake to shift his ground, attack

*New trial—right to shift ground.*

the character of the woman, and assume a position entirely inconsistent with that taken upon the trial of the case, and in this way obtain a new trial.

The defendant below was free to rely on the bad character, if any he could show, of plaintiff below, and to prove that on the trial in bar of this suit. He was not willing, however, to take the chance of damages being aggravated by his failure to establish such contention, and he will not be allowed to experiment with the court and obtain a new trial and all the benefit of such matter without assuming the risk incident to its introduction at the hearing.

This is a proper case for the application of the doctrine of judicial estoppel which we have just discussed in *Stearns Coal & Lumber Co. v. Jamestown R. Co.* 141 Tenn. —, 208 S. W. 334: "A new trial will not be granted . . . to enable a defendant to avail himself of a defense which was within the issues, but not presented at the trial; or to make a defense inconsistent with the one presented, or contradictory to admissions made,

or points tacitly conceded." 29 Cyc. 852.

This disposes of all the assignments of the plaintiff in error.

Referring to the petition of the defendant in error with reference to the action of the court of civil appeals in suggesting a remittitur, we do not find it necessary to go into any elaborate consideration thereof.

Our revisory jurisdiction of the judgments of the court of civil appeals does not permit that we should try a case anew. We are not to go over the entire record and decide it as a new controversy. It is our duty

to ascertain if there are any errors in the action of the court of civil appeals and to correct such errors.

Upon consideration of all the circumstances of this case, we are not prepared to say that the court of civil appeals erred in suggesting a remittitur of part of this verdict.

We are inclined to the opinion that the result reached by the court of civil appeals is substantially just, and are not disposed to interfere therewith.

The judgment of the Court of Civil Appeals is accordingly affirmed.

## ANNOTATION.

### When Statute of Limitations commences to run against civil action for seduction.

- I. In general, 155.
- II. From last act of intercourse, 156.
- III. From loss of services, 158.
- IV. From attainment of majority, 160.

#### I. In general.

It seems to be the general rule that the right of action for seduction, other than an action for loss of services resulting therefrom, accrues at the time the seduction takes place, in other words, at the time of the first act of intercourse between the parties, and that the Statute of Limitations commences to run from that time. *Davis v. Boyett* (1904) 120 Ga. 649, 66 L.R.A. 258, 102 Am. St. Rep. 118, 48 S. E. 185, 1 Ann. Cas. 386; *Wilhoit v. Hancock* (1869) 5 Bush (Ky.) 567; *Dunlap v. Linton* (1891) 144 Pa. 335, 22 Atl. 819.

Thus it was said in *Davis v. Boyett* (Ga.) supra: "It is well established that where the suit is for the seduction, and not for loss of services and expenses incurred in consequence of the seduction, the Statute of Limitations begins to run from the act of seduction." The decisions of the Indiana and Tennessee courts were adversely commented on in that case, the court saying: "We do not think we would feel disposed to follow the courts of Tennessee and Indiana in holding that the act of seduction may be continued after the female seduced

has lost her virtue. We apprehend that it would be very difficult to apply such a principle to a criminal case in which the Statute of Limitations was pleaded to an indictment for seduction, so as to avoid the bar of the statute, upon the ground that the act of seduction had been continuously performed for a considerable length of time after the first act of sexual intercourse between the accused and his alleged victim."

In *Wilhoit v. Hancock* (1869) 5 Bush (Ky.) 567, an action by a father for loss of services, it was said obiter that in an action for the seduction itself the statute runs "from the act of seduction." In *Dunlap v. Linton* (1891) 144 Pa. 335, 22 Atl. 819, a similar action, there was dictum to the same effect.

The difficulty of arriving at any general rule was referred to in *Rockwell v. Day* (1918) 101 Wash. 580, 172 Pac. 754, wherein it appeared that the seduction occurred on or about April 9, 1909; that the meretricious relations then begun continued until on or about December 20, 1913, and that the action was brought on December 5, 1916. The defendant contended that the statute began to run on April 9, 1909, and that the action would be barred on April 9, 1912. The plaintiff, however, insisted that the better rule is that the



statute does not begin to run, where improper relations are begun under a promise of marriage, so long as the relations are continued, or until the last act of intercourse; that all the acts of intercourse are one transaction, and that a continued promise of marriage is implied from time to time. It further appeared that the illicit relations were abandoned, and later resumed, but under no new promise of marriage. The court, in commenting on the application of the rule, said: "The general rule, as most text-writers agree, is that the statute begins to run from the time of the seduction, where the action is maintained by the woman on her own behalf. . . . But whether we call the one or the other the general or the better rule, it must be admitted that there is a very marked conflict of authority. We could base our opinion on either rule and sustain it by sound reason, for if the one rule protects the artless and confiding female, the other protects the man from the artful pretensions of women who may pretend to have been seduced in order to obtain a pecuniary compensation, or to hide a shame revealed by a subsequent pregnancy, and who may fortify their pretensions by a showing of continued illicit cohabitation as a circumstance to sustain the charge of seduction under a promise of marriage, or by arts, persuasions, or promises. . . . The facts in many of the cases seem to have called for a rule that would allow or defeat the action, according to the justice of the particular case. . . . We, therefore, at this time, hesitate to lay down any rule that would be a guide for all cases, nor is it necessary as we view the facts in this case." It was held, under the facts, that a right of action for seduction under a promise of marriage accrues at the time the promise is made, and, granting that it would continue until the illicit relations are broken off and for the statutory period of three years thereafter, the application of the rule demands that the relations be continuous, and if abandoned and returned to under no new promise, the statute begins to run from the time of the voluntary resumption of the

illicit relations. The court said: "An action for tort accrues at the time the wrong is committed. This rule is universal unless modified by statute, as, for instance, the statute allowing an action to be brought within three years after a fraud is discovered, or where the courts have arbitrarily worked an exception, as has been done by some of them in seduction cases. As a premise we can agree that plaintiff had a right of action on the 9th day of April, 1909, if at all, and we may grant that it would continue until the relations were broken off, and for three years thereafter. But the application of this rule demands that such intercourse be continuous, and referable, directly or by fair implication, to the original promise, and that the loyalty of the woman to her expectation of marriage be unbroken. A woman who abandons her shame and makes a resolution not to return to it, but who does return voluntarily and under no new promise, can hardly be said to be in a position to invoke the unwritten equity which has been voiced in the opinions relied on. Plaintiff left defendant in May, June, or July, 1912, and went to Portland. She says: 'I returned in September. When I returned I went out to my own house at Ross park. Mr. Day called to see me there. He came out there and stayed all night. I hadn't any intention when I came home of living any more with him.' Plaintiff did not exact a renewal of the promise to marry, if any was ever made, and there is no showing of shame or anxiety over her situation for more than four years thereafter, when this suit was brought. Under these facts, it would do violence to every rule of law to say that plaintiff was not bound to bring her action within three years after September, 1912, for at that time, and after a voluntary surrender of her obligation to Hera, she made of herself a willing sacrifice upon the altar of Aphrodite."

#### *II. From last act of intercourse.*

The courts of at least two jurisdictions, while recognizing the rule that the Statute of Limitations begins to run from the time of the seduction,

hold that seduction may be a continuous act so long as the illicit intercourse is kept up; and that, in such a case, the statute commences to run from the last, and not from the first, act of intercourse. *Haymond v. Saucer* (1882) 84 Ind. 3; *McCoy v. Trucks* (1889) 121 Ind. 292, 23 N. E. 93; *Gunder v. Tibbits* (1899) 153 Ind. 591, 55 N. E. 762; *Davis v. Young* (1891) 90 Tenn. 303, 16 S. W. 473; *Ferguson v. Moore* (1897) 98 Tenn. 342, 39 S. W. 341. See the reported case (*HEGGIE v. HAYES*, ante, 150.)

This rule is now firmly established in Tennessee, although the supreme court of that state first held to the contrary. In *Franklin v. McCorkle* (1886) 16 Lea (Tenn.) 609, 57 Am. Rep. 244, 1 S. W. 250, it was held that the cause of action accrued, and the statute began to run, when the first act of sexual intercourse occurred. In *Davis v. Young* (1891) 90 Tenn. 303, 16 S. W. 473, this decision was overruled (one judge dissenting), and it was held that the Statute of Limitations does not begin to run against the plaintiff until the last illegal act is committed. The court said: "The averments that the acts constituting the wrong complained of were committed under a promise of marriage, and that such promise was continued and renewed from time to time to a period less than twelve months before the bringing of the suit, save the bar. Trusting to the good faith of the defendant, and relying upon his promises, the daughter was overreached. The promise continued to influence her, and each yielding must be accredited to the promise. It is not presumable that the promise was meant by the one, and understood by the other, to be carried out and performed immediately after the accomplishment of his first act of defilement, but at some future time. As it was alone upon the faith of the promise that the purpose of the defendant could be achieved, it follows as of course that each successive submission by the daughter was in consideration of that promise, and so understood by the defendant. Therefore, the seduction is made up of the several violations by

the defendant, and he will not be permitted to confine her remedy to the first illicit act as the only one of seduction, and, when sued, relieve himself by showing that first act to have occurred more than twelve months before suit brought. Such limitation places it in the power of the unprincipled to effect the ruin of the confiding female, and then, by flattering the confidence and hopes of his victim, persevere in her debauchery at his will, and at last ignore all his cruel deceptions of the meantime, and insult the disgrace he has brought about, by pleading the twelve months' statute as applicable to the first act in his series of villainy. It should never be that one, by confessing his infamy, may, by multiplying the evidences of that infamy, acquit himself from accountability for its consequences. To hold that, under promise of marriage deceitfully made for the purpose of seduction, the first illicit act completes the offense, and the statute then begins to run, is to offer a reward to the unscrupulous to do many wrongs that he may escape the bitter consequences of his deceit, and to have him know that the longer he practises his frauds and imposes upon a trusting woman, the more sure he is of going unwhipped of justice."

The case cited was approved and followed in *Ferguson v. Moore* (1897) 98 Tenn. 342, 39 S. W. 341, wherein it was held that the statute does not begin to run against the right to maintain an action for seduction under a promise of marriage, so long as the defendant, by acts, promises, and artifices, keeps up the illicit intercourse, as seduction is, in such cases, a continuous act.

In *Thompson v. Clendening* (1858) 1 Head (Tenn.) 287, it appeared that the defendant, in an action brought against him for the seduction of the plaintiff's daughter, claimed that the trial court erred in admitting any evidence of sexual intercourse beyond the period of three years from the commencement of the action. The appellate court said: "We do not think so. The whole of the defendant's intercourse with the person seduced, and

all the circumstances of the case, are to be regarded as an entire transaction, and are admissible as evidence to the jury, as well in view of the question whether the defendant is the father of the child, as to show the extent of the injury in aggravation of the damages."

The reported case (*HEGGIE v. HAYES*, ante, 150) follows the rule as established in Tennessee, and holds that the statute does not commence to run against the plaintiff in a civil action for seduction until the last act of illicit intercourse under the promise of marriage has occurred; and that it is immaterial that the contract of marriage was not entered into prior to the first unlawful act.

In *Haymond v. Saucer* (1882) 84 Ind. 3, the complaint charged that the seduction occurred in July, 1878, and the testimony of the plaintiff showed that the first sexual intercourse occurred in the preceding December, and from this it was insisted that the intercourse had in July following did not constitute a seduction. The court said: "This was a question for the jury. If the subsequent intercourse was the result of the first, and of the promise then made, and of the persuasions then employed, it was a seduction; and, where such successive acts are shown to have occurred under an engagement to marry, the jury may properly regard them as constituting elements of one wrong, consummated in the last act of intercourse."

To the same effect is *McCoy v. Trucks* (1889) 121 Ind. 292, 23 N. E. 93, wherein the court said: "There is no force in the objection that the complaint on its face shows that the action is barred by the Statute of Limitations. . . . In a case of this character the plaintiff is not confined to evidence of one act, nor to evidence covering one particular day or week, but she has a right to give evidence covering many acts and extending over a considerable period of time. She has a right to show the continued conduct of the defendant towards her."

In *Gunder v. Tibbits* (1899) 153 Ind. 591, 55 N. E. 762, it appeared that the first act of sexual intercourse oc-

curred March 1, 1892; that the illicit relations continued until about February 1, 1895; and that the action for seduction was brought on March 23, 1896. The court held that the successive acts of sexual intercourse constituted a continuous wrong, "consummated in the last act," and that the action brought within two years of the final act of intercourse was not barred by the two years' Statute of Limitations. The court further said: "If an act is done under any sort of constraint, plain justice forbids the defendant to count the time of his control as a part of the period of limitations. In holding that this civil action is not barred, it may be needless to say that what the rule would be in prosecutions under the Penal Code is not hereby decided."

### III. *From loss of services.*

While it seems to be established that in a civil action for seduction, and not for loss of services resulting therefrom, the Statute of Limitations commences to run from the act of seduction, the courts have differed as to when the statute begins to run in a case where the loss of services is made the gravamen of the action. As the right of action is founded on the relation of master and servant, and not on that of parent and child, the prevailing rule, however, seems to be that the statute does not commence to run until the loss of service has actually occurred.

In *Clem v. Holmes* (1880) 33 Gratt. (Va.) 722, 36 Am. Rep. 795, it was held that where the only change in the common law made by statute is to dispense with the allegations and proof of loss of services, the plaintiff may still bring his action at common law, making the loss of services the gravamen of the complaint, and when this is done, the limitation is from the loss of service and not from the act of seduction. In that case it appeared that an action was brought by a father for loss of services occasioned by the seduction of his infant daughter, who was in temporary service at the defendant's home when the seduction occurred; that she returned to her

father's house, where she was confined and delivered of a child, and that the expense and loss were incurred in nursing and care during that period. The court said that the statute began to run from that period.

In *Riddle v. McGinnis* (1883) 22 W. Va. 253, it was held that, although the statute dispensed with the necessity of alleging and proving loss of services, no other change was thereby made in the common-law rule; and that it was still necessary to allege that the relation of master and servant existed between the plaintiff and his daughter, and that the father's right of action for loss of services resulting from his daughter's seduction did not accrue until he was deprived of her services. It appeared here that the daughter lived away from her father's home at the time of the seduction, and returned home, and was there confined and nursed. The court held that the statute began to run from that time.

In *Wilhoit v. Hancock* (1869) 5 Bush (Ky.) 567, it appeared that an action was brought by a father for loss of service resulting from the seduction and impregnation of his daughter, and that the suit was brought within one year from the birth of her child, but not within one year from the act of seduction as provided by statute. The court said: "The first serious question presented is as to the right of the father to recover for the seduction as incident to the loss of service, especially when the suit is not brought within a year from the act of seduction. . . . As no suit at common law could be brought by the parent until loss of service accrued, and the extent of this loss and the incidental expense could not be ascertained until the daughter's recovery, it is most apparent that the perfect right of action did not accrue until the daughter's recovery; for this might be longer or shorter, involving greater or lesser loss of time and expense; hence, the Statute of Limitations could not begin to run on the first attack of sickness, nor even the exact day of the child's birth, but from the mother's recovery. As the action was brought within one year from the child's birth, there can

be no doubt of the legal right to maintain it."

But in *McKay v. Burley* (1859) 18 U. C. Q. B. 251, it was held that, in an action by a brother for the seduction of his sister, where the principles of the common law were not interfered with by the statute applicable to a suit by a parent, and the evidence must establish the relation of master and servant, the Statute of Limitations began to run from the time of the seduction, and not from the birth of the child. Robinson, Ch. J., said: "We take it to be undeniable that the Statute of Limitations began to run from the time of the seduction; for the plaintiff could then have brought his action, and need not have waited until the child was born."

In *L'Esperance v. Duchene* (1850) 7 U. C. Q. B. 146, it was held that a father was not obliged to wait for the birth of a child before bringing an action for loss of services resulting from his daughter's seduction. See to the same effect *McIntosh v. Tyhurst* (1865) 24 U. C. Q. B. 443.

In *Briggs v. Evans* (1844) 27 N. C. (5 Ired. L.) 16, it was held that where pregnancy results from the seduction it is not necessary for the father to wait until the birth of the child, to entitle him to maintain an action for the loss of her services.

In *Dunlap v. Linton* (1891) 144 Pa. 335, 22 Atl. 819, it was held, in an action by a father for the seduction of his daughter, that the cause of action was the seduction, and not the resulting expense of childbirth and support, and that the action was barred when the statutory period of six years had elapsed since her seduction. See also *Logan v. Murray* (1820) 6 Serg. & R. (Pa.) 175, 9 Am. Dec. 422.

A somewhat unusual situation was presented in *Davis v. Boyett* (1904) 120 Ga. 649, 66 L.R.A. 258, 102 Am. St. Rep. 118, 48 S. E. 185, 1 Ann. Cas. 386, wherein it appeared that a father brought an action for the seduction of his minor daughter, alleging that, although the act of seduction was committed on May 2, 1899, it did not come to his knowledge, and he was not injured and damaged thereby, until

April 15, 1900. It further appeared that more than two years (the statutory period) had elapsed since the act of seduction had been accomplished before the action was instituted, and if the right of action accrued when the seduction took place, the bar of the statute had attached, unless the plaintiff was debarred or deterred from bringing his action by fraud on the part of the defendant. The plaintiff did not allege that he was debarred from bringing his action within the statutory period, but rested his case, so far as the Statute of Limitations was concerned, squarely on the proposition that the statute would not begin to run until he had knowledge of the seduction; and that no cause of action arose in his favor until that time. It was held that the father's cause of action arose when the act of seduction was complete, and not when he discovered that his daughter had been seduced, and was therefore barred by the two years' Statute of Limitations. The court said: "As our Civil Code provides that seduction is the gist of the action, gives a right of action whether it is followed by pregnancy or not, provides that the mother may bring the action if the father refuses to sue, and that no loss of service need be alleged or proved, it would seem that in any suit for damages consequent upon the seduction of a daughter the cause of action would accrue when the act of seduction was accomplished. But whether the old common-law action still survives in this state, or is superseded by the action for which our statute provides, it is apparent, we think, in the present case, that the action was for the seduction, and not for loss of service consequent thereon. This being true, it is clear that the cause of action was barred by the Statute of Limitations, as more than two years had elapsed after the right of action accrued before the suit was instituted. . . . Besides, the plaintiff, according to his own showing, had more than thirteen months in which to bring his suit, after he discovered that his daughter had been seduced by the defendant, which is longer than the time limited in some

of our sister states in which to bring a suit of this character."

#### IV. From attainment of majority.

The Statute of Limitations does not commence to run against the right of a minor female to bring an action for her seduction until she arrives at the age of twenty-one years. *Morrell v. Morgan* (1884) 65 Cal. 575, 4 Pac. 580; *Watson v. Watson* (1884) 53 Mich. 168, 51 Am. Rep. 111, 18 N. W. 605; *Gates v. Shaffer* (1913) 72 Wash. 451, 130 Pac. 896.

The rule was laid down in *Gates v. Shaffer* (Wash.) *supra*, wherein it was held that the statute begins to run against a female's right to bring an action for her own seduction from the time she reaches the age of twenty-one years, notwithstanding § 8743 of Rem. & Bal. Code provides that "females shall be deemed and taken to be of full age at the age of eighteen years and upwards."

So, in *Watson v. Watson* (1884) 53 Mich. 168, 51 Am. Rep. 111, 18 N. W. 605, it appeared that an action for seduction was brought against the defendant by his adopted daughter, and that the action was not begun until more than the statutory limitation of six years had elapsed from the time of the alleged seduction. The court said: "The suit, under the statute, might have been brought by some relative for the plaintiff (How. Stat. § 7779); but if it had been it would have been barred. But the person whose family relation to the plaintiff was such as naturally to indicate him as the one to bring suit for such an injury on the plaintiff's behalf was the defendant himself, and gross injustice might result from any rule of law which should make his own inability or unwillingness to take the steps called for by the relation operate to extinguish a right of action for his own misconduct. . . . And when she is an infant at the time of the seduction, and nobody acts for her during her minority, there is the same equity in this case as in any other, that she be allowed a reasonable time after coming of age to decide upon seeking redress."

H. B.

ROYAL C. MOORE, Appt.,  
v.  
FREDERICK C. PENNEY et al., Respts.

Minnesota Supreme Court — January 24, 1919.

(— Minn. —, 170 N. W. 599.)

**Mortgage — preservation of junior lien.**

1. To preserve any rights under a junior lien, the junior creditor must redeem thereunder from the senior creditor who made the redemption next prior in time, even if he himself be such senior creditor.

[See note on this question beginning on page 163.]

**— redemption by creditor.**

2. The right of a creditor to redeem from a foreclosure sale is purely statutory, and the redemption can be effected only by complying with the requirements of the statute.

[See 19 R. C. L. 638, 643.]

**— redemption from oneself.**

3. If such senior creditor also holds the junior lien next in line, he may re-

deem thereunder from himself as senior creditor by filing the necessary proofs of such redemption without going through the useless form of paying money to himself; but such redemption operates to satisfy and discharge the debt secured by the senior lien, for the reason that under the statute no redemption can be made without paying such debt.

[See 19 R. C. L. 642 et seq.]

Headnotes by TAYLOR, C.

APPEAL by plaintiff from an order of the District Court for Hennepin County granting new trial of an action brought to recover the amount alleged to be due on certain promissory notes. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. L. E. Stetler, for appellant:

The redemption was merely a means of acquiring title to the land in question, and the debt secured by the Moore mortgage could not be canceled by the mere formality of redemption; but the value of the land could be, as far as such value would go.

Ritchie v. Ege, 58 Minn. 291, 59 N. W. 1020; Sprague v. Martin, 29 Minn. 233, 13 N. W. 34.

Messrs. Albee Smith and Frank M. Nye for respondents.

Taylor, C., filed the following opinion:

Defendant owned a tract of land in Hennepin county on which he had given a first mortgage of \$1,600, a second mortgage of \$2,650, and a third mortgage of \$700. He had also given promissory notes to evidence the debts secured by the several mortgages. The first mortgage

was foreclosed. Plaintiff held the second and third mortgages. As a creditor holding the second mortgage, plaintiff redeemed from the foreclosure sale. As a creditor holding the third mortgage, he redeemed from the redemption made by himself under the second mortgage.

Thereafter he brought this suit on the notes secured by the mortgages. At the trial he took the position that the value of the land over and above the amount paid to redeem it from the sale under the first mortgage should be applied on the notes, and that he was entitled to recover the amount of the notes less the sum so to be applied thereon. The value of the land, over and above the amount paid to redeem it from the sale, was not sufficient to pay the second mortgage debt in full. Defendant took the position that plaintiff, by

his redemption under the third mortgage, had paid and satisfied the debt secured by the second mortgage and was only entitled to recover whatever balance might be found due on the debt secured by the third mortgage. The court submitted the case to the jury in accordance with plaintiff's theory, but subsequently granted a new trial on the ground that this was error, and that the redemption under the third mortgage had satisfied and discharged the debt secured by the second mortgage.

The sole question presented is whether the debt secured by the second mortgage was satisfied and discharged by the redemption under the third mortgage.

The right of a creditor to redeem from a foreclosure sale is purely statutory; and what he must do to effect a redemption,

**Mortgage—  
redemption by  
creditor.**

and the rights acquired thereby, are fixed and determined by the statute. *Tinkcom v. Lewis*, 21 Minn. 132; *Cuilerier v. Brunelle*, 37 Minn. 71, 33 N. W. 123; *State ex rel. Anderson v. Kerr*, 51 Minn. 417, 53 N. W. 719; *Bartleson v. Munson*, 105 Minn. 348, 117 N. W. 512. The statute, after providing that the senior creditor having a lien may redeem by paying the amount for which the land was sold with interest, within five days after the expiration of the year allowed to the owner for redemption, further provides: "Each subsequent creditor having a lien in succession, according to priority of liens, within five days after the time allowed the prior lien holder, respectively, may redeem by paying the amount aforesaid and all liens prior to his own held by the person from whom redemption is made." Gen. Stat. 1913, § 8147.

This statute has been before the court many times, and its purpose and effect are fairly well settled. The purpose is to make the land satisfy the liens on it to as great an extent as possible, and to this end the statute provides for a sort of auction sale among creditors, by giving in

turn to the holder of each successive lien the right to pay off prior claims, and by so doing to apply on his own claim any excess in value of the property over and above the amount so paid. Each lien stands by itself, and is cut out unless redemption be made under it. If a creditor who holds two liens redeems under his senior lien and wishes to preserve and enforce his junior lien, he must also redeem under the junior lien, even if it be next in line. The fact that he has redeemed under the senior lien, and also holds the next junior lien, gives him no other or different rights under the junior lien than would be possessed by any other creditor holding such junior lien. *Pamperin v. Scanlan*, 28 Minn. 345, 9 N. W. 868; *Parke v. Hush*, 29 Minn. 434, 13 N. W. 668; *Buchanan v. Reid*, 43 Minn. 172, 45 N. W. 11; *Ritchie v. Ege*, 58 Minn. 291, 59 N. W. 1020; *Bagley v. McCarthy Bros. Co.* 95 Minn. 286, 104 N. W. 7.

These decisions establish the doctrine that, in order to preserve any rights under a junior lien, the junior creditor must redeem under it —preservation  
of junior lien.

from the senior creditor who made the redemption next prior in time, even if he himself be such senior creditor. He can do so or not at his option. If he elects to redeem, the statute prescribes what he must do to effect the redemption. Within a year from the date of the sale, he must give notice of his intention to redeem; and at the time of redeeming, he must produce proof of the lien under which he makes the redemption, and of the amount due thereon, and must pay the amount of the claims from which he redeems. These statutory requirements are mandatory. But if the right to redeem under the junior lien is held by the same creditor who redeemed under the senior lien, the redemption payment under the junior lien would be made by such creditor to himself as holder of the rights acquired by the redemption under the senior lien. Of such

a situation the court has said: "We are of the opinion that it is not necessary for such creditor redeeming from himself to go through the idle ceremony of paying money to himself," and that placing on file the documents which show that he is entitled to redeem under the junior lien, and has elected to do so, is sufficient to effect the redemption. *Ritchie v. Ege*, 58 Minn. 291, 59 N. W. 1020. But in no case has it been held that such a redemption operates to tack the debt secured by the junior lien to the debt secured by

the senior lien. While the creditor need not go through a useless form, yet if he elects to and does redeem under his junior lien, such redemption operates to satisfy and discharge the debt secured by the senior lien, for the reason that the statute requires the payment of such <sup>—redemption from oneself.</sup> debt in order to effect the redemption. It follows that plaintiff, by redeeming under his third mortgage, satisfied and discharged the debt secured by his second mortgage.

Order affirmed.

### ANNOTATION.

#### Redemption by one having two or more liens on same property.

It is provided by statute in some jurisdictions that where property is judicially sold a lien holder may redeem, and any lien holder seeking to avail himself of this right must put himself in the line of redemption by redeeming from all liens prior to his own. See 19 R. C. L. title, Mortgages, pp. 638 et seq.

The reported case (*MOORE v. PENNEY*, ante, 161) holds that where a person holding two liens on property attempts, by virtue of the junior of his liens, to redeem from a foreclosure sale under a lien prior to both, he must redeem not only from the lien which has been foreclosed, but from his own senior lien. The court holds, following and quoting *Ritchie v. Ege* (1894) 58 Minn. 291, 59 N. W. 1020, that in such a case the lien holder need not go through the form of paying to himself the amount of his senior lien; but that in all other respects he must comply with the statute with respect to redemption therefrom. In *Ritchie v. Ege* (Minn.) supra, the failure of the lien holder to file a notice of redemption from his own prior lien was held to be fatal. The court cites, as establishing the rule thus laid down, three earlier cases in the same jurisdiction. *Pamperin v. Scanlan* (1881) 28 Minn. 345, 9 N. W. 868; *Parke v. Hush* (1882) 29 Minn. 434, 13 N. W. 668, and *Buchanan v. Reid* (1890) 43 Minn.

172, 45 N. W. 11. These cases are not within the scope of the present discussion, holding that the purchase by a lien holder of the certificate of sale under a prior lien is not of itself a redemption by him from that sale.

In *Bagley v. McCarthy Bros. Co.* (1905) 95 Minn. 286, 104 N. W. 7, it appeared that there were two mortgages on a piece of property, and that two judgments in favor of the same person, and docketed at the same time, were also liens thereon, subject to the mortgage. The property was sold under execution issued on one of the judgments, and bid in by the judgment creditor. Thereafter one of the mortgages was foreclosed and the property bid in by the mortgagor. The judgment creditor sought to redeem as such. The case was determined on the ground that his status as a judgment creditor was lost by merger on his purchase at the execution sale. But, assuming for the purpose of argument that the judgment under which the sale was had was prior to the other judgment, the court said by way of dictum: "If the lien of the larger judgment was prior to the lien of the smaller judgment, as the mortgagee contends, the judgment creditor was not entitled to redeem. He failed to 'join the ranks of the redemptioners.' To enable the holder of a second mortgage to preserve his



lien under such security, he must have filed his notice of intention to redeem from his foreclosure sale under the first mortgage. *Pamperin v. Scanlan* (1881) 28 Minn. 345, 9 N. W. 868; *Parke v. Hush* (1882) 29 Minn. 434, 13 N. W. 668; *Buchanan v. Reid* (1890) 43 Minn. 172, 45 N. W. 11; *Sprandel v. Houde* (1893) 54 Minn. 308, 56 N.

W. 34; *Ritchie v. Ege* (1894) 58 Minn. 291, 59 N. W. 1020. Correspondingly, to preserve the lien of the later judgment after the expiration of the period of redemption from the execution sale under the prior judgment, the judgment creditor must have filed notice of his intention to redeem from that sale." W. A. S.

MAREN G. TORGERSON et al., Respts.,

v.

BRITHA HAUGE et al., Appts.

*North Dakota Supreme Court—July 21, 1916.*

(34 N. D. 646, 159 N. W. 6.)

**Will — contract to make.**

1. The parents of Andrew Torgerson entered into an oral understanding with him in 1899, whereby he should reside with and care for them during their lives, and should receive their property. They executed and delivered to him their joint written will, constituting him sole devisee of all their property. Andrew purchased an adjoining quarter, sold his own homestead in another county, and for fifteen years lived with his parents.

Andrew died in June, 1914; the father in October following, at the age of seventy-four years. The mother was seventy-four years old at the time of the trial. Andrew leaves a widow and four minor children. Surviving him are these defendants, his four brothers and sisters, and his mother. Six weeks after the death of Andrew, his brothers and sisters procured the aged and enfeebled father and mother to make another will, revoking the former one, and dividing all their property between themselves and the heirs of Andrew, one fifth to each. The parents then leave and reside with the defendants. Andrew's widow protests and offers to continue to support and care for them.

The children of Andrew herein seek to enjoin the probate of the second will and maintain the status quo during the lifetime of the mother; and to define the estate of the minors in the real property, and declare their interest therein a trust upon the fee thereof to be subsequently perfected by the probate of the first will or proceedings in equity; and to annul any pretended interest of the defendants under the purported second will and to make suitable provisions meanwhile for the maintenance and care of the mother out of said homestead premises, title to which was acquired by final proof years ago, but subsequent to the delivery of the first will. Held: A will executed under such an agreement is both contractual and testamentary. Its contractual features cannot be later revoked by the testators without the consent of the beneficiaries, where executed, and where equity should enforce its provisions.

[See note on this question beginning on page 172.]

Headnotes by Goss, J.

— performance.

2. Under the facts this contract under which said will was executed and delivered was substantially performed, and to such an extent that equity will grant relief equivalent to specific performance and fasten a trust upon the property for the benefit of the heirs of the beneficiary under the contract, as against any transferee or devisee.

— effect of execution.

3. A will so executed will be recognized in equity as a part performance of the contract, and becomes itself, in its contractual features, an enforceable contract.

— homestead.

4. That the title to the government homestead had not been vested by final proof in the testator when said will and contract was made was immaterial, where subsequently made.

[See 13 R. C. L. 646.]

— effect of statute.

5. Such a contract for transfer and

will executed thereunder is not a violation of, but instead is provided for and recognized by, U. S. Rev. Stat. § 2291.

[See 13 R. C. L. 638.]

— acquiescence — effect.

6. The mother of Andrew having joined in the will and acquiesced for years in the benefits under the contract; no homestead rights of hers are violated by equitable provision for her maintenance from said property or its proceeds. Equity has power, under such circumstances, to award possession as against her to the heirs of Andrew, where ample provision for her maintenance is made, and she refuses to remain with them upon said premises.

— waiver.

7. No rights of the widow of Andrew are involved, she having formally waived any right in said premises to and in favor of her children, these plaintiffs.

**APPEAL** by defendants from a judgment of the District Court for Wells County in favor of plaintiffs in an action brought to enforce a contract made by defendants with plaintiffs' intestate, to devise certain property to him in consideration of support, and to enjoin the probate of a second will. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. B. F. Whipple and J. J. Youngblood, for appellants:

An unproved homestead is not devisable by will or contract.

Sutphen v. Sutphen, 30 Kan. 510, 2 Pac. 100; Wood v. Noel, 116 La. 516, 40 So. 857; Ford v. Ford, 24 S. D. 644, 124 N. W. 1108; Cascade Public Service Corp. v. Railsback, 59 Wash. 376, 109 Pac. 1062; Tait v. New York L. Ins. Co. 1 Flipp. 288, Fed. Cas. No. 13,726; Siegel, C. & Co. v. Eaton & P. & Co. 165 Ill. 550, 46 N. E. 449.

Plaintiffs are seeking specific performance of an alleged oral contract. Assuming the contract to have been established, they cannot maintain their action for specific performance because the contract has not been completed.

Cox v. Cox, 26 Gratt. 305; Snyder v. Snyder, 77 Wis. 95, 45 N. W. 818; Bourget v. Monroe, 58 Mich. 563, 25 N. W. 514; Benedict v. Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120;

Prusiecke v. Ramzinski, — Tex. Civ. App. —, 81 S. W. 771.

Messrs. John O. Hanchett and J. L. Johnston, for respondents:

Mortgages executed by homestead entryman prior to proof and patent, where the entryman thereafter perfects his title and obtains patent to the land, are valid.

Adam v. McClintock, 21 N. D. 483, 131 N. W. 394; Martin v. Yager, 30 N. D. 577, 153 N. W. 286; Holtan v. Beck, 20 N. D. 5, 125 N. W. 1048; Sutphen v. Sutphen, 30 Kan. 510, 2 Pac. 100.

An oral agreement to convey real estate by deed or will, when reasonably definite and certain in its terms, and when same has been acted upon and the grantee has gone into possession and erected valuable improvements on the land, with the knowledge of the vendor, is valid and enforceable in law; and an action for specific performance can be maintained in a court of equity for its enforcement.

Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Teske v. Dittberner, 70 Neb.

544, 113 Am. St. Rep. 802, 98 N. W. 57; *Svanburg v. Fosseen*, 75 Minn. 350, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4.

When a man has given up his inherent right to establish and build a home for himself and family elsewhere, and has, pursuant to such a contract, occupied and for many years improved a tract of land belonging to another, under an agreement to convey it to him by deed or devise it to him by will, the only adequate remedy is by action for specific performance in a court of equity, which will under such circumstances decree specific performance.

*Bird v. Pope*, 73 Mich. 483, 41 N. W. 514; *Young v. Young*, 45 N. J. Eq. 27, 16 Atl. 921; *Svanburg v. Fosseen*, supra; *Teske v. Dittberner*, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57.

The homestead estate can be lost both by husband and wife by abandonment or estoppel in pais, the same as any other interest in or title to real property.

*Engholm v. Ekrem*, supra; *Ferris v. Jensen*, 16 N. D. 466, 114 N. W. 372; *Bird v. Pope*, supra.

Andrew Torgerson in his lifetime, under his contract with his parents and his partial performance thereof, acquired, and had at the time of his death, an equitable estate in the land in question, which would pass upon his death to his heirs or devisees, and which passed to his heirs, the plaintiffs.

*Young v. Young*, 45 N. J. Eq. 27, 16 Atl. 921; *France v. France*, 8 N. J. Eq. 650; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370, 12 N. J. Eq. 142; *Davison v. Davison*, 13 N. J. Eq. 246; *Haughwout v. Murphy*, 22 N. J. Eq. 546.

Mr. H. J. Bessesen also for respondents.

Goss, J., delivered the opinion of the court:

The quarter section, the subject-matter of this suit, was the government homestead of Torger J. Hauge. It is the southwest quarter of 6, township 149 north of range 71 west, and within Wells county. Torger Hauge made proof thereon in 1902. Britha Hauge, now his widow, is still living. Their children were the defendants other than the widow appellant, and also their youngest son, Andrew Torgerson.

The plaintiffs are his children suing by guardian the mother and the brothers and sisters of their father, Andrew Torgerson. Both Andrew Torgerson and his father, Torger J. Hauge, are dead. The son died from tuberculosis June 5, 1914, after a lingering illness. His father, Torger J. Hauge, died in October following.

In 1899, Torger J. Hauge and his wife were living upon this tract as their unproved government homestead. Andrew Torgerson, their youngest son, unmarried, was residing upon a government homestead near Balfour. The other four children of Torger and wife had married and had left the parental roof. In 1899, the father and mother entered into an arrangement with Andrew that he should return to their home, reside with and care for them for the balance of their lives, and should receive therefor all their property, including their unproved homestead, upon the death of both of them. Andrew thereupon made commutation proof upon his homestead near Balfour and sold it, realizing some \$1,500 net from its sale. He immediately returned to the home of his parents, purchasing a quarter of school land adjoining, and making the first payments thereon to the state with a portion of the proceeds from the sale of his homestead. He took possession of all personalty on the father's homestead and cropped it, taking those also. The father soon afterward, in 1902, made proof upon his homestead, and patent therefor presumably has been issued. In 1899 the father's homestead was worth approximately \$10 per acre. The buildings were of sod. Substantial frame buildings, consisting of a house worth twelve or fifteen hundred dollars, a large hip-roofed barn, worth from ten to twelve hundred dollars, and several other frame buildings, as granaries and the like, have been built upon the father's homestead by Andrew since his return. There is substantial proof that a portion of the pro-

ceeds from the son's homestead went into the frame house, the first building erected. The buildings and improvements, in the aggregate of the value of approximately \$3,500, upon the father's homestead, were placed there by Andrew from part of the proceeds of the sale of his homestead, but in larger part from the crops he had raised upon the land in question and the school quarter. All the buildings and improvements were placed upon the father's homestead, instead of upon the school land quarter, and during all the years from 1899 until Andrew's death he had resided thereon.

Andrew married in 1907, and he and his family, together with his father and mother, have always lived there. During all this time the old people had been well and comfortably cared for by the son and his wife, and were apparently well satisfied during these fifteen years with their condition and with the performance of the agreement under which they were maintained. For some years before the son's death in 1914 he had been ailing; but no complaint has been made that during that time and up to his death the old people were not properly cared for. In fact, the contrary is the proof. During all this time peace and harmony prevailed, and at various times the old people have referred to the understanding with Andrew, and declared that his wife and children, in case of his death, should not be dispossessed, but should perform the contract the same as Andrew did when living, and receive the same benefits. They even consented to the giving of a deed for said purposes a few days before Andrew's death; but evidently for sentimental reasons, such as the consideration for the feeling of the son during his last illness, they did not trouble themselves or him to make the transfer.

This original understanding or contract does not rest entirely in parol. Soon after the return of Andrew in 1899, and evidently to

carry out the agreement and place it and the good faith of the parties beyond question for all time, the father and mother had a will prepared, and which they executed and attested in the presence of witnesses and subsequently delivered to Andrew. In part, it reads: "We do hereby jointly and severally give, devise, and bequeath to our beloved son, Andrew Torgerson, all our estate whether held jointly or severally, of whatever name, title, or description, real, personal, or mixed. This will to become operative only upon the death of the survivor of us. We do hereby make, constitute, and appoint Andrew Torgerson the forenamed, sole executor of this last will and testament without being required to give bonds for the discharge of his trust as such executor." The possession of this will has been retained at all times by Andrew, and since his death by his widow or the plaintiffs. Its execution and delivery are admitted, and also are established by the uncontroverted proof. Each and all of the defendants knew of its provisions and the arrangement under which the son Andrew, and later his wife, had occupied the premises in question and cared for and maintained the old people. As above stated, the son died first, and at a time when the father was very feeble and in poor health and needed continuous personal attention and care. At Andrew's death his widow was six months pregnant, and physically unable to render all the care to the aged parents of Andrew that was necessary, and was assisted by her sister and other hired help; and several times a week by another son, a brother of Andrew.

Some six weeks after Andrew's death, evidently under prearrangement for the purpose, but without informing Andrew's widow thereof until it occurred, a meeting of the surviving brothers and sisters of Andrew, the defendants in this action, took place at the home of the old people and the widow and chil-

dren, at which time the father and mother were induced to make a second will, under the provisions of which the father's homestead, still standing of record in his name, was devised to all his children, share and share alike, devising to the three minor children of Andrew only a one-fifth share of this property. Its purpose was to disregard and annul the earlier will, and avoid any rights of the heirs of Andrew under it and the contract entered into in connection therewith, and performed under for more than fifteen years. There is evidence in the record that the father and mother were reluctant to do this, but did it under the solicitation, if not under what amounted to the coercion and duress, of their other four surviving children, these defendants. There is evidence from which to conclude that the old lady and her remaining children, defendants, desired to keep this property from Andrew's widow. And on the same day the aged couple were removed to the residence of one of the defendants. Andrew's widow, realizing the drift that matters were taking, offered to care for the father and mother that they might remain with her, and that she would give them a home and fulfil the contract years before entered into with Andrew, and frequently referred to in conversation with her or in her presence. This they refused to do. Subsequently, the administrator of Andrew's estate made a similar offer, and also offered to contribute a portion of the crops or a monthly allowance for their support, in the performance and fulfilment of said previously existing contract. But this was declined.

Soon afterwards the father died, being some seventy-four years old at the time of his death. The mother was seventy-four at date of trial. This action is brought by Andrew's children by guardians, to enforce said contract by having the property decreed to be held in trust by the mother for her support, but subject to the vested interests there-

in of the plaintiff's minor children and heirs of Andrew Torgerson, deceased, and that the probating of the second will as establishing title adverse to the interest of plaintiffs be enjoined, and that the interests of the plaintiffs and the widow be defined and declared, and that the other defendants take nothing. At trial the widow of Andrew filed a waiver in favor of her four children, of any interest she might have had in **Will-waiver.**

said property. The relief asked was granted by the lower court. From its decree the defendants appeal, demanding a trial de novo. On retrial the facts are found as heretofore set forth in this opinion.

The points argued in briefs will now be considered. It is asserted "that it was error to hold that plaintiffs have an estate and vested interest in said real property," and "to hold that prior to his death Torger J. Hauge held the legal title to said land in trust for Andrew's heirs," and "that plaintiffs are entitled to the use, occupation, and possession of said land," and defendants claim that the parents have never waived nor conveyed their homestead rights in said premises, and that the mother, Britha Hauge, "cannot be divested of the absolute use, occupation, and possession of said land by any substitution of other means for her care and support." It is undisputed that a will was made and delivered, and the status of the parties was accordingly changed for fifteen years to conform to and comply with the agreement, the terms of which were definite and specific. The will was executed under and in performance of the original contract, and for a valuable consideration moving to the contracting parties, i. e., the value of the support, care, and maintenance of the aged couple, worth \$300 per year under the proof, while the value of the crops and advantages to Andrew, present and prospective, was considerable.

"A will executed under an agreement founded upon a valuable con-

sideration is contractual as well as testamentary. In the latter aspect

—contract to make.

it may be revoked without the consent of the beneficiary, but not in the former." Syllabus in *Nelson v. Schoonover*, 89 Kan. 388, 131 Pac. 147. The opinion also has the following: "An agreement in writing made upon sufficient consideration, to devise real estate, is enforceable by specific performance against the heirs or devisees of the testator. *Newton v. Lyon*, 62 Kan. 306, 310, 62 Pac. 1000; *Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 351; *Dillon v. Gray*, 87 Kan. 129, 123 Pac. 878; 30 Am. & Eng. Enc. Law, 621"

—also citing and quoting from 36 Cyc. 735, as follows: "An agreement to make a certain disposition of property by will is one which, strictly speaking, is not capable of a specific execution, yet it is within the jurisdiction of a court of equity to do what is equivalent to a specific performance of such an agreement. Such a contract is enforced after the death of the promisor by fastening a trust on the property in the hands of the heirs, devisees, and personal representatives and others

—performance. holding the property with notice of the contract, or as volunteers."

"A will duly executed in pursuance of an agreement based upon a valuable consideration becomes itself, in a sense, an enforceable contract. The testator cannot, by making a later will, escape the obligation confirmed by the first one. 40 Cyc. 1068; *Schouler, Wills*, 3d ed. § 452. The delivery of the will to the beneficiary has been treated as of importance in emphasizing the contractual feature of the transaction. 40 Cyc. 1068, note 2;" *Nelson v. Schoonover*, 89 Kan. 388-392, 131 Pac. 147. "There is no dissent in the authorities from the proposition that one may make a valid contract with another to devise or bequeath property by his last will in a certain specified way." *Morrison v. Land*, 169 Cal. 580, 147 Pac. 261. An almost identical contract with

this, except that the will had not been delivered to the beneficiary, was nevertheless enforced in like manner in *Whitney v. Hay*, 181 U. S. 77, 45 L. ed. 758, 21 Sup. Ct. Rep. 537, in an appeal from court of appeals of District of Columbia, in an opinion by Justice Harlan. Therein are found facts closely parallel to here. "His [plaintiff's] plans of life were materially altered in order that he might take care of Piper and wife during their respective lives. Piper put Hay in actual possession of the premises in question, in execution of his agreement with Hay. But he failed to do that which was vital to Hay, namely, to put the absolute title to the property in him. Under all the circumstances, the failure of Piper to invest Hay with the legal title was such a wrong to the latter as entitled him, under the established principles of equity, to the protection which would be given by a decree specifically declaring that the defendant holds the title in trust for him. We are of opinion that such relief is consistent with the objects intended to be subserved by the Statute of Frauds; for the decree in favor of Hay does not charge Piper upon his parol contract with him, but rests upon the equities arising out of the acts and conduct of the parties, subsequent to the making of the original agreement."

Another closely analogous case is *Baker v. Syfritt*, 147 Iowa, 49, 125 N. W. 998, holding that, "where the will has been made pursuant to a valid contract, the testator cannot, by the act of revocation, escape the obligations of his contract; nor will his heirs take any advantage by such revocation,"—citing *Robinson v. Mandell*, 3 Cliff. 169, Fed. Cas. No. 11,959; *Dufour v. Pereira*, 1 Dick. 419, 21 Eng. Reprint, 332; *Breathitt v. Whittaker*, 8 B. Mon. 530; *Carmichael v. Carmichael*, 72 Mich. 76, 1 L.R.A. 596, 16 Am. St. Rep. 528, 40 N. W. 173; *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415; *Van Duyne v. Vreeland*, 12 N. J. Eq. 142; *Edson v. Parsons*, 155 N. Y.

555, 50 N. E. 265; *Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347; *Amherst College v. Ritch*, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876; *Ahrens v. Jones*, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666; *Re O'Hara*, 95 N. Y. 403, 47 Am. Rep. 53. "The proposition is one which may be regarded as having been accepted generally." *Baker v. Syfritt*, supra, citing 1 *Jarman, Wills*, 27; 2 *Story, Eq. Jur.* § 785; *Schouler, Wills*, § 454; *Walpole v. Orford*, 3 Ves. Jr. 402, 30 Eng. Reprint, 1076, 4 Revised Rep. 38.

See also *Best v. Gralapp*, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 491, citing also *Kofka v. Rosicky*, 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788; *Price v. Price*, 111 Ky. 771, 64 S. W. 746, 66 S. W. 531; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; *Svanburg v. Fosseen*, 75 Minn. 350, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4; *Owens v. McNally*, 113 Cal. 444, 33 L.R.A. 369, 45 Pac. 710; *Teske v. Dittberner*, 65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 181, and lengthy opinion in rehearing in 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57. See also *Bird v. Pope*, 73 Mich. 483, 41 N. W. 514, and *Young v. Young*, 45 N. J. Eq. 27, 16 Atl. 921.

Such is unquestionably the law. Early cases may be found, as *Cox v. Cox*, 26 Gratt. 305; *Snyder v. Snyder*, 77 Wis. 95, 45 N. W. 818, and *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514, in apparent conflict, but, upon inspection, are either later overruled or are distinguishable on facts from the one at bar. The legal title to these premises is held in trust for the plaintiffs, whose parents have substantially performed the contract as set forth under the facts.

As to the homestead rights of defendant *Britha Hauge*, mother, she is shown to have signed and executed the will jointly with her husband, and to have received support for years under reliance by Andrew upon its validity and its being a part performance of the agreement

of her husband, fee owner. She should not now be permitted to revoke her will with its contractual provisions performed to her advantage, and to now assert that said contract is invalid. To do so will be equivalent to allowing her to defraud her son's heirs, by revocation of her will and repudiation of her contract. *Nelson v. Schoonover*, 89 Kan. 388, 131 Pac. 147; *Teske v. Dittberner*, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57; *Engholm v. Ekrem*, 18 N. D. 185, 119 N. W. 35; *Whitney v. Hay*, 181 U. S. 77, 45 L. ed. 758, 21 Sup. Ct. Rep. 537. All that is sought is to sustain her own written instrument, to enforce her own writing according to its terms, and meanwhile to maintain the status quo until it becomes operative. ~~acquiescence—effect.~~ This is no invasion of her homestead rights; on the contrary, they are duly respected and enforced for her benefit.

Appellants urge that the homestead, unproved when the will was executed and delivered, was not devisable by will, or subject to alienation by will or contract under Federal statutes against alienation. On the contrary the Federal statutes recognize the right to make such a devise of an unproved homestead. U. S. Rev. Stat. § 2291, Comp. Stat. 1916, § 4532, 8 Fed. Stat. Anno. 2d ed. p. 557, declares that "no certificate shall be given, or patent issued therefor, until (after) the expiration of five years from the date of such entry; and if . . . the person making such entry, or if he be dead, his widow, or in case of her death, his heirs or devisee," makes final proof, patent issues. It is not an alienation prohibited by the Federal Homestead Act (*Newkirk v. Marshall*, 35 Kan. 77, 10 Pac. 571), on facts very similar to those at bar. But the point has been ruled upon adversely, denying such contention, in *Adam v. McClintock*, 21 N. D. 483, 131 N. W. 394, and *Martin v. Yager*, 30 N. D. 577, 153 N. W. 286. Defendants

are estopped to assert such a claim.

—homestead.

Title has vested in the father. The Federal government has had no interest for years in this tract, and it is the only one that could be heard to assert such to be an alienation contrary to law. The wife and these defendants, who seek to claim under the title of the parent, cannot question this vested interest in the son and his heirs on any such ground, where the father himself could not have done so. Adam v. McClintock, *supra*. Nor can these heirs complain that the first will did not mention themselves. Its contractual features, not its testamentary ones, are before this court. It has become a contract, executed substantially and irrevocably as between sire and son, and is enforceable under all present-day authority.

—effect of execution.

As a contract it is, valid in equity, though perhaps as a will it would be invalid to operate to disinherit the defendants, they not being therein mentioned. Comp. Laws 1913, § 5667. It is further contended that as the will "runs to Andrew Torgerson only, not to his heirs or devisees," the services to be rendered by Andrew were personal in their character, and this being the fact, no one could be substituted to complete his part of the contract, which was then subject to avoidance by the parents on the death of Andrew before either of them.

None of the cases sustain such a construction. In equity this contract was substantially performed. The father was virtually upon his deathbed when the son died, after fifteen years of observance of its terms. True, the mother, seventy-four years of age, was alive at time of trial, but her expectancy is as short as her mind is enfeebled, as appears from her own testimony. To sustain appellants in this contention would place those who had sustained parents through their period of understanding into a ripe

old age of childishness, at the irresponsible caprice of the enfeebled parent, and when such whim has been invited by the perhaps reprehensible conduct of envious relatives, who for such years have shirked filial duties until, in the late twilight of their parents' lives, is seen a chance to profit at the expense of the one who had, for filial reasons, or by valid contract, supported the parents for years.

Neither the contention that the personal care by Andrew, or the fact of his death prior to that of his parents, can bar equitable jurisdiction to indirectly accomplish specific performance by enjoining violation of the contract. "Whether equity will decree the specific performance of a contract rests (entirely) in judicial discretion and always depends upon the facts of the particular case. As a rule when a definite contract to leave property by will has been clearly and certainly established, and there has been performance on the part of the promisee, equity will grant relief, provided the case is free from objection on account of inadequacy, . . . and there are no circumstances or conditions which render the claim inequitable." Syllabus in *Anderson v. Anderson*, 75 Kan. 117, 9 L.R.A. (N.S.) 229, 88 Pac. 743. The performance by Andrew was complete until his death. The contract did not specify that his death should forfeit all rights of his heirs or estate obtained under such performance. Equity should not imply or construe such a forfeiture, where none has been stipulated. In fact every equity and circumstance are in favor of enforcement of the contract, the contractual features of the will executed and delivered under it in partial performance of it.

The law and the equities of the case fully sustain the judgment appealed from, and it is affirmed.

Petition for rehearing denied, August 16, 1916.



## ANNOTATION.

### Right to revoke will executed pursuant to contract.

- I. Introductory, 172.
- II. General rule, 172.
- III. Illustrations, 173.

#### *I. Introductory.*

This note, in discussing the revocability of a will made pursuant to a contract, excludes from consideration the right of revocation where joint or mutual wills are made. It also excludes the right to specific performance of an agreement to give property by will. With respect to cases of that kind it is deemed to be of no importance whether the agreement was broken by failure to make a will, or by the revocation or change of a will once made. The note, therefore, does not review cases like *Whitney v. Hay* (1901) 181 U. S. 77, 45 L. ed. 758, 21 Sup. Ct. Rep. 537, wherein a contract to devise was enforced after the revocation of a will made pursuant to a contract without reference to that will, but those cases only wherein it was sought to affix a contractual character to the will itself.

#### *II. General rule.*

Though a will is made pursuant to a contract, it is revocable in the sense that after revocation it is no longer effective as a will, and if a revoking will is made, that will is admissible to probate. "If one should, under contract, execute a will and covenant not to change it, and afterwards should revoke it, substituting another, the latter only could be admitted to probate as a will; the other party would obtain redress only by securing, at law or in equity, such remedy for breach of the covenant as the rules of those jurisdictions provide." *Eggers v. Anderson* (1901) 63 N. J. Eq. 264, 55 L.R.A. 570, 49 Atl. 578. So, in *Day v. Washburn* (1911) 76 N. H. 203, 81 Atl. 474, in granting specific performance, it was said: "The superior court, of course, has no jurisdiction in this proceeding to set up the first will, or to annul the probate had of the later. The decree suggested will not have such effect.

The first will was offered merely as evidence of the contract alleged, and the decree will not affect the probate of the second." In *Nelson v. Schoonover* (1913) 89 Kan. 388, 131 Pac. 147, it appeared that a will was executed pursuant to an agreement of the testator to leave all his property to the devisee. It was subsequently revoked by another will. The court affirmed a decree establishing title in the property in the devisee in the first will, but reversed so much of the decree as set aside the second will, holding that the payment of debts and the settlement of the estate must be had under that will. However, in *Mutual L. Ins. Co. v. Holloday* (1883) 13 Abb. N. C. (N. Y.) 16, a will made pursuant to a contract was held to be irrevocable, and a subsequent will attempting to revoke it was canceled as a cloud on title.

But where a will is made in pursuance of a contract resting on a valuable consideration, it loses its voluntary and donative aspect, and becomes itself a contract. "A will duly executed, in pursuance of an agreement based upon a valuable consideration, becomes itself, in a sense, an enforceable contract. The testator cannot, by making a later will, escape the obligation confirmed by the first one." *Nelson v. Schoonover* (1913) 89 Kan. 392, 131 Pac. 147.

"When based on a valuable consideration, a paper in form a will may, especially when delivered to a party interested, constitute legally and in fact an irrevocable contract." *Bolman v. Overall* (1886) 80 Ala. 451, 60 Am. Rep. 107, 2 So. 624.

The general rule is, therefore, that a will executed pursuant to a contract cannot be revoked so as to relieve the testator of its contractual obligation.

**Alabama.**—*Bolman v. Overall*, *supra*.

**Iowa.**—*Johnston v. Myers* (1908) 138 Iowa, 497, 116 N. W. 600.

**Kansas.**—*Nelson v. Schoonover* (1913) 89 Kan. 388, 131 Pac. 147.

**Mississippi.**—*Anding v. Davis* (1860) 38 Miss. 574, 77 Am. Dec. 658.

Montana.—*Huffine v. Lincoln* (1916) 52 Mont. 585, 160 Pac. 820.

New Hampshire.—*Day v. Washburn* (1911) 76 N. H. 208, 81 Atl. 474.

New York.—*Mutual L. Ins. Co. v. Holloday*, *supra*.

North Dakota.—See the reported case (*TORGERSON v. HAUGE*, *ante*, 164).

Pennsylvania.—*Johnson v. McCue* (1859) 34 Pa. 180; *Smith v. Tuit* (1889) 127 Pa. 341, 14 Am. St. Rep. 851, 17 Atl. 995, on second appeal (1890) 137 Pa. 35, 20 Atl. 579. *Conlon v. Conlon* (1902) 20 Pa. Super. Ct. 45.

South Carolina.—*Bruce v. Moon* (1899) 57 S. C. 60, 35 S. E. 415.

In *Eggers v. Anderson* (1901) 63 N. J. Eq. 264, 55 L.R.A. 570, 49 Atl. 578, it appeared that an old woman had been in large part supported by a number of young ladies belonging to a charitable organization. They requested her, in consideration of what they had done and expected to do for her, to make a will in their favor. This she did, but shortly thereafter destroyed it and made another, giving her property to her relatives in Germany. The young ladies continued their charitable assistance until her death. It was held that the agreement was satisfied by the making of the will, and implied no agreement to die testate thereof. But in *Bruce v. Moon* (1899) 57 S. C. 60, 35 S. E. 415, referring to an attempted revocation of a will made in consideration of support, the court said: "But it is said that A. H. Moon complied with his promise to plaintiff by making his will, giving her all of the property of which he died seised and possessed. This, as it seems to us, we must say, is a mere play upon words. To say that a person has fulfilled his agreement to give to another all of his property at his death, in consideration of valuable services performed, by making his will in accordance with such agreement, and then to turn right around and annul and effectually destroy such testamentary provision by conveying away all of his property to another, leaving nothing whatever upon which the will could operate, would be 'keeping the word of promise to the ear and breaking it to the hope.' Such a mode

of performing an agreement certainly cannot be recognized by a court of equity."

Reference has been made to the fact that a will executed pursuant to contract was delivered to the beneficiary or to a third person, as indicating an intent to make it contractual in nature. *Padfield v. Padfield* (1874) 72 Ill. 322; *Nelson v. Schoonover* (1913) 89 Kan. 388, 181 Pac. 147. But the irrevocability of a will thus made is not affected by the fact that it is retained in the possession of the testator. *Anding v. Davis* (1860) 38 Miss. 574, 77 Am. Dec. 658, wherein the court said: "Nor is this equitable right secured to the complainants impaired by the fact that the will, the instrument of conveyance and the evidence of the agreement, was to remain in the possession of Anding. For after its execution, as agreed on, he had no right to destroy it, without a violation of his agreement. His retention of it was a part of the agreement which he had undertaken, and which he was bound to observe. If he executed and afterwards destroyed it, then it was a violation of his agreement."

So, in *Johnson v. McCue* (1859) 34 Pa. 180, it was said: "There is an apparent difficulty arising from the fact that the principal writing was not delivered. But the form of the transaction shows that delivery was not intended. The contract was to be complete and perfect without this, and the delivery of the other side of the contract by the other parties, and the subsequent dealings and actual relations of the parties, show that it was complete and perfect. The delivery of the will would make this fact more obvious, but it was not essential to the perfection of the contract."

### III. Illustrations.

In *Anding v. Davis* (1860) 38 Miss. 574, 77 Am. Dec. 658, it appeared that an agreement was made that, in consideration of a conveyance of land, the grantee would, by will, reconvey the land to the grantor. He made a will to that effect, but afterwards destroyed it. A bill to enforce the reconveyance was sustained, the court

saying: "Upon that consideration, in part, and for that purpose, he had received the deed, and the agreement had the force of a contract; and the will, when executed, was, as to this property, irrevocable."

In *Bolman v. Overall* (1886) 80 Ala. 451, 60 Am. Rep. 107, 2 So. 624, it appeared that a will was executed in consideration of services rendered to the testatrix, and was delivered to the executrix therein named. Thereafter the testatrix executed another will, making a different disposition of her property, which was probated. A bill for the specific performance of the terms of the first will was sustained, the court saying that the will was in its essential nature a contract.

In *Mutual L. Ins. Co. v. Holloday* (1883) 13 Abb. N. C. (N. Y.) 16, it appeared that land was conveyed by a husband to his wife on her agreement to devise it to him should he survive her. She made a will to that effect, but later made a second will, revoking it. Establishing title in the husband, and canceling the second will as a cloud on the husband's title, the court said: "The husband having caused the property to be conveyed to his wife as he agreed, it would be impossible to restore him to his former position, otherwise than through the last will and testament of his wife, by which the title to the land should again become vested in him at her death. To defeat this conclusion, it cannot be insisted that a will is in its nature ambulatory and revocable during the life of the testator. That statement, true in itself, can have no application to a case where the testator had obligated himself by a valid agreement, founded upon a good consideration, which is wholly inconsistent with the making of another will, by which he should attempt to devise the property, the subject of the agreement, to others than the person from whom the consideration proceeded, and to whom he was bound by the terms of the agreement to devise it."

In *Johnson v. McCue* (1859) 34 Pa. 180, it appeared that a will was made pursuant to a contract, and on the same day a writing was made, ex-

pressing the agreement of the devisees to support the testator. It was held that the two writings constituted one contract, and that the will, being part of an arrangement essentially bipartite, was not subject to revocation. See, to the same effect, *Conlon v. Conlon* (1902) 20 Pa. Super. Ct. 45, wherein it appeared that the testator took from the devisee a bond for a monthly payment during the life of the testator, and that the will and the bond were placed in a sealed envelop and delivered to a third person.

In *Smith v. Tuit* (1889) 127 Pa. 341, 14 Am. St. Rep. 851, 17 Atl. 995, it appeared that a will was made under an agreement by the devisee to support the grantor. The devisee was put into possession of the property given by the will, and entered on the performance of his part of the contract. It was held that the will thereupon lost its revocability, and became an executed contract. See to the same effect, the same case on second appeal in (1890) 137 Pa. 35, 20 Atl. 579.

In *Bruce v. Moon* (1899) 57 S. C. 60, 35 S. E. 415, it appeared that a will was made in consideration of an oral agreement to support the testator, which agreement was performed. The testator attempted to revoke the will, by a conveyance of his property to a person who had notice of the contract and will. Holding that the conveyance was void, the court said: "Both upon principle and authority, we have no doubt that A. H. Moon could not defeat the testamentary provision made for the plaintiff in his will, by the conveyance. To allow A. H. Moon, after having received and enjoyed the consideration upon which his promise to give his property, at his death, to the plaintiff, rested, and after having, in recognition of such promise, actually executed his will to that effect, to defeat such testamentary provision by this conveyance to his son, would be a palpable fraud on the plaintiff, which a court of equity should not and will not tolerate. The view which we have adopted is fully sustained by the authorities in our own state as well as elsewhere. While it is undoubtedly true that a

person may, within the limitations prescribed by statute which have no application here, dispose of his property, either by deed or will, in any way that he sees proper, yet this right, like all others, may be bargained away by a valid contract."

In *Padfield v. Padfield* (1874) 72 Ill. 322, it appeared that a will was executed pursuant to a contract and delivered to a third person. It was held that an irrevocable trust was thereby created. The court said: "The fact that he had the right to make another will, and revoke the one made in the first instance, did not change the character of the trust established or the rights acquired under it."

So, in *Huffine v. Lincoln* (1916) 52 Mont. 585, 160 Pac. 820, it appeared that a wife contemplated a conveyance to her children, but agreed to convey to her husband on his agreement to devise the property to them. He made a will to that effect, but on his remarriage revoked it. The court declared a trust in favor of the children, saying: "It is argued that inasmuch as he made the will and inasmuch as his later revocation of it was perfectly legal, if not actually commanded by his subsequent marriage, no trust can be said to exist because there was no fraud. This is too narrow a view of the transaction."

In *Nelson v. Schoonover* (1913) 89 Kan. 388, 131 Pac. 147, it appeared that a wife agreed to give by will to her husband all property of which she died seised. A will was executed pursuant to that contract. Thereafter she made another will, giving half her property to the husband and half to a son. In an action by the husband it was held that he was entitled to a decree vesting the title to all the property in him.

In *Lowe v. Bryant* (1860) 30 Ga.

528; 76 Am. Dec. 673, evidence of an antenuptial agreement, by which the husband promised to give by will to his wife all the property received from her on the marriage, was offered in aid of the interpretation of the husband's will. In holding the evidence to be admissible, though not for that purpose, the court said: "It is true that the evidence was offered, not for the purpose of enforcing such antenuptial contract, but for the purpose of sustaining or aiding the construction put on the will and codicil by the defendant. The evidence was not competent for that purpose, as there was no ambiguity about the will or codicil. The import was plain and obvious, giving to the widow only a life estate in the property in controversy; but the evidence was admissible for the purpose of setting up and enforcing such antenuptial contract. If it was true that the testator did make such antenuptial agreement, and his admissions are competent to prove it, and he had this will written in accordance with such agreement, and kept it by him for that purpose, this was such a part performance of the agreement as took the case out of the Statute of Frauds, even if it was within the statute, which, in the opinion of the court, is very doubtful. And when the testator signed and executed that will, it became a fully executed one, and could not be altered by any codicil or subsequent will that he could make."

In *Johnston v. Myers* (1908) 138 Iowa, 497, 116 N. W. 600, it appeared that a contract was made whereby all the property of the promisor was to be left to the promisee. A will made pursuant thereto devised a certain lot. The promisee sued for damages for breach of the contract. It was held that he had no lien on the lot.

W. A. S.

LINCOLN R. SCOTT, Plff. in Err.,  
v.  
PEOPLE OF THE STATE OF COLORADO EX REL. BOARD OF COM-  
MISSIONERS OF YUMA COUNTY.

*Colorado Supreme Court (In Banc) — April 1, 1918.*

(— Colo. —, 172 Pac. 9.)

**Bail — right of surety to discharge.**

1. A surety on a bail bond is entitled to discharge if he surrenders his principal at any time before judgment is rendered in an action upon the bond.

[See note on this question beginning on page 180.]

**— when judgment entered.**

2. No final judgment is entered pending motion for new trial in an action on a bail bond, so as to prevent surrender of the principal by the surety, if, after findings and order of judgment against the surety, the court

stays the entry of judgment until disposition of a motion for new trial.

[See 15 R. C. L. 580.]

**Judgment — what is.**

3. The findings of a court do not constitute a judgment.

[See 15 R. C. L. 570.]

**ERROR** to the District Court for Yuma County to review a judgment in favor of plaintiff in an action on a bail bond. *Reversed.*

The facts are stated in the opinion of the court.

Mr. John T. Bottom for plaintiff in error.

Messrs. Robert M. Work and J. A. Fowler, for defendants in error:

It was not necessary to call the sureties before declaring the forfeiture of the bond.

Ingram v. State, 10 Kan. 630.

Where an act is done in the exercise of an official duty by one holding that office, it is not necessary to add to his signature a designation of his office, to make the act valid.

Thompson v. Haskell, 21 Ill. 214, 74 Am. Dec. 98; Shattuck v. People, 5 Ill. 481; Irving v. Brownell, 11 Ill. 416; Stout v. Slattery, 12 Ill. 162; Rowley v. Berrian, 12 Ill. 200.

In the absence of a statute it is not necessary to give the court jurisdiction to call the sureties.

Ingram v. State, *supra*.

The court has power to cause the bond to be renewed or dismissed, and the continuance of the bond for the term does not discharge the sureties.

People v. Hanaw, 106 Mich. 421, 64 N. W. 328.

Sureties are liable when case is continued to next term, if principal or accused is present at the time of continuance.

State v. Smith, 66 N. C. 620.

And are liable until sentence is pronounced.

Moorehead v. State, 38 Kan. 489, 16 Pac. 957; Jackson v. State, 52 Kan. 249, 34 Pac. 744.

A recognizance or bail bond in general requires three things: To appear and answer, to stand and abide the judgment of the court, and not depart without leave of the court,—and each of these particulars is distinct and independent.

State v. Hancock, 54 N. J. L. 393, 24 Atl. 726; Martin v. Force, 3 Colo. 199; Hughes v. Cummings, 7 Colo. 138, 2 Pac. 289; Evans v. Young, 10 Colo. 316, 3 Am. St. Rep. 583, 15 Pac. 424; Shattuck v. People, 5 Ill. 478.

There is a great difference between the rendering of a judgment and the entry of a judgment.

Winstead v. Evans, — Tex. Civ. App. —, 33 S. W. 580; Burns v. Skelton, 29 Tex. Civ. App. 453, 68 S. W. 527; Columbus Waterworks Co. v. Columbus, 46 Kan. 666, 26 Pac. 1046; Martin v. Pifer, 96 Ind. 245; State ex rel. Brown v. Brown, 31 Wash. 397, 62 L.R.A. 974, 72 Pac. 86; Schuster v. Rader, 13 Colo. 329, 22 Pac. 505; Jasper v. Schlesinger, 22 Ill. App. 637; Iron

(— *Colo.* —, 172 *Pac.* 9).

Silver Min. Co. v. Mike & S. Gold & S. Min. Co. 6 C. C. A. 180, 12 U. S. App. 497, 56 Fed. 956; Farmers' State Bank v. Bales, 64 Neb. 870, 90 N. W. 945; State ex rel. Green v. Henderson, 164 Mo. 347, 86 Am. St. Rep. 618, 64 S. W. 138; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Re Rose, 8 Cal. Unrep. 50, 20 Pac. 712; Parrott v. Kane, 14 Mont. 23, 35 Pac. 243; McClain v. Davis, 37 W. Va. 330, 18 L.R.A. 634, 16 S. E. 629; Barthrop v. Tucker, 29 Wash. 666, 70 Pac. 120; Vigo County v. Terre Haute, 147 Ind. 134, 46 N. E. 350; Chamberlain v. Evansville, 77 Ind. 542.

Allen, J., delivered the opinion of the court:

This is an action wherein the plaintiff in error is sued as surety upon a bail bond. Upon trial the court found the issues of law and of fact for the plaintiff and against the defendant. The plaintiff in error, defendant below, duly filed his motion for new trial. Before the motion for new trial was disposed of, and at the hearing thereon, the defendant showed to the court that he had surrendered the principal to the sheriff, and had paid the costs which had accrued in the criminal action in which the bail bond had been given, and also the costs in this action. The facts thus shown were admitted by plaintiff.

It is now contended by plaintiff in error that the trial court erred in failing to dismiss the action after the showing above mentioned was made. The plaintiff in error was entitled to be discharged from liability upon the bail bond if he surrendered the principal, who was the defendant in the criminal case, before judgment was rendered in this action. *Huston v. People*, 12 *Colo. App.* 271, 55 *Pac.* 262. The defendant in error, however, insists that at the time of the surrender of the principal the judgment in this action had been rendered.

At the time the principal was surrendered by the surety in the instant case, no judgment had been entered against the surety. The

record shows that, at the conclusion of the trial of this case, the trial judge employed the following language: "At this time the court finds generally the issues of law and fact in this case for the plaintiff, and orders that judgment be entered against the defendant on the bond in question in the sum of \$1,000, with interest thereon from the 9th day of October, 1912, and for costs. Let the record show the exception of the defendant to the findings, and order for judgment and the judgment to be entered thereon. Ten days given in which to file a motion for a new trial. The entry of judgment will be stayed during that time. If a motion be filed, entry of judgment will be further stayed until the final disposition of the motion for a new trial."

The foregoing did not amount to a rendition of a judgment, but was merely the announcement of the decision of the court. The term, "judgment," as used in the statute, § 2075, *Mills's Anno. Stat.* 1912 (*Rev. Stat.* 1908, § 1918), relieving sureties upon the surrender of the principal, means a judgment as ordinarily defined, and, as defined in § 221, *Mills's Anno. Code*, "the final determination of the rights of the parties in the action." Such final determination, according to the record in this case, would not take place until after the motion for a new trial was disposed of. Prior to that time there was no judgment either rendered or entered. The court merely found the issues of law and of fact in favor of the plaintiff. The findings of a court do not constitute a judgment. *McKnight v. Ballif*, 45 *Colo.* 138, 100 *Pac.* 433.

The trial court, therefore, erred in assuming that it had rendered a judgment before the principal was surrendered by the surety, and in failing to dismiss the case upon the showing by the surety, prior to

Bail—right of  
surety to  
discharge.

rendered the principal, who was the defendant in the criminal case, before judgment was rendered in this action.

—when judgment entered.

Judgment—what is.

November 1, 1916, when the court ordered judgment entered in favor of plaintiff, that he had surrendered the principal and paid the costs in the criminal case and in the case at bar.

The judgment is reversed, and the cause remanded, with directions to dismiss the action.

**NOTE.**

The general subject of the surrender of the principal by sureties on a bail bond is considered in the annotation beginning at page 180. The question as to when the right to surrender is terminated is discussed at pages 189 et seq. of that annotation.

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MRS. D. E. CAMPBELL, Appt.,

v.

BOARD OF COUNTY COMMISSIONERS of Reno County et al.

*Kansas Supreme Court—July 6, 1918.*

(103 Kan. 329, 175 Pac. 155.)

**Bail — custody on other charge — effect — surrender.**

1. A person who is out on bail under a criminal charge in one county, and who is arrested by a constable from another county under a criminal charge filed in the latter county, cannot be taken from the custody of the constable, without his consent, by the sureties on the bail of the person charged, and be surrendered to the sheriff of the first county, so as to release such sureties.

[See note on this question beginning on page 180.]

**—duty of prisoner.**

2. Under the circumstances mentioned in the first paragraph of this syllabus, after being released from the charge filed against him in the latter county, it is the duty of such person to appear at the proper time for trial in the first county, and it is the

duty of the sureties on his bail to produce him for that trial.

•[See 3 R. C. L. 53.]

**Appeal — refusal to submit questions.**

3. It is not error to refuse to submit to a jury special questions which would not, if answered, elicit any fact that could affect the judgment to be rendered.

Headnotes by MARSHALL, J.

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APPEAL by plaintiff from a judgment of the District Court for Reno County in favor of defendants in an action brought to recover an amount deposited with the clerk of the court in lieu of bail, for the appearance of one charged with the crime of grand larceny. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Lee Monroe for appellant.

Messrs. H. E. Ramsey and E. T. Foote, for appellees:

There was a defect of parties in the action, and Sanders was a necessary party. The money is presumed to have been his property.

Applegate v. Young, 62 Kan. 100, 61 Pac. 402; Way v. Day, 187 Mass. 476, 73 N. E. 543; Doty v. Braska, 138 Iowa, 396, 116 N. W. 141; State v.

Owens, 112 Iowa, 408, 84 N. W. 529; State v. Ross, 100 Tenn. 303, 45 S. W. 673; Whiteaker v. State, 31 Okla. 65, 119 Pac. 1003.

A person brought back upon requisition may be arrested upon another charge.

Re Flack, 88 Kan. 616; 47 L.R.A. (N.S.) 807, 129 Pac. 541, Ann. Cas. 1914B, 789.

Marshall, J., delivered the opinion of the court:

The plaintiff appeals from a judgment rendered against her and in favor of the defendants for costs. The plaintiff seeks to recover \$2,000 which had been deposited with the clerk of the district court of Reno county by O. H. Dorr in lieu of bail for the appearance of one John Sanders, who was then charged with grand larceny. This is the second time that this action has been before this court. *Campbell v. Reno County*, 97 Kan. 68, 154 Pac. 257, Ann. Cas. 1918D, 538. There a judgment in favor of the defendants was reversed, and the cause was remanded for further proceedings. A detailed statement of the facts was made in the former opinion.

On the trial from which the present appeal was taken, the jury answered special questions, a part of which are as follows:

Q. 5. Did the constable from Cowley county have Sanders in his custody at the time it is claimed a surrender was made?

A. Yes.

Q. 6. Did the constable from Cowley county, at the time it is claimed a surrender was made, with a view of effecting a surrender, give Sanders his liberty and allow him to pass into the custody of Carl Duckworth through a surrender by O. H. Dorr?

A. No.

Q. 7. Were the officers from Reno county holding Sanders all of the time he was in their custody, on the date in question, for the constable from Cowley county?

A. Yes.

Other than as modified by the special findings of the jury, the facts now presented are the same as those presented on the former hearing in this court.

1. The first question presented by the plaintiff (who has succeeded to Dorr's rights) is: "Could Sanders be effectively surrendered so as to entitle Dorr to reclaim his de-

posit without the consent and concurrence of the Cowley county constable?"

The plaintiff argues that the fact that John Sanders was in the custody of the constable from Cowley county could not and did not prevent Dorr from surrendering Sanders to the sheriff of Reno county, and thereby release the \$2,000 which had been deposited with the clerk of the district court of that county. If Sanders was surrendered, so that the sheriff had control and custody of him, and could have held him as against the constable, then the \$2,000 was released. Before the surrender, or attempted surrender, Sanders had been arrested by the constable from Cowley county, and, under the findings of the jury, was continuously thereafter in the custody of that constable. At the time of his arrest by the constable, Sanders was out on bail. The sheriff had no right to take him out of the custody of the constable. It follows that neither Sanders nor his sureties had any right to deprive the constable of the custody of Sanders by surrendering him to the sheriff.

Bail—custody  
on other charge  
—effect—sur-  
render.

2. The plaintiff argues that, when Sanders was released by habeas corpus proceedings in Cowley county, it was the duty of the state to secure an order from the judge of the district court of that county remanding Sanders to the custody of the sheriff of Reno county. The answer to this argument is that Sanders was not in the custody of the sheriff of Reno county when he was arrested by the constable. The sheriff did not have custody of Sanders on the charge filed against him in Reno county after he had been released on bail. When he was released in Cowley county, he was discharged from the custody of the officers in that county, and was given his freedom to the same extent as he had enjoyed that freedom when he was taken into custody by the constable. When Sanders was released in Cowley



county, he was again out on bail awaiting his trial in Reno county. The action against him in that county had been continued to the September term of the district court. When that action was called for trial, the state did not have Sanders in custody anywhere, and was not preventing his appearance, and was not preventing his sureties from producing him for trial. The authorities seem to be almost unanimous in holding that, after he was released in Cowley county, it was his duty to appear for trial in Reno county, and his sureties were then under obligation to produce him for that trial. Note in Ann. Cas. 1912C, 747.

—duty of  
prisoner.

3. The plaintiff asked the court to submit to the jury the following questions:

"(1) What, if anything, was said by O. H. Dorr in the office of the clerk of the district court of Reno county, just prior to the drawing of the check sued on herein, about surrendering John Sanders to Carl Duckworth, deputy sheriff, and to whom were such words spoken?"

"(2) What, if anything, was said by John Sanders at the office of the clerk of the district court of Reno county, Kansas, on the day the check sued on was drawn and shortly prior to such drawing on the subject of a surrender of said Sanders to Carl Duckworth, deputy sheriff, and to whom were such words spoken?"

These questions were refused. There was no error in refusing them. Questions are submitted to establish facts, not evidence. If these questions had been submitted, and had been answered, as the plaintiff evidently anticipated they would be answered, those answers would not have established any fact on which judgment could have been rendered, or which could have affected it. The answers might have been the basis for argument concerning the truth of other facts which should have been considered in rendering judgment.

Appeal—refusal  
to submit  
questions.

The judgment is affirmed.

Petition for rehearing denied October 18, 1918.

## ANNOTATION.

### Surrender of principal by sureties on bail bond.

- I. Right to surrender principal generally, 180.
- II. Right to arrest for purpose of surrender:
  - a. In general, 184.
  - b. Who may arrest, 186.
  - c. Necessity of process, 188.

#### I. Right to surrender principal generally.

The modern system of bail is a development of "an ancient and extremely vigorous form of suretyship or hostageship, which rendered the surety liable to suffer the punishment that was hanging over the head of the released prisoner." 2 Pollock & M. History of English Law, p. 589. The principal is, therefore, considered as committed to the custody of his bail.

#### II.—continued.

- d. Arrest in foreign jurisdiction, 188.
- III. Termination of right to surrender, 189.
- IV. Sufficiency of surrender:
  - a. In general, 191.
  - b. To whom made, 196.
- V. Effect of surrender, 197.

From this responsibility they are at liberty to release themselves at any time by surrendering the principal into the custody from which he was taken by the giving of bail.

United States.—Taylor v. Taintor (1873) 16 Wall. 366, 21 L. ed. 287.

Georgia.—Clark v. Gordon (1889) 82 Ga. 613, 9 S. E. 333.

Illinois.—People ex rel. Boenert v. Barrett (1903) 202 Ill. 289, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23;

People use of Masterson v. Hathaway (1903) 206 Ill. 42, 68 N. E. 1053 affirming (1902) 102 Ill. App. 628.

Kentucky.—Com. v. Bronson (1853) 14 B. Mon. 361.

Louisiana.—State v. Cunningham (1855) 10 La. Ann. 393; State v. Lazzarre (1857) 12 La. Ann. 166.

Michigan.—Re Cannon (1882) 47 Mich. 481, 11 N. W. 280.

Nebraska.—Bartling v. State (1903) 67 Neb. 637, 93 N. W. 1047, 97 N. W. 443.

New York.—Nicolls v. Ingersoll (1810) 7 Johns. 145.

North Carolina.—State v. Schenck (1905) 138 N. C. 560, 49 S. E. 917, 3 Ann. Cas. 928.

England.—Ex parte Gibbons (1747) 1 Atk. 238, 26 Eng. Reprint, 153; Anonymous (1704) 6 Mod. 231, 87 Eng. Reprint, 982.

And see the cases cited throughout this note.

"The bail have their principal always upon a string, and may pull the string whenever they please, and render him in their own discharge." Anonymous (1704) 6 Mod. 231, 87 Eng. Reprint, 982.

"When bail is given the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment." Taylor v. Taintor (1873) 16 Wall. (U. S.) 366, 21 L. ed. 287.

In State v. Schenck (N. C.) supra, it was said: "At common law, when bail was given, and the principal relieved from the custody of the law, he was regarded, not as freed entirely, but as transferred to the friendly custody of his bail. They had a dominion over him, and it was their right, at any time, to arrest and deliver him again to the custody of the law, in discharge of their obligation."

In People use of Masterson v. Hathaway (1903) 206 Ill. 42, 68 N. E. 1053, affirming (1902) 102 Ill. App. 628, it was said: "The obligation of the bail in this class of cases is to produce the principal before the court upon demand, and at any and all times surrender him up in accordance with its mandates. But this obligation is one of which the bail may be relieved at

any time by a voluntary surrender of the principal. In contemplation of law the principal is in the custody of his bail, who may take him where he pleases, and detain him or surrender him in court into the custody of the sheriff who has process against him, or, if the bail concludes his principal meditates flight, or for any reason desires no longer to be held responsible for the appearance of the principal, he may cause him to be imprisoned in the common jail of the county, and thus exonerate himself from his obligation."

The right to surrender the principal extends to sureties in a bastardy proceeding. Turner v. Wilson (1875) 49 Ind. 581.

Though the bail acted under a mistake of fact in surrendering the principal, the latter is not entitled, on showing the mistake, to be again released on the bond. Wiggins v. Tyson (1901) 112 Ga. 744, 38 S. E. 86, wherein it appeared that the bail surrendered the principal in the belief that they were bound to do so, whereas in fact the remittitur on an appeal had not yet been sent down. The court said: "It is true that the reason given for the surrender was that Wiggins and his bondsmen supposed that the sheriff had legal authority to take and carry Wiggins to the penitentiary. It matters not what reasons may actuate a surety in the surrender of his principal; if he in fact surrenders him, and such surrender is made in the manner provided by law, without regard to his reasons or the motives which actuated him, the surety is discharged from further liability on the bond."

In State v. Anderson (1903) 119 Iowa, 711, 94 N. W. 208, it appeared that a person arrested on a charge of felony executed an individual bond in the sum of \$1,500, which sum his father deposited with the clerk of the court, and he was released pending the trial. He was convicted and sentenced to a term of imprisonment, and also to pay the cost of the prosecution, which amounted to \$476, and his bail pending an appeal was fixed at \$3,000. The accused surrendered himself, and

his father moved for the release of the \$1,500, which motion the prosecuting attorney opposed on the ground that the money was to be applied towards the payment of the costs. Thereafter the appeal from the judgment of conviction was perfected, and one Reno became surety on the bail bond for \$3,000, and on the same day the court granted the motion for the release of the \$1,500. The order was complied with. Later Reno took the accused before the sheriff and surrendered him and obtained a receipt for him from the sheriff, and moved for the exoneration of his bail bond. This motion the prosecuting attorney opposed on the ground that the giving of the appeal bond was merely a fraudulent scheme to obtain the prior deposit of \$1,500. The trial court sustained this contention, but the ruling was set aside on appeal. The supreme court said: "The surety has, under the statute, an absolute right 'at any time' before the forfeiture of the bond to surrender the defendant and be released. Code, § 5528. That right becomes perfect the moment the bond is accepted and the defendant discharged from custody, and continues until a forfeiture of the undertaking has been declared or the conditions of the bond have been performed. If we are to say that a surrender within an hour is proof of fraudulent intent, who shall say at what particular point of time it may be made without bearing the badge of bad faith? It is said that the admitted circumstances are such that we may assume the bond was given with a preconceived purpose to surrender the defendant. Such purpose, if it existed, is not necessarily fraudulent. It may often happen that bail is given to allow defendant brief respite for business or other reasons, and with the express intent to surrender him as soon as that end is accomplished, whether the interval be months, days, or hours; and such transaction would violate neither the letter nor the spirit of the law. The only purpose of the bond is to secure the production of the defendant in execution of the judgment from which he appeals, and if that condition be

performed the law is satisfied, without regard to the time such obligation is in force. But assuming that in the present instance the bond was given with no other purpose than to enable Walter F. Anderson to secure the release of the deposit, is the state in any manner 'defrauded' by the subsequent surrender of the defendant? It is not questioned that the giving of the bond 'in good faith' would have made the right to a refund of the money absolute, nor is it disputed that in such case Reno would have had the right at any time, pending the appeal to this court, to release himself from liability upon the bond by giving the defendant back into custody. Now, if he may terminate his liability at any time by pursuing a line of action prescribed by the statute, it seems clear that the state suffers no legal injury or wrong because he avails himself of that right pursuant to a secret purpose existing in his mind at the time he signed the bond. In other words, so long as he does only that which the statute expressly authorizes him to do, it is not within the province of the court to make the motive which inspires his act a reason for denying him the right which such statute gives. The force of these suggestions is seen when we note the provision in the court's order by which, if Reno pays the \$476 into court, it may again be released by giving another bond 'in good faith.' Let us suppose these terms are accepted, and another bond given in the utmost good faith, and thereafter the surety, having good reason to believe the defendant is liable to abscond, surrenders him as provided by law; certainly it cannot be said, in the absence of a statute requiring it, that, in addition to the surrender, he must also restore the deposit, as a condition of the exoneration of his bond. The undertaking of a surety upon an appeal from a conviction of a felony is that 'the defendant will surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgment of the supreme court upon the appeal.' He does not undertake to pay the costs of

prosecution in either court. If the judgment appealed from is affirmed, and the defendant is surrendered by the surety, or voluntarily surrenders himself, in execution of the judgment against him, and of the orders of the supreme court, the bond has spent its force and should be discharged. A surrender made in advance of the judgment upon appeal has precisely the same effect. The surety thereby does all he undertook or promised to do, and his exoneration cannot be denied as a means of compelling him to perform an act or duty not 'nominated in the bond.'"

In *Kellogg v. State* (1870) 43 Miss. 57, it appeared that one indicted for larceny gave a bail bond, on which one Jones was surety, and was released. He was tried and convicted, but he obtained a new trial and remained at liberty under the bail. However, Jones became uneasy and surrendered his principal to the sheriff. The latter accepted the surrender and exonerated the surety. Thereafter one Kellogg became surety. The sheriff let the accused out pending the new trial. When the case was called for trial the principal did not appear. The second bail bond was declared forfeited and later a final judgment was rendered thereon. Kellogg made a motion to set the judgment aside on the ground that the sheriff had no right to accept the surrender of the principal from Jones, the original surety. This contention was held to be untenable, the court saying: "That sureties in criminal cases can surrender their principal in this and other states, as well as in England, is well established, both in law and practice, and that the sureties are thus released from continued liability is equally well settled. An eminent author, quoting Hawkins, P. C., says: 'A man's bail are looked upon as his jailers of his own choosing, and the person bailed is, in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper jailer.' The same author also says: 'A person who is bail may arrest his prin-

cipal anywhere.' 'So also the right of a man who is bail to surrender his principal, and thus discharge himself, exists with us.' A learned judge of Massachusetts said: 'In legal contemplation, a prisoner, notwithstanding he is bailed, remains in the custody of the persons who became his bail, and they have a right, at any time, to discharge themselves by a surrender of their principal.' The mode of making, and the officer to whom to make the surrender, are specially pointed out by statute in most of the states. It may be laid down as a general rule that the surrender should be made to an officer authorized to admit to bail, or to commit to jail."

In *Harp v. Osgood* (1842) 2 Hill (N. Y.) 216, the action was to recover on a written promise made by a third person to pay a certain sum of money to a surety in case the principal made default in appearance. It appeared that the principal after his release on bail went to Virginia, where he engaged in certain contracting work. When his case was called he failed to appear. The surety obtained a copy of the bond and delivered the same to a constable, with instructions to arrest the principal. The constable went to Virginia, but on arriving there found that the principal's wife was in a delicate situation, and that if he were to leave Virginia at that time he would sustain great damage in his contract works. The parties, therefore, entered into an arrangement whereby the principal paid to the constable his traveling expenses and the defendant executed the following written instrument: "For value rec'd I promise to pay to George Harp or order the sum of \$200 by the 1st of January next. This is, provided Charles H. Chapman does not make his appearance at the Oct. court of Madison county, N. Y. in 1837. Amherst, May 21, 1837. (Signed) J. C. Osgood." The principal remained in Virginia and later failed to appear as agreed. It was held that the constable could maintain the action for and on behalf of the surety. The court said: "Bail may surrender their principal in criminal as well as in civil cases, and may

be discharged from their recognizance. . . . Although the plaintiff was a constable in this state, he was not acting in his official capacity in making the arrest in Virginia. He went there as the mere agent or deputy of the bail; and the statute against taking securities *colore officii* has nothing to do with the case. The undertaking was not void as being against public policy. Chapman was not suffered to remain in Virginia for the purpose of enabling him to escape public justice, but because it was extremely inconvenient, both on account of his family and his business, to come to this state at that time. Under such circumstances he was allowed to go at large, on procuring security that he would appear in court at a subsequent day. The power of the bail was not used oppressively for the purpose of extorting money from the principal, but for the sole purpose of securing an indemnity to the bail."

In *Carr v. Sutton* (1912) 70 W. Va. 417, 74 S. E. 239, Ann. Cas. 1913E, 453, it appeared that one Sutton was arrested, charged with the commission of a felony. Carr became surety on Sutton's bail bond. Thereafter Sutton and several others entered into an indemnity bond to Carr in case he suffered any loss from his undertaking. But it further appeared that Carr negligently allowed Sutton to escape, although he was requested by the sureties on the indemnity bond to arrest Sutton and surrender him. It was held that Carr could not recover on the indemnity bond, the court saying: "But while the obligation of Carr thus assumed was great, his power over Sutton, given by § 8, chap. 156, Code 1906, as well as by the common law, was also great. By said § 8 he was entitled at any time on application to the clerk to a bailpiece, authorizing him or his agent, at any time, and at any place, within or without the state, and without further process, to arrest Sutton so delivered to bail and commit him to jail. 3 Am. & Eng. Enc. Law, 708, and cases cited from numerous states. Moreover, the law is, that when the obligation of bail is assumed the surety becomes in law the jailer of his

principal, and his custody of him is but a continuance of the original imprisonment, and though he cannot actually confine him he is subrogated to all the other rights and means which the state possesses, to make his control of him effective."

The case of *Re Bauer* (1892) 112 Mo. 231, 20 S. W. 488, arose under a Missouri statute (Rev. Stat. 1889, § 4130) which reads as follows: "When a bail desires to surrender his principal, he may procure a copy of the recognizance from the clerk, by virtue of which the bail, or any person authorized by him, may take the principal in any county within this state." It was held that a surety has the right to surrender his principal even where the latter is out on bail pending an appeal from the conviction and sentence for a felony, such as perjury. But in the case of *Re Griswold* (1880) 13 R. I. 125, it was held that a surety on a bail bond in a criminal action could not surrender his principal, as the Rhode Island statute gives this right only to a surety on a civil or special bail bond. In *Talley v. State* (1902) 44 Tex. Crim. Rep. 162, 69 S. W. 514, it was held that a surety on a recognizance given for the perfecting of an appeal could not surrender the principal and so be released from his undertaking. That decision was overruled in *Ex parte Cobb* (1913) 69 Tex. Crim. Rep. 473, 154 S. W. 997, wherein it was held that the right to surrender exists in case of a bail bond given pending an appeal to the same extent as in case of one given for the appearance of the accused at the trial.

In Iowa, it is held that bail on an appeal from a judgment imposing a fine only cannot exonerate themselves by surrendering the principal, but are responsible for the payment of the fine. *State v. Stommel* (1893) 89 Iowa, 67, 56 N. W. 263; *State v. Meier* (1895) 96 Iowa, 375, 65 N. W. 316.

## II. Right to arrest for purpose of surrender.

### a. In general.

To effectuate their right of surrender the bail have the right to arrest the principal. See the cases cited

throughout this subdivision. The scope of the right to arrest was stated obiter in *Turner v. Wilson* (1875) 49 Ind. 581, as follows: "It is also insisted that a surety in a bastardy prosecution has no lawful right to deliver up his principal and be released from liability on his bond. There is no difference in a bastardy case in this respect from any other case. The rule is the same in criminal and civil cases. *Gray v. Fulsome* (1835) 7 Vt. 452; *State v. Thompson* (1856) 48 N. C. (3 Jones, L.) 365; *Blood v. Morrill* (1845) 17 Vt. 598; *Simmons v. Adams* (1848) 15 Vt. 677; *Mather v. Clark* (1827) 2 Aik. (Vt.) 209. The common-law right, as between the parties, of a bail to take his principal at any time, at any place, and under any jurisdiction, has remained unimpaired during more than two centuries. In the quaint language of the old books, 'the bail have their principal always upon a string, and may pull the string whenever they please, and render him in their own discharge.' In this country, for anything the principal can complain of, the bail may, by virtue of his piece, take him in any house or place, in any county, state, or territory, on Sunday or any other day, in the nighttime, or at any time, and, upon demand, may break open doors. He may call persons to assist him, and they will be justified by his command." So in *Taylor v. Taintor* (1873) 16 Wall. (U. S.) 866, 21 L. ed. 287, it was said: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose." See to the same effect *Cain v. State* (1876) 55 Ala. 170; *Hawk v. State* (1887) 84 Ala. 466, 4 So. 690.

In *Com. v. Brickett* (1829) 8 Pick.

(Mass.) 138, the court said: "By the common law the bail has the custody of the principal, and may take him at any time, and in any place. 2 Highmore, Bail, 199, and the cases there cited. The taking is not considered as the service of process, but as a continuation of the custody which had been, at the request of the principal, committed to the bail. The principal may, therefore, be taken on Sunday. The dwelling house is no longer the castle of the principal, in which he may place himself to keep off the bail. If the door should not be opened on demand at midnight, the bail may break it down, and take the principal from his bed, if that measure should be necessary to enable the bail to take the principal."

In *United States v. Keiver* (1893) 56 Fed. 422, it was said, arguendo: "The bail have the custody of the principal, and may take him at any time or in any place. His dwelling is no longer his castle, as against the right of the sureties, but may be entered at any time of day or night, and on a Sunday as well as on a week day."

In *State v. Dwyer* (1896) 70 Vt. 96, 39 Atl. 629, it was said, obiter, that the bail may use as much force as is necessary to take and bring in the principal.

In making the arrest the bail is entitled to break the outer door of a dwelling to enter the premises where the principal is. *Nicolls v. Ingersoll* (1810) 7 Johns. (N. Y.) 145, wherein it was said: "Another question presented was whether the bail had a right to break open the outer door of the plaintiff's house to make the arrest. The verdict authorizes us to presume that a demand was made before entry; for this fact was submitted to the jury as being necessary to be shown by the defendant, to render the entry lawful. That the bail may break open the outer door of the principal, if necessary, in order to arrest him, follows, as a necessary consequence, from the doctrine that he has the custody of the principal; his power is analogous to that of the sheriff, who may break open an outer door to take a prisoner who has escaped from ar-

rest." So, in *Sheers v. Brooks* (1792) 2 H. Bl. 120, 126 Eng. Reprint, 463, Lord Loughborough said: "This plea appears to me to be good, both in form and substance. It shows that the defendants were bail, and not mainperners, for it states that they duly became bail and entered into a recognizance, the legal effect of which is that the principal was in their custody; and a further averment of his being delivered to them would have been unnecessary: when a party is bailed, the bail have a right to go into the house of the principal, as much as he has himself; they have a right to be constantly with him, and to enter when they please, to take him. And I see no difference between a house of which he is solely possessed, and a house in which he resides by the consent of another." See also the dictum in the cases quoted *supra* in this subdivision.

The bail may arrest the principal on a Sunday and confine him till the next day, and then surrender him. *Anonymous* (1704) 6 Mod. 231, 87 Eng. Reprint, 982.

An exemption of a bankrupt from "all arrests, restraints, or imprisonments of his creditors" while in attendance on the commissioners in bankruptcy does not deprive the sureties on a bail bond of the right to arrest him for the purpose of surrender. *Ex parte Gibbons* (1747) 1 Atk. 238, 26 Eng. Reprint, 158.

Where the condition of the bond has been performed and the bail thereby exonerated, their power to arrest the principal terminates. *Spillman v. People* (1885) 16 Ill. App. 224. In that case it appeared that the principal was in court when judgment was rendered against him, and was committed. Thereafter sentence was suspended. At a later date it was sought to enforce the sentence, and the principal could not be found. A judgment was thereupon rendered against the bail. On their motion to set it aside, it was objected that they must first produce the principal. The court said: "As long as the surety remains bound for the appearance of his principal, just so long, but no

longer, has he a right to arrest him and to surrender him to the court. But as soon as the recognizance has spent its force and become functus officio, then, as between him and his surety, the principal is a free man and no longer liable to arrest. If the record of conviction, commitment, and subsequent suspension of the sentence is true as set forth in the motion, then the recognizance was no longer in force, and the surety had no power over the principal to bring him into court."

So, after the time within which the surety may exonerate himself as of right by surrendering the principal has expired, his right to arrest is terminated. *Com. v. Johnson* (1849) 3 Cush. (Mass.) 454.

*b. Who may arrest.*

The bail may deputize another person to arrest the principal. *State v. Mahon* (1842) 3 Harr. (Del.) 568; *Salles v. Werner* (1912) 171 Ill. App. 96; *Harp v. Osgood* (1842) 2 Hill (N. Y.) 216; *Boardman v. Fowler* (1800) 1 Johns. Cas. (N. Y.) 413; *State v. Lingerfelt* (1891) 109 N. C. 775, 14 L.R.A. 605, 14 S. E. 75.

In *Nicolls v. Ingersoll* (1810) 7 Johns. (N. Y.) 145, *supra*, the court said: "I see nothing, on general principles, against allowing this power to be exercised by an agent or deputy; and no case is to be found where the right has been denied. It is a general rule of law, even with respect to public officers, that their ministerial acts may be performed by deputy; and with respect to private individuals, the law recognizes the act of an authorized agent as equal to that of the principal; and there is no principle of policy which renders it necessary to make this case an exception."

The person empowered by the bondsman to arrest the principal may not delegate his authority. *State v. Mahon* (Del.) *supra*, wherein the court said: "The arrest must be by the bail himself or by his immediate deputy in writing. Either the bail or his deputy may call in the aid of others in making the arrest; but such aid must be rendered in the presence

of the person authorized to make the arrest. This presence need not in all cases be an actual bodily presence, but in every case the bail or deputy must be at the moment engaged in or about the arrest, and the other person acting merely in his aid. As when the bail, pointing out the principal, calls on another to seize him, the arrest would be good, even though at the moment of the arrest the parties might be out of the immediate presence of the bail. In other words, the arrest must be the act of the person authorized, by means of his assistant; and not the arrest of the assistant, who has no authority further than it is conferred by the presence or active co-operation of the bail or his deputy."

In *Chesapeake & O. R. Co. v. Vaughn* (1909) — Ky. —, 115 S. W. 217, it appeared that one Layne was out on bail pending the hearing of a charge made against him. Layne failed to appear at the trial. The plaintiff and two others were sureties on the bail bond. They went to the place where Layne was, and arrested him. They boarded the defendant's train with Layne with the object of taking him to the county in which he was prosecuted. While the train was in motion Layne walked to the rear platform of the car and sought to escape. However, the plaintiff and his cosureties struggled with him and prevented his escape. While the parties were thus engaged the defendant's brakemen and conductor stopped the train and ordered them off. According to the plaintiff, after they came off the train, the defendant's employees started the train again, leaving plaintiff and the prisoner on the ground. The conductor testified that he left the parties there because the plaintiff refused to show him his authority to arrest and hold Layne. It was held that if the defendant failed to give the plaintiff a reasonable opportunity to convey his prisoner over the defendant's line the latter was liable in damages to the former.

In some jurisdictions a statute provides for an arrest by the sheriff on a direction of the bail indorsed on a certified copy of the recognizance. See

*Sternberg v. State* (1883) 42 Ark. 127; *People v. Paulsen* (1909) 146 Ill. App. 534.

But where an unauthorized person seeks to arrest the principal, and in the altercation commits a felony, he will be held liable therefor. *Coleman v. State* (1905) 121 Ga. 594, 49 S. E. 716. In that case it appeared that a person on bail was indicted. Having failed to appear, the bond was declared forfeited. The son of the surety obtained a warrant for his arrest. The warrant was addressed "to any sheriff, deputy sheriff, constable or marshal of this state." The son placed the warrant in the hands of the defendant and another, both private individuals, with instructions to arrest the principal. The defendant attempted to apprehend the principal, and in so doing killed him. It was held that he could not defend himself on the ground that he had a warrant in his possession for the arrest of the deceased. The court said: "Where one accused of crime is released on bond, he is transferred from the custody of the sheriff to the legal but friendly custody of the bail, whose 'dominion is a continuance of the original imprisonment;' but they may at will surrender him again to the custody of the law. If the accused refuses to surrender, the bail can seize and hold him in order to make delivery in discharge of the bond. But the surety may be a woman, or a man physically too weak to cope with the accused; or the person charged with the crime may be at a distant point, and out of the reach of his bondsman. For these and other reasons, the bail may lawfully deputize an agent to seize the body and deliver him to the custody of the sheriff. . . . While this is true, a new trial cannot be granted here because of the court's refusal to give the charge requested as to the right to make such arrest by an agent. There was no evidence in the present case to show that the bail had appointed Coleman to recapture Griffin; and nothing to show that he authorized his son, R. E. Collins, to make such arrest, or delegated to him any power to appoint agents for that purpose." And



in *People v. Moore* (1845) 2 Dougl. (Mich.) 1, it was held that where a sheriff obtained a warrant for the arrest of the principal, and he delivered it to a constable with oral instruction to apprehend the principal, the arrest was invalid, as the oral instruction was unauthorized. The court stated that the direction should have been given in writing.

*c. Necessity of process.*

At common law no process was necessary to authorize the arrest of the principal by his bail. *Re Siebert* (1899) 61 Kan. 112, 58 Pac. 971; *State v. Cunningham* (1855) 10 La. Ann. 393; *Com. v. Brickett* (1829) 8 Pick. (Mass.) 138.

In *Taylor v. Taintor* (1873) 16 Wall. (U. S.) 366, 21 L. ed. 287, the rule was said to rest on the reason that the seizure "is likened to the rearrest by the sheriff of an escaping prisoner."

In the case of *Re Siebert* (Kan.) *supra*, the court said: "It is sufficient to say in reply to this that in immemorial legal theory the petitioner never was discharged from custody. The giving of the recognizance by him only operated to transfer the custody of his person from the sheriff to his sureties. Thenceforth, they, instead of the sheriff, were his jailers. Blackstone defines bail as 'a delivery or bailment of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail.' 4 Bl. Com. 297. There was, therefore, no occasion for the issuance and service of a new order of arrest nor for a warrant of commitment. The prisoner having been thus retransferred from the custody of one jailer to another from whom the former had received him, the latter jailer again took him, and thence was authorized to detain him under the original warrant by which he had been arrested. The effect of a surrender of an accused by his bail is to remit him to the same condition he was in before the recognizance was given; he is then held on the original process

against him, no new process being necessary to justify his confinement."

In some jurisdictions it is provided by statute that the bail may arrest the principal on a bailpiece or certified copy of the recognizance. In *Carr v. Sutton* (1912) 70 W. Va. 417, 74 S. E. 239, Ann. Cas. 1913E, 453, such a statute was held to be cumulative, and not to affect the common-law right to arrest without process. But in *Gray v. Strickland* (1909) 163 Ala. 344, 50 So. 152, a similar statute was held to abrogate the common-law rule, and an arrest without a certified copy of the undertaking was held to constitute false imprisonment. See, to the same effect, *Nicholson v. Killpatrick* (1914) 188 Ala. 258, 66 So. 8.

*d. Arrest in foreign jurisdiction.*

Bail have no power to arrest the principal in a foreign country. *Reese v. United States* (1870) 9 Wall. (U. S.) 13, 19 L. ed. 541. But, as between the states of the American Union, the bail of one held to answer in one state may arrest the principal in another state, and no requisition is necessary. *Salles v. Werner* (1912) 171 Ill. App. 96; *Com. v. Brickett* (1829) 8 Pick. (Mass.) 138; *Nicolls v. Ingersoll* (1810) 7 Johns. (N. Y.) 145; *State v. Lingerfelt* (1891) 109 N. C. 775, 14 L.R.A. 605, 14 S. E. 75. And see dictum in *Taylor v. Taintor* (1873) 16 Wall. (U. S.) 366, 21 L. ed. 287.

In *Nicolls v. Ingersoll* (1810) 7 Johns. (N. Y.) 145, it was said: "If the principal is to be considered as standing in the situation of a prisoner who has escaped from the arrest of the sheriff, according to the language of one of the cases, can there be any reasonable doubt but a sheriff, in such case, would have a right to pursue and arrest his prisoner, in a neighboring state; and, by parity of reasoning, bail must have the like authority. The cases I have referred to are sufficient to show that the law considers the principal as a prisoner, whose jail liberties are enlarged or circumscribed, at the will of his bail; and, according to this view of the subject, it would seem necessarily to follow that, as between the bail and his prin-

cipal, the controlling power of the former over the latter may be exercised at all times and in all places; and this appears to me indispensable for the safety and security of bail."

In *State v. Lingerfelt* (N. C.) *supra*, the court said: "It is urged by the attorney general that the right, when exercised in another state, may be attended with inconvenience and trouble; but, with the qualifications stated in *Republica v. Philadelphia Gaoler* (1797) 2 Yeates (Pa.) 263, it is not plainly apparent how any evil may result. Be that as it may, the principle is firmly established by a uniform course of judicial decisions, both state and Federal, and until the legislature sees fit to regulate the manner in which the bail from another state is to exercise his rights, we do not feel at liberty (especially in a case of life and death) to assume the exceptional position that the common-law method, as generally recognized in the United States, does not apply in North Carolina. It is urged, however, that, the recognizance having been forfeited by the default of the principal to appear in the Tennessee court, the right of bail to take his principal was extinguished. It will be observed that the judgment was only conditional, and that a scire facias was ordered to be issued. It has never been understood in this state, nor do we so understand the common law, that such a judgment has the effect contended for. The right of the bail to take his principal in a criminal case before final judgment, and to produce him in court in mitigation of the penalty, is generally recognized in North Carolina, and we have been referred to no authority where the contrary has been held."

In *Whitener v. State* (1897) 38 Tex. Crim. Rep. 146, 41 S. W. 595, it was held that a warrant issued at the instance of a surety desiring to surrender his principal may be executed in any county of the state.

Where a person accused of the commission of a crime in one jurisdiction is at liberty under a bail bond, and is later held in custody by the authorities of another jurisdiction, the

surety on the bail bond cannot take him from that custody for the purpose of surrendering him. *United States v. French* (1812) 1 Gall. 1, Fed. Cas. No. 15,165; *Cozart v. Wolf* (1916) 185 Ind. 505, 112 N. E. 241. And see *CAMPBELL v. RENO COUNTY* (reported herewith) ante, 178. In *United States v. French* (Fed.) *supra*, it was held that the sureties could not obtain the body of the principal on a writ of habeas corpus for the purpose of surrendering him, when it appeared that after he was released on bail he was arrested and kept in custody on another charge. In *Taylor v. Taintor* (1878) 16 Wall. (U. S.) 366, 21 L. ed. 287, it appeared that the principal was arrested in Connecticut and gave bail. He went to New York and was there arrested and taken to Maine on a requisition. It was held that a forfeiture of the bond was proper, the court saying: "They may doubtless permit him to go beyond the limits of the state within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee."

### III. Termination of right to surrender.

The general rule seems to be that bail may surrender the principal, and thereby exonerate themselves, at any time before the entry of final judgment in a proceeding to enforce their liability.

Colorado.—*SCOTT v. PEOPLE* (reported herewith) ante, 176.

Georgia.—*Smith v. State* (1855) 17 Ga. 462.

Illinois.—*Weese v. People* (1858) 19 Ill. 643.

Indiana.—*Lorance v. State* (1848) 1 Ind. 359; *State ex rel. Smith v. Smith* (1917) — Ind. App. —, 117 N. E. 553.

Missouri.—*State v. Taylor* (1896) 136 Mo. 462, 37 S. W. 1121; *State v. Green* (1915) 263 Mo. 637, 178 S. W. 678.

New Mexico.—*State v. Riley* (1916) 21 N. M. 450, 155 Pac. 720.

North Carolina.—*State v. Lingerfelt* (1891) 109 N. C. 775, 14 L.R.A. 605, 14 S. E. 75.

In *Watson v. Bancroft* (1849) 4

Strobb. L. (S. C.) 218, it was said: "It is now fully settled that the bail may surrender their principal at any time before the end of the term to which the sci. fa. on the bail bond is returnable. Formerly the surrender was regarded *ex gratia* or as a favor granted by the court, but is now so indisputably established as to be considered a matter of right. In this case the surrender was made within the time and by the leave of the court. The only question made is whether the court under these circumstances ought to have ordered that all further proceedings on the sci. fa. should be stayed, on the payment of costs which had accrued. The bail stipulate for nothing else but that the principal shall be put back in the possession of the sheriff out of whose custody he has been taken. When this is done, they are discharged from any legal liability, and why should a causeless action be continued, and the bail put to the expense of pleading to and defending themselves against an action manifestly without anything remaining to support it?"

In *Smith v. State* (1855) 17 Ga. 462, the court said: "We are all, as a court, familiar with the practice which allows a security, upon a recognizance, to discharge himself at any time before final judgment, by surrendering the prisoner and paying the costs of scire facias. We were of the opinion that there was some statute on this subject, but have not been able to find it. The practice may be of common-law origin. At all events, it is a reasonable practice, . . . and a just one, as applicable to this particular case."

The entry of a conditional judgment of forfeiture does not terminate the right of the sureties to surrender the principal. *Bearden v. State* (1889) 89 Ala. 21, 7 So. 755; *State v. Lingerfelt* (N. C.) *supra*.

In *Com. v. Johnson* (1849) 3 Cush. (Mass.) 454, it was held that the bail of one charged with a crime cannot exonerate themselves by surrendering him after the recognizance has been forfeited of record, the court saying: "It was then manifestly too late for

the surety to save his liability by a surrender of the principal. The time for the surrender was past; the record of the forfeiture of the recognizance was made up; and the consequent liability of the surety was fixed. At this stage of the proceedings, there is no provision of law by which the surety, as a matter of right, can discharge himself from liability by a surrender of the principal, though the court may have power to receive a surrender, and to remit the penalty in whole or in part; but that is wholly a matter of discretion, and recognizes no right to make a surrender after a forfeiture."

In *SCOTT v. PEOPLE* (reported herewith) a decision was rendered in an action against the sureties, but the entry of judgment was stayed for ten days to permit a motion for a new trial. Before the entry of judgment the principal was surrendered. It was held that the sureties were exonerated.

In *State v. Anderson* (1903) 119 Iowa, 711, 94 N. W. 208, it was said that the right to surrender "becomes perfect the moment the bond is accepted and the defendant discharged from custody, and continues until a forfeiture of the undertaking has been declared or the conditions of the bond have been performed."

In *Huston v. People* (1898) 12 Colo. App. 271, 55 Pac. 262, a surrender made before the return day of a scire facias on the bond was held to exonerate the sureties.

In *Milner v. Petit* (1701) 1 Ld. Raym. 720, 91 Eng. Reprint, 1380, the court announced a rule that "if the plaintiff in the original action brings debt against the bail upon their recognizance, the bail shall have eight days after the return of the writ to render the principal; and if there be but four days in the term after the return of the writ, he shall have four days in the following term."

In *United States v. Robinson* (1907) 85 C. C. A. 520, 158 Fed. 410, it was held that the surrender must be made before the end of the term at which the recognizance is declared to be forfeited.

If the principal is surrendered be-

fore the entry of final judgment on the bond, the right of the bail to exoneration is not affected by the fact that during the absence of the principal a witness has left the jurisdiction, so that the prosecuting attorney is compelled to dismiss the prosecution for lack of evidence. *State v. Green* (1915) 263 Mo. 637, 173 S. W. 673.

In *Flemming v. Shockley* (1910) 8 Ga. App. 229, 68 S. E. 1013, it was held, in an action by the surety to charge the principal with the expense of making the surrender, that a surety on a bail bond does not have to wait until the bond is finally forfeited before he surrenders his principal.

In Louisiana, by statute, the bail must surrender the principal within five days after the rendition of a judgment of forfeiture on the bail bond, and a surrender after that date does not exonerate him. *State v. Farron* (1849) 4 La. Ann. 275; *State v. Martin* (1897) 49 La. Ann. 752, 22 So. 224; *State v. Johnson* (1913) 132 La. 11, 60 So. 702. In *State v. Williams* (1885) 37 La. Ann. 200, it was held that a surrender at the term at which the forfeiture was declared exonerated the sureties.

By statute in Kentucky, if the principal is surrendered before the entry of final judgment against the bail the court may, in its discretion, exonerate them. See *Com. v. Coleman* (1859) 2 Met. (Ky.) 382; *Combs v. Com.* (1898) 103 Ky. 385, 45 S. W. 359; *Com. v. Hillis* (1906) 29 Ky. L. Rep. 1063, 96 S. W. 873. In *Fortney v. Com.* (1910) 140 Ky. 545, 131 S. W. 383, it was said: "The discretion which is conferred upon the court by the section is a judicial discretion, and not an arbitrary one. But its exercise will not be controlled unless palpably abused. *Com. v. Davidson* (1866) 1 Bush (Ky.) 133; *Yarbrough v. Com.* (1889) 89 Ky. 151, 25 Am. St. Rep. 524, 12 S. W. 143. Yet the statute must be administered in such a manner as to effectuate its purposes. The purpose of requiring bail bonds is not to enrich the treasury, but to secure the administration of justice. The purpose of the statute in allowing a remission of the whole or a part of the sum specified in the

bond, where the defendant is surrendered or arrested before judgment is entered against the bail, is to secure the defendant's being arrested and brought to justice. The bail has this means of protecting himself, and an incentive is offered to him to secure the arrest of the defendant. Thus, justice is not defeated by the criminal's flight, and while the trial may be delayed, the criminal does not escape. The primary object of the law is to punish the criminal. The bond is allowed to be given for the convenience of a person not yet proved to be guilty, and to protect the state against the expense of keeping such persons in jail. When the criminal has been arrested promptly, as in this case, it would entirely defeat the purpose of the statute if no part of the penalty of the bail bond is remitted; for if this may be done, no inducement will be held out to the bail to have the defendant arrested and brought to justice, and it was this that the statute was aimed to secure." In *Husbands v. Com.* (1911) 143 Ky. 290, 136 S. W. 632, it appeared that the state's attorney had given the principal permission to leave the state. The court allowed six months to the bail within which to find and surrender him, saying: "The circuit court, when it was made to appear that the party had been, in fact, misled by the commonwealth's attorney, and that this was the cause of the accused not appearing, should have given the bail a reasonable opportunity to produce the accused, and his failure to do so, under all the circumstances, was an abuse of discretion."

#### IV. Sufficiency of surrender.

##### a. In general.

It has been held that, where a statute prescribes the manner in which the principal in a bail bond shall be surrendered by his sureties, the statutory method must be strictly followed to exonerate the sureties. *Edwards v. State* (1913) 39 Okla. 605, 136 Pac. 577; *Woodring v. State* (1908) 53 Tex. Crim. Rep. 17, 108 S. W. 371. And see the dictum in *Cameron v. Burger* (1911) 60 Or. 458, 120 Pac. 10.

In *Roberts v. State* (1878) 4 Tex. App. 129, the court, after stating the terms of the statute, said: "These are the modes, and the only ones known to our law. The procedure is fully and explicitly stated in the articles 2741 to 2750, inclusive, and, according to our construction, must be pursued strictly."

In *Edwards v. State* (Okla.) *supra*, it was held that where the statute provides for certain record entries a surrender may not be proved by *parol*.

In *United States v. Stevens* (1883) 16 Fed. 101, it was held that a compliance with the statute requiring an exoneration to be indorsed on the bond was essential, the court saying: "It is a statutory rule of evidence, declaratory, however, of the general law, and founded in a wise policy, analogous to that of the Statute of Frauds, that the only evidence of the discharge of the sureties in bail shall be the entry by competent authority of the exoneration on the record or the bailpiece, or a copy or them, as the case may be. And it is sufficient reply to the very able argument of counsel for the defendants that the fact of death of the principal, his imprisonment, or other such excuse, may be shown by *parol* in defense on a proper plea that, as to the defense in this case, the statute imposes another rule, however it may be in those mentioned by counsel. The fact of the surrender may be the essential act, as counsel says, to effectuate the discharge; but the only legal evidence of it, under this statute, is the entry. Again, the answer to the argument that there is no fault of the sureties, but only of the judge or other officer receiving the surrender to make the entry, for which the sureties should not suffer after a surrender, is obvious. The fault is that of the sureties. The officer may be at fault and negligent in failing to perform the ministerial duty of making the entry of the judicial act in ordering the discharge of the sureties; and, possibly, under some circumstances, the officer may be liable to an action for such negligence, if the contributory negligence of the surety himself be no defense. But clearly it

is the duty of all parties, or their attorneys, to see to it that, in all cases, the clerk or other ministerial officer shall make the proper entries on the record authorized by the judicial judgment, and it is their fault if they do not give this matter their attention."

In *State v. Tieman* (1874) 39 Iowa, 474, the statute under consideration provided as follows: "At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer to whose custody he was committed at the time of giving bail, in the following manner: 1. A certified copy of the undertaking of bail must be delivered to the officer, who shall detain the defendant in his custody thereon as upon a commitment, and must, by a certificate in writing, acknowledge the surrender. 2. Upon the undertaking and the certificate of the officer, the district court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during term time at the same term, and upon three clear day's notice thereof to the district attorney, with a copy of the undertaking and certificate, may order the bail to be exonerated." Construing that statute, the court said: "The sheriff would have no authority to take or receive the defendant again into his custody, unless delivered to him in the manner pointed out in the statute, or unless delivered to him or placed in his custody in the presence of, and with the knowledge and sanction or by order of, the magistrate, for, the undertaking being duly executed and accepted, the defendant was entitled to freedom from arrest except in a legal manner. In the offer made it was not proposed to show that the magistrate ordered the sheriff to receive Corville into his custody from the surety, or that he had any knowledge whatever that the surety had or intended to surrender him into the custody of the sheriff."

But in *State v. Lambert* (1898) 44 W. Va. 308, 28 S. E. 930, it was held that the failure of the justice to whom a surrender is made to give a certifi-

cate of the fact does not impair the effectiveness of the surrender.

In *State v. Mudd* (1911) 232 Mo. 564, 134 S. W. 562, it was held that an actual surrender of the principal to the sheriff by the sureties was a sufficient compliance with the statute, although the latter did not, at the time of the surrender, deliver a certified copy of the recognizance to the sheriff, as the statute required.

To constitute a valid surrender the principal must actually be delivered into custody. Thus, an offer to the court to surrender the principal, made when the latter is not in court or in custody, is unavailing. *Bonner v. Com.* (1905) 27 Ky. L. Rep. 652, 85 S. W. 1196.

In *Woodring v. State* (1908) 53 Tex. Crim. Rep. 17, 108 S. W. 371, the court held that the statute contemplated a manual delivery of the principal by the sureties to the sheriff. In this case it appeared that the sureties told the sheriff that they wished to surrender their principal. The parties made an arrangement to meet at a certain place. The sheriff appeared and so did the principal, but not the sureties. The sheriff informed the principal of his bondsmen's intent and issued to him a new bond with instructions to procure new bondsmen, which the latter never did. It was held that there was no surrender here within the purport of the Texas statute. The court said: "The laws of this state provide but two modes in which bail can effect a surrender of their principal: one mode being by surrendering him into the custody of the sheriff of the county where he is prosecuted; and the other, by making affidavit of a desire to surrender him, and thereby obtaining an order for his arrest. A strict compliance with one or the other of the modes above indicated is necessary to a valid surrender."

So, in *State v. Rollins* (1875) 52 Ind. 168, it appeared that the principal fled and the bail made no effort to retake him. The sheriff pursued and arrested him and placed him in jail. The bail again went on his bond and then immediately surrendered him. It was held that the surrender

prevented a judgment of forfeiture on the first bond. The court said: "It is argued that the above statute was intended to relieve the surety where the principal had run away against his consent, and where he had made an honest effort to secure the return of the principal. We do not think such a construction can be placed upon the statute. It is not so expressed, nor is there anything to show such a legislative intent. The language is broad and express. The bail, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal in open court or to the sheriff, and, upon the payment of costs, shall be discharged. The bail had the right to take out a bailpiece and arrest the principal in any county in the state. *Turner v. Wilson* (1875) 49 Ind. 581. The state had a right to rearrest the principal. We think it can make no difference how the principal was produced in court. If he was produced by the bail and costs paid before final judgment, the surety was entitled to be discharged."

If the sheriff, at the request of the bail, proceeds to arrest the principal, it constitutes a valid surrender, though he is not bound to undertake the making of the arrest and may require the sureties to bring the principal in. *Sternberg v. State* (1883) 42 Ark. 127.

Where the principal is arrested on another charge and is in the custody of the officer to whom a surrender should be made, it is sufficient to exonerate the sureties. *Huston v. People* (1898) 12 Colo. App. 271, 55 Pac. 262, wherein the court said: "Counsel for the people contend, however, that there was no such delivery to the sheriff as is required by the statute. The accused was, on the 14th of December, in the custody of the sheriff in the county jail, the place where the statute said he should be in order to entitle the sureties to be discharged. What more, then, could the sureties do than make a formal surrender? They had no authority to take him out of jail and deliver him back to the sheriff, even if such an idle and useless

ceremony should have been necessary." Compare *State v. Warwick* (1891) 3 Ind. App. 508, 29 N. E. 1142, wherein it was held that the arrest of the principal by the sheriff after the forfeiture of the bond did not release the sureties.

In *McKinney v. Com.* (1881) 3 Ky. L. Rep. 465, it was held that a delivery to the jailer so as to exonerate the bail must be such as to give the jailer dominion over the accused, and this can ordinarily be done only by putting the accused in the apartment of the jail where prisoners are usually confined. In *Com. v. Clark* (1886) 7 Ky. L. Rep. 828, it was held that a jailer cannot be required to receive from the surety in a bail bond the surrender of the defendant at any other place than the jail; yet if he does accept such surrender elsewhere the surety will be exonerated. But the jailer being a peace officer, and the surety having the right to command his services as such in arresting the defendant, whether he held the prisoner after the arrest as jailer or as a peace officer is a fact to be settled by the evidence.

In *Berkstresser v. Com.* (1889) 127 Pa. 15, 17 Atl. 680, a plea reciting that the bail produced the principal in open court and petitioned the court to receive a surrender, on which petition the court refused to act, and that the sheriff was then and there present, was held not to show a surrender to the sheriff.

In *People v. Robb* (1894) 98 Mich. 397, 57 N. W. 257, the facts and the conclusion of the court were stated as follows: "Levi Lister was acting as deputy sheriff at the time the bail was estreated, and at the time Robb was in court, and sentenced for the offense of keeping a house of ill fame. The defendants offered to show that one of the sureties on the bond requested Louis Hosbein, another deputy sheriff, to take Robb into custody whenever he interposed a plea of not guilty to the charge for which he is recognized in this case, and that this request was communicated to Mr. Lister. The court excluded this testimony. We are cited to no case, nor have we been able to find one, in which

it has been held that this is a sufficient surrender. There are cases, it is true, in which it is held that a surrender to the sheriff, accompanied by a certified copy of the recognizance, may be made, but these cases usually depended upon statute. Our statute has made ample provision by § 9488, How. Stat., which provides for the issue of a mittimus, and the delivery of the process, with the body of the principal, to the sheriff. But until there is such delivery, accompanied by process, or the order of some court authorizing the detention of the principal, the sheriff could not justify a detention upon the mere oral direction of the surety, except as the agent of the surety."

In *Perkins v. Terrell* (1907) 1 Ga. App. 250, 58 S. E. 133, a record recital that the principal was "produced" by the sureties was held not to be sufficient to show that he was "surrendered," the court saying that a surrender "into custody" must appear.

In *Du Laurence v. State* (1909) 31 Ohio C. C. 418, it was held by a divided court that mere bodily delivery of a principal by a surety in open court is not a sufficient surrender unless accepted by the court.

The fact that the principal attends at the beginning of his trial, no offer to surrender him into custody being made by the bail, is not sufficient. *Lee v. State* (1875) 51 Miss. 665, wherein the court said: "The record shows that the accused was not surrendered by his sureties, either to the court or to the sheriff. He was present on his trial, but in the custody of his sureties, who, according to the Code and the terms of their undertaking, were his keepers until he was duly surrendered by them, or he was discharged by due course of law. The mere presence of the accused for trial was not a surrender; nor had his arraignment and trial this effect."

A statute of Louisiana (Rev. Stat. § 1033) provides as follows: "Any surety may be relieved from responsibility by making a formal surrender of the defendant or party accused in open court, or within the four walls

of the prison of the parish, and not otherwise."

In *State v. Miller* (1902) 109 La. 27, 33 So. 57, it was held that the manner of surrender provided by the statute must be strictly followed. In that case it appeared that the principal failed to appear when the case was called. A bench warrant was issued against him and given to the parish sheriff. While the sheriff was looking for him one of the sureties learned that he was in New Orleans. The surety went there and found the principal and had him arrested. The sheriff also went to New Orleans, thinking that he might find the principal there, but he did not know that he was there. On his arrival the surety turned over the prisoner to him, and the sheriff placed him in jail. It was held that the surety did not surrender the principal in the manner prescribed by the statute. The court said: "The accused was not surrendered by his surety to the sheriff or his deputy in open court, nor did he surrender him within the four walls of the prison. The surrender, if formally made, took place in the parish of New Orleans. The subsequent placing in jail of the accused was not the act of the surety, but of the sheriff. The statute, after setting out the precise circumstances under which the surety is entitled, by a surrender of the accused, to a discharge, declares that it must be made under those specified circumstances."

In *State v. McMichael* (1898) 50 La. Ann. 428, 23 So. 992, it appeared that the principal failed to appear at the call of the case. A short time after the term of the court for which the case was marked for trial, the sureties appeared before the sheriff of the parish and stated that "they were prepared to produce the principal." It was held that their bare statement was not such a "formal surrender" as was intended by the statute.

In *State v. Martel* (1842) 3 Rob. (La.) 22, it appeared that the principal, while the jury were deliberating on his case, forcibly made his escape from the court room. Thereafter a judgment on the bail bond was entered against him and his sureties. The

latter contended that the judgment should be set aside because the principal escaped from the custody of the law. But the court held that they were liable, as they had not made a formal surrender of their principal.

In *State v. Reames* (1914) 136 La. 48, 66 So. 393, it was held that the surrender of the principal to a deputy sheriff at a place 30 miles from the courthouse was not a compliance with the statute. But in *State v. Trahan* (1879) 31 La. Ann. 715, it appeared that the defendant was indicted for murder, and after a disagreement of the jury in his trial he was released on bail. Pending a second trial he was convicted of another offense and placed in jail. While in jail one of his sureties on the first bail bond told the sheriff that he wished to surrender the defendant. The sheriff said that "it was all right, and that he would cancel the bond." The sheriff then told the principal that his sureties had surrendered him, and later indorsed the bonds as follows: "I hereby certify that Richard Leblanc, one of the bondsmen of Voorhies Trahan on the reverse hereof, has this day surrendered the said V. Trahan to me within the four walls of the jail of the parish. June 11, 1879, G. B. Shaw, Shff." A few days later the defendant escaped from jail. The state's attorney proceeded to have the bond declared forfeited and to obtain a judgment thereon. The sureties contended that they were not liable as they had surrendered their principal, but the trial court gave judgment against them as well as against the principal. On appeal, the judgment as to the former was set aside. The court said: "If bail are not entitled to an exoneration upon such surrender as this, then it would be necessary to hold that they must go through the dumb show of getting the sheriff to lead the prisoner out of his cell only that the bail might instantly lead him back into it, and there deliver him. What we are now holding was foreshadowed in *State v. Frith* (1839) 14 La. 191, where it was said the bail might have been exonerated by a formal declaration to the sheriff, while



the principal was in actual custody, that they wished to surrender him. In this case, not only was the declaration made and taken cognizance of by the sheriff, but he executed a formal release, and the surrender was complete. The surrender was made by one only of the sureties, but a release of one inures to the benefit of all. *State v. Doyal* (1857) 12 La. Ann. 653. All of them have appealed. It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment in favor of the defendants, sureties, releasing them from their obligation and for their costs in both courts."

In *State v. Frith* (La.) *supra*, the defendant gave a bail bond with sureties. Thereafter, and while at large under the bail bond, he was arrested and placed in jail for another crime. The sureties contended that his being in custody exonerated them. But the court held that under the Louisiana statute they were bound to make a formal surrender of their principal. The court said: "The bail are not entitled to an exoneration in this case, because they have made no formal surrender. The principal being confined or imprisoned for an offense not bailable did not prevent a formal surrender, which might have been made. The principal being in the custody of the sheriff, by a formal declaration to that officer that the bail wished to surrender him, and did not consider themselves any longer bound for his appearance, they might have been exonerated."

*b. To whom made.*

"It may be laid down as a general rule that the surrender should be made to an officer authorized to admit to bail or to commit to jail." *Kellogg v. State* (1870) 43 Miss. 57. See to the same effect, *People v. Robb* (Mich.) *supra*; *State v. Le Cerf* (1829) 1 Bail. L. (S. C.) 410.

It seems that at common law a delivery to the sheriff was not authorized. *House v. Anniston* (1912) 5 Ala. App. 357, 59 So. 686. Statutes in many states, however, provide specifically

for a surrender to the sheriff. In *Roberts v. State* (1878) 4 Tex. App. 129, under a statute authorizing a surrender "into the custody of the sheriff," the court said: "No officer save the sheriff can receive the accused from the hands of the bail when the surrender is proposed to be made by them of his person. This is an authority which the law has not conferred upon constables or any other officer."

It has been held that where a surrender to the sheriff is authorized the surrender may be made to his deputy. *Carter v. State* (1884) 43 Ark. 132; *Ward v. Colquitt* (1879) 62 Ga. 267.

In *Carter v. State* (Ark.) *supra*, it appeared that while the principal was out on bail the surety delivered him to a deputy sheriff. The sheriff had been elected to a term of office, and then re-elected, but had not received his commission on the re-election until after the delivery of the principal. It further appeared that the sheriff had not reappointed his deputy at the time of the delivery. Holding, in an action on the bond, that the deputy sheriff had authority to accept the surrender of the principal, the court said: "The receipt for the prisoner was in the sheriff's own name, by deputy, and there is nothing to indicate that he had ever repudiated his former deputy's action. It is most probable that neither the surety nor the deputy knew, at that time, that the sheriff had qualified under his new term on the day before. He had not then received his commission. Everything seemed to have been done regularly, in the utmost good faith, with the intention of complying with the law, and with no appearance of collusion on the part of the surety with the subsequent escape of the prisoner."

But in *State v. Le Cerf* (1829) 1 Bail. L. (S. C.) 410, it was held that, while a surrender to the sheriff might be valid, a delivery of the principal by his sureties to a deputy sheriff was invalid. And see to the same effect *People v. Robb* (Mich.) *supra*, wherein it was said that the surrender must be to an officer who may commit the principal to jail.

Where the surrender is made to an

officer not entitled to receive it, as where it is made to the jailer, and not to the court, the officer holds the principal for the sureties. *Com. v. Bronson* (1853) 14 B. Mon. (Ky.) 361.

Though the statute provides that a surrender shall be made "to the sheriff," it is a sufficient surrender if the principal is produced in open court, where new bail with other sureties is given. *Young v. Deneen* (1906) 220 Ill. 350, 77 N. E. 193, affirming (1905) 123 Ill. App. 380.

After the case has been removed by an appeal, a surrender in the court where it originated is ineffectual. *House v. Anniston* (1912) 5 Ala. App. 357. So, in *Stegars v. State* (1827) 2 Blackf. (Ind.) 104, it was held that where a recognizance was given before a justice for the appearance of the principal in a superior court, a surrender to the justice was ineffectual. See to the same effect *Bird v. Terrell* (1907) 128 Ga. 386, 57 S. E. 777.

In *Miller v. State* (1846) 8 Blackf. (Ind.) 77, it was held that where a recognizance is forfeited in a justice's court, and the record certified to the circuit court, the principal may be surrendered in the latter court.

In Indiana, the surrender may be made in open court or to the sheriff. *State v. Rollins* (1875) 52 Ind. 168.

In Kentucky, it seems that the proper practice is to surrender the principal in the court at which he is bound to appear, if it is in session (*Com. v. Bronson* (1853) 14 B. Mon. (Ky.) 361); and during vacation, to make the surrender to the jailer (*Ramey v. Com.* (1885) 83 Ky. 534; *Schneider v. Com.* (1860) 3 Met. (Ky.) 410).

#### *V. Effect of surrender.*

A valid surrender of the principal exonerates the bail from all further liability on the bond. *SCOTT v. PEOPLE* (reported herewith), ante, 176; *State ex rel. Smith v. Smith* (1917) — Ind. App. —, 117 N. E. 553; *Bruce v. Colgan* (1822) 2 Litt. (Ky.) 284; *State v. Green* (1915) 263 Mo. 637, 173 S. W. 673; *State v. Rosseau* (1873) 39 Tex. 614; *Hughes v. State* (1890) 28 Tex. App. 499, 13 S. W. 777. And see the cases cited throughout this note

"The surrender by the sureties places the principal back in the custody of the sheriff, and he holds him by virtue of the original *capias* under which he arrested him in the first instance, the condition of the prisoner being precisely the same as though he had never been bailed." *Patillo v. State* (1880) 9 Tex. App. 456.

The exoneration of the sureties by a surrender is not affected by the fact that the principal is thereafter discharged by an unauthorized order of another court, and is never brought to justice. *State v. Callahan* (1914) 93 Kan. 172, 144 Pac. 189.

In *State v. Doyal* (1857) 12 La. Ann. 653, it was held that where two of the sureties on a bail bond surrender the principal all of the sureties are exonerated.

In *Spooner v. Smith* (1910) 134 Ga. 323, 67 S. E. 813, it appeared that the principal procured his release by giving a bail bond with two sureties. On the same day on which he was released, the sureties, fearing that he would run away, took him into custody. One of the sureties carried him to the sheriff and the latter locked him up in jail. Thereafter this surety, without the knowledge of the cosurety, went to the jail and induced a deputy sheriff to release the principal on the strength of the original bond. Later the principal ran away. In an action on the bail bond the sureties contended that the previous surrender to the sheriff exonerated them. Holding against this contention, the court said: "A surety cannot be allowed to procure the release of a prisoner on the basis of a bond signed by him and another, holding it out as a subsisting bond to a deputy sheriff who does not know otherwise, and then repudiate it on the ground that it was inoperative as a bond, because the prisoner had been delivered up to the sheriff after the bond was given, though apparently there was nothing to show any want of vitality in it. To permit this would be to allow the surety to perpetrate a fraud, to hold out a bond as in force, and on that basis secure the advantage derivable from the subsisting bond,

and then turn and secure an advantage on the basis that it was not. He is estopped from doing so. If the bond signed by him had sufficient vitality to accomplish the release, it was sufficient to bind the surety who used it for that purpose."

The surrender of the principal and the exoneration of the surety, after a conditional judgment of forfeiture, do not relieve the principal from liability on the forfeited recognizance. *Weese v. People* (1858) 19 Ill. 643; *Lorance v. People* (1848) 1 Ind. 359. C. M.

## HEWITT LOGGING COMPANY, Respt.,

v.

## NORTHERN PACIFIC RAILWAY COMPANY, Appt.

*Washington Supreme Court (In Banc) — August 18, 1917.*

(97 Wash. 597, 166 Pac. 1153.)

### Constitutional law — overcharges for freight — submission of claim to Public Service Commission.

1. A statute requiring a claim to recover overcharge of freight rates to be presented to the Public Service Commission, and limiting the time for such presentation, does not contravene a constitutional provision that property shall be delivered at any station at charges not exceeding those made for similar property to a more distant station in the same direction on the theory that common-law remedies are thereby preserved.

[See note on this question beginning on page 203.]

### — vested rights — procedure.

2. No litigant has a vested right in procedure so long as his right of action is not abolished.

[See 6 R. C. L. 309.]

### Common law — what is.

3. The common law is not an inflexible code, but a comprehensive enumeration of principles sufficiently elastic to meet the social development of the people.

[See 5 R. C. L. 806.]

APPEAL by defendant from a judgment of the Superior Court for Pierce County in favor of plaintiff in an action brought to recover for an overcharge for freight collected by defendant from plaintiff's assignor. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. George T. Reid, J. W. Quick, and L. B. da Ponte for appellant.

Messrs. Gordon & Easterday and J. E. Belcher for respondent.

Messrs. Higgins & Hughes and Hyman Zettler, amici curiæ.

Chadwick, J., delivered the opinion of the court:

This is an action to recover for an overcharge, collected by appellant from respondent's assignor, for freight upon sawlogs hauled from Satsop, Washington, to Hoquiam. A greater rate was charged than for

a like service given to others between Mack, Washington, and Hoquiam, a greater distance on the same line and in the same direction. The freight was hauled under the published tariffs of the road.

After a demurrer had been filed, the complaint, which alleged no more than the overcharge, was amended, appellant consenting thereto, by adding the following: "All of which shipments were covered by appropriate bills of lading issued by defendant, which bills of

lading were alike in form and one of which is hereto attached, marked 'Ex. C,' and made a part hereof."

The demurrer being renewed upon the grounds (1) that the complaint did not state a cause of action, and (2) that the action was not commenced within the time prescribed by law, was overruled upon both grounds. Judgment for want of an answer was entered against appellant.

Appellant relied on Rem. Code, § 8626-91, which provides that where complaints are made to the Public Service Commission concerning overcharges they shall be made within two years: "All complaints concerning overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the Commission."

And upon Rem. Code, § 165: "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

It is admitted that the cause of action arose more than two years, and less than six years, before the commencement of the action; the position of the appellant being that the Public Service Commission Law affords an exclusive remedy, or, if not, the action is barred under the general Statute of Limitations. Rem. Code, § 165.

We find that the remedy afforded by the statute, while not, in the strict sense of the term, exclusive, is, to the extent that it requires a submission of all controverted questions arising out of freight rates and freight charges, mandatory, and that one aggrieved by an overcharge must first submit his petition to the Public Service Commission within two years after his cause of action has accrued, as a condition precedent to the right to maintain an action, which is in form a common-law action, modified only in so far as the statute touches the measure of re-

covery and the time within which the action may be brought.

The pertinent sections of the Act of 1911, which is known as the "Public Service Commission Law," Laws 1911, chap. 117, p. 538, are as follows:

"Section 22. No common carrier, subject to the provisions of this act, shall charge or receive any greater compensation in the aggregate for the transportation of persons or of a like kind of property, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance . . ." Rem. Code, § 8626-22.

"Section 80. Complaint may be made by the Commission of its own motion, or by any person or corporation, . . . by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission: . . .

"Upon the filing of a complaint, the Commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided." Id. § 8626-80.

Section 81 provides for a hearing and "at the conclusion of such hearing the Commission shall make and render findings concerning the subject-matter and facts inquired into and enter its order based thereon. . . . A full and complete record of all proceedings had before the Commission, or any member thereof, on any formal hearing had, and all testimony shall be taken down by a stenographer appointed by the Commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to

review any order of the Commission, a transcript of such testimony, together with all exhibits introduced, and of the record and proceedings in the cause, shall constitute the record of the Commission." *Id.* § 8626-81.

"Section 91. When complaint has been made to the Commission concerning the reasonableness of any rate, fare, toll, rental, or charge for any service performed by any public service company, and the same has been investigated by the Commission, and the Commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the Commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.

"If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, and in such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated. If the complainant shall prevail in such action, he shall be allowed a reasonable attorney's fee, to be fixed and collected as part of the costs of the suit. All complaints concerning overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the Commission." *Id.* § 8626-91.

And §§ 104 and 111 (Rem. Code, §§ 8626-104, 8626-111), to which we shall hereafter refer.

The right to recover for discriminations in freight rates had not always been acknowledged by the courts. To save any controversy over the question of the right of a shipper who had suffered an extortion in the way of an unequal charge, or who had paid a greater charge for a short haul than had been

charged another for a long haul, the people put in the Constitution a declaration prohibiting the practice.

"Persons and property transported over any railroad . . . shall be delivered at any station . . . at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station. . . ." Const. art. 12, § 15.

Respondent insists that this section reaffirms the common law. Its argument logically assumes that it is beyond the power of the legislature to take from a shipper any of the remedies incident to the common law, and that it can assert its right to recover in an action upon the bill of lading which is a contract bringing the limitation for such actions within Rem. Code, § 157, which provides for a limitation of six years on "(2) an action upon a contract in writing, or liability express or implied arising out of a written agreement." But we think that such conclusion does not follow.

To avoid unjust discrimination, unlawful rebates, and favoritism theretofore prevailing, the several states, as well as the Congress of the United States, have adopted regulatory statutes. In *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179, the then Commission Law was attacked because it had provided a procedure then unknown to the law and procedure prevailing in the courts and quasi judicial tribunals of the country. In passing upon the objection, it was said: "It is true that the forms of law and procedure under which this Commission is acting are not in all respects like the forms and procedure governing other courts; and in the language of many of the cases cited by the counsel for appellant, and repeated by the appellants themselves in their arguments, in some respects 'it is not a proceeding under the forms and with the machinery provided by the wisdom of successive ages.' But it occurs to us that it makes no

difference whether it is a proceeding under the forms and with the machinery provided by the wisdom of successive ages, or whether it is under the powers and proceedings provided by this age. Law is a progressive science, and must necessarily regard the changing conditions of society and of the business of the country, and the legislature and courts of to-day ought certainly to be as well qualified to provide machinery for the guidance of a commission as was the lawmaking power two hundred years ago. The essential idea does not take cognizance of the antiquity of the powers and machinery under which the Commission is acting, but of the question whether, under such powers and the working of such machinery, the respective legal rights of the carriers and the people are preserved. A careful examination of the whole act, we think, refutes the statements made by the attorneys for appellant that the law is cunningly devised for the purpose of preventing railroads from obtaining just judgments, and repels the presumption that the Commission provided for by the legislature is appointed for the purpose of oppressing railroad companies. We think, on the contrary, the presumption must be that the Commission will act with fairness towards all parties."

No better statement of the spirit, purpose, and object of such laws has ever been written.

We may grant that the Constitution declares the common law, but it does not follow that the legislature may not occupy its acknowledged field and define procedures and fix limitations upon the assertion of the right preserved. The "Public Service Commission Law" does not assume to take away the common-law right of action. The legislature has accepted the declaration of the Constitution at its full worth, and has, by a complete statute, endeavored to avoid all of the annoyances and collateral questions attending the assertion of the common-law remedy, such as the reasonableness

of the rate in and of itself, and its reasonableness when compared to another rate, the character and extent of service, and attending circumstances, and the measure of recovery, which, it is said, was never defined at common law (Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315), and which, it is said with equal gravity, was as certain as a recovery can be upon an implied contract to pay money (Sullivan v. Minneapolis & R. R. Co. 121 Minn. 488, 45 L.R.A. (N.S.) 612, 142 N. W. 3).

To define procedure, to make a condition precedent, and to fix a limitation does not destroy the force of the Constitution. On the contrary, a law so providing makes it efficient, certain, and uniform in its operation. The substantive right remains; that is all the citizen can insist upon, for it is held under authority without limit that no litigant has a vested right in procedure so long as his right of action is not abolished.

Constitutional  
law—vested  
rights—  
procedure.

In the Minnesota case, supra, the court held that the Public Service Commission Law of that state was not exclusive, and that the common-law right as well as common-law remedies were not repealed by it. The court reminded itself of the rule as laid down by Chief Justice White in Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 437, 51 L. ed. 553, 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075: "We concede that we must be guided by the principle that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory"—and proceeded

to hold that, whereas the act did not provide a civil remedy, the shipper might pursue his common-law remedy independent of the statute. But here the procedure is not repugnant to, but is in aid of, the common-law right. The statute exempts itself from the rule of the Minnesota case by providing in terms, "If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same. . . ." Laws 1911, chap. 117, p. 600, § 91 (Rem. Code, § 8626-91).

To say that it is beyond the power of the legislature to provide for an inquiry by a board skilled in the technical science of freight and passenger rates as a prerequisite to the institution of a suit, and within a definite time, would be to assert the indefensible principle that the legislature could not pass any law of procedure where a right of action existed at common law.

That the legislature intended to save all substantive rights is made plain by the act itself. Section 104 provides: "This act shall not have the effect to release or waive any right of action by the state or any person for any right, penalty or forfeiture which may have arisen or may hereafter arise under any law of this state; . . ." Rem. Code, § 8626-104.

And § 111 evidences the legislative intent that all actions brought after the passage of the act should be governed by the terms of the act in so far as it defined procedure. Section 111 (*id.* § 8626-111) saves only pending actions, while § 104 saves all substantive rights then accrued or thereafter to accrue.

The object of the law was to fix a certain procedure applicable to all cases and to avoid the confusion that would follow a holding for appellant, that is, two limitations upon one cause of action,—a limitation of two years and one thereafter, if a petition were filed with the Commis-

sion, and one of six years if respondent's theory be accepted.

Not much has been said by the court upon the subject of freight rates and common-law remedies, but all that has been said is consistent with the principle now asserted. *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, *supra*; *State ex rel. Goss v. Metaline Falls Light & Water Co.* 80 Wash. 652, 141 Pac. 1142. Goss and wife petitioned the court for a writ of mandamus to compel a public service corporation to furnish their place of business with water at a rate alleged to be the customary rate of like service to others. A demurrer was interposed and sustained upon the ground that the Public Service Commission had exclusive jurisdiction to entertain the petition in the first instance. The ruling of the court was sustained. That to so provide by statute was not considered by the court as a denial of remedy, for it said: "A careful examination of this act will disclose a legislative intention to invest the Public Service Commission with exclusive original jurisdiction to hear, pass upon, and determine the questions here presented. The Public Service Commission, as constituted, is authorized to examine in the first instance and pass upon these problems. Appellants should seek their remedy before that tribunal."

The case of *Northern P. R. Co. v. Carstens Packing Co.* 92 Wash. 243, 158 Pac. 721, is relied on. That case arose under a rule of the Interstate Commerce Commission upon a subject resting in rule and regulation as distinguished from right and remedy, and throws no light upon the present controversy.

Respondent contends that the court has held in *Lilly Co. v. Northern P. R. Co.* 64 Wash. 589, 117 Pac. 401, that the court has jurisdiction to entertain a suit independent of the statute. That case is readily distinguished and, when properly understood, does not impinge any of our present conclusions. The court there dealt with the rights of the

parties as they were defined by the Interstate Commerce Law. The jurisdiction of the courts to entertain a suit to recover illegal discriminations in freight rates without first resorting to the Interstate Commerce Commission was sustained upon, and by reference to, the 22d section of the Act to Regulate Commerce. "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." 24 Stat. at L. 387, chap. 104, Comp. Stat. 1916, § 8595.

The Act to Regulate Commerce preserves existing rights and remedies; the Public Service Commission Law preserves rights, but not remedies, except as to cases then pending. Laws 1911, chap. 117, pp. 609, 611, §§ 104, 111 (Rem. Code, §§ 8626-104, 8626-111).

If the common law be the growth of the ages, it follows that it must grow with the ages. The common law is not an inflexible code, but a comprehensive enumeration of principles sufficiently elastic to meet the social development of the people. It is in a state of "constant improvement and development, in keeping with advancing civilization and new conditions of society." Holmes, Common Law, pp. 1-5, 36 et seq.

Common law—  
what is.

It was the boast of the common law that it afforded a remedy for every wrong. Its remedies were not always adequate. Sometimes, because of changing conditions, they become burdensome. This was the evident condition when the problems of transportation first engaged the attention of the courts. To repeat, the people wisely asserted the common-law right to compel fairness of freight charges in their Constitution, and left it to the legislature to define a procedure that would, while preserving the right, make recovery certain in amount, and tend to reduce the volume of litigation. In so doing, it worked no hardship on anyone by making provision that a claim should be filed with the Commission and within a certain time, it being nowhere asserted that the time limited is unreasonable.

Constitutional  
law—over-  
charges for  
freight—sub-  
mission of claim  
to Public Serv-  
ice Commission.

The claim for the overcharge was not made by respondent's assignor within the time fixed by law. The condition precedent to the right to sue is nonexistent. The complaint does not state a cause of action.

Reversed and remanded with directions to dismiss.

Ellis, Ch. J., Holcomb, Morris, Mount, Main, Fullerton, and Parker, JJ., concur.

## ANNOTATION.

### Validity of statute requiring claims for refund of overcharges by carriers to be submitted to Public Service Commission.

A statute making it a condition precedent of any remedy by an aggrieved shipper against a carrier that he complain to the Railroad Commission, and have its determination of whether the rate complained of is excessive, was held to provide an exclusive remedy in *Frank A. Graham Ice Co. v. Chicago, M. & St. P. R. Co.* (1913) 153 Wis. 145, 140 N. W. 1097, and not to be unconstitutional as the denial of the right of trial by jury

guaranteed by the state and Federal Constitutions. The court states that no one has a vested right in the continuance of the common-law remedy to redress future wrongs, and it is further stated that the legislature, in the statute involved, preserved a remedy by action against the Railroad Commission in favor of any aggrieved party, so that the rights of all parties are well guarded under the law.

A statute permitting complaints to



be filed with the Railroad Commission, and providing for a special procedure upon the award in the circuit court in case the carrier should fail to satisfy the same, was sustained in *Illinois C. R. Co. v. Paducah Brewery Co.* (1914) 157 Ky. 357, 163 S. W. 239. The statute provided for an investigation by the Railroad Commission of overcharges, in which investigation an award shall be made according to the judgment of the Commission, which, if not paid, shall be filed in the circuit court of the county, and summons issued against the carrier. This was held not violative of a constitutional provision that the general assembly shall not pass local or special acts concerning the jurisdiction, or the practice, or the circuits of the courts of justice; or the rights, powers, duties, or compensation of the officers thereof; but practice in the courts of continuous session may be made different from practice in circuit courts held in terms. The specific objections which were made by the railroad company to the statute in question were (1) that, upon the award being filed in the office of the clerk of the circuit court, he was required to issue a summons without the filing of his petition as in other actions; (2) because of the restriction contained in the statute as to the introduction of evidence in the circuit court; and (3) because it conferred upon the circuit court exclusive jurisdiction of actions upon awards of the Commission, irrespective of the amount in controversy. The court states that the purpose of the constitutional provision in question was to insure the uniformity of jurisdiction and practice in the circuit courts, and under the statute the proceedings upon an award of the Commission would be the same in one circuit court as in another, and that this does not constitute special legislation within the purview of the constitutional limitation.

The constitutionality of the Kentucky act was again sustained in *Louisville & N. R. Co. v. Greenbrier Distillery Co.* (1916) 170 Ky. 775, P.U.R.1916F, 508, 187 S. W. 296, and

held not to violate § 59, subsection 1, of the Kentucky Constitution by allowing an award of the Railroad Commission to be proceeded upon and a judgment rendered thereon without the complainant filing a petition and setting forth his cause of action, as is ordinarily required to be done. The Kentucky act was further sustained in the case, over the objection that under it the Railroad Commission was vested with judicial powers contrary to constitutional provision dividing the powers of government into three distinct departments, namely, legislative, executive, and judicial, and providing also for a separation of these departments and vesting the judicial power in the senate when sitting as a court of impeachment, and in one supreme court and the courts established by the Constitution, and providing further that no court except those provided for in the Constitution should be established.

The validity of the Kentucky statute was sustained also by the United States Supreme Court, which held that the procedure thereunder for recovery before the state Railroad Commission, of reparation for payment previously made to a carrier for transportation in excess of the rate found by such Commission to be reasonable, could not be said to deny the due process of law guaranteed by the United States Constitution on the theory that there was no formal issue and no method of requiring the production of evidence; that the pleadings were sufficiently formal, and the carrier was permitted to raise such issues and introduce such evidence as it desired; and that there was nothing to show that it suffered for lack of compulsory process against witnesses. *Louisville & N. R. Co. v. Finn* (1915) 235 U. S. 601, 59 L. ed. 379, P.U.R.1915A, 121, 35 Sup. Ct. Rep. 146. It was further held by the United States Supreme Court that a carrier could not object on constitutional grounds to the procedure under the Kentucky statute for the recovery and reparation for payment previously made to it for transportation in excess of the rates found by the Railroad Commission to be reason-

able, because, on the subsequent trial in the court to enforce the Commission's reparation order, there was no right to adduce evidence other than such as was presented to the Commission, unless the court should first be satisfied that the evidence was such as could not have been produced before the Commission with the exercise of reasonable diligence, where there was nothing to show that such a carrier had or could have had any defense to the payment of reparation, that it had not already either interposed or waived in the proceedings before the Commission, or to show that it had any evidence to be adduced before the court that it would be prevented from introducing by the effect of the restriction.

A statute providing that a shipper may invoke his remedy by application to the board of railroad commissioners or by an action of court, but may not pursue both remedies at the same time, and providing that if the action is brought before the Commission the Commission may order reparation, and providing further for the enforcement of its order in the circuit court, was sustained in *Turner Creamery Co. v.*

*Chicago, M. & St. P. R. Co.* (1915) 36 S. D. 310, P.U.R.1916A, 1083, 154 N. W. 819. The objections that were raised to the statute in this case were that it violated due process of law (a) because § 8, chapter 312, Laws 1913, makes the order of the board absolute unless appealed from; (b) because, upon appeal to the circuit court, the trial must be had solely upon the record made before the board; (c) because, upon appeal to the circuit court, no trial by jury is provided for. In answering the first point, the court states that in view of the fact that the statute provides for the enforcement of the order of the Commission in another action, there is no reason for the assertion that due process of law has been violated by the statute making the order absolute unless appealed from. The statute was held not to be unconstitutional because of the second reason, and the third reason was held to be obviated by an amending statute, which provided for a trial by jury in the circuit court in cases in which the order of the board required the payment of money.

W. A. E.

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W. L. GILBERT, Respt.,

v.

GLOBE & RUTGERS FIRE INSURANCE COMPANY of the State of  
New York, Appt.

*Oregon Supreme Court (In Banc) — September 17, 1918.*

(— Or. —, 174 Pac. 1161.)

**Insurance — denial of liability — effect on estoppel.**

1. The denial of liability by an insurer who has promised to pay a loss relieves whatever estoppel may exist because of the promise to plead the time limitation provided in the policy, so that the action must be brought within a reasonable time thereafter.

[See note on this question beginning on page 218.]

**— adjustment — finding of amount.**

2. The finding by an insurance adjuster that the amount of the loss exceeded the face of the policy, upon visiting with the owner the insured property, which has been destroyed by fire, is an adjustment of the loss.

[See 14 R. C. L. 1363 et seq.]

**— time limitation — validity.**

3. A provision of an insurance policy, limiting the time for bringing action to recover for a loss to twelve months after the loss, is valid.

[See 14 R. C. L. 1417, 1418.]

**— unreasonable delay.**

4. A delay by an insured for more

than two and a half years in bringing an action on a policy limiting the time for action to one year after loss, after the insurer has repudiated its promise to pay the loss, is unreasonable and bars action on the policy.

[See 14 R. C. L. 1416 et seq.]

— garnishment — waiver of time limit.

5. That an insurer has been garnished for a claim against the insured, and for that reason refuses to pay the policy to the insured, does not amount to a waiver of the time limited in the policy for bringing the action.

[See 14 R. C. L. 1423.]

On Petition for Rehearing.

**Definition — waiver — estoppel.**

6. The distinction between waiver and estoppel is that a waiver is a voluntary relinquishment of a known right, while an estoppel consists of a preclusion which in law prevents one from alleging or denying a fact in con-

sequence of his own previous act, averment, or denial.

**Waiver — effect.**

7. One who relinquishes a known right given him by contract cannot, without consent of his adversary, reclaim it.

**Estoppel — lifting ban — notice.**

8. The ban of an estoppel may be lifted by the one against whom it is invoked, by the giving of proper notice.

— denial of liability on insurance policy.

9. The ban of an estoppel upon an insurer to deny liability on a policy, because of the assurance of its agent that the claim would be paid, is lifted by notifying the insured that the claim will not be paid, so that the insured can no longer rely on it to prevent the running of the limitation period.

[See 14 R. C. L. 1423 et seq.]

**APPEAL** by defendant from a judgment of the Circuit Court for Marion County in favor of plaintiff in an action brought to recover the amount alleged to be due on a fire insurance policy. *Reversed.*

**Statement by Johns, J.:**

On June 14, 1912, for value, the defendant executed to plaintiff its certain standard fire insurance policy for \$1,200 on a beach cottage in Gearhart park. On October 2, 1912, while the policy was in force, the property was totally destroyed by fire. The defendant was promptly notified of the loss, and about October 16, 1912, the plaintiff, with T. C. Shankland, as the adjuster of the defendant, and at his request, made a trip to Gearhart for the purpose of adjusting the loss. Shankland fixed the amount of the loss at \$1,531, and thereafter they returned together to Portland. The claim was never paid, and outside of some personal interviews with the agent of the company, and the writing of some letters to the home office, insisting upon payment, nothing further was done by the plaintiff prior to the commencement of this action. Pending the adjustment of the loss, the representative of the Astoria Box & Lumber Company had a conference with Shankland, after which that company commenced an action

against the plaintiff upon an alleged claim of about \$500, sued out a writ of attachment, and caused a garnishee process to be served upon the defendant to secure the claim.

Plaintiff commenced this action on June 20, 1916. The policy provides that in the event of loss the insured, "within sixty days after the fire, unless such time is extended in writing by the company, shall render a statement to the company, signed and sworn to by said insured," as to certain matters and things therein required. It also provides: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after the full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

In his complaint the plaintiff alleges that he kept and performed all of the terms and conditions of the policy by him to be kept and performed; that after the garnishee process was served he demanded of defendant that it pay the amount of

the policy; that "said demand was repeatedly made, and said defendant herein represented that said payment would be made, and said loss fully adjusted and settled, as soon as said pretended garnishment proceedings had been determined and disposed of;" that "said representations and promises on the part of defendant in reference to said settlement of said loss were continued until after one year had elapsed from the date of said fire as herein set forth and alleged, and then and after that date said company refused to make settlement of said loss or any part of said \$1,200 absolutely;" that such representations and promises were made to deceive the plaintiff, and that by reason thereof he did not commence his action "upon said policy within the time limit therein, to wit, one year, and said plaintiff believed said representations to be true, and, relying thereon, was induced thereby not to bring said action within said time aforesaid;" that such representations were false and fraudulent and were made without any purpose or intent of complying therewith and to deceive and mislead the plaintiff; that he relied thereon, "and on account of said representations and said conduct defendant ought not now to be permitted to say that this action was not commenced within the time limited by said policy."

To the complaint the defendant filed an amended answer, denying any and all of its material allegations, except as to the issuance of the policy, and among other grounds of defense, and for a further and separate answer, alleged that the "proof of loss" was not made within sixty days after the fire, as provided for in the policy, and that the action was not commenced within the time specified by the terms of the policy. To this answer the plaintiff filed a further and separate reply, in which he alleged facts tending to show that the defendant was estopped to claim that "proof of loss" was not made within sixty days, or to plead the time limitation in the policy, for the

reasons that "said representations and promises on the part of defendant in reference to said settlement of said loss were continued until after one year had elapsed from the date of said fire, as set forth and alleged in plaintiff's complaint, and then, and not until then, said company refused to make settlement for said loss or any part thereof." A trial was had, and the jury returned a verdict for the full amount of the policy, upon which judgment was entered, and from which this appeal is taken.

Messrs. Veazie, McCourt, & Veazie for appellant.

Messrs. W. C. Winslow and Carey F. Martin for respondent.

Johns, J., delivered the opinion of the court:

We have twice carefully read the record. The plaintiff met the adjuster of the defendant at the scene of the fire, for the purpose of investigating and adjusting the amount of the loss, in going to and from which place he traveled 250 miles. It is very apparent from the record that the sole and only object of the plaintiff in meeting the adjuster at Gearhart was to ascertain and determine the amount of the loss, with a view of making the necessary proofs; otherwise, he would not have gone to the expense and trouble of making the trip. The policy was for \$1,200. The adjuster found that the loss was \$1,531; hence, the amount of the loss was adjusted.

Insurance—  
adjustment—  
finding of  
amount.

It is maintained that the plaintiff did not make any actual "proof of loss," as required by the terms and conditions of the policy. There is no evidence that the plaintiff ever requested, or that the defendant ever furnished him, any blanks for his "proof of loss." Fair dealing and business courtesy required that the defendant should aid and assist, rather than mislead and deceive, him in the making of his "proof of loss," and it is very clear that the adjuster, Shankland, was far more interested in having the garnishee

process of the Astoria Box & Lumber Company served on the defendant than he was in aiding and assisting the plaintiff; otherwise there never would have been any question about such proof.

But, under the view that we have taken of this case, all such considerations become immaterial. The testimony shows that the plaintiff read over and knew the terms and conditions of the policy at the time of its receipt, and it expressly provides that any action must be brought "within twelve months next after the fire." The fire occurred on October 2, 1912. This action was commenced on June 29, 1916. The authorities are uniform in holding that a time limitation in which such

an action shall be brought is valid, if the time is reasonable, and that a twelve months' limitation is reasonable.

The plaintiff alleges in his complaint that one year after the fire the defendant "then refused to make said settlement for said loss, or any part of said sum of \$1,200 absolutely," and that, "relying upon the alleged promises and by reason thereof, he did not bring his action within the twelve months; that the defendant ought not now to be permitted to say that this action was not commenced within the time limited by said policy." In substance, he makes the same allegations in his reply, and as a witness he testifies to a conversation with the adjuster, Shankland, in the fall of 1913, in which the adjuster told him that he did not have any right to bring action, that he had lost his right if he ever had one, and also that up to the time of that conversation with Shankland in Portland in October, 1913, he relied upon the promises of the defendant that the policy would be paid when the garnishment proceedings were adjusted. Hence, the plaintiff alleges in both his complaint and reply, and as a witness testifies, that at or about the time the year expired he knew and was advised by the company that it de-

nied all liability and would contest his claim, yet he did not commence his action until at least two years and eight months after he received that information. In the face of such allegations and proof, we are of the opinion that when he acquired such knowledge he could not thereafter rely, and did not rely, upon such alleged promises or representations of the company. The plaintiff has not shown or alleged any excuse or reason for not bringing his action within a reasonable time after he received the information, on or about October 2, 1913, that his claim would be contested, or why he delayed bringing his action until June 29, 1916.

Assuming that the defendant was estopped to plead the time limitation, the estoppel was removed when the plaintiff was notified that the defendant denied liability and would contest his claim, and upon receipt of such notice the plaintiff then had a reasonable time within which to commence his action. *David v. Oakland Home Ins. Co.* 11 Wash. 181, 39 Pac. 443; *Phillips v. Union Cent. L. Ins. Co.* (C. C.) 101 Fed. 33. The action was commenced on June 29, 1916, and under the facts disclosed by the record we hold as a matter of law that it was not commenced within a reasonable time after the defendant notified the plaintiff that it would contest his claim and deny liability, and for such reason the court should have directed the jury to return a verdict for the defendant. This decision is founded upon a contract, and is not in conflict with, and is to be distinguished from, the opinion of Mr. Justice Benson in the case of *Hood v. Seachrest*, 89 Or. 457, 174 Pac. 734, rendered September 10, 1918, which was founded upon the statute.

It is also shown by the record that the garnishee process was still pending at the time the action herein was commenced, and under the authority of *Ripley v. Aetna Ins. Co.* 30

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(— Or. —, 174 Pac. 1161.)

N. Y. 136, 86 Am. Dec. 362, the fact that the defendant had been garnished, and that by reason thereof <sup>—garnishment—</sup> it would not settle <sup>waiver of</sup> the loss while that <sup>time limit.</sup> process was pending, did not amount to a waiver of the time limitation in the policy, and the defendant would not be estopped.

The judgment of the Circuit Court is reversed, and the action is dismissed.

A petition for rehearing having been filed, Benson, J., on February 11, 1919, handed down the following additional opinion (— Or. —, 178 Pac. 358):

The petition for rehearing in this case very earnestly attacks the conclusion in the original opinion herein, which is expressed in these words: "Assuming that the defendant was estopped to plead the time limitation, the estoppel was removed when the plaintiff was notified that the defendant denied liability and would contest his claim, and upon receipt of such notice the plaintiff then had a reasonable time within which to commence his action."

The opinion concludes that, since more than two years had elapsed thereafter before the action was commenced, plaintiff's right was barred. The question suggested by the opinion and the arguments upon the petition for rehearing did not assume a prominent position in the former hearing, and therefore we have since made a very careful investigation of the authorities which have at this time been cited by counsel.

Plaintiff argues that when a defendant has, by his own conduct, waived any of the requirements of a contract, that condition or limitation is out of the contract for all time, and cannot be revived. He also urges, as a sequence, that when the period of the limitation fixed by the contract has been eliminated by the conduct of the defendant there remains no limit other than the general Statute of Limitations,

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under which this action is not barred. In considering the authorities in support of this view, we may well keep in mind the somewhat elusive distinction between waiver and estoppel as illustrated in Kimball v. Horticultural Fire Relief, 79 Or. 133, 154 Pac. 578, a distinction which appears to be that a "waiver" is <sup>Definition—</sup> a voluntary relin- <sup>waiver—</sup> quishment of a known right, while <sup>estoppel.</sup> an "estoppel" consists of a preclusion which in law prevents a party from alleging or denying a fact in consequence of his own previous act, averement, or denial. Hence, if a party

relinquishes a known right, awarded him by contract, he cannot, without the consent of his adversary, reclaim it. But the ban of an estoppel may be lifted by the <sup>Waiver—effect.</sup> party against whom <sup>Estoppel—</sup> it is invoked, by the <sup>lifting ban—</sup> giving of proper notice. In the case at bar, we may assume that the defendant, by the conduct of its agents, led the plaintiff to believe that his claim would not be contested, but would eventually be paid. So long as it maintained this attitude, the plaintiff was warranted in remaining quiescent; but when defendant notified him that the policy claim would not be <sup>—denial of</sup> paid the ban of the <sup>liability on</sup> estoppel was raised, <sup>insurance</sup> and the plaintiff <sup>policy.</sup> could no longer plead that he was being deceived by the tactics of the adversary.

With these principles in mind, let us examine the authorities cited by the appellant. The leading case relied upon is that of Semmes v. Hartford Ins. Co. (Semmes v. City F. Ins. Co.) 13 Wall. 158, 20 L. ed. 490, in which the circumstances were of a sort which could occur only once in many generations. The plaintiff was a resident and citizen of Mississippi, and the defendant a corporation of Connecticut. The loss occurred in January, 1860, and the action was begun on October 31, 1866. The defendant relied upon a

provision in the policy to the effect: "No suit for the recovery of any claim upon the same should be sustainable in any court unless such suit should be commenced within the term of twelve months next after any loss or damage should occur; and that in case any such suit should be commenced after the expiration of twelve months next after such loss or damage should have occurred, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

To this plea there was a replication of the diverse citizenship of the parties, and that the Civil War had prevented the prosecution of the suit within the time limited in the contract. Mr. Justice Miller delivered the opinion of the court, and apparently bases his reasoning and conclusion upon the second clause of the time limitation, as above set out, using this language:

"Now, this contract relates to the twelve months next succeeding . . . the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to twelve months, to be made up of the days in a period of five years in which the plaintiff could lawfully have commenced his suit.

"So, also, if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within twelve months, is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that, when once rebutted fully, nothing but a presumption of law or presumption of fact could again revive it. . . . And though the plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the contract, he must still bring his suit within the reasonable time fixed by the legislative authority; that is, by the Statute of Limitations."

It will be at once observed that this case is widely different from the

one at bar, in that there is no element in it, either of waiver or of estoppel. The failure to bring the action within the contract time was not attributable to either plaintiff or defendant, but to the unforeseen tragedy of civil war. This difference is emphasized by the fact that Mr. Justice Miller bases his conclusion upon that clause of the policy which makes the failure to sue within twelve months conclusive evidence of the invalidity of the claim, a clause which is not found in the policy which we are considering.

The next case which we are asked to consider is *Illinois Live Stock Ins. Co. v. Baker*, 153 Ill. 240, 38 N. E. 627. This case holds that hopes of payment held out to a plaintiff by an insurance company as an inducement not to sue within the time limited in the policy operate as a waiver of the limitation clause in the policy; that such waiver cannot be revoked, and that after such waiver the case rests upon the statutory limitation.

Next we have the case of *Galloway v. Standard F. Ins. Co.* 45 W. Va. 237, 31 S. E. 969, from which we quote: "Now, whether such promise continuing unexecuted for a time, and then ended by a refusal to perform it, leaving a part of the period reasonably sufficient for suit, would be a waiver of the clause, or merely suspend it from the promise to the refusal to fulfil it, I need not, do not, say. I do say, however, that where such promise stands for the whole period of the limitation, it is not a mere suspension, but a waiver of the clause of limitation."

The opinion cites with approval *Semmes v. Hartford Ins. Co.*, and *Illinois Live Stock Ins. Co. v. Baker*, supra, and holds that the general Statute of Limitations controls.

Finally, our attention is directed to *Earnshaw v. Sun Mut. Aid Soc.* 68 Md. 465, 6 Am. St. Rep. 460, 12 Atl. 884. This case resembles that of *Semmes v. Hartford Ins. Co.* supra, in that there is no element of either waiver or estoppel; the delay in bringing the action having

been accomplished by the act of a third party, who commenced a suit to restrain the defendant from paying the money to plaintiffs, and secured a temporary restraining order which continued in force until the contract time limitation had expired. The opinion simply follows *Semmes v. Hartford Ins. Co.* supra, and bases its conclusion upon that authority.

Opposed to these, there is a strong line of authorities which hold to the view that such acts of the defendant as are indicated in the present case do not, in the strict sense, constitute a waiver, but a simple case of estoppel, the effect of which is to suspend the time limitation of the contract until the hour when the estoppel is removed by notice to the plaintiff that his claim is repudiated, at which moment the contract limitation again becomes effective, and gives the plaintiff twelve months from that date in which to begin his action. Among the authorities supporting this doctrine, we note 1 *Wood on Limitations*, § 49, which says: "If the insurer adjusts the loss, and promises to pay it within a specified time, the period covered by the promise is excluded from the limitation."

*Joyce on Insurance*, § 8207, says: "A provision requiring suit to be brought within a certain time may be waived, and this waiver may be inferred from acts and conduct on the part of the insurer. And if the insured is induced by the acts of the officers or agents of the insurer to suspend for a certain time the performance of acts required on his part after loss, such time should be added to the time limited for bringing action."

The following cases support the doctrine thus formulated: *Killips v. Putnam F. Ins. Co.* 28 Wis. 472, 9 Am. Rep. 506; *Black v. Winnieshiek Ins. Co.* 31 Wis. 74; *Kentucky Mut. Security Fund Co. v. Turner*, 89 Ky. 665, 13 S. W. 104; *Steel v. Phenix Ins. Co.* 2 C. C. A. 463, 7 U. S. App. 325, 51 Fed. 715; *Allemania F. Ins. Co. v. Peck*, 33 Ill. App. 548; *Fey*

*v. I. O. O. F. Mut. L. Ins. Co.* 120 Wis. 358, 98 N. W. 206; *Voorheis v. People's Mut. Ben. Soc.* 91 Mich. 469, 51 N. W. 1109. These authorities appear to us to be founded upon the better reasoning, and we therefore conclude that, plaintiff having failed to commence his action within twelve months after being notified that defendant repudiated his claim, the action is barred, and the petition for a rehearing must be denied.

McBride, Ch. J., and Harris and Bean, JJ., concur.

Johns, J., concurs in the result, adhering to the former opinion.

Burnett, J., concurring:

This is an action to recover the amount of a policy of the standard form prescribed by the statutes of this state, insuring a dwelling house owned by the plaintiff, for one year from June 14, 1912. The complaint alleges that "thereafter and on the — day of October, 1912, the plaintiff made due and sufficient notice of the fire, and proof of loss in the form required by said defendant and caused the same to be filed with said defendant company, which said proof was filed and accepted by said defendant company. That plaintiff herein has duly and fully performed all of the terms, conditions, and obligations of said policy upon his part to be kept and performed. That upon the — day of October, 1912, said defendant company made a full and complete investigation of said fire, and assessed and established the loss of this plaintiff to be about the sum of \$1,600."

These quoted excerpts from the complaint are denied by the answer.

It is admitted that the house was totally destroyed by fire, October 2, 1912. The plaintiff's allegation of his ownership of the property is traversed. It is admitted, as he alleges in substance, that a few days after the fire, in an action in the circuit court for Marion county against the plaintiff here, the plaintiff in an action caused a writ of attachment to be issued and levied upon the funds in the hands of the



defendant company, owing to this plaintiff. The complaint charges, in substance, that after the attachment was levied the plaintiff demanded from defendant the amount of the policy, and the latter represented that payment would be made and the loss fully adjusted and satisfied as soon as the attachment proceedings had been determined and disposed of, which representations were continued until after a year had elapsed from the date of the fire, after which the company refused absolutely to pay anything whatever; that the assurances of payment after the settlement of the attachment proceedings were made for the purpose of deceiving the plaintiff and causing him not to bring any action against the defendant; that, believing such representations to be true, he was induced thereby not to sue within the time prescribed by the policy; and that on account of said representations the defendant ought not now to be permitted to say that the action was not commenced within the time limited by the contract. Averring that no part of the insurance money has been paid, the plaintiff demands judgment therefor, with interest and costs. A copy of the policy is appended to the complaint as an exhibit.

The matter about promising to pay as soon as the attachment had been determined and the charges of deception on the part of the defendant were denied by the answer.

Among other defenses, the defendant, reciting the contents of the policy on that point, avers that the plaintiff did not within sixty days after the fire, and has not at any time, rendered any statement to the defendant containing any of the matters or things required by the said policy of insurance, nor did he within sixty days after the fire or at any time since offer any proof of his loss; and, further, that no suit or action on the policy was commenced within twelve months next after the fire, or at any time before this action was begun, which itself was not instituted within the time

provided by said policy. This was traversed by the reply. By way of estoppel that pleading declares, in substance, that the defendant ought not to be permitted to say that the action was not commenced within sixty days after the fire, "upon the ground and for the reason that immediately after said fire plaintiff herein duly notified defendant thereof, and that said defendant instructed plaintiff that one T. C. Shankland would be the adjuster to adjust the loss occasioned by said fire, and that he should thereafter transact all business in connection with said loss with the said T. C. Shankland, and that thereafter and within sixty days from said fire plaintiff herein met the said T. C. Shankland at the place of said fire, and then and there fully informed the said T. C. Shankland concerning all the facts and circumstances known to plaintiff regarding said fire, and then and there answered all questions concerning the same asked by the said T. C. Shankland, and then and there signed all papers required to be signed by the said T. C. Shankland, and that the said T. C. Shankland then and there informed this plaintiff that he had furnished all information that was necessary, and that he had signed all papers that were necessary to be signed to prove said loss and furnish information to defendant company, and that plaintiff herein relied upon the representations and statements of the said T. C. Shankland, and made no other proof of said loss and furnished no other information concerning the same, believing that he had furnished all information and proof demanded and desired by said defendant company, to said company's agent, the said T. C. Shankland."

Upon similar grounds, based on the allegation that the company had promised to pay the face of the policy as soon as the attachment proceedings were settled, and that the promises were continued until after the one year in which he might sue had expired, it is contended that the defendant is estopped from urging

the conventional limitation upon bringing the action. A jury trial resulted in a verdict and judgment for the plaintiff, and the defendant appeals.

The plaintiff testifies that he effected the insurance on the property, received the policy, took it home with him, and read it in full. It appears without dispute that he discovered the provision therein to the effect that the policy should be void if he were not the sole and unconditional owner of the land upon which the dwelling stood, and inasmuch as he had only a permissive occupancy of that realty, subject to sale for the joint account of himself and the owner of the fee, he returned the instrument to the agents who effected the insurance, and they appended a rider in the form required to cover the apparent estate.

The admitted policy on its face concludes with this clause: "This policy is made and accepted subject to the conditions, provisions, and agreements not in conflict with law or contrary to public policy, contained on the first page hereof and those hereafter placed hereon, and to the conditions placed upon page two hereof, all of which said conditions, provisions and agreements are hereby specially referred to and made a part of this policy; and no officer, agent, or other representative of this company shall have power to waive any condition, provision, or agreement of this policy, except such as, by the terms of this policy, may be the subject of agreement written hereon or added hereto; and as to such conditions, provisions, and agreements, no officer, agent, or representative of this company shall have such power or be deemed or held to have waived any of such conditions, provisions, and agreements, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

It is further stated in the con-

ditions that "in any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company."

Further, that "within sixty days after the fire, unless such time is extended in writing by this company, (the insured) shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire."

Again: "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

And, lastly: "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire."

A short time after the fire the plaintiff wrote a letter to the local agent at Portland, notifying him thereof. On October 11, 1912, that representative of the company addressed a letter to him as follows:

"Please be advised that we have heard from San Francisco about your loss at the beach. Mr. T. C. Shankland will be the adjuster; we inclose his personal card. He will send you a telegram addressed to Hubbard on Monday forenoon; it will be sent from Ashland, Oregon, as he was called down there to-day, but Sunday evening he will be able to decide just what evening he will be able to leave Portland for Gearhart park. He stated that it would be necessary for you to be there in order for you to properly sign up required papers."

The plaintiff testified that Shankland preceded him to the scene of the fire, near Gearhart in Clatsop county, and that when he arrived he found Shankland and signed the following:

#### Investigation Agreement.

Witnesseth, that the undersigned W. L. Gilbert, the insured, claiming to have met with loss by fire of October 2, 1912, to property described for insurance under policy No. 79,721 of the Globe Underwriters' Insurance Company, issued at its agency at Portland, Oregon, on the 14th day of June, 1912, and that the undersigned T. C. Shankland has been detailed by said insurance company as its adjuster in this case to investigate the facts and circumstances of said loss, and to report particulars thereof to said insurance company's offices, for their information, and that it is desired that said attention be given without delay or prejudice to the rights of either party to said policy contract:

Therefore, it is hereby agreed and stipulated that said adjuster may proceed in said investigation and may agree with said insured, in accordance with the provisions of said policy, as to the ascertained or estimated amount of both sound value of, and loss and damage by said fire to, property which said insured claims was described for insurance under said policy, if said agreement can be reached; and that this agreement is and that the said agreement

hereinabove referred to (if made) is to be, without reference to any other question or questions which has or have arisen or may hereafter arise under the conditions and stipulations of said policy.

Said insured understands and agrees, that the said adjuster has no authority to waive, modify, or strike from said policy, any of its terms, conditions, or stipulations, nor to revive the said policy should it have become void or voidable from any cause.

Witness our hands Gearhart, Oregon, this 15th day of October, 1912.

W. L. Gilbert, Insured.  
Globe Underwriters' Insurance Company,

by T. C. Shankland, Adjuster.

This paper seems to have been executed in duplicate, both copies being offered in evidence on the part of the defendant. The plaintiff admits signing one of them, and says that the signature on the other looks like his own, but that he does not remember signing it, although he says that he signed two papers on that occasion. In one place he merely says that he made proof of loss at that time; again, he says that Shankland called one of the papers "proof of loss." This is all denied by the latter. No notice was served upon the defendant to produce any such paper. The plaintiff says that he gave it to Shankland. The latter, however, was not called upon, as far as the record discloses, to produce the writing, and the only evidence about it on the part of plaintiff is his mere statement that he made proof of loss. There is no pretense in the testimony on his behalf that the instrument contained any of the stipulated requisites for such a writing. By the terms of the policy, which the plaintiff himself says he read with care, it is stipulated that action to recover for the loss must be brought within one year after the fire. Respecting the matter of the delay beyond that period, he says that on a subsequent occasion Shankland told him the loss

could not be paid until after the attachment action was settled.

Urged by his counsel to tell everything, he said: "As near as I can remember, he said he didn't think there would be any trouble with the company about paying the policy when the lumber company was settled with."

Asked to tell fully what was said, plaintiff testified as follows:

A. Well, I don't know as there was very much else said, only what I have stated here.

Q. Well, I want you to go over the whole thing, just as though you had never mentioned it before, Mr. Gilbert.

A. He said he had no right, because I didn't put in my proof of loss.

Q. Was that the time when you went down there thirty days after the fire?

A. No.

Q. Well, now, that is the conversation we are talking about now, and I want you to confine yourself to that, and tell what he said, and all that he said.

A. Well, he didn't say anything at that time, only just that I couldn't have my money until that case was settled. That is about all he did say about it. I don't remember of his saying anything else that I can recall to memory now; it is some time ago.

All the matter relied upon by the plaintiff to prove either waiver or estoppel is found in the evidence about the declarations of Shankland. No other statement of any other person in any way connected with the defendant company is put forth in support of the contention that the plaintiff was excused from furnishing proof of loss, or from commencing his action within one year next after the fire. It is necessary, therefore, to determine the extent of Shankland's authority to bind the company.

It is well settled that one dealing with the agent of another does so at his peril, and must be prepared to

show that the other is really the agent of the principal sought to be charged, or that the latter has given the supposed agent apparent power to act as he did in the matter in question, or, with knowledge of his doings or statements, has ratified the same, or has waived his want of authority, or is in some manner estopped to deny the same. *Rumble v. Cummings*, 52 Or. 203, 208, 95 Pac. 1111; *Baker v. Seawear*, 63 Or. 350, 127 Pac. 961; *Sharp v. Kilborn*, 64 Or. 371, 130 Pac. 375; *Roberts v. Lombard*, 78 Or. 100, 152 Pac. 499; *Bessler v. Derby*, 80 Or. 513, 157 Pac. 791.

It is also a well-established principle that one having knowledge of the limited authority of an agent cannot bind the principal, by any act or statement of the agent, beyond the actual scope of the authority thus known to the one seeking to charge the principal by virtue of something said or done by the alleged agent. *Weidert v. State Ins. Co.* 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242; *Egan v. Westchester Ins. Co.* 28 Or. 289, 42 Pac. 611; *Leavitt v. Dimmick*, 86 Or. 278, 168 Pac. 292.

The following extract from 1 *Mechem on Agency*, § 707, is apropos to the discussion: "Parties dealing with an agent known by them to be acting only under an express grant, whether the authority be general or special, are bound to take notice of the nature and extent of the authority conferred. They must be regarded as dealing with that grant before them, and are bound at their peril to notice the limitations thereto prescribed, either by its own terms or by construction of law. . . . So, where the act assumed to be done by the agent is one for which the authority is required by law to be conferred by a written instrument or by a writing under seal, the parties dealing with him must take notice of that fact, and they will be bound by any limitations or restrictions contained therein, although they

have not had actual knowledge of them."

The doctrine of the latter part of this excerpt is applicable to the requirement of the statute about the necessary conditions of fire insurance policies, wherein it is prescribed that "in any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company."

Under the sanction of this law, the plaintiff was charged with knowledge that the authority of Shankland must be in writing, and hence the limits of the alleged agent's power were imputed to the former by operation of law. In addition to this, he himself confessedly agreed in writing to the special scope of Shankland's agency. Admittedly, the plaintiff was informed that Shankland would be the adjuster. No further authority was conferred upon him by the letter addressed to the plaintiff and already quoted. It is prescribed in the policy itself that the company shall not be held to have waived any provision or condition thereof, or any forfeiture thereof, by any requirement, act, or proceeding on its part, relating to the appraisal, or to any examination therein provided for. The plaintiff knew this, because, as he said, he read the policy before the fire. Moreover, in the document which he signed at the time the adjuster inspected the ruins, he expressly stipulated that "said insured understands and agrees that the said adjuster has no authority to waive, modify, or strike from said policy, any of its terms, conditions, or stipulations, nor to revive the said policy should it have become void or voidable from any cause."

Beyond this, the general scope of that agreement which he admits signing was merely that the adjuster was to investigate the facts and circumstances of the loss, and, if possible, agree as to the amount of loss and damage, "without reference to any other question or questions which has or have arisen, or may

hereafter arise, under the conditions and stipulations of said policy."

The plain construction of this writing, which the plaintiff does not in the least attempt to impeach for fraud, mistake, or any other reason, makes it manifest that the agency of Shankland was limited, within the knowledge of the plaintiff, to the mere question of ascertaining the amount of the loss, without dealing in any manner or to any degree with any other question then or thereafter to be involved between the parties. Under the stipulated limitation of the so-called agent's power, it can make no difference what the latter said respecting the proof of loss, or the sufficiency for that purpose of the papers which the plaintiff signed. It is stated in § 712, L. O. L., that

"There shall be no evidence of the contents of a writing other than the writing itself, except in the following cases:

"1. When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in § 782.

"2. When the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default."

This section closes with the rule that, in the cases mentioned in the subdivisions here quoted, either a copy or oral evidence of the contents of the instrument shall be produced.

Section 782, L. O. L., to which reference is made in the quoted matter above set forth, reads thus: "The original writing shall be produced and proved except as provided in § 712. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss; but the notice to produce it is not necessary where the writing itself is a notice, or where it has been wrongfully ob-

tained or withheld by the adverse party."

For the plaintiff, as a witness, to call a paper "proof of loss," is but a legal conclusion. It is not evidence of the contents of the paper required by the Code, even if a showing had been made authorizing the admission of oral statements on that subject. It is a reasonable rule that the witness who gives substituted testimony by word of mouth, in place of the writing itself, should state the language thereof as nearly as possible, so that the court may determine whether it comes within the definition of the instrument in question as embodied in the policy. In *Wiseman v. Northern P. R. Co.* 20 Or. 425, 23 Am. St. Rep. 135, 26 Pac. 272, the defendant was sued for the value of certain household goods claimed to have been lost by it while transporting the same over its railroad. One ground of its defense was based upon a release to a minimum valuation. It seems that the original of that document had been forwarded to an official in Chicago, Illinois; that the claim agent of the defendant at St. Paul had telegraphed that the files in the office of the traffic manager in Chicago had been searched, and that the release could not be found there. It appears that the instrument had never been in the office of the company at Portland, Oregon. The defendant then offered the deposition of the agent at the origin of the shipment in Michigan, to prove the contents of the release which it seems he had taken from the plaintiff; but this court affirmed the action of the circuit court in denying the right to introduce secondary evidence, on the ground that sufficient diligence to produce the original had not been shown. Other cases on this subject are as follows: *Bowick v. Miller*, 21 Or. 25, 26 Pac. 861; *Harmon v. Decker*, 41 Or. 587, 93 Am. St. Rep. 748, 68 Pac. 11, 1111; *Gladstone Lumber Co. v. Kelly*, 64 Or. 163, 129 Pac. 763; *Jones v. Teller*, 65 Or. 328, 133 Pac. 354; *Muir v.*

*Morris*, 80 Or. 378, 154 Pac. 117, 157 Pac. 785.

In the present instance no attempt whatever was made to produce the original, either by calling upon the defendant by notice or upon Shankland by subpoena duces tecum. To sum up on this feature, the special agency of Shankland was confined to the matter of ascertaining the amount of damage, and, if possible, to agree upon that with the plaintiff, without reference to any other question. This did not authorize him to receive proof of loss nor to declare to the plaintiff that the instrument which he signed was proof of loss or sufficient for that purpose. Moreover, no showing was made, allowing secondary evidence of the contents of the instrument. Even if there had been, there was no testimony to show what those contents were, so that the court might be able to determine whether the instrument amounted to a compliance with the express terms of the policy, or supported the plaintiff's allegation that he had performed all the terms of the contract upon his part.

The question of apparent scope of authority has no place in the discussion, for it is admitted that the plaintiff not only knew but agreed in writing upon the limitations of Shankland's agency. As stated, the estoppel, even if properly pleaded, depends entirely upon the statements of Shankland, who, as the plaintiff knew and stipulated, had no authority to bind the company. To hold otherwise would be to violate the express provisions of the policy itself, upon which the plaintiff relies; for it says on the face thereof, which the plaintiff read, that "no officer, agent, or representative of this company shall have such power or be deemed or held to have waived any of such conditions, provisions, and agreements, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or

be claimed by the insured, unless so written or attached."

It would also be violative of the statutory condition, on page 2 of the policy, that "the company shall not be held to have waived any provision or condition of the policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for."

As Mr. Justice Ramsey said in *Oatman v. Bankers' Fire Relief Asso.* 66 Or. 388, 400, 134 Pac. 1033, 1035: "The rules relevant to questions of waiver prior to the enactment of the standard policy law do not apply now. So far as this statute is inconsistent with the common law, it supersedes it. It is the duty of the courts to give effect to the statute, and not to nullify its requirements. This statute not only imposes a penalty on insurance companies for noncompliance with its terms, but it declares in express terms that if the condition quoted supra is not complied with, the policy is void."

The same reasoning applies to the alleged statements of Shankland, upon which the plaintiff relies to excuse himself for not bringing the action within one year, namely, that he knew that Shankland had no authority to bind the company by any such statements. The company cannot be estopped by any unauthorized declaration of its agent where the party urging the estoppel is aware of the limitations upon the agent's authority. It was the duty of the court to construe the legal effect of the admitted writing (L. O. L. § 136), and to declare that no authority existed on the part of Shankland to bind the company in the manner

contended for by the plaintiff. The terms of the agency having been admitted and agreed upon in writing, it became the duty of the court as a matter of law to declare what could and what could not be imputed to the company under such circumstances. *Glenn v. Savage*, 14 Or. 567, 576, 13 Pac. 442; *Anderson v. Adams*, 43 Or. 621, 638, 74 Pac. 215; *Baker v. Seawear*, 63 Or. 350, 354, 127 Pac. 961.

For the purposes of this case it matters not whether the question arose upon a departure or the necessity of pleading an estoppel in the complaint. It was held in *Mercer v. Germania Ins. Co.* 88 Or. 410, 171 Pac. 412, that "in an action on a contract, plaintiff must prove a right to prevail under the contract, unless he alleges in his complaint a waiver on the part of the defendant of some of the provisions of the contract, or an estoppel to assert them as a defense."

But whether we apply this doctrine as showing that the plaintiff has not proved that he fully performed the contract, and that his plea of estoppel in his reply is a departure, or whether we consider the estoppel on its merits, the result is the same; for the latter contention, depending as it does on the declarations of an unauthorized agent, fails for want of proof on the merits.

The whole matter was presented to the court at the close of all the testimony, by motion for a directed verdict, and, on the admitted terms of the policy and the stipulated limitations upon the authority of the agent, upon whose declarations the plaintiff solely depends for either waiver or estoppel, the court should have allowed the motion.

## ANNOTATION.

**Subsequent denial of liability following promise or negotiations as affecting contractual limitation for action upon insurance policy.**

**Denial after expiration of limitation period.**

Although there are many cases holding or assuming that the insurer,

by conduct extending beyond the limitation period, inducing the insured to believe that his claim would be settled without suit, was precluded from in-

voking the contractual limitation against insured, there are comparatively few which consider the question now under annotation, as to whether such conduct amounts to a definite waiver of the contractual limitation, in the sense that it cannot be revived, or a mere suspension thereof. A majority of those that do consider the question take the view that the contractual limitation is definitely waived, and cannot be revived by a denial of liability, where the insurer's conduct, which justifies the insured in delaying suit, extends beyond the period fixed by the limitation.

Thus, in *Galloway v. Standard F. Ins. Co.* (1898) 45 W. Va. 237, 31 S. E. 969, where the insurer had promised to pay, and had not denied liability until after the expiration of the six months limited by the policy for bringing suit, it was held that the provision had been waived, not merely suspended, and that the insurer could not thereafter rely on it. The court said: "Now, whether such promise, continuing unexecuted for a time, and then ended by a refusal to perform it, leaving a part of the period reasonably sufficient for suit, would be a waiver of the clause, or merely suspend it from the promise to the refusal to fulfil it, I need not—do not—say. I do say, however, that, where such promise stands for the whole period of the limitation, it is not a mere suspension, but a waiver of the clause of limitation. The mere pendency of negotiations for settlement is no waiver. *McFarland v. Peabody Ins. Co.* (1873) 6 W. Va. 425. But a promise to pay ends controversy, and by it the company says: 'You need not sue at all. I will pay without suit.' It admits of no other interpretation. *Thompson v. Phenix Ins. Co.* (1890) 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019, held that a promise to pay was a waiver, and barred the company from this defense. The court went further, saying that conduct of the company, inspiring a hope and expectation on the part of the insured party that the loss would be amicably adjusted, would operate as such waiver and estoppel. The court held it an es-

toppel against the plea, not a mere suspension. It said delay to sue would, in such case, be attributable to the company. It said the waiver need not be in writing. Assurances of settlement, which reasonably throw the insured party off his guard, and lull him into security, will waive the limitation clause, and bar its use by the insurance company. *Allemania F. Ins. Co. v. Peck* (1890) 133 Ill. 220, 23 Am. St. Rep. 610, 24 N. E. 538; *Bonnert v. Pennsylvania Ins. Co.* (1889) 129 Pa. 558, 15 Am. St. Rep. 730, 18 Atl. 552; *St. Paul F. & M. Ins. Co. v. McGregor* (1885) 63 Tex. 399; *Bish v. Hawkeye Ins. Co.* (1886) 69 Iowa, 184, 28 N. W. 558; *Martin v. State Ins. Co.* (1882) 44 N. J. L. 485, 43 Am. Rep. 397; 2 May, Ins. § 488. *Home Ins. & Bkg. Co. v. Myer* (1879) 93 Ill. 271, holds a promise to pay a waiver. We must remember that this clause is for the benefit of the company, inserted by it to limit the period for suit shorter than the general law, and it would be unjust to allow it, by its action, to cause delay in suit, and then plead this clause. Being for its benefit, it may waive it. In determining whether such promise of payment is a waiver or a mere suspension of running of time, we must reflect that the limitation clause is only a matter of contract, not like the Statute of Limitations. It either operates, or is entirely gone by reason of waiver. The statutory limitation fixes a period as a bar, and then says that when there is obstruction to the prosecution of the suit, by absence or other cause, the time of the obstruction does not count. The running of time stops for a time and then begins again,—opens and expands,—because the statute says so; but not so with the contractual limitation."

It may here be remarked that in the *Thompson Case*, cited in the preceding quotation, the question before the court was whether the failure to bring the action within the prescribed period, computing from the date of the fire, was fatal, and, so far as appears, the court had no occasion to consider what the effect of delay for the prescribed period, computing from the in-



surer's denial of liability, would have been.

In accord with the Galloway Case in *Lynchburg Cotton Mill Co. v. Travelers' Ins. Co.* (1906) 9 L.R.A.(N.S.) 654, 79 C. C. A. 464, 149 Fed. 954, reversing (1905) 140 Fed. 718, a provision of an indemnity policy that action must be brought upon it within thirty days after final satisfaction of a final judgment for damages by the insured was held waived, and not merely suspended, by the prolongation of attempts at compromise between the insured and the insurer, beyond the thirty-day period. The court said: "The plaintiff in error satisfied the judgment against it on the 15th day of April, 1904, and, under the strict terms of clause 14, suit should have been instituted thereon within thirty days from that time; but, by reason of the correspondence of the parties, this period was confessedly extended from the 15th day of May, 1904, until the 16th day of August, 1904; and the effect of the decision of the lower court is that what occurred operated to suspend said clause to the 16th day of August, 1904, when it was again revived and became operative for a period of thirty days, thereby requiring suit to be instituted within thirty days from the 16th of August, 1904. In this view we are unable to concur, believing that the same is neither supported by reason nor authority. Clause 14 was a limitation prescribed by the contracting parties in the interest of the insurer, and which should be construed most favorably for the insured. *Steel v. Phenix Ins. Co.* (1892) 2 C. C. A. 463, 7 U. S. App. 325, 51 Fed. 715; *Cotten v. Fidelity & C. Co.* (C. C. 1890) 41 Fed. 506; 2 May, Ins. 3d ed. § 478; 2 Wood, F. Ins. 2d ed. 120. The insurer had the right to insist on the enforcement of this special limitation, but, upon departing therefrom, certainly in the absence of express stipulation to the contrary, what was done operated not as a suspension of the clause, but a waiver thereof; and after such waiver, the general Statute of Limitations of the state, and not the special time named in the contract, governed the parties in the en-

forcement of the same. The reason for this is apparent; and this case is a striking illustration of what would be the ill effect of a contrary doctrine. No one would ever know when, as to such contracts, the Statute of Limitations began or ceased to run. It would not be determinable from an examination of the contract, nor from the state statute, but would depend upon an uncertain and indefinite state of facts, as to which persons might think differently, and bring about a chaotic condition, which would be exceedingly undesirable. The requirement to sue within thirty days is a stringent clause at best, in contravention of the general law on the subject, and only enforceable because of the special agreement of the parties; and it is one that cannot and should not be revived by implication, if once lost; and, besides, the equities of the case would be unfavorable to the adoption of such a policy. The insurer, knowing his rights under the general law, could afford to waive the clause in question in order to effect an adjustment, and the insured, likewise, to make or entertain such a proposition, realizing that by so doing he would forfeit nothing, and, upon failure, proceed by suit within the statutory period to enforce his claim. The contrary view would result in making practically impossible any effort at compromise between the parties, certainly so far as the assured is concerned. If it be suggested that the benefit of the clause, so far as securing speedy adjustment, would be lost, the answer is that, at least, a specific contract for revivor of the special limitation contemplated after the failure of the settlement should be had, if it is proposed to avoid the statutory limitation."

And in *Illinois Live Stock Ins. Co. v. Baker* (1894) 153 Ill. 240, 38 N. E. 627, where the insurer induced the insured to delay suing until after the expiration of the period of limitation fixed by the policy, it was held that there was a waiver of the provision, and that this could not be recalled or revoked. The court said: "If any substantial part of the time provided by the limitation is lost by reason of the

waiver, the limitation is wholly gone. It cannot be revived, nor can the plaintiff be required to sue within any time short of the statutory limitations."

And in *Philadelphia Casualty Co. v. Thacher* (1916) 150 C. C. A. 131, 236 Fed. 869, the limitation for bringing suit within one year of the termination of a credit insurance policy was held waived, by an agreement between the insured and insurer to await the result of the bankruptcy proceedings of one of the insured's debtors, which apparently extended beyond the limitation period. The court here expressly stated that the one year's contractual limitation was thus entirely abrogated, and not merely suspended, and the Statute of Limitations was considered to govern the rights of the parties.

And the court in *Creem v. Fidelity & C. Co.* (1910) 141 App. Div. 493, 126 N. Y. Supp. 555, where a liability insurer, by its conduct in assuming the defense of actions against the insured, waived the provision of the policy limiting the time within which the insured might sue thereon, stated that it could not thereafter rely thereon; that a waiver once established could not be recalled.

In *Dibrell v. Georgia Home Ins. Co.* (1892) 110 N. C. 193, 28 Am. St. Rep. 678, 14 S. E. 783, where the insurer required the insured to obtain certain papers as a part of his proofs of loss, which necessarily consumed more than the twelve months within which the policy provided suit should be brought, it was held that the provision was waived, and that the insured was free from any restriction as to the time of bringing suit, except such as was imposed by the Statute of Limitations.

Other cases, however, hold either expressly, or in effect, that the conduct on the part of the insurer, which justifies the insured in delaying action until after the expiration of the period prescribed by the contract, does not have the effect to definitely waive the contractual limitation, in the sense that it cannot be revived, but merely fixes a new point for the

computation; or, as some cases hold, allows the insured a reasonable time after the insurer has notified the insured of the rejection of the claim.

In *Black v. Winneshiek Ins. Co.* (1872) 31 Wis. 74, where the loss was adjusted, and the insurer agreed to pay the claim on a certain date unless the insurer should otherwise notify the claimant, and it failed to give notice or pay, and suit was brought shortly after the expiration of the limitation period, it was held that the period from the time of making the agreement to the time payment was agreed to be made should be excluded in the computation of the limitation period. And to the same effect, see *Killips v. Putnam F. Ins. Co.* (1871) 28 Wis. 472, 9 Am. Rep. 506.

In *Goodwin v. Merchants' & B. Mut. Ins. Co.* (1902) 118 Iowa, 601, 92 N. W. 894, where the insurer had induced the plaintiff to dismiss a suit commenced within the limitation period, and to agree to arbitrate, and the agreement upon the arbitration had fallen through, it was held that the insurer was estopped to assert the limitation provision, and it was held that, conceding that this did not give the plaintiff a right to sue at any time within the general Statute of Limitations, but only a right to bring action within a reasonable time after the waiver, the plaintiff had complied therewith.

In *David v. Oakland Home Ins. Co.* (1895) 11 Wash. 181, 39 Pac. 443, where the insurer continued negotiations looking to a settlement until after the expiration of the period of limitation fixed by the policy, it was held waived, and the plaintiff was held to have a reasonable time after rejection of his claim, in which to sue. The court said: "So long as the insured was thus given the right to suppose that the question of adjustment was an open one, he had the right to assume that the condition of the policy as to the time for the commencement of an action thereon had been waived by the company. And such waiver would continue until, by some definite action on its part, the company had notified the insured of the rejection of

his claim. After which, he would have a reasonable time in which to commence an action upon the policy."

And in *Staats v. Pioneer Ins. Asso.* (1909) 55 Wash. 51, 104 Pac. 185, it was held that an insurer could not invoke the limitation provision of the policy involved, where it had, until after the expiration of the period, induced the belief that the claim would be paid, and the plaintiff was apparently held entitled to a reasonable time after the company denied liability, to institute suit.

In *Cochran v. London Assur. Corp.* (1896) 93 Va. 553, 25 S. E. 597, where the insurer, at the plaintiff's request, had agreed to an extension of the time for bringing suit beyond the period fixed by the policy, it was held that it could not withdraw the extension without the consent of the one to whom it was granted, and could not afterwards attach certain conditions to the consent; and an action brought within the period of extension was held seasonably brought.

The following cases, in which the insurer did not deny liability until after the expiration of the limitation periods, though holding that the insurer could not invoke the contractual limitation against the action, throw but little, if any, light upon the question now under consideration, for the reason that it was not necessary for the courts to decide more than that the failure to bring the action within the time specified, computing from the date of loss, or other date fixed by the contract, was not fatal; it not appearing that the period prescribed had run since the denial of liability:

**United States.**—*Thompson v. Phenix Ins. Co.* (1889) 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; *Curtis v. Home Ins. Co.* (1865) 1 Biss. 485, Fed. Cas. No. 3,503; *Ide v. Phoenix Ins. Co.* (1870) 2 Biss. 333, Fed. Cas. No. 7,001; *Steel v. Phenix Ins. Co.* (1892) 2 C. C. A. 463, 7 U. S. App. 325, 51 Fed. 715, affirmed in (1894) 154 U. S. 518, 38 L. ed. 1064, 14 Sup. Ct. Rep. 1153; *Alten v. McFall* (1898) 89 Fed. 463; *De Farconnet v. Western Ins. Co.* (1901) 110 Fed. 405, affirmed in (1903) 58 C. C. A. 612, 122 Fed. 448.

**Arkansas.**—*Dwelling House Ins. Co. v. Brodie* (1889) 52 Ark. 11, 4 L.R.A. 458, 11 S. W. 1016.

**Colorado.**—*Prudential Ins. Co. v. Hummer* (1906) 36 Colo. 208, 84 Pac. 61.

**District of Columbia.**—*Brown v. Commercial F. Ins. Co.* (1903) 21 App. D. C. 325.

**Georgia.**—*Hartford F. Ins. Co. v. Amos* (1896) 98 Ga. 533, 25 S. E. 575; *American Ins. Co. v. McVickers Bros.* (1910) 135 Ga. 118, 68 S. E. 1026; *Stanley v. Sterling Mut. L. Ins. Co.* (1913) 12 Ga. App. 475, 77 S. E. 664.

**Illinois.**—*Home Ins. & Bkg. Co. v. Myer* (1879) 93 Ill. 271; *Allemania F. Ins. Co. v. Peck* (1890) 133 Ill. 220, 23 Am. St. Rep. 610, 24 N. E. 538, affirming (1889) 38 Ill. App. 548; *Mutual Ben. Life Asso. v. Coats* (1892) 48 Ill. App. 185; *Phoenix Ins. Co. v. Stewart* (1893) 53 Ill. App. 273; *Fireman's Fund Ins. Co. v. Western Refrigerating Co.* (1894) 55 Ill. App. 329, reversed on other grounds in (1896) 162 Ill. 322, 44 N. E. 746; *German Ins. Co. v. Johnson* (1873) 52 Ill. App. 585; *Derrick v. Lamar Ins. Co.* (1874) 74 Ill. 404.

**Indiana.**—*Grant v. Lexington F. L. & M. Ins. Co.* (1854) 5 Ind. 23, 61 Am. Dec. 74; *Continental Casualty Co. v. Hunt* (1913) 53 Ind. App. 657, 101 N. E. 519.

**Iowa.**—*Bish v. Hawkeye Ins. Co.* (1886) 69 Iowa, 184, 28 N. W. 553.

**Maryland.**—*Metropolitan L. Ins. Co. v. Dempsey* (1890) 72 Md. 288.

**Massachusetts.**—*Little v. Phoenix Ins. Co.* (1877) 123 Mass. 380, 25 Am. Rep. 96; *Jennings v. Metropolitan L. Ins. Co.* (1888) 148 Mass. 61, 18 N. E. 601.

**Michigan.**—*Turner v. Fidelity & C. Co.* (1897) 112 Mich. 425, 38 L.R.A. 529, 67 Am. St. Rep. 428, 70 N. W. 898; *Masterbrook v. United States Acci. Asso.* (1908) 154 Mich. 16, 117 N. W. 543; *Dolsen v. Phoenix Preferred Acci. Ins. Co.* (1908) 151 Mich. 228, 115 N. W. 50.

**Mississippi.**—*Scottish Union & Nat. Ins. Co. v. Enslie* (1900) 78 Miss. 157, 28 S. W. 822.

**Nebraska.**—*Phenix Ins. Co. v. Rad*

**Bila Hora Lodge** (1894) 41 Neb. 21, 59 N. W. 752.

**New Jersey.**—**Martin v. State Ins. Co.** (1882) 44 N. J. L. 485, 43 Am. Rep. 397.

**New York.**—**Bowen v. Preferred Acci. Ins. Co.** (1903) 82 App. Div. 458, 81 N. Y. Supp. 840, appeal dismissed in 175 N. Y. 497, 67 N. E. 1091; **Peters v. Empire L. Ins. Co.** (1904) 90 N. Y. Supp. 296; **Robinson v. Metropolitan L. Ins. Co.** (1896) 1 App. Div. 269, 37 N. Y. Supp. 146, affirmed in (1899) 157 N. Y. 711, 53 N. E. 1131; **Ames v. New York U. Ins. Co.** (1856) 14 N. Y. 253.

**Oklahoma.**—**Northwestern Nat. L. Ins. Co. v. Ward** (1915) — Okla. —, 155 Pac. 524.

**Pennsylvania.**—**Bonnert v. Pennsylvania Ins. Co.** (1889) 129 Pa. 558, 15 Am. St. Rep. 730, 18 Atl. 552; **Harold v. People's Mut. Acci. Ins. Asso.** (1892) 12 Pa. Co. Ct. 454.

**Texas.**—**St. Paul F. & M. Ins. Co. v. McGregor** (1885) 63 Tex. 399; **Horst v. London F. Ins. Co.** (1889) 73 Tex. 67, 11 S. W. 148; **Mutual Reserve Fund Life Asso. v. Folbert** (1895) — Tex. Civ. App. —, 33 S. W. 295.

**Washington.**—**Hall v. Union Cent. L. Ins. Co.** (1900) 23 Wash. 610, 51 L.R.A. 288, 83 Am. St. Rep. 844, 63 Pac. 505.

In some of the above cases, the courts declared in terms that the limitation provision had been "waived," and if it were to be assumed that that term was employed with the precision used in the reported case (**GILBERT v. GLOBE & R. F. INS. Co.** ante, 205), and as distinguished from "estoppel," they could, perhaps, furnish some indirect authority for the view that the contractual limitation was entirely extinguished. But it is, at least, doubtful whether the courts in these cases deliberately and consciously employed the term in its strict, technical significance, with an appreciation of its logical import as regards the point under consideration. In the **Thompson Case**, for instance, the court seems to negative any such implication by the statement that the "waiver" need not be in writing, but may arise from such a course of conduct on the part of the insurer as will equitably "estop" it

from pleading the prescribed limitation in bar.

**Denial before expiration of limitation period.**

In the reported case (**GILBERT v. GLOBE & R. F. INS. Co.**) the insurer denied liability before the termination of the period of limitation fixed by the policy and its prior conduct, leading the insured to believe that his claim would be paid, was held not to waive the limitation provision, but to merely work an estoppel, which was terminated by a denial of liability, from which time the period of limitation prescribed ran.

In some cases, in which the negotiations apparently ceased, by a denial of liability before the expiration of the limitation period fixed by the policy, it has been held that the time consumed in negotiations for a settlement should be excluded in figuring the period of limitations. **Allemania F. Ins. Co. v. Peck** (1889) 33 Ill. App. 548, affirmed without discussion in this point in (1890) 133 Ill. 220, 23 Am. St. Rep. 610, 24 N. E. 538; **Voorheis v. People's Mut. Ben. Soc.** (1892) 91 Mich. 469, 51 N. W. 1109.

It will be observed that in the reported case (**GILBERT v. GLOBE & R. F. INS. Co.** ante, 205), although the decision on the question under consideration was against the insured, it was assumed that he was entitled to the full period prescribed by the contract, computing from the time of the denial of liability.

In the following cases, however, where the negotiations for settlement were broken off by the insurer before the expiration of the limitation period fixed by the policy, and a reasonable time remained for bringing suit before the termination of that period, it was held that the insurer was entitled to assert the limitation provision as a defense:

**Connecticut.**—**Vincent v. Mutual Reserve Fund Life Asso.** (1902) 74 Conn. 684, 51 Atl. 1066.

**Georgia.**—**Metropolitan L. Ins. Co. v. Caudle** (1905) 122 Ga. 608, 50 S. E. 337.

**Illinois.**—**Phoenix Ins. Co. v. Lebcher** (1886) 20 Ill. App. 450.

**Louisiana.**—Blanks v. Hibernia Ins. Co. (1884) 36 La. Ann. 599.

**Michigan.**—Dahrooge v. Rochester German Ins. Co. (1913) 177 Mich. 442, 48 L.R.A.(N.S.) 906, 143 N. W. 608; Law v. New England Mut. Acci. Asso. (1892) 94 Mich. 266, 53 N. W. 1104; Lentz v. Teutonia F. Ins. Co. (1893) 96 Mich. 445, 55 N. W. 993; Shackett v. People's Mut. Ben. Soc. (1895) 107 Mich. 65, 64 N. W. 875.

**New Hampshire.**—Maynard v. United States Health & Acci. Ins. Co. (1911) 76 N. H. 275, 81 Atl. 1077.

**New York.**—Curry v. Empire L. Ins. Co. (1905) 49 Misc. 65, 98 N. Y. Supp. 6; Allen v. Dutchess County Mut. Ins. Co. (1904) 95 App. Div. 86, 88 N. Y. Supp. 530.

**Vermont.**—Morrill v. New England Ins. Co. (1899) 71 Vt. 231, 44 Atl. 358.  
J. T. W.

## SAM GAY

v.

DISTRICT COURT OF TENTH JUDICIAL DISTRICT in and for Clark County et al.

*Nevada Supreme Court—March 4, 1918.*

(41 Nev. 330, 171 Pac. 156.)

### Jury — right — removal from office.

1. No right to jury trial exists in a proceeding for the removal of a public officer from his office, although it is criminal in its nature, where plenary power is conferred by the Constitution upon the legislature to provide for such cases, pursuant to which the legislature has provided a summary and special proceeding which does not include trial by jury.

[See note on this question beginning on page 232.]

### Courts — jurisdiction of district court — removal of public officer.

2. District courts have jurisdiction of proceedings for the removal of a sheriff from office although such jurisdiction is not directly conferred by the Constitution, if that instrument declares that provision shall be made for the removal of officers guilty of malfeasance or nonfeasance in office, and the statute provides that whenever complaint shall be presented to the district court, charging refusal or neglect to perform duty, it shall be the duty of the court to cite the person charged before it for hearing.

### Officer — removal of incumbent — authority of legislature.

3. The power of the legislature is plenary so far as the method of procedure is concerned, under a constitutional requirement that provision shall be made by law for the removal from office of any civil officer for malfeasance or nonfeasance in the performance of his duty.

[See 22 R. C. L. 561.]

### Courts — power to confer jurisdiction.

4. Powers other than those expressly conferred by the Constitution upon the district court may be conferred upon it under a constitutional provision dividing the powers of government into three departments, and providing that no person charged with the exercise of powers properly belonging to one department shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

[See 6 R. C. L. 144 et seq.; 7 R. C. L. 1047.]

### Office — removal — complaint.

5. A proceeding to remove a public officer from office need not be in the name of the people where, under authority of the Constitution conferring plenary power upon it, the legislature has established a procedure which does not require such complaint.

[See 22 R. C. L. 572 et seq.]

**Statute — allowance of damages — right to complain.**

6. An officer against whom proceedings are instituted to remove him from office cannot complain of a provision in the statute allowing the entry of a judgment against him for damages in favor of complainant, if the parties agree that the provision shall be waived and no such judgment entered in the case.

[See 6 R. C. L. 89.]

**Constitutional law — right to raise question of constitutionality of statute.**

7. No one can urge that an act or part of an act is unconstitutional, if his rights are in no way infringed by it.

[See 6 R. C. L. 89.]

**Statute — title — sufficiency.**

8. A title, "Removal of Public Officers," is broad enough to cover provisions for different methods of removal with the procedure necessary to make them effective.

ORIGINAL PROCEEDING in Certiorari to inquire into the jurisdiction of respondents to enter a judgment removing petitioner, as county sheriff, from office. *Writ dismissed.*

The facts are stated in the opinion of the court.

Messrs. W. R. Thomas, A. W. Ham, Richard Busteed, and Charles E. Barrett for petitioner.

Messrs. George B. Thatcher, Attorney General, E. T. Patrick, A. S. Henderson, and F. A. Stevens for respondents.

Messrs. McNamara & Van Fleet, amici curiæ.

Coleman, J., delivered the opinion of the court:

This is an original proceeding in certiorari to inquire into the jurisdiction of the tenth judicial district court of the state of Nevada to enter a judgment removing the petitioner, Sam Gay, as sheriff of Clark county, Nevada, from office.

A complaint was filed in the district court of said county, wherein it was alleged that the defendant, Sam Gay, as sheriff, was guilty of nonfeasance in office, in that he neglected and refused to arrest one Joe Keate, his deputy, while the latter was making an assault with a pistol upon W. H. Harkins, a justice of the peace, in the presence of the defendant. Upon the filing of the complaint citation was issued and served upon the defendant. Defendant did not demur to the complaint, or in any way question the jurisdiction of the court, but filed an answer denying certain of the allegations of the complaint. The mat-

ter was heard upon the issue thus raised, and the court found the allegations of the complaint to be true, and entered judgment removing the defendant from office.

The Constitution of Nevada, as do the constitutions of the various states, divides the powers of the state into three branches, and provides that the judicial power of the state shall be vested in a supreme court, district courts, and in justices of the peace, and authorizes the legislature to establish municipal courts. Section 6, art. 6, of the Constitution, provides that the district courts shall have jurisdiction in certain cases, but does not say that they shall have jurisdiction in proceedings for the removal of any public officer; hence, counsel for petitioner contend that the district court had no jurisdiction to hear and determine the charges filed with said court, and to make the order for the removal of the petitioner from office.

Without determining as to the scope and effect of § 6, art. 6, of the Constitution, but conceding for the sake of this matter that the district court acquired no jurisdiction under the section of the Constitution mentioned, we are nevertheless of the opinion that the court had jurisdiction to hear and determine the mat-

ter presented in the complaint filed in the district court, charging the petitioner with nonfeasance in office.

Courts—jurisdiction of district court—removal of public officer.

From time immemorial society has found it necessary to make some provision for the removal of venal, corrupt, faithless, and negligent public officers. The importance of this was realized when the Constitution of the United States was drafted, and this policy has been carried into the constitution of every state in the Union. The impeachment of all of the state and judicial officers of Nevada, except justices of the peace, is provided for in article 7 of the Constitution; and while no procedure is prescribed in the Constitution for the removal of other officials, § 4 of article 7 reads: "Provision shall be made by law for the removal from office of any civil officer other than those in this article previously specified, for malfeasance or nonfeasance in the performance of his duty."

It was pursuant to this provision of the Constitution that the legislature passed "An Act Providing for the Removal from Office of Public Officers for Malfeasance or Nonfeasance in Office, Regulating the Mode of Procedure, and Other Matters Properly Connected Therewith." Stat. 1909, p. 293; Rev. Laws, §§ 2851, 2852. Sections 21 and 22 of the act read:

"Sec. 21. If any person now holding or who shall hereafter hold any office in this state, who shall refuse or neglect to perform any official act in the manner and form as now prescribed by law, or who shall be guilty of any malpractice or malfeasance in office may also be removed therefrom as hereinafter prescribed.

"Sec. 22. Whenever any complaint in writing, duly verified by the oath of any complainant, shall be presented to the district court, alleging that any officer within the jurisdiction of said court has been guilty of charging and collecting

any illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office as prescribed by law, or has been guilty of any malpractice or malfeasance in office, it shall be the duty of the court to cite the party charged to appear before him on a certain day, not more than ten or less than five days from the time when said complaint shall be presented, and on that day, or some subsequent day not more than twenty days from that on which said complaint is presented, shall proceed to hear, in a summary manner, the complaint and evidence offered by the party complained of, and if, on such hearing, it shall appear that the charge or charges of said complaint are sustained, the court shall enter a decree that said party complained of shall be deprived of his office, and shall enter a judgment for five hundred dollars in favor of the complainant and such costs as are allowed in civil cases."

The constitutional convention, in adopting § 4 of article 7 of the Constitution, realized, no doubt, that to confer upon legislative bodies the duty of impeaching, trying, and removing district, county, township and municipal officers would be to place an undue burden upon the legislature, and, furthermore, might in some instances unreasonably delay the removal of vicious officials, and in many cases would afford no relief whatever, in view of the fact that a majority of the officers contemplated by § 4, art. 7, of the Constitution, are elected for only two years, and since the legislature convenes during the month in which the public officers referred to take office, and adjourns at the end of sixty days, not to reconvene until after the term of all county officers shall have expired, and therefore conferred plenary power upon the legislature to provide a special and summary proceeding for the removal of certain officers. *State v. Borstad*, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014; *State*

ex rel. Payne v. District Ct. 53 Mont. 350, 165 Pac. 294.

Numerous objections are made to the act under which the proceedings in the district court were had, but, as we view the authority conferred by the section of the Constitution mentioned, they may be all brushed aside, save and except such objections only as go to the title of the act. We say this for the reason

that the power of the legislature is plenary so far as providing for the method of procedure is concerned. We do not think there is any authority which questions this view. The supreme court of California, in *Re Marks*, 45 Cal. 199, had under consideration a statute substantially the same as ours, and one which was enacted pursuant to a constitutional provision to all intents and purposes the same as ours. The court in that case said: "The Act of 1853 does provide how, in what manner, upon what procedure, in what court, officers not of the first class shall be tried for that misdemeanor in office known at common law, and recognized in this statute, as neglect of official duty. The power of the legislature to enact such a statute (under the latter clause of § 18) is plain,—as obvious as is the power of the assembly to prefer, and that of the senate to try, articles of impeachment under the first clause of the same section. The power to remove certain officers for misdemeanor in office is exercised only by the assembly and senate under the name of the impeachment; the like power to remove all other officers under like circumstances and for like causes is to be exercised 'in such manner as the legislature may provide.' § 19. The power to provide the manner in which a delinquent is to be tried in the second case is on a footing with the power to directly remove the delinquent by the judgment of the senate in the first case.

In a comparatively recent case, in an opinion by Beatty, Ch. J., and

concurred in by the full court, the supreme court of California said: "This is a summary proceeding, regulated, as far as it is regulated at all, by a statute (Penal Code, §§ 758 et seq.) which the legislature has plenary power to pass under the authority of § 18 of article 4 of the Constitution, providing for the trial of public officers for misdemeanor in office otherwise than by impeachment. It is exempt from merely technical rules of procedure. *Re Burleigh*, 145 Cal. 36, 78 Pac. 242." *Re Shepard*, 161 Cal. 171, 118 Pac. 513.

The supreme court of Minnesota, in considering the authority of the legislature under a similar constitutional provision in the case of *State ex rel. Clapp v. Peterson*, 50 Minn. 239, 52 N. W. 655, expressed the following views: "Article 13 of the Constitution, after providing in § 1 for 'the removal of state officers and judges of the supreme and district courts by impeachment,' then provides in § 2 that 'the legislature of the state may provide for the removal of inferior officers from office for malfeasance or nonfeasance in the performance of their duties.' The power thus conferred is plenary, and confers authority upon the legislature to vest the power of removal, and the determination of the question whether cause for removal exists, in any department of the government or in any officer or official body it may deem expedient. There is no requirement that this power shall be conferred only on the courts. Indeed, the very purpose of this provision was to provide a more summary and less cumbersome method of removing inferior officers than by impeachment or by indictment, according to the course of the common law, for malfeasance or nonfeasance in office. If, then, the power of removal vested in the governor by this act be judicial, we have here the constitutional authority for it."

The supreme court of Montana, in *State ex rel. Payne v. District Ct.* supra, in speaking of the authority



conferred by a section of the Constitution of that state similar to § 4, art. 7, of our Constitution, used the following language: "Proceedings for the removal of a public officer do not necessarily partake of the nature of a criminal prosecution. Indeed, the power to remove an unfaithful or negligent public official is not essentially a judicial power. Under our Constitution, its exercise is left to the legislature itself, or to such other authority as the legislature may designate. This is the plain import of § 18 above, and is the general rule in the absence of any constitutional declaration upon the subject. 29 Cyc. 1370; State ex rel. Atty. Gen. v. Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; Territory ex rel. French v. Cox, 6 Dak. 501. The power may be conferred upon the governor (Cameron v. Parker, 2 Okla. 277, 38 Pac. 14), or upon a board (Donahue v. Will County, 100 Ill. 94). It may be conferred upon a court of general or limited jurisdiction to be exercised in the mode provided by law, and consequently, if the legislature sees fit to require a jury trial, a jury trial must be had; but, if it sees fit to provide for a summary hearing without a jury, no constitutional right of the accused is infringed."

In State ex rel. Hamilton v. Grant, 14 Wyo. 41, 1 L.R.A. (N.S.) 588, 116 Am. St. Rep. 982, 81 Pac. 798, the supreme court of Wyoming, in passing upon the power of the legislature under a similar constitutional provision, said: "The legislature, however, under the provisions of § 19, art. 3, of the Constitution, did have express warrant for the passage of an act for the removal of officers not subject to impeachment, and the method of procedure in effecting such removal is not limited by any other constitutional provision. Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 23 L.R.A. 699, 41 Am. St. Rep. 606, 58 N. W. 611."

In Skeen v. Paine, 32 Utah, 295, 90 Pac. 440, it is said: "Section 21, art. 6, of the Constitution, among other things, provides that such re-

movals may be made 'in such manner as may be provided by law.' Here a plenary power is conferred upon the legislature. This provision of the Constitution is special, and the mere fact that in another part of the same instrument (§ 18, art. 8) it is provided that prosecutions shall be in the name of 'the state of Utah' does not necessarily prevent a proceeding civil in its consequences from being conducted in the name of a private person."

The supreme court of Michigan, in *People ex rel. Clay v. Stuart*, 74 Mich. 411, 16 Am. St. Rep. 644, 41 N. W. 1091, in passing upon a similar constitutional provision, observed: "It will be noticed that the power conferred by this section of the Constitution is plenary. The legislature is to provide by law for the removal of county officers, etc., in such manner as to them shall seem just and proper. The power conferred is in its nature political, and has reference exclusively to the polity of government, which would be inherently defective if no remedy of a summary nature could be had to remove from office a person who, after his election, had been convicted of crime, or who neglected his duty, or who was guilty of malversation in the administration of his office. Every person elected to a county, township or school district office holds it subject to removal, in the manner provided by law under this section of the Constitution, which commits to the legislature the whole subject of removal. They are to prescribe the mode in which it shall be done, and this includes everything necessary for the accomplishment of the object. The causes, the charges, the notice, the investigation, and the determination, and by whom these shall be conducted and the removal adjudged, are all in the discretion of the legislature."

In State ex rel. Kirby v. Henderson, 145 Iowa, 657, 124 N. W. 767, Ann. Cas. 1912A, 1286, in passing upon a case growing out of constitu-

tional and statutory provisions similar to ours, we find the following:

"Section 5 of the act under which this proceeding is prosecuted expressly provides that the 'proceeding shall be summary in its nature and triable as an equitable action.' We think, therefore, that no constitutional right of the defendant was invaded."

See also *Moore v. Strickling*, 46 W. Va. 515, 50 L.R.A. 279, 33 S. E. 274; *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843; *People ex rel. Clay v. Stuart*, supra; *State v. Seawell*, 64 Ala. 225; *State ex rel. Atty. Gen. v. Savage*, 89 Ala. 1, 7 L.R.A. 426, 7 So. 7, 183.

In this connection we incidentally call attention to § 1, art. 3, of our Constitution, which reads: "The powers of the government of the state of Nevada shall be divided into three separate departments—the legislative, the executive and the judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted."

Thus, we see that the constitutional convention made it plain that other powers than those expressly mentioned in § 6, art. 6, of the Constitution, might be delegated to the district court.

The language of *Norcross, J.*, in *Bell v. First Judicial District Ct.* 28 Nev. 280, 1 L.R.A.(N.S.) 843, 113 Am. St. Rep. 854, 81 Pac. 875, 6 Ann. Cas. 982, is not opposed to the view we have expressed. What was said in that case was directed to an entirely different question than the one here presented, as will be readily seen from a reading of the opinion.

But it is urged, and with apparent earnestness, that the complaint in removal proceedings in the district court charged the defendant with a crime, and that he was entitled to a jury trial under that section of the Constitution which pro-

vides that the right of trial by jury shall remain inviolate forever. We think we have disposed of this question by showing that the legislature had plenary power under the terms of the Constitution to pass an act authorizing the removal of officers, and, pursuant to that authority, had passed a law which

Jury—right—  
removal from  
office.

provided a summary and special proceeding for such cases. In this connection we wish to say that the case of *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615, is not in conflict with this view; for, while it is true that the court in that case, as in other cases, held that the proceeding to remove a public officer was criminal in its nature, the court said: "The intent to make it a criminal prosecution is to my mind clear." The opinion then proceeds to give the reasons which induced the court to take that view, and it is apparent that its conclusion was reached because it was the evident intent of the legislature that the proceeding should be criminal in its nature, and not because the Constitution contemplated a proceeding inherently criminal in its character. In fact, strange as it may seem, the reply brief of the petitioner practically concedes as much; for, in answering the contention of respondent on this point, wherein it was sought to show why different proceedings had existed in California in removal cases, counsel say: "The case, *Re Marks*, 45 Cal. 199, is relied upon by respondent, but it will be noted that the opinion in that case was prior to the adoption of the Codes, and was had under a provision of law which ceased to exist upon the adoption of the Codes."

But the supreme court of California has held that though the proceeding is criminal in nature, under certain statutes, the defendant was not entitled to a jury. *People ex rel. Dorris v. McKamy*, 168 Cal. 533, 143 Pac. 752.

The contention that the proceeding should have been instituted in the name of the state of Nevada is

Courts—power  
to confer  
jurisdiction.

entirely without merit. As we have shown, the inquiry was had under a special proceeding, provided pursuant to plenary power conferred by the Constitution. Even in California, after the adoption of the Codes, and under statutes which the supreme court of that state held showed a clear intent upon the part of the legislature to make the proceedings criminal in their nature, it was decided that the accusation did not have to be made in the name of the people. *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843.

Objection is made to that part of the act which provides that the court, in making the order of removal, shall enter judgment for \$500 in favor of the complainant. The complainant and the defendant in the removal proceedings expressly

**Statute—allow-  
ance of damages  
—right to  
complain.**

agreed that this requirement of the statute might be waived, and accordingly no such judgment was rendered by the court; hence, we are of the opinion that it is not necessary that we determine this question, as it is a well-established rule of law

**Constitutional  
law—right to  
raise question  
of constitution-  
ality of statute.**

that no one can urge that an act or part of an act is unconstitutional, if his rights are in no way infringed by it. 6 R. C. L. 89; 8 Cyc. 789.

The objection made to the title of the Act of 1909 is without merit.

**Statute—title—  
sufficiency.**

The title of the act relates to one subject only, and that is to the removal of public officers. It is true that the act deals with three methods of removal: One by accusation made by the grand jury, one by impeachment by the assembly, and one by accusation by a private citizen. That part of the act relating to impeachment by the assembly prescribes the method of procedure to be followed in the trial by the senate. The act also provides for the summary method by accusation of a private individual, and makes

provision for the proceedings after the accusation is filed. And, apparently realizing that individuals are reluctant to file charges against a public official as the basis for his removal, the legislature also made provision for the initiation of proceedings for the removal of a public officer by accusation on the part of the grand jury. In other words, this act not only supplements the constitutional provisions for the removal of state officials, but creates two separate, distinct, and independent methods of removal of county officers. Just why the legislature thought it necessary to create two methods of removal of county officials is not clear, but since one method is more drastic than the other, it may be that the legislature anticipated that there might be occasions when a drastic measure would be needed; but whatever the reason, or lack of reason, the statute, which was enacted pursuant to plenary authority by clear and unmistakable language, creates the two methods, and beyond that we cannot inquire.

For the reasons given, it is ordered that the writ of certiorari heretofore issued be, and the same is, hereby dismissed.

*Sanders, J.*, concurs.

*McCarran, Ch. J.*, concurring:

I concur. Sections 1, 2, and 3 of article 7 of our Constitution lay down the manner and authority by which certain specified state and judicial officers may be removed from office. So far as these officers are concerned, the mode of removal from office is by the Constitution limited and fixed. But in contemplation of the necessity for removal of civil officers other than those designated, § 4 of article 7 of the Constitution provides: "Provision shall be made by law for the removal from office of any civil officer other than those in this article previously specified, for malfeasance or non-feasance in the performance of his duties."

By this provision of the organic law the power was reserved and as-

signed to the legislative branch of the government to provide a way by which civil officers other than those whose office is within the contemplation of §§ 1, 2, and 3 of article 7 might be removed for malfeasance or nonfeasance in office. To meet this and to provide a rule of conduct by which removal from office might be accomplished as to those officers not affected by §§ 1, 2, and 3 of article 7 of the Constitution, the legislature of 1909 passed the act under which petitioner, as sheriff of Clark county, was brought before the district court. It is the right of the designated authority or tribunal of determination, the district court, to entertain such proceeding as is here questioned. Section 6 of article 6 of the Constitution, in prescribing the jurisdiction of the district court, contains no words of limitation as to matters of which that court may take jurisdiction but rather excludes other courts and tribunals from exercising jurisdiction over those subject-matters specifically named as belonging to that of the district court.

To declare that § 6 of article 6 of the Constitution, by its language, limited the jurisdiction of the district court to matters specifically named in that section, would be to open discussion to any number of matters and proceedings which, by reason of this constitutional provision, would find no jurisdictional resting place. Such was never the intention of the authors of our Constitution.

By § 4 of article 7 of the Constitution the legislative branch of the government was given full power to enact laws looking to the impeachment and removal of civil officers other than those mentioned in the preceding sections. The power to enact such laws implied power to assign the accomplishment of the law's purpose to a designated functionary. The legislature of 1909 carried out this power by designating the district court as the tribunal before which matters of this character should be heard and deter-

mined. In enacting the statute and designating the tribunal before which its object should be carried out, the legislature, having full power in the matter, could, as it did, concisely and emphatically outline the steps to be taken and rigidly lay the course to be pursued. *Re Shepard*, 161 Cal. 171, 118 Pac. 513.

In my judgment, the matter contemplated by the statute cannot properly be termed a criminal proceeding, and I say this, fully aware of the decision of the supreme court of California in the matter of *People ex rel. Dorris v. McKamy*, 168 Cal. 531, 143 Pac. 752, in which is reviewed the former decisions of that court. *Re Curtis*, 108 Cal. 661, 41 Pac. 793; *Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1; *Re Burleigh*, 145 Cal. 35, 78 Pac. 242. It is a proceeding for removal from office, rather than a prosecution for malfeasance or nonfeasance in office. Criminal prosecution might follow after removal, in which event a plea of once in jeopardy could not be interposed.

It is contended that this statute is in contravention of constitutional provisions because trial by jury is not contemplated in the proceeding before the district judge. In this respect, it may be properly said that the proceeding contemplated by the statute is not a trial, but rather a proceeding to remove from public office, and as such does not involve either life, liberty, or property.

The question here involved has in one form or another been passed upon on several occasions by the Supreme Court of the United States, under the contention that by such statute the officer removed was deprived of due process of law under the 14th Amendment.

In the case of *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478, statutory proceedings much more summary than those of ours were considered. In that instance a statute of Louisiana, instituted for testing right to office, was under consideration. The statute was upheld as providing due process of law, and the provision which eliminated hear-

ing before a jury was held to be not repugnant to the amendment.

In the case of *Foster v. Kansas*, 112 U. S. 201, 205, 5 Sup. Ct. Rep. 8, 97, 28 L. ed. 629, 696, it appears that the attorney general of the state of Kansas proceeded in quo warranto in the supreme court of the state for the removal of a county attorney, alleging his failure to prosecute certain violations of the law of that state. The case went to the Supreme Court of the United States on rule, and there, after referring to *Kennard v. Louisiana*, *supra*, the court held that the proceeding was of a civil nature, and inasmuch as the process for removal, though summary, provided for bringing the party into court and notifying him of the case he had to meet, and gave him an opportunity to be heard in his defense, and gave opportunity for deliberation and judgment of the court, it constituted due process of law.

In the case of *Wilson v. North Carolina*, 169 U. S. 586, 18 Sup. Ct. Rep. 435, 42 L. ed. 865, 18 Sup. Ct. Rep. 435, the matter grew out of the suspension of a railroad commissioner by the governor of North Carolina. On being carried to the Supreme Court of the United States, Mr. Justice Peckham, speaking for that court, said: "The controversy relates exclusively to the title to a state office, created by a statute of the state, and to the

rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the Constitution of the state, excepting in so far as they may be protected by any provision of the Federal Constitution."

Continuing, it was said: "The procedure was in accordance with the Constitution and laws of the state. . . . What kind and how much of a hearing the officer should have before suspension by the governor was a matter for the state legislature to determine, having regard to the Constitution of the state." In my judgment, that portion of the statute here involved which would permit of a judgment against the deposed officer of any sum of money is clearly in violation of the constitutional guaranty prohibiting the deprivation of property without due process of law. Even, however, were this involved here, which is not the case, since no such judgment was entered in this matter against petitioner in the district court, it would not avail in furtherance of petitioner's contention, for, under the established rule in this court, constitutional portions of the statute might be enforced, if intact and operative, and unconstitutional portions might be rejected. *Virginia & T. R. Co. v. Henry*, 8 Nev. 165.

Petition for rehearing denied, July 5, 1918.

## ANNOTATION.

### Right to jury trial in proceeding for removal of public officer.

- I. General rule, 232.
- II. Rule in Alabama, 234.
- III. Rule in Texas, 234.
- IV. Rule in Utah, 235.

#### I. General rule.

The general rule is that a public officer has no constitutional right to a jury trial in a proceeding to remove him from office.

California.—*Woods v. Varnum* (1890) 85 Cal. 639, 24 Pac. 843.

Idaho.—*Rankin v. Jauman* (1894) 4 Idaho, 53, 36 Pac. 502.

Massachusetts.—*Ashley v. Three Justices* (1917) 228 Mass. 63, — A.L.R. —, 116 N. E. 961.

Michigan.—*People ex rel. Clay v. Stuart* (1889) 74 Mich. 411, 16 Am. St. Rep. 644, 41 N. W. 1091.

North Carolina.—*State ex rel. Burke v. Jenkins* (1908) 148 N. C. 25, 61 S. E. 608; *State ex rel. Caldwell v. Wilson* (1897) 121 N. C. 425, 28 S. E. 554, affirmed in (1898) 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

Tennessee.—*State ex rel. Timothy v. Howse* (1915) 134 Tenn. 67, L.R.A.

1916D, 1090, 183 S. W. 510, Ann. Cas. 1917C, 1125; State ex rel. Thompson v. Crump (1915) 184 Tenn. 121, L.R.A. 1916D, 951, 183 S. W. 505.

**West Virginia.**—Moore v. Strickling (1899) 46 W. Va. 515, 50 L.R.A. 279, 33 S. E. 274. And see the reported case (GAY v. DISTRICT CT. ante, 224).

A public office is not property within the meaning of the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law." Ashley v. Three Justices (Mass.) and Moore v. Strickling (W. Va.) supra.

The legislature of a state has plenary power to enact laws, providing for the summary removal of officers whose removal is not provided for by the Constitution. Rankin v. Jauman (Idaho); State ex rel. Timothy v. Howse (Tenn.), and People ex rel. Clay v. Stuart (Mich.) supra.

A proceeding to remove a public officer is not a criminal case so as to bring it within that clause of the Constitution which provides for a trial by jury in criminal cases. Rankin v. Jauman (Idaho) and Ashley v. Three Justices (Mass.) supra.

The nature of the proceeding demands immediate and summary action. If the ordinary proceedings of trial by jury were used it would result, in many cases, in the public being left without a remedy, since the term of office of the accused officer would have expired before the case could be finally decided. People ex rel. Clay v. Stuart (Mich.) and State ex rel. Timothy v. Howse (Tenn.) supra. And see the reported case (GAY v. DISTRICT CT.).

The incumbent of a public office holds it, subject to all conditions and statutes affecting it. State ex rel. Caldwell v. Wilson (N. C.) and People ex rel. Clay v. Stuart (Mich.) supra.

In the case of State ex rel. Caldwell v. Wilson (N. C.) supra, wherein it appeared that the governor had suspended a railroad commissioner, pending action by the legislature, under authority of a statute (N. C. Laws 1891, chap. 320), it was held that the commissioner had no right to a jury trial.

In the case of Woods v. Varnum (Cal.) supra, it was held that a tax collector was not entitled to a jury trial, in a proceeding brought to remove him from office for malfeasance. The Constitution (art. 4, § 18), after a provision for the impeachment of certain enumerated officers by the senate, expressly provided that "all other civil officers shall be tried for misdemeanor in office in such manner as the legislature may provide." The statute (Pen. Code, § 772) provided for removal in a "summary manner." It was held that this clearly excluded the right of trial by jury.

In Rankin v. Jauman (Idaho) supra, an action was brought to remove a member of the board of county commissioners from office for malfeasance, a statute (Rev. Stat. 1887, § 7459) providing that, on the presentation of an information charging official misconduct, the court must cite the party charged to appear and must proceed to hear, in a summary manner, both sides of the case. By the statute, if the charge was sustained, the court must enter a decree, depriving the party of his office, and enter a judgment of \$500 and costs in favor of the informer. It was held that the legislature had power to provide for the summary removal of officers whose removal was not provided for by the Constitution. It was also held that the imposition of a penalty did not make it a criminal proceeding, within the guaranty of a jury trial in such proceedings.

In People ex rel. Clay v. Stuart (Mich.) supra, it was held that a prosecuting attorney had no right to a jury trial, in a proceeding brought to remove him from office. The Constitution of Michigan (art. 12, § 7) provides as follows: "The legislature shall provide by law for the removal of any officer elected by a county, township, or school district in such manner and for such cause as to them shall seem just and proper." The legislature, in pursuance of this provision, enacted a law authorizing the governor to remove all county officers on proof of certain official misconduct. It was held that it was within the power of

the legislature to provide a remedy of a summary nature, and that all persons elected to county, township, or school district offices held office subject to removal in the manner prescribed by the legislature.

In *State ex rel. Burke v. Jenkins* (1908) 148 N. C. 25, 61 S. E. 608, wherein it appeared that the treasurer of a town had been removed by the town commissioners for malfeasance, it was held that he was not entitled to a jury trial, but only to notice and an opportunity to be heard, which had been given him.

In *State ex rel. Timothy v. Howse* (1915) 184 Tenn. 67, L.R.A.1916D, 1090, 183 S. W. 510, Ann. Cas. 1917C, 1125, it was held that a mayor had no constitutional right to a jury trial, since the proceeding for ouster is summary in its nature, and is not an ordinary common-law action. The court said that, since the Constitution does not expressly prohibit the legislature from providing a summary proceeding for the removal of public officers for misconduct in office, it is competent for them to do so.

In *State ex rel. Thompson v. Crump* (1915) 184 Tenn. 121, L.R.A.1916D, 951, 183 S. W. 505, following the decision in *State ex rel. Timothy v. Howse* (Tenn.) *supra*, it was held that, in a proceeding of ouster from public office, defendants were not entitled to a jury trial of the issues of fact presented by the pleadings.

In *Moore v. Strickling* (1899) 46 W. Va. 515, 50 L.R.A. 279, 33 S. E. 274, wherein a prosecuting attorney was removed from office for gross immorality, it was held that he was not entitled to a jury trial, a public office not being property in the constitutional sense, but a public trust, conferred on the holder to be exercised for the benefit of the public, and, accordingly, not being within the protection of the "due process" clause of the Constitution.

In *Ashley v. Three Justices* (Mass.) *supra*, the proceeding was under a Corrupt Practices Act. Three taxpayers, as authorized by that act, brought a petition in the superior court to declare vacant the office of one who had

been declared elected and had been inaugurated, on the ground that he had violated the act. The constitutional provision relating to jury trials required a trial by jury in criminal cases, and in "all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised." It was held that the proceeding was not criminal, though, by the terms of the Corrupt Practices Act, removal entailed a disqualification to hold office for three years; that the proceeding was not one "concerning property," and that the proceeding was of a public nature and not a suit between individuals, and hence that there was no right to a jury trial thereof.

#### II. Rule in Alabama.

In Alabama, under a special statute (Act of 1819, § 3), a jury trial is provided for court clerks in proceedings brought to remove them from office for malfeasance. *Callahan v. State* (1832) 2 Stew. & P. (Ala.) 379. In that case it was held that a court clerk had a right to a jury trial of the charges against him, before being removed from office, as it is expressly provided by § 3 of the Act of 1819, entitled "An Act Specifying the Causes and Manner of Removing Clerks," that all charges against clerks shall be exhibited to the court in writing, and the court shall direct the facts to be tried by a jury, and, on a conviction thereof, such clerk shall be fined or removed from office, as the court of which he is clerk shall think proper.

#### III. Rule in Texas.

In Texas, a distinction is made between public officers who have been elected and those who have been appointed. In the former case, the office is held to be property, of which the holder cannot be deprived without a trial by jury. *Honey v. Graham* (1873) 39 Tex. 1. In the latter case it is held not to be property. *State ex rel. Maxwell v. Crumbaugh* (1901) 26 Tex. Civ. App. 521, 63 S. W. 925. This rule does not apply where the method of removal from a particular office is pro-

vided by the Constitution. *Davis v. State* (1871) 35 Tex. 118.

In *Honey v. Graham*, *supra*, wherein it appeared that the governor had removed the state treasurer without a jury trial, it was held that a public office to which the incumbent had been elected was property and a privilege which could not be taken from the incumbent, except as provided by the 16th section of the 1st article of the Constitution: "No citizen of this state shall be deprived of life, liberty, property, or privileges, outlawed, exiled or in any manner disfranchised, except by due course of the law of the land," and, therefore, that the treasurer should have had a jury trial.

In *State ex rel. Maxwell v. Crumbaugh*, *supra*, it appeared that a county superintendent of public instruction had been appointed by a county commissioner's court, and that the court thereafter abolished the office, as it was authorized by statute to do. It was held that a public office is not property, within the meaning of the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law."

In *Davis v. State*, *supra*, it was held that a sheriff had no right to a jury trial, on being removed from his office by the judge of the district court of the county wherein he held office, by authority of a provision of the Constitution of Texas (art. 5, § 18), which reads as follows: "One sheriff for each county shall be elected by the qualified voters thereof, who shall

hold his office for four years, subject to removal by the judge of the district court for said county, for cause spread upon the minutes of the court." The court said that the evident intent and purpose of this clause of the Constitution was to put the sheriff directly under the immediate supervision and control of the judges, with full power and authority to remove summarily for any cause, whether punishable as a crime or not, which might hinder and delay the business of the court.

#### IV. Rule in Utah.

In Utah, a statute provides for a jury trial of all public officers not liable to impeachment.

In *Law v. Smith* (1908) 34 Utah, 394, 98 Pac. 300, the proceeding was against a sheriff, to remove him from office for malfeasance. The statute under which the proceeding was brought (Utah Comp. Laws 1907, §§ 4565 et seq.) provides (§ 4574) that, if the accused enters a plea of guilty, the court must render a judgment of conviction against him, and, if he denies the charges, the court must proceed to the trial of the accusation. It further provides (§ 4575) that "the trial must be by jury, and shall be conducted in all respects in the same manner as the trial of an indictment, or information for a felony." In the trial court the judge directed a verdict for the defendant. The appellate court held that this was error, and that the jury must pass on the facts of the case under proper instructions as to the law. B. F. D.

### STATE BANK OF BLACK DIAMOND, Respt.,

v.

H. JOHNSON et al., Appts.

*Washington Supreme Court (Dept. No. 2) — December 31, 1913.*

(— Wash. —, 177 Pac. 340.)

#### Assignment — conditional sale contract — effect.

1. An assignment by one who has reserved title to an automobile, under a conditional sale contract, of all right, title, and interest in the purchase money note and memorandum of conditional sale, transfers the right to



retake possession of the machine under the contract, and is not a mere election to look to the purchaser for payment, although the assignment guarantees the payment and fulfilment of the contract.

[See note on this question beginning on page 242.]

**Vendor and purchaser — purchase from one having no title.**

2. A purchaser of a chattel acquires no more title or interest in the thing purchased than his vendor has, unless the true owner has, by act or neglect, estopped himself from disputing the claims of the purchaser.

**Sale — market overt — right of purchaser.**

3. One who purchases from a regular dealer at his place of business an automobile of which he is the apparent owner, but to which he in fact has no title, acquires no title as against the true owner.

**APPEAL** by defendants from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover possession of an automobile. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Kerr & McCord, for appellants:

The title retained by the seller under a conditional sale is the absolute title which remains in him or passes from him to the purchaser absolutely, accordingly as the conditions of the sale are broken, or as they are fulfilled, or as may result from some act of election on the part of the seller.

*Merchants & Planters Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565; *Parlin & O. Co. v. Harrell*, 8 Tex. Civ. App. 368, 27 S. W. 1084; *Winton Motor Carriage Co. v. Broadway Automobile Co.* 65 Wash. 650, 37 L.R.A. (N.S.) 71, 118 Pac. 817; *MacLeod v. Aberdeen Brewing Co.* 82 Wash. 74, 143 Pac. 440; *Stewart & H. Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *Eilers Music House v. Douglass*, 90 Wash. 683, L.R.A. 1916E, 613, 156 Pac. 937.

Even assuming that the title to the automobile did pass to plaintiff as between it and its assignor, yet defendants had no notice, actual or constructive, of the assignment until December 1st, long after they had purchased the car from Grant-Coffin-Campbell Company.

*Barbour v. Hodge*, 99 Wash. 578, 170 Pac. 115; *Scott v. Farnam*, 55 Wash. 336, 104 Pac. 639; *Barker v. Seattle*, 97 Wash. 518, 166 Pac. 1143.

Messrs. Karr & Gregory and H. G. Sutton, for respondent:

The rule of law with reference to passing of title of personal property is that it is controlled by the intention of the parties.

*Pacific Lounge & Mattress Co. v. Rudebeck*, 15 Wash. 336, 46 Pac. 392; *Lauber v. Johnston*. 54 Wash. 59, 102

Pac. 873; *Collingnon & Co. v. Hammond Mill Co.* 68 Wash. 626, 123 Pac. 1083.-

Under a conditional sale contract the vendor retains the title to the property, and has not a mere lien thereon.

*Barton v. Groseclose*, 11 Idaho, 227, 81 Pac. 623; *Dillon & West v. Grutt*, 38 Nev. 46, 144 Pac. 741; *Keane v. Kibble*, 28 Idaho, 274, 154 Pac. 972; *Lazarovitch v. Tatilbum*, 103 Me. 285, 69 Atl. 275; *Pease v. Teller Corp.* 22 Idaho, 807, 128 Pac. 981.

The assignment of a conditional sale contract by the vendor carries the title to the property and also the right to bring an action for replevin for same.

*Standard Steam Laundry Co. v. Dole*, 22 Utah, 311, 61 Pac. 1103; *Bank of Little Rock v. Collins*, 66 Ark. 240, 50 S. W. 694; *Re Lutz*, 197 Fed. 492; *Duarte v. Minnick*, 85 Wash. 539, 148 Pac. 600; 35 Cyc. 335; *Barbour v. Hodge*, 99 Wash. 578, 170 Pac. 115.

While possession is prima facie evidence of ownership of personal property, yet he who deals with such possession upon the mere evidence which it affords, takes upon himself the risk that there is another and true owner.

*Moore v. Robinson*, 62 Ala. 537.

**Parker, J.**, delivered the opinion of the court:

This is a replevin action, wherein the plaintiff bank seeks recovery of an automobile, claiming title to the same by virtue of a conditional sale contract therefor, executed by Grant-Coffin-Campbell Company as vendor, as assignment of all the rights of that company under the

conditional sale contract, and forfeiture of the vendee's rights thereunder. The defendants, Johnson and Dahl, claim lawful possession and title to the automobile as innocent purchasers for value. Trial in the superior court for King county, sitting without a jury, resulted in findings and judgment in favor of the plaintiff, from which the defendants have appealed to this court.

On September 17, 1917, Grant-Coffin-Campbell Company, then being the owner and in possession of the automobile, entered into a conditional sale contract with A. L. Skonnord, looking to the transfer of the title to the automobile to Skonnord, which contract, in so far as we need notice its terms, reads as follows:

Know all men by these presents, that Grant-Coffin-Campbell Company, a corporation, of Seattle, Washington, the vendor, on the 17th day of September, 1917, delivered to A. L. Skonnord, residing at Seattle, in King county, state of Washington, the vendee, personal property, described as: One Grant six model K touring car No. 23,494 engine No. 1813 with full equipment thereon, under contract of conditional sale on these terms and conditions at the price of \$887.50. . . .

Said property is and shall remain the absolute property of the vendor, or its assigns, until the full payment of the purchase price or of any judgment therefor. . . .

The vendee has paid to the vendor on account of the purchase price the sum of \$297.50 and the balance, to wit, \$600, is evidenced by the following promissory note, which is accepted as additional evidence of indebtedness and not as payment, viz.:

Seattle, Washington, Sept. 17, 1917.

For value received I promise to pay to Grant-Coffin-Campbell Company or order, \$600, in gold coin of the United States of America, with interest thereon in like gold coin at the rate of 8 per cent per annum from date until paid, payable in twelve instalments of not less than

\$50 in any one payment, together with the full amount of interest due on this note at the time of payment of each instalment. The first payment to be made on the 17th day of October, 1917, and a like payment on the 17th day of each month thereafter, until the whole sum, principal and interest, has been paid, if any of said instalments are not so paid, the whole sum of both principal and interest to become immediately due and collectable at the option of the holder hereof. . . .

A. L. Skonnord. . . .

The vendor may at any time sell or assign its interest in the property, including said note and insurance, to any person, and such transferee shall have the same rights hereunder as the vendor.

Time is of the essence of this contract. If the vendee shall make default in the payment of said note, or any instalment thereof, principal or interest, as and when the same shall become due, . . . or sell or attempt to sell, or encumber, said property, . . . it shall be optional with the vendor to (1) declare this contract forfeited and determined, and take possession of said property with or without process of law, and retain all sums paid by the vendee, as and for rent, for the use of said property; or (2) to declare the whole unpaid sum of said note, with interest immediately due and collectable.

Grant-Coffin-Campbell Company,  
by Edw. P. Campbell, Pres.,  
Vendor.

A. L. Skonnord, Vendee.

On the date of the execution of the conditional sale contract the rights of Grant-Coffin-Campbell Company thereunder were duly assigned by it to respondent bank by indorsement on the back thereof, as follows:

For value received I hereby sell, assign, and transfer to State Bank of Black Diamond all my right, title, and interest in and to the within note and memorandum of conditional bill of sale, and I hereby guaran-

tee the payment and fulfilment of the within contract at the time and in the manner therein stated. . . .

Grant-Coffin-Campbell Co.,

by Edw. P. Campbell, Pres.

This assignment was made in consummation of an outright sale to the bank of all the rights of Grant-Coffin-Campbell Company under the contract, and not as collateral or security. Thereafter, on the day following, the conditional sale contract with the assignment so indorsed thereon, was filed in the office of the auditor of King county, as it is claimed, in pursuance of the provisions of §§ 3670, 3671, Rem. Code. A few days after, October 17, 1917, the date on which the first deferred instalment of the purchase price under the conditional sale contract became due, Skonnord, being unable or unwilling to pay any portion of the balance of the purchase price, returned the automobile to Grant-Coffin-Campbell Company. Thereafter, on October 25, 1917, appellants, Johnson and Dahl, entered into a contract with Grant-Coffin-Campbell Company for the purchase of a second-hand automobile of the same general description as that described in the conditional sale contract, although not specifically describing that automobile, for an agreed price of \$600, paying \$20 down thereon. On the following day Edward P. Campbell, of Grant-Coffin-Campbell Company, delivered the automobile mentioned in the conditional sale contract, and which had been returned to Grant-Coffin-Campbell Company, evidently in compliance with the contract made between that company and Johnson and Dahl the day previous, executing a bill of sale therefor to Johnson and Dahl, in the name of "Campbell Motor Car Company, by Edward P. Campbell, President." Johnson and Dahl then paid to Campbell the balance of the \$600 agreed purchase price. It appears that there was no such corporation or concern as the "Campbell Motor Car Company." On about November 1, 1917, Mr. Karr, attorney for the bank, called

Campbell's attention to the fact that Skonnord had failed to pay the \$50 instalment falling due under the conditional sale contract on October 17, 1917. Thereupon Campbell informed Karr that he, Campbell, had promised Skonnord that he would take care of the payment for Skonnord. Whereupon Campbell then paid to Karr, for respondent, the sum of \$106, being the instalments and interest falling due October 17 and November 17, 1917. Thereafter, about December 1, 1917, the officers of the bank learned for the first time that the automobile had been returned by Skonnord to Grant-Coffin-Campbell Company, and that Campbell had assumed to sell and dispose of it to someone. As soon thereafter as the officers of the bank were able to discover that Johnson and Dahl were the persons to whom Campbell had assumed to sell and deliver the automobile, they immediately notified Johnson and Dahl that the bank was the owner of the automobile under the conditional sale contract and the assignment thereof, and demanded possession of the automobile from them. They refused to deliver possession of the automobile to the bank, and also refused to pay the instalment maturing December 17, 1917, then past due, under the provisions of the conditional sale contract. Thereafter, on December 19, 1917, this action was commenced by the bank, seeking recovery of the automobile. Upon the filing of the conditional sale contract in the office of the county auditor of King county it was duly indexed, both direct and inverted, as to grantor and grantee, that is, as to Grant-Coffin-Campbell Company and Skonnord, and in connection therewith, at each of the two places so indexed, a notation was made in red ink as follows: "Assigned to the State Bank of Black Diamond." The facts so far related by us are either admitted or appear in the record uncontroverted. The trial court found, however, touching the question of the knowledge of John-

son and Dahl of the bank's claim of title to the automobile, as follows: "That the defendants herein, and each of them, prior to taking possession of said automobile or paying any money therefor, either knew or could by the exercise of reasonable diligence have known that the plaintiff herein was the owner of said automobile under and by virtue of the said memorandum of conditional sale, and that they were not bona fide purchasers thereof without notice."

It is first contended by appellants, Johnson and Dahl, that respondent bank did not acquire the legal title to the automobile by the assignment of the interest of Grant-Coffin-Campbell Company in the note and conditional sale contract, and that the assignment became, in effect, an election on the part of both parties thereto to vest title to the automobile in Skonnord, and thereafter to look to him only as a debtor, owing the balance of the purchase price therefor. It seems plain that, since the legal title to the automobile remained in Grant-Coffin-Campbell Company by the express terms of the conditional sale contract, there was no legal impediment to that company transferring its title to the automobile to the bank, of course, subject to Skonnord's right to perfect his title by the payment of the balance due upon the purchase price, as against the bank as well as against Grant-Coffin-Campbell Company. So it becomes a question of the intention of Grant-Coffin-Campbell Company and the bank, to be gathered from the terms of the assignment. We have seen that the assignment transferred to the bank all "right, title, and interest" of Grant-Coffin-Campbell Company "in and to the within note and memorandum of conditional bill of sale." Now, that company possessed under the conditional sale contract two alternative rights: (1) The right to retake the automobile upon the failure of Skonnord to comply with the terms of the conditional sale contract; and (2) the right to look

to Skonnord as a debtor owing the balance of the purchase price. We are quite unable to view the language of this assignment other than as evidencing an intent on the part of both Grant-Coffin-Campbell Company and the bank to transfer to the bank both of these alternative rights, either of which the bank could elect to claim, as Grant-Coffin-Campbell Company could have done had no assignment been made. It is true the assignment guaranteed "the payment and fulfilment of the within contract," but these words, as we view them, had no other effect than to render Grant-Coffin-Campbell Company liable as a guarantor, not only for the payment of the balance due upon the purchase price, should the bank elect to seek recovery of such balance as a debt, but also as a guarantor of the return of the automobile, should the bank elect to claim that right upon the failure of Skonnord to pay the balance of the purchase price.

Assignment—  
conditional sale  
contract—  
effect.

Counsel rely principally upon our decisions in Winton Motorcar Co. v. Broadway Automobile Co. 65 Wash. 650, 37 L.R.A.(N.S.) 71, 118 Pac. 817, in support of their contention that there was, by the assignment, an election on the part of both parties thereto to look to Skonnord as a debtor only and to vest title to the automobile in him. In that case, however, there was involved an assignment, by indorsement, of a simple promissory note given by the vendee to the vendor to evidence the purchase price of a conditional sale contract. The note was an entirely separate instrument from the contract of sale. It did not, upon its face, make any reference to the contract, nor did the contract make any reference to the note. The transfer of the note was only a transfer of the right to look to the vendee as a debtor. This, we held, constituted an election to vest title to the property in the vendee, and thereafter to look to him only as a debtor. Had the note and conditional

sale contract there involved been embodied in one instrument, and all the rights thereunder assigned as in this case, we think the conclusion reached in that case would have been different. In *Barbour v. Hodge*, 99 Wash. 578, 583, 170 Pac. 115, observations were made in harmony with this view, though the question was but very briefly noticed therein. In the following decisions, each involving the assignment of a promissory note, and conditional sale contract embodied in one writing, similar to the one here involved, it was held that the assignment of such note and contract and of the interest of the assignor thereunder, though the assignment did not in terms refer to the property, effected a transfer of the reserved legal title to the assignee. *Myers v. Yaple*, 60 Mich. 339, 27 N. W. 536; *Barton v. Groseclose*, 11 Idaho, 227, 81 Pac. 623; *Lazarovitch v. Tatilbum*, 103 Me. 285, 69 Atl. 275; *Bank of Little Rock v. Collins*, 66 Ark. 240, 50 S. W. 694. We are quite convinced that the assignment by Grant-Coffin-Campbell Company of all its "title and interest in and to" the note and conditional sale contract vested the reserved title to the automobile in the bank.

It is further contended by counsel for Johnson and Dahl that they are, in any event, innocent purchasers of the automobile for value, from one having possession and apparent title thereto, and that they should now be protected as against the claim of the bank. It is argued that the filing of the conditional sale contract and assignment indorsed thereon in the auditor's office did not give to Johnson and Dahl any constructive notice of the bank's title to the automobile, nor even of the title of Grant-Coffin-Campbell Company prior to the execution of the assignment, and also that they had no actual knowledge of any facts putting them upon inquiry or requiring them to take notice of the bank's title to the automobile, nor the claim of title of anyone thereto other than Grant-Coffin-Campbell Company,

the Campbell Motorcar Company, or Edward P. Campbell, from one or the other of whom it may be said they purchased the automobile. It may well be argued that Johnson and Dahl had no constructive notice under the filing and recording provisions of our conditional sale contract statute (§§ 3670, 3671, Rem. Code), since that statute makes no provision for the filing, recording, or indexing of assignments of this nature, and it is not claimed that the assignment was recorded or indexed as a bill of sale under § 5291, Rem. Code. It may also well be argued that since neither Grant-Coffin-Campbell Company, Campbell Motorcar Company, nor Edward P. Campbell were holding the automobile as a vendee under a conditional sale contract, there was no occasion for Johnson and Dahl to look to the files or indexes of conditional sale contracts to learn what interest of that nature might be claimed by either of those parties. Our decisions in *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746; *Fischer v. Woodruff*, 25 Wash. 67, 87 Am. St. Rep. 742, 64 Pac. 923; and *Dial v. Inland Logging Co.* 52 Wash. 81, 100 Pac. 157, might be cited in support of such argument. However, we shall assume, rather than here decide, that Johnson and Dahl had no constructive notice, under the recording provisions of our conditional sale contract statutes, of any claim of title on the part of the bank.

The finding of the trial court above quoted that Johnson and Dahl knew, or could by the exercise of reasonable diligence have known, of the bank's claim of title when they purchased the automobile, which finding, we assume, relates to notice apart from constructive notice under the recording provisions of the statute, is challenged by counsel for Johnson and Dahl as not being supported by the evidence. A review of the evidence leaves us in considerable doubt as to the correctness of this finding. However, let us concede that Johnson and Dahl

had no such knowledge as would put them upon inquiry, leading to their discovering the bank's claim of title, in what position do we find them? Simply this, they purchased the

automobile from one who had no title whatever therein. They acquired no more title or interest in the automobile when they purchased it from Grant-Coffin-Campbell Company, Campbell Motorcar Company, or Edward P. Campbell than as if they had purchased it from one who had stolen it, in which event, of course, they would have acquired no title whatever as against the real owner.

Some contention is made rested upon the fact that Grant-Coffin-Campbell Company was a corporation engaged generally in the sale of automobiles, and that the automobile was purchased by Johnson and Dahl at its place of business, it being then in possession and the apparent owner of the automobile. It is true that possession of personal property is some evidence of title thereto by the one in possession of it, but in order to sustain Johnson and Dahl's claim of title in this case it would be necessary to go to the extent of invoking in their favor the doctrine that a sale in market overt vests good title in the vendee though the vendor had no title, applicable under certain conditions in England, but not recognized as the law in this country. 35 Cyc. 358; 2 Bouvier, Law Dict. Rawle's 3d Rev. 2095. If the vendor has no title, the vendee acquires none, unless the one having title has, by act or neglect, estopped himself from disputing the vendee's claim of title so acquired. It seems plain there is no such estoppel here.

Some contention is made in behalf of Johnson and Dahl, rested upon the theory that Skonnord returned the automobile to Grant-Coffin-Campbell Company in satisfaction of all claims against him under the conditional sale contract, resulting in the title to the automobile remaining in that company by agree-

ment between it and him at a time when he had no notice that the rights of Grant-Coffin-Campbell Company under the conditional sale contract had been assigned to the bank. The record convinces us that when Skonnord returned the automobile to Grant-Coffin-Campbell Company he was advised that the note and conditional sale contract had been assigned by that company to the bank. One of the express terms of the conditional sale contract is that "the vendor may at any time sell or assign its interest in the property . . . to any person, and such transferee shall have the same rights hereunder as the vendor."

This plainly suggested the possibility of an assignment, and the evidence in the record tends strongly to show that when the automobile was returned by Skonnord, Campbell then promised him to pay the balance due upon the contract to the bank to the end that he, Skonnord, might be relieved from further obligation under the contract. But even if the facts were as claimed by counsel for Johnson and Dahl touching the question of Skonnord's want of notice of the assignment, the fact still remains that neither Grant-Coffin-Campbell Company, Campbell Motorcar Company, nor Edward P. Campbell had any right, title, or interest whatever in the automobile at the time one or the other of them as-  
 assumed to sell it to Johnson and Dahl. Sale—market overt—right of purchaser.

Whatever view may be taken of any branch of this case, other than of the question of the bank acquiring title to the automobile by assignment of the conditional sale contract, there remains the fact that Johnson and Dahl's vendor had no title to convey, and the want of estoppel preventing the bank from asserting its title to the automobile, the judgment is affirmed.

Main, Ch. J., and Mount, Fullerton, and Holcomb, JJ., concur.

Petition for rehearing denied.

### ANNOTATION.

#### **Rights as between the assignee of a conditional vendor and one who deals with the latter after the return of the property.**

The reported case (*STATE BANK v. JOHNSON*, ante, 235) is the only case found passing upon the rights of the assignee of the conditional vendor and a subsequent purchaser of the property from him, after it has been returned by the original vendee. This case applies the general rule that an assignment of a conditional sale note or contract carries with it the right to the property, and that hence, where the property is subsequently returned to the vendor, he acquires no title thereto. Hence, a subsequent sale by him does not vest the purchaser with title to the property as against the assignee of the original contract.

A case of interest in this connection is *Wayne v. Sherwood* (1853) 14 Barb. (N. Y.) 633. In that case a boat was sold with a reservation of title until

notes given for the purchase price were paid. The purchaser resold to another person upon the express condition that the latter should pay the notes; and he in turn sold the boat and warranted the title. The latest purchaser paid the notes and then sought to hold the original purchaser for the amount thereof. It is held that in equity the boat was the fund for the payment of the notes, and that the plaintiff was the assignee of the original seller and the second purchaser, and hence he was invested with the rights and subject to the responsibilities of each as to the original purchaser, and that while he held the boat, the notes must be regarded as satisfied, and he could not recover thereon. A. G. S.

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H. W. PEARSON, Appt.,

v.

DUNCAN & SONS.

*Alabama Supreme Court — December 21, 1916.*

(— Ala. —, 73 So. 406.)

#### **Contract — to refrain from business — validity.**

1. A contract by one for a specified sum, to discontinue his business in a certain city and not to re-engage in it, so long as the other contracting party maintains its plant, is void as in general restraint of trade, although by separate contract the latter purchases the implements which the former used in the business.

[See note on this question beginning on page 250.]

#### **— general rule.**

2. A contract in general restraint of trade is void as against public policy, but a contract in partial reasonable restraint of trade will be sustained and enforced where its restraint is directed to the protection and effectuation of a sale of a business by him who has engaged to refrain from competition.

[See 6 R. C. L. 785 et seq.]

#### **Assignment — void contract — effect.**

3. Assignment of a void contract in restraint of trade confers no rights which can be enforced in equity.

[See 2 R. C. L. 600.]

#### **Injunction — bill without equity.**

4. A bill without equity will not support an injunction of any character under any circumstances.

[See 14 R. C. L. 332.]

**Municipal corporation — powers.**

5. A municipal corporation can exercise only powers expressly granted, necessarily implied in or incident to powers expressly granted, and those indispensably necessary to the accomplishment of the objects and purposes of the municipality.

[See 19 R. C. L. 768.]

**— discretionary power.**

6. Authority conferred upon a municipality to do all things that in discretion of the governmental authority may seem necessary for the good order and welfare of the municipality grants only the right to exercise a discretion within the scope of the authority conferred.

[See 19 R. C. L. 770.]

**Estoppel — to question authority of municipality.**

7. Everyone who has received the

benefit of a contract with a municipality is not estopped to set up the want of corporate authority to make such contract.

[See 19 R. C. L. 1062.]

**Assignment — of ultra vires contract — effect.**

8. One to whom a municipal corporation has assigned an ultra vires contract made by it acquires no right to enforce it.

[See 2 R. C. L. 601; 19 R. C. L. 1062.]

**Municipal corporation — power to contract.**

9. Power to contract for the abandonment of a particular business within its limits, is not conferred upon a municipality by charter authority to do all things that may be necessary for the good order and welfare of the municipality.

[See 19 R. C. L. 771, 788.]

**APPEAL** by defendant from an order of the Chancery Court for Tallapoosa County granting an injunction in a suit to enforce specific performance of a contract not to sell ice. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. N. D. Denson & Sons, for appellant:

If the bill is without equity, according to the well-established rule in such cases, the granting of the injunction is reversible error.

McHan v. McMurry, 173 Ala. 182, 55 So. 793.

There is no power given to the city to purchase and own an ice plant; and certainly no power given it to operate such a plant in the manufacture of ice, nor is there any power given it to engage in the business of selling ice.

Cleveland School Furniture Co. v. Greenville, 146 Ala. 559, 41 So. 862; New Decatur v. Berry, 90 Ala. 432, 24 Am. St. Rep. 827, 7 So. 838; 1 Dill. Mun. Corp. § 89.

The contract is ultra vires and cannot be enforced, nor can it afford foundation for any action in equity or action at law.

Simmons v. Troy Iron Works, 92 Ala. 427, 9 So. 160; 1 Elliott, Contr. §§ 614, 909; Atty. Gen. v. Detroit, 150 Mich. 310, 121 Am. St. Rep. 625, 113 N. W. 1107; Donable v. Harrisonburg (Switzer v. Harrisonburg) 104 Va. 533, 2 L.R.A.(N.S.) 910, 113 Am. St. Rep. 1056, 52 S. E. 174, 7 Ann. Cas. 519; Keen v. Waycross, 101 Ga. 588, 29 S. E. 42.

Respondent is not estopped from setting up the invalidity of the contract by reason of the fact that he is a party to it.

Cleveland School Furniture Co. v. Greenville, 146 Ala. 559, 41 So. 862; United States Fidelity & G. Co. v. Dot-han, 174 Ala. 480, 56 So. 953; Flowers v. W. T. Smith Lumber Co. 157 Ala. 505, 47 So. 1022; Chambers v. Falkner, 65 Ala. 448; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

Messrs. Bulger & Rylance, for appellees:

The town of Alexander City had the right to make the contract with respondent Pearson, and the same is not ultra vires.

The transaction between Alexander City and the respondent Pearson is not in restraint of trade.

Harris v. Theus, 149 Ala. 133, 10 L.R.A.(N.S.) 204, 123 Am. St. Rep. 17, 43 So. 131; Moore & H. Hardware Co. v. Towers Hardware Co. 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41; McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806.

The allegations of the bill show that permanent injury will result and pecuniary compensation is inadequate, therefore a court of equity will interfere by injunction.



Hooper v. Dora Coal Min. Co. 95 Ala. 239, 10 So. 652; Hamilton v. Brent Lumber Co. 127 Ala. 78, 28 So. 698; Dixie Grain Co. v. Quinn, 181 Ala. 208, 61 So. 886; Webster v. Debardeleben, 147 Ala. 280, 41 So. 831; Jones v. Peebles, 133 Ala. 299, 32 So. 60.

McClellan, J., delivered the opinion of the court:

A contract in general restraint of trade is against public policy, is void, and unenforceable; but a contract in partial, reasonable restraint of trade will be sustained and enforced where its re-

**Contract—  
general rule.**

straint is directed to the protection and effectuation of a sale of a business by him who has engaged to refrain from competition. Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 50 L.R.A. 175, 85 Am. St. Rep. 125, 28 So. 669; Harris v. Theus, 149 Ala. 133, 10 L.R.A. (N.S.) 204, 123 Am. St. Rep. 17, 43 So. 131; Smith v. Webb, 176 Ala. 596, 40 L.R.A. (N.S.) 1191, 58 So. 913.

The appellees would avail of the rights they assert against the appellant through a lease of an ice plant from the town of Alexander City, in connection with which they claim to have succeeded by assignment to them of the contract to be quoted. This contract, which was executed by the appellant and the town of Alexander City, is as follows:

For and in consideration of \$100 to me in hand paid by the town of Alexander City, I agree to discontinue my ice business in Alexander City and adjacent territory for a period of five years or so long as the present plant is operated by the town or an individual as home plant. I also agree not to associate myself in any way with another individual, firm, or corporation for the purpose of handling ice in Alexander City or adjacent territory for the period as above stated or as long as the plant is operated as a home plant, either by the town or an individual.

This contract is to be void should the town grant license to any other

than parties operating the above-mentioned plant.

It is further agreed and understood that the signers of this contract and agreement are to abide by all the conditions herein set out.

It is further agreed that H. W. Pearson is to have five days to dispose of what ice he has on hand and no other.

This bill prays the specific performance of that contract, and that alone, through the permanent injunction of appellant to engage in the ice business in Alexander City and adjacent territory for the time specified in the writing. It is clear that the quoted instrument's whole effect, so far as obligations assumed by appellant were or are concerned, was that appellant should discontinue his ice business in that territory, and refrain from engaging therein, directly or indirectly, for the time stipulated in the instrument. In this writing there is no provision for or about the purchase or sale of appellant's ice business or of any stock or instrumentalities pertaining to his ice business. It necessarily results that the application of the principle stated to the obligation set forth in the instrument above requires the conclusion that the contract is void and unenforceable, —to refrain  
from business—  
validity. because it is an

effort to impose a general restraint to engage in a certain business in a certain territory. In paragraph 5 of the bill it is alleged: "Your orators would further state, charge, and aver that after the town of Alexander City had leased the ice plant as above set out it did on, to wit, the 2d day of September, 1915, for and in consideration of \$100 in cash paid to the respondent, H. W. Pearson, procure an agreement from the said H. W. Pearson whereby he agreed to discontinue his ice business in the town of Alexander City and adjacent territory for a period of five years, or so long as the ice plant located at Alexander City was operated by the town of Alexander

(— Ala. —, 73 So. 406.)

City or an individual as a home plant, a copy of which said contract and agreement is hereto attached and marked 'Exhibit B,' and made a part of this bill as if written herein with leave of reference thereto. Your orators would further show that, at the time this said contract was entered into between the town of Alexander City and the said H. W. Pearson, the town of Alexander City also bought from said Pearson all of his ice tools and things necessary for the handling of the ice business and paid him a valuable consideration for the same, and the said H. W. Pearson agreed in said contract that he would not enter into the ice business in the town of Alexander City for a period of five years, or so long as the ice plant at Alexander City was operated by the town or an individual as a home plant."

None or all of the allegations of this paragraph suffice to bring the contract here sought to be specifically enforced through injunctive process within the saving clause of the doctrine before reiterated. While it is averred that, at the time of the contract sought now to be enforced, the town of Alexander City "also bought from said Pearson all of his ice tools and things necessary for the handling of the ice business and paid him a valuable consideration for the same," yet it is not made to appear that this purchase of articles was a part of the written contract of which the appellees now seek specific performance. The contract of the purchase of the chattels mentioned in paragraph 5 was, for aught that appears in the bill, a distinct contract from the one reduced to writing and exhibited with the bill wherein the appellant engaged to refrain from conducting an ice business. Since the contract here sought to be enforced was void as against public policy, its attempted assignment by the town of Alexander City to the appellees conferred upon them no rights they could enforce in a court of

Assignment—  
void contract—  
effect.

equity. Indeed, if this contract had been made with the appellees themselves, the result would have been the same. A bill without equity will not support an injunction of any character under any circumstances. *McHan v. McMurry*, 173 Ala. 182, 55 So. 793.

Injunction—  
bill without  
equity.

It is further insisted that the town of Alexander City was without power or authority to make the contract here sought to be enforced; that its attempt so to do was ultra vires and void. Whether the powers conferred on this municipality are those enumerated in its charter of 1899 (Local Acts, 1898-99, p. 1706), or those enumerated in the Municipal Code (Pol. Code, §§ 1260, 1261), or in both, we have not been pointed to any provision of both or either of these enactments whereby this municipality was empowered to contract in the manner or to the end disclosed in this bill.

"It is established that a municipal corporation may exercise these and only these powers: Those granted in express terms; those necessarily implied in, or incident to, the powers expressly conferred; and those indispensably necessary to the accomplishment of the declared objects and purposes of the municipality." *Colvin v. Ward*, 189 Ala. 198, 66 So. 98, and decisions therein cited.

Municipal  
corporation—  
powers.

General clauses in charters of municipalities whereby the governing authorities of the corporation are granted expressly, or in equivalent terms, power to do all things that in their discretion may seem necessary for the good order and welfare of the municipality, are only efficient "to grant to that body the right to exercise 'a discretion within the scope of the authority conferred.'" *Montgomery v. Montgomery & W. Pl. Road Co.* 31 Ala. 76, 83, 84.

—discretionary  
power.

Even one who has received the

benefit of a contract with a municipal corporation is not estopped to set up the want of the corporate authority to make such a contract. *Montgomery v. Montgomery & W. Pl. Road Co.* supra; *Sherwood v. Alvis*, 83 Ala. 115, 117, 3 Am. St. Rep. 695, 3 So. 307; *Westinghouse Mach. Co. v. Wilkinson*, 79 Ala. 312, 314. Since all persons dealing with a municipal corporation are held to a knowledge of its powers and of the powers and authority of its officers, an assignee of a contract ultra vires the corporation can take nothing thereunder. *Eufaula v. McNab*, 67 Ala. 588, 42 Am. Rep. 118; 2 Dill. Mun. Corp. 5th ed. § 791.

It appears from the bill that this municipality leased from the Tallapoosa Ice & Coal Company its ice plant for a period of five years on the 18th of August, 1915; that about the 1st of January, 1916, the appellees purchased this ice plant from the Tallapoosa Ice & Coal Company, paying for the same and taking possession thereof; that this purchase was made with the knowledge and consent of the municipality and with its agreement that the municipality would surrender and transfer to the appellees the municipality's contract of lease and its contract with the appellant, which agreement was carried into effect, the appellees paying to the municipality about \$700 of indebtedness that had accrued on account of the lease contract between the Tallapoosa Ice & Coal Company and the town of Alexander City. It thus clearly appears from the dealing between the municipality and the appellees that the municipality itself is not now engaged in manufacturing ice. Hence there is no foundation for the insistence that the municipality was, when contracting with these appellees, undertaking to exercise any possible power it had to furnish water to the inhabitants

of the municipality; if, indeed, such a power could be said to justify the activity of a municipality in manufacturing ice for sale within or without its confines. The sum of what the municipality undertook to do, in respect of its agreement with the appellees, was this: To transfer its lease of an ice plant to individuals for their operation of it, and to vest in its lessees (who are now the owners of the plant by purchase thereof from the municipality's lessor) the obligation of the appellant to the municipality to refrain from conducting an ice business in the territory prescribed for the period specified. Whatever rights the appellees could or do claim as against this appellant could only be traced through their succession to obligations assumed by the appellant to the municipality; and this obligation being wholly void as an effort to create a monopoly, and the municipality being without power to contract as it undertook to do with the appellant, the appellees derived nothing upon which they may invoke the powers of a court of equity to enforce specific performance. The only consideration passing to the appellant was from the municipality, and not from the appellees to the appellant.

The reference, in the written contract above quoted, to the operation of the plant by the town or by an individual as a home plant, was ineffectual to alter the effect of the engagements to the advantage of the appellees; those terms of the contract here sought to be enforced being incorporated therein for the purpose, only, of defining the period of time during which the appellant should refrain from engaging in the ice business in that locality.

The bill is without equity; and, in consequence, the injunction was improperly issued.

Reversed and rendered.

Anderson, Ch. J., and Sayre and Gardner, JJ., concur.

**Estoppel—to question authority of municipality.**

**Assignment—of ultra vires contract—effect.**

**Municipal corporation—power to contract.**

**NOTE.**

For a discussion of the question of the validity of a contract to keep out of a particular business when independent of any other contract, see annotation appended to SHAPARD v. LESSER, *infra*, in which it is pointed out that the reported case (PEARSON v. DUNCAN, ante, 242) is not in accord with the view that the good will

of a business may be sold, apart from the means of carrying it on, and that as an incident to, and to effectuate, such sale, the vendor may bind himself not to compete with the purchaser; and therefore that the only ground upon which the decision in the reported case may be sustained is that the agreement was, under the circumstances, at variance with the public interest.

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T. A. SHAPARD, Appt.,

v.

HARRY LESSER et al.

*Arkansas Supreme Court — March 5, 1917.*

(127 Ark. 590, 193 S. W. 262.)

**Contract — to suppress business — validity.**

1. A contract by the owner of a cotton oil mill to pay another an annuity to refrain from establishing a business of buying cottonseed at the place where the mill was located is void as against public policy.

[See note on this question beginning on page 250.]

**— general rule.**

2. Contracts in partial restraint of trade, with reference to a business or profession and the good will thereof, are valid and enforceable to the extent reasonably necessary for the protection of the purchaser.

[See 6 R. C. L. 786.]

**Equity — suit by stockholder — transfer.**

3. When stockholders of a dissolved corporation come into a suit by an assignee of the corporation to collect

an account for goods sold and delivered, the case should be transferred to equity.

[See 7 R. C. L. 737 et seq.]

**Appeal — refusal to transfer to equity — nonprejudice.**

4. Error in refusing to transfer an action to the equity court does not require reversal, if the same result was reached which the equity court would have been compelled to reach had the case been transferred.

[See 2 R. C. L. 230 et seq.]

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**APPEAL** by defendant from a judgment of the Circuit Court for Lee County in favor of plaintiff Lesser, in a suit to recover the amount alleged to be due upon an open account. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Moore, Vineyard, & Satterfield for appellant.

Messrs. Daggett & Daggett, for appellees:

The claim of defendant for damages for alleged breach of contract cannot be set off against the claim on the open account.

Gerson v. Slemons, 30 Ark. 50; Stewart v. Scott, 54 Ark. 187, 15 S. W. 463; B. A. Stevens Co. v. Whalen, 95 Ark. 488, 129 S. W. 1081; Burton

v. Blytheville Realty Co. 108 Ark. 411, 158 S. W. 131.

Where, without a sale of good will or other legitimate dealing therewith, one party agrees with the other to abstain from business, such contract is invalid without regard to its reasonableness as to either space or time.

Page, Contr. p. 685, § 434; Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 50 L.R.A. 175, 85 Am. St. Rep. 125, 28 So. 669; Gamewell Fire

Alarm Teleg. Co. v. Crane, 160 Mass. 50, 22 L.R.A. 673, 39 Am. St. Rep. 458, 35 N. E. 98; Clark v. Neeham, 125 Mich. 84, 51 L.R.A. 785, 84 Am. St. Rep. 559, 83 N. W. 1027; 6 R. C. L. § 196.

Hart, J., delivered the opinion of the court:

On March 8, 1915, Harry Lesser, doing business under the firm name of the Marianna Cotton Oil Mill, brought suit in the circuit court against T. L. Shapard for \$876.65, alleged to be due upon an open account. The plaintiff stated that the Marianna Cotton Oil Company, a corporation, had conveyed this account, together with all of its other property of every kind, to him, and that shortly thereafter it surrendered its charter to the state of Arkansas, and lost its legal entity as a corporation. In April, 1915, A. D. Goldman, Blanche L. Goldman, J. L. Isaacs, W. B. Mann, and Jim Thompson filed a motion in the cause, stating that at the time the Marianna Cotton Oil Company surrendered its charter they were stockholders in it and owned all the shares of stock issued by it. They stated that Blanche Goldman owned 796 shares, Harry Lesser, 797 shares, J. L. Isaacs, four shares, and the rest of them one share each, and asked to be made parties plaintiff to the action. The motion was granted over the objection of the defendant. The plaintiff alleged that the balance due was for hulls and meal set out in the account sued on. The defendant answered and admitted that he had received the hulls and meal set out in the account sued on, but stated that he had purchased same from the Marianna Cotton Oil Company, and denied that plaintiffs had any right to recover on said account. The material facts are as follows: In January, 1915, the Marianna Cotton Oil Company, by deed duly executed, pursuant to resolution unanimously passed by its stockholders, conveyed all of its property of every kind to Harry Lesser, and the consideration was that Harry Lesser should pay all

the debts of the corporation. The corporation then, by resolution duly passed by its stockholders, surrendered its charter to the state of Arkansas. It was solvent at the time Harry Lesser took possession of its property under the conveyance to him. He paid its debts and thereafter conducted the business under the style of Marianna Cotton Oil Mill. The account sued on came into his possession along with the other assets of the corporation. Other facts will be stated or referred to in the opinion. The jury returned a verdict for the plaintiff for \$876.65, with accrued interest. The defendant has appealed.

The defendant in his amended answer sets up the following: "That on the — day of —, 1912, he entered into an agreement with the Arkansas Cotton Oil Company, of Helena, Arkansas, by the terms of which he and the said Cotton Oil Company were to erect and operate a cotton gin at Rondo, Arkansas; that the Marianna Cotton Oil Company at that time, and for a long time prior thereto, owned and operated a cotton gin and bought cottonseed at said town of Rondo; that as soon as the Marianna Cotton Oil Company learned that it was to have competition in the gin business and in buying cottonseed at Rondo, it immediately began negotiations with the defendant for the purpose of inducing him to rescind his agreement with the Arkansas Cotton Oil Company (which was competitor of the Marianna Cotton Oil Company), and proposed that if he would do so it would pay him \$400 annually for his good will and influence in staying out of the gin business and cottonseed business at Rondo in competition with Marianna Cotton Oil Company; that thereupon by mutual agreement he rescinded his said agreement with the Arkansas Cotton Oil Company, and accepted the proposition of the Marianna Cotton Oil Company, and has ever since abided by and faithfully lived up to said agreement,

and has not been in any wise connected with the gin or cotton business at Rondo in opposition to or competition with the Marianna Cotton Oil Company or its assigns."

It is insisted that the judgment should be reversed because the court refused to allow the defendant the \$400 annually as set out in that part of the answer just quoted.

Contracts in partial restraint of trade with reference to a business or profession, where ancillary to the sale of the business or profession and the good will thereof, are valid and enforceable to the extent reasonably necessary for the protection of the purchaser. *Hampton v. Caldwell*, 95 Ark. 387, 129 S. W. 816; *Bloom v. Home Ins. Agency*, 91 Ark. 367, 121 S. W. 293, and cases cited; *Edgar Lumber Co. v. Cornie Stave Co.* 95 Ark. 449, 130 S. W. 452. In such cases the vendor, by entering into and observing the covenant not to engage in his business or profession for a stipulated time in a certain locality, secures to himself the full value of his business or profession and its good will, and such contract does not in any wise tend to stifle competition or to the detriment of the public. The good will of a business or profession has a value which the seller has an absolute right to secure in this way. The purpose to create a monopoly in the territory around the town of Rondo is obvious from the matter set forth in the answer.

According to its allegations the Marianna Cotton Oil Company executed the contract in question with the defendant in order to prevent him and another oil company from erecting and operating a cotton gin at Rondo, and thus becoming its competitor in buying cottonseed. The avowed object of the contract, according to the allegations of the answer, was to stifle competition and to promote a monopoly in the cottonseed business to the manifest injury of the public. The contract was not entered into for the purpose of protecting the oil-mill company

in a legitimate use of something which it acquired by it; for nothing was conveyed to the oil-mill corporation. The purpose and effect of the contract was to enable the oil-mill corporation to enjoy an illegitimate use of something which it already had. The contract was against public policy, and the court correctly refused to allow defendant to use it as a set-off against the account sued on. *Clemons v. Meadows*, 123 Ky. 178, 6 L.R.A. (N.S.) 847, 124 Am. St. Rep. 339, 94 S. W. 13; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 50 L.R.A. 175, 85 Am. St. Rep. 125, 28 So. 669; 6 R. C. L. § 196, p. 791; Page, Contr. § 434, p. 685.

In *Jett v. Theo. Maxfield Co.* 80 Ark. 167, 96 S. W. 143, the court held, under our statute, an account is not assignable, and that a party to whom it is sold or transferred cannot sue on it alone, but must make his assignor a party to the action.

In the present case the corporation, before it surrendered its charter, sold and transferred all its assets to Harry Lesser. It is urged that the judgment should be reversed because Harry Lesser did not bring himself within the above rule. After the corporation had surrendered its charter to the state all the stockholders came in and asked to be made parties plaintiff to the action, which was done. It is conceded that they had a right to surrender the charter of the corporation to the state under the authority of State ex rel. Atty. Gen. v. *Arkansas Cotton Oil Co.* 116 Ark. 74, 171 S. W. 1192, Ann. Cas. 1917A, 1178, and *Freeo Valley R. Co. v. Hodges*, 105 Ark. 314, 151 S. W. 281; but it is contended that under the principles announced in *Alf Bennett Lumber Co. v. Walnut Lake Cypress Co.* 105 Ark. 421, 151 S. W. 275, that the cause should have been transferred to equity when the stockholders were made parties to the suit. Counsel are correct in this

-to suppress  
business-  
validity.

Contract-  
general rule.

Equity-suit by  
stockholder-  
transfer.

contention, but it by no means follows that the judgment should be reversed for that reason. It is well settled that this court only reverses for errors prejudicial to the rights of the party appealing. The record shows that the corporation was solvent at the time it surrendered its charter to the state, and that Harry Lesser agreed to pay its debts. All persons interested in the assets of the corporation were before the court. It is true the court did not formally transfer the cause to the chancery court, but it reached the same end at which it would have arrived had it done so. The fact that the circuit court reached the same conclusion as the chancery court would have been compelled to have reached had the case been trans-

Appeal—refusal  
to transfer to  
equity—  
nonprejudice.

ferred to it shows that the defendant was not prejudiced. See *Boles v. Jessup*, 57 Ark. 469, 21 S. W. 880, and *Eagle v. Oldham*, 116 Ark. 565, 174 S. W. 1176, 1199. In other words, the defendant did not dispute that he owed the account sued on. All the parties interested in the assets of the corporation were parties to the suit, and the defendant was not entitled to the set-off claimed by him, for the reason already given.

It necessarily follows that the result should have been the judgment rendered in the event it had been tried in equity. No prejudice, therefore, could have resulted to the defendant, and the judgment is affirmed.

Petition for rehearing denied.

## ANNOTATION.

### Contract to keep out of a particular business as an unlawful restraint of trade, when independent of any other contract.

#### I. General rules, 250.

#### II. Applications of the rules:

- a. Agreement not to compete in manufacturing, buying produce, or doing specified class of work, 251.
- b. Agreement in form of lease of machinery, 252.
- c. Agreement to close hotel, 252.

#### I. General rules.

The early rule was that any contract which tended to restrain trade was void, but the rigor of that rule has been relaxed so that many contracts in partial restraint of trade are now recognized as valid. Covenants in partial restraint of trade are now generally upheld as valid when they are agreements by a seller of a business, not to compete with the buyer in such a way as to decrease the value of the business; by a retiring partner, not to compete with the firm; by a partner, not to do anything to hinder the business of the partnership; by an assistant or agent, not to compete with his master or employer after the expira-

#### II.—continued.

- d. Agreement between carriers, 253.
- e. Agreement by vendor of stock in corporation, 253.
- f. Sale of good will of business, 254.
- g. Agreement to abandon project, 255.

tion of his term of service; by the buyer of property, not to use it in competition with the business retained by the seller, and agreements made by the lessor of property, not to use it in competition with the business of the lessee.

It is, however, a very general rule that all contracts in partial restraint of trade must be incident to and in support of another contract, or a sale in which the covenantor has an interest which is in need of protection.

**United States.**—*Oliver v. Gilmore* (1892) 52 Fed. 562; *Fox Solid Pressed Steel Co. v. Schoen* (1896) 77 Fed. 29; *United States v. Addyston Pipe & Steel Co.* (1898) 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; S.

**Jarvis Adams Co. v. Knapp** (1903) 71 C. C. A. 1, 121 Fed. 34.

**Alabama.**—**Tuscaloosa Ice Mfg. Co. v. Williams** (1899) 127 Ala. 110, 50 L.R.A. 175, 85 Am. St. Rep. 125, 38 So. 669; **PEARSON v. DUNCAN** (reported herewith) ante, 242; **American Laundry Co. v. E. & W. Dry Cleaning Co.** (1917) — Ala. —, 74 So. 58.

**Arkansas.**—**SHAPARD v. LESSER** (reported herewith) ante, 247.

**California.**—**Dodge Stationery Co. v. Dodge** (1904) 145 Cal. 380, 78 Pac. 879.

**Indiana.**—**Chicago, I. & L. R. Co. v. Southern Indiana R. Co.** (1904) 38 Ind. App. 234, 70 N. E. 843.

**Iowa.**—**Chapin v. Brown Bros.** (1891) 83 Iowa, 156, 12 L.R.A. 423, 32 Am. St. Rep. 297, 48 N. E. 1074.

**Kentucky.**—**Clemons v. Meadows** (1906) 123 Ky. 178, 6 L.R.A. (N.S.) 847, 124 Am. St. Rep. 339, 94 S. W. 13; **Barrone v. Moseley Bros.** (1911) 144 Ky. 698, 139 S. W. 869; **Nickell v. Johnson** (1915) 162 Ky. 520, 172 S. W. 938.

**Louisiana.**—**Webb Press Co. v. Pierce** (1906) 116 La. 905, 41 So. 203.

**New Mexico.**—**Gross, K. & Co. v. Bibb** (1914) 19 N. M. 495, 145 Pac. 480.

**New York.**—**Chappel v. Brockway** (1839) 21 Wend. 157; **Ross v. Sadgbeer** (1839) 21 Wend. 166.

**Ohio.**—**Field Cordage Co. v. National Cordage Co.** (1892) 6 Ohio C. C. 615, 3 Ohio C. D. 613.

**North Carolina.**—**Shute v. Shute** (1918) 176 N. C. 462, 97 S. E. 392.

**Pennsylvania.**—**Cleaver v. Lenhart** (1897) 182 Pa. 285, 37 Atl. 811.

**South Dakota.**—**Prescott v. Bidwell** (1904) 18 S. D. 64, 99 N. W. 93.

This does not mean, however, that agreements not to compete are necessarily valid when they are incident to a lawful contract, or that they are invalid where the covenantor parts only with the good will of his business. The test to be applied is whether the restraint is such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not such as to interfere with the interests of the public. Thus, the ground on which the decision in **PEAR-**

**SON v. DUNCAN** (reported herewith) ante, 242, may be sustained, if at all, is not that the agreement was invalid because not ancillary to the sale of the promisor's ice business, but because such agreement was, under the circumstances of the case, at variance with the public interest. Interference with the interest of the public may begin before protection of the purchaser ends. Herein lies the explanation of the fact that in some of the cases hereinafter set forth covenants have been held valid which in other cases are pronounced invalid.

Even where the attempt to restrain trade was made in connection with a sale of a business, but was the subject of a second and independent contract, the courts have held that it was void, where the first contract was fully executed before the second one was entered into. Thus, in **Cleaver v. Lenhart** (1897) 182 Pa. 285, 37 Atl. 811, where the previous contract of sale of a certain business was complete in all respects, a second agreement, whereby the vendor agreed not to engage in the same business, was void as a mere voluntary agreement in restraint of trade, which could have no legal sanction. So, also, in **Prescott v. Bidwell** (1904) 18 S. D. 64, 99 N. W. 93, where one partner purchased the entire business of a partnership, including good will, clientage, etc.; and thereafter entered into another agreement whereby, for a fixed sum, the same partner purchased certain articles of the retiring partner; and, as a further consideration, the retiring partner agreed not to engage in the same business, the court held that the restriction was void, though, had it been included in the first contract, it would have been valid under a section of the statute which permits such a restriction upon the dissolution of a partnership.

## II. Applications of the rules.

### a. Agreement not to compete in manufacturing, buying produce, or doing specified class of work.

A contract by the owner of an ice machine to discontinue the manufacture of ice in a certain town for the term of five years, when made with-



out any sale of his business, and in consideration of payments by the owner of the only other ice plant in the place, in which there was a demand for ice sufficient to consume and render marketable the output of both factories, was held void in *Tuscaloosa Ice Mfg. Co. v. Williams* (1899) 127 Ala. 110, 50 L.R.A. 175, 85 Am. St. Rep. 125, 38 So. 669, as against public policy, because of the restraint of trade and the creation of a monopoly in the supplying of ice within the town.

And in *Oliver v. Gilmore* (1892) 52 Fed. 562, a contract which provided that the works, factory, and machinery owned, leased, and controlled by one party should not be operated or used by any person whatsoever for the manufacture of a certain kind of hinges for and during a certain period, in consideration whereof the second party agreed to pay a certain percentage of his sales to the first party, was held void as an illegal restraint of trade.

In *Shute v. Shute* (1918) 176 N. C. 462, 97 S. E. 392, it was held that an agreement on the part of the vendee of a cotton gin plant that he would not engage or be interested in ginning cotton, or buying cottonseed or seed cotton, for a period of ten years, on the north side of a certain creek in the county, and would remove a gin plant which he was then operating within such territory, the vendor binding himself not to build or cause to be built any ginning plant in such county on the south side of such creek for a period of ten years, was void, because it appeared upon the face of the agreement that this division of the territory was not for the purpose of conveying to the vendee the right to obtain all the patronage of the establishment which the vendor sold to him, but for the purpose of shutting off competition, by preventing the vendee from putting up any other plant or being interested in the establishment of any other plant within all that part of the county north of the creek.

In *Chapin v. Brown Bros.* (1891) 83 Iowa, 156, 12 L.R.A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074, an agreement by grocers not to buy butter from the

producers for two years, if a firm should open a butter store in the place, was held void for lack of consideration, where such firm neither paid anything therefor, nor bought any established plant, place of business, or good will.

In *American Laundry Co. v. E. & W. Dry Cleaning Co.* (1917) — Ala. —, 74 So. 58, the court refused to enjoin a breach on the part of a laundry company of an agreement whereby it undertook to deliver to the complainant all dry cleaning work which it received from its customers for a period of ten years, and in the meantime not to engage in the dry cleaning business, and the complainant agreed, for the same period, not to engage in the laundry business, on the ground that such agreement was in restraint of trade and tended to create a monopoly in the dry cleaning and laundry business in that locality.

*b. Agreement in form of lease of machinery.*

In *Field Cordage Co. v. National Cordage Co.* (1892) 6 Ohio C. C. 615, 3 Ohio C. D. 613, a contract taking the form of a lease of machinery was held to be, in reality, a covenant not to compete with the lessee, and accordingly to be void.

And in *Clark v. Needham* (1900) 125 Mich. 84, 51 L.R.A. 785, 84 Am. St. Rep. 559, 83 N. W. 1027, a lease by a firm of all its machinery used in the manufacture of chaplets or anchors, with an agreement that it would not, for five years, manufacture or sell any chaplets or anchors, with some slight exceptions, upon the execution of which lease the lessee leased back the machinery to the first lessor, with permission to use it for any other purpose than the one prohibited, constituted an illegal contract in restraint of trade, where it was not limited as to territory, and the lessor had been engaged in carrying on such business in other states.

*c. Agreement to close hotel.*

In *Clemons v. Meadows* (1906) 123 Ky. 178, 6 L.R.A. (N.S.) 847, 124 Am. St. Rep. 339, 94 S. W. 13, a contract between the proprietors of the only

two first-class hotels in a town, to close one for a money consideration to be paid by the proprietor of the other, in order to give the latter a monopoly of the business, was held to be contrary to public policy and void.

The case of *Wittenberg v. Mollyneaux* (1900) 60 Neb. 583, 83 N. W. 842, although in some of its facts quite similar to *Clemons v. Meadows* (Ky.) *supra*, differs from the latter case in an essential feature which serves to bring out clearly the distinction between a stipulation not to engage in a particular business, which is ancillary to another lawful contract, and such a stipulation which is not ancillary to another contract. In that case the owners of hotels in the same place agreed to exchange their properties, and, as a part of the agreement, the conveyance made by the plaintiff to the defendant provided that the premises therein described should not be used for hotel purposes for a period of two years. This stipulation was held valid, under the general principle that partial restraints are not deemed to be unreasonable when they are ancillary to the actual purchase of property, made in good faith, and are apparently necessary to afford fair protection to the purchaser. It is apparent that the distinguishing feature in this case, namely, the fact that the stipulation was ancillary to a lawful contract, was lacking in *Clemons v. Meadows*, although the two cases are quite similar so far as the other facts are concerned.

*d. Agreement between carriers.*

The same question has sometimes arisen where, in a contract between two carriers, one agrees not to enter into competition with another by refraining from using the same route as the other company. In *Chicago, I. & L. R. Co. v. Southern Indiana R. Co.* (1904) 38 Ind. App. 234, 70 N. E. 843, an agreement by one railroad not to run tracks to or from certain stone quarries which were connected with the other railroad was held void as in restraint of trade. And in *Anderson v. Jett* (1889) 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670, an agreement between

owners of rival steamboats to divide profits of the business in a certain proportion, without creating any partnership or any other duty or obligation toward each other; and which also provided that, in case either party sold his boat for the purpose of going out of business, he should not re-engage in it for one year, was held void on grounds of public policy, as an attempt to prevent competition in business. But to the contrary were the decisions in *Pierce v. Fuller* (1811) 8 Mass. 223, 5 Am. Dec. 102, holding that an agreement not to use a stage in opposition to the plaintiff's stage was valid, the court implying that one stage was sufficient to do all of the business upon that route; and in *California Steam Nav. Co. v. Wright* (1856) 6 Cal. 258, 65 Am. Dec. 511, holding that a contract between owners of steamboats, whereby one agreed not to permit its steamboats to run on certain waters, was valid on the ground that it did not tend to create a monopoly. And in *Leslie v. Lorillard* (1888) 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363, holding that an agreement by a steamship corporation to buy out a competing line which, in consideration of a monthly payment, agreed to discontinue running vessels between ports mentioned, and not to charter or sell their vessels for use on that route, and not to become in any way interested in the running of steamships between those places, was not void as in restraint of trade.

*e. Agreement by vendor of stock in corporation.*

In *Dodge Stationery Co. v. Dodge* (1904) 145 Cal. 380, 78 Pac. 879, it was held that the vendor of stock in a corporation had no vendible interest in the good will of the business carried on by the corporation, and an agreement by one selling his stock in the corporation, not to engage in the same business, was void.

But a contrary view was expressed in *National Enameling & Stamping Co. v. Haberman* (1903) 120 Fed. 415, the court saying: "I cannot regard with favor the claim that the defendant was a mere stockholder in the vendor

company, and therefore was not concerned in the good will at all. He has all the qualities which render his restrictive covenant of great value, and, that fact being recognized by the parties, he received \$50,000 in addition to his stockholder's share of the fruits of the sale. Possibly his dangerous proclivities were suspected; be that as it may, his superior value was clearly recognized and very well paid for in advance. He ought to be the last man on the list of covenantors to find fault with the bargain which he made, presumably in the best of faith."

The validity of a stipulation on the part of the seller of stock in a corporation, not to engage in a competing business, is also recognized in *S. Jarvis Adams Co. v. Knapp* (1903) 78 C. C. A. 1, 121 Fed. 34, s. c. on subsequent appeal (1905) 70 C. C. A. 536, 135 Fed. 1008; *A. B. Dick Co. v. Fuller* (1914) 213 Fed. 98.

*f. Sale of good will of business.*

The good will of an existing business may, apart from the means of carrying it on, be the subject of sale, and hence a covenant on the part of the seller not to compete with the buyer, which is not unreasonable in respect of the restraint imposed, may be valid.

Thus, a contract, by the terms of which one party agreed to pay to the other a certain sum each month while he lived, and while the promisor remained a corporation, in consideration of his agreement to give up the business of dealing in molding sand obtained from sand banks in a certain county, and not to engage further in it personally, or as agent for any other than the corporation, was held in *Wood v. Whitehead Bros. Co.* (1901) 165 N. Y. 545, 59 N. E. 357, to be valid, although not connected with a transfer of anything in the way of a business or a plant. The court, speaking through Gray, J., said: "The feature which is said to distinguish this case from our prior decisions upon the subject is that the plaintiff's agreement was unaccompanied by the sale of any business plant, or stock. At the time of contracting with the defendant, he

had neither. He was engaged in the business of buying and selling Albany molding sand, and was, presumably, a business rival of the defendant. By this contract, he agreed to discontinue his business and to turn over to the defendant all orders for sand which he then had, or might thereafter receive. The effect of the arrangement was to transfer to the defendant the good will, or custom, of the business which he had built up, and to cease to be its competitor to the extent described. That a man may not contract, as he will, with respect to himself, or to his property rights, demands the intervening of some authoritative reason, founded in considerations of public policy. The denial of the right can only be reasonable, when to permit its exercise is seen to be fraught with consequences injurious to the interests of society. The state has a right to limit individual rights, when their exercise touches the public interests and, if unrestrained, would be prejudicial to order or to progress. The doctrine which avoids a contract for being one in restraint of trade is founded upon a public policy. It had its origin at a time when the field of human enterprise was limited, and when each man's industrial activity was more or less necessary to the material well-being and welfare of his community and of the state. A discussion of the doctrine and the history of the law appear in the cases of *Diamond Match Co. v. Roeber* (1887) 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419, and of *Leslie v. Lorillard* (1888) 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363. The conditions which made so rigid a doctrine reasonable no longer exist. In the present practically unlimited field of human enterprise, there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business. Interference would only be justifiable when it was demonstrable that, in some way, the public interests were endangered. But contracts between parties, which have for their object the removal of a rival and competitor in a business,

are not to be regarded as contracts in restraint of trade. They do not close the field of competition, except to the particular party to be affected. To say, at the present day, that such a contract as was made in this case was affected by a public interest and was a matter of public concern would be, in my opinion, unreasonable. Such a contract not only does not obstruct trade, but it may be for the advantage of the public, as well as of the individual. Story, *Contr.* § 551. Heretofore, in most of the cases which have come before the courts, the covenant to refrain from a calling within a territory described accompanied a sale of the business itself, with all its appliances or appurtenances. For obvious reasons, that would be so; but, if the calling be one which is followed without a business plant, is any principle of public policy the more violated by a covenant to discontinue it? Clearly not, and this court has not held to that effect. Indeed, its utterances have intimated to the contrary."

And in *Brett v. Ebel* (1898) 29 App. Div. 256, 51 N. Y. Supp. 573, it was held that a covenant, upon the sale of the good will of the business of soliciting freight for a certain port, not to solicit freights for such port in or from any place in the United States east of the Mississippi river for a certain term, was not without consideration because no material "plant" was involved in the transaction, the court saying: "The good will of a business may be sold independently. A physician may sell the good will of his practice without selling his office furniture or his surgical instruments. So, a lawyer may sell the good will of his clientage without selling his library. The same rule applies to the good will of a mercantile business; in fact, to good will generally."

In *Mapes v. Metcalf* (1901) 10 N. D. 601, 88 N. W. 713, a stipulation to discontinue the newspaper and job printing business, and not to resume the same within five years, was held to be valid as ancillary to the sale of the good will of the business.

And in *Vandiver v. Robertson* (1907) 125 Mo. App. 307, 102 S. W. 659, an agreement with a rival news-

paper publisher to discontinue the publication of the promisor's paper at a certain town, and at no time, during the time the other party might be in the newspaper business in said town, to resume the publication of that or any other newspaper in said town, nor to engage in or be in any way interested in any newspaper published in said town, was held not to be invalid, although it was not ancillary to any other contract, on the ground that the restraint imposed was so limited that its tendency was not to inflict a loss upon the public.

*g. Agreement to abandon project.*

It does not follow that because, as incident to a sale of the good will of a business apart from any transfer of the property used in the business, a covenant by the seller not to re-engage in the business may be valid, a contract to forego an unexecuted intention to engage in business is likewise lawful. The reason for making a distinction between the two kinds of cases appears to be that, in the former case, the public interest which requires that a seller shall be free to enter into such covenants as will adequately protect the purchaser outweighs the public interest which requires free and unrestricted competition; while, in the latter case, the public interest which seeks to promote competition tips the scale, there being no countervailing interest to be taken into consideration.

Thus, in *Webb Press Co. v. Bierce* (1906) 116 La. 905, 41 So. 203, a contract by which one who had contemplated engaging in lawful business in a certain place, for a pecuniary consideration, agreed with one with whom he had had no previous relations, and who also contemplated engaging in the same business at the same place, to abandon his plan, was held void as an unreasonable restraint of trade.

And in *Gross, K. & Co. v. Bibb* (1914) 19 N. M. 495, 145 Pac. 480, an agreement by one who was contemplating the establishment of a store at a certain place in competition with the other party to the agreement, who was at that time engaged in business at

that place, to abandon the project, was held to be unlawful, it not being incidental or ancillary to a valid contract for the sale of an established business and its good will, and for the purpose of protecting the good will of the business sold.

And see also in this connection *SHAPARD v. LESSER* (reported herewith) ante, 247.

But in *Sauser v. Kearney* (1910) 147 Iowa, 335, 126 N. W. 322, an agreement by one who owned a lot on which the business of conducting a lumber yard could be carried on, and who, in contemplation of engaging in such business, had procured a stock of lumber and placed a small portion of it upon the lot, to sell to another dealer the lumber so purchased, and not to engage in the business at that place for

a term of two years, was held valid as ancillary to the sale of a business, the court taking the view that his contract not to engage in the business was not merely a sale of a prospective right which anyone would have to engage in the business in that town if he saw fit.

In *Moore v. First Nat. Bank* (1903) 139 Ala. 595, 36 So. 777, a contract whereby a contractor abandoned negotiations for the building of a mill, and allowed defendant to take the contract without competition by him, was held not void as opposed to public policy, as the public had no concern in the letting of the contract for the building of the mill, and therefore no interest in maintaining competition.

E. S. O.

W. C. STERRETT, Receiver, etc., of Alabama Trust & Savings Company,  
v.

SECOND NATIONAL BANK of Cincinnati, Ohio.

*United States Circuit Court of Appeals, Sixth Circuit — December 4, 1917.*

(159 C. C. A. 55, 246 Fed. 753.)

#### **Receiver — title to assets — suit in other jurisdiction.**

1. No title to the assets of a corporation which will permit suit in another jurisdiction, even with the assent of the appointing court, is conferred upon a receiver in an equity suit to wind up the affairs of a corporation, where the statute provides that the assets of insolvent corporations are a trust fund to be marshaled by a court of equity, that a receiver may be appointed of all assets of the corporation who shall, under direction of that court, collect all debts and manage the assets of the corporation as the court shall direct, and that the receiver shall immediately take charge of the business, collecting its assets under the law and rules of the court.

[See note on this question beginning on page 262.]

#### **— right to sue — general rule.**

2. A mere chancery receiver is but an officer of the court appointing him, and in the absence of some conveyance or statute vesting in him title to the debtor's property, he cannot sue in the courts of a foreign jurisdiction for its recovery upon the mere order of the appointing court, or without other authority than that arising out of his appointment as receiver.

[See 23 R. C. L. 124.]

#### **— title conferred by statute.**

3. Where the statute under which a

receiver is appointed confers upon him title to the property of the debtor, he may sue as of right in the courts of a foreign jurisdiction for recovery of the property.

[See 23 R. C. L. 124.]

#### **Appeal — questioning title of plaintiff.**

4. Lack of title in plaintiff which will confer jurisdiction upon the trial court may be brought to the attention of the appellate court for the first time on appeal.

[See 2 R. C. L. 69 et seq.]

**CROSS APPEALS** from a decree of the District Court of the United States for the Southern District of Ohio (Sater, District Judge) in favor of plaintiff in part only, in a suit to recover sums for which defendant was alleged to be liable because of dealings between it and the insolvent savings company; defendant appealing from so much of the judgment as held it liable; and plaintiff appealing from so much as rejected part of his claims. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Knappen and Denison, Circuit Judges, and McCall, District Judge.

Messrs. Lawrence Maxwell, Ferdinand Jelke, Jr., Landon L. Forchheimer, Charles N. Leslie, Joseph Sagmeister, and I. B. Foraker for defendant.

Messrs. Edmund H. Dryer, Philip Roettinger, and S. C. Roettinger, for plaintiff:

Plaintiff, by express decree of the court of his appointment, is authorized to institute and prosecute this suit. Such rights of action, therefore, as may have arisen and existed to redress the injuries done the corporation, and of any creditor or stockholder, are vested in plaintiff.

*Oates v. Smith*, 176 Ala. 45, 57 So. 438; 10 Cyc. 836; *Harrigan v. Gilchrist*, 121 Wis. 183, 99 N. W. 909; 23 Am. & Eng. Enc. Law, 2d ed. 1078; 5 Thomp. Corp. 6939, 6950, 6952, 6953, 6961; *High, Receivers*, 4th ed. § 320; *Humboldt Min. Co. v. American Mfg. Min. & Mill. Co.* 10 C. C. A. 415, 22 U. S. App. 334, 62 Fed. 356; *Germania Safety-Vault & T. Co. v. Boynton*, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797; *National Park Bank v. German-American Mut. W. & Secur. Co.* 116 N. Y. 281, 5 L.R.A. 673, 22 N. E. 567; *National Bank v. Young*, 41 N. J. Eq. 531, 7 Atl. 488; *Steiner v. Steiner Land & Lumber Co.* 120 Ala. 128, 26 So. 494; *Chambers v. Falkner*, 65 Ala. 448; *Gulf Yellow Pine Lumber Co. v. Chapman & Co.* 159 Ala. 444, 48 So. 662; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L.R.A. 605, 16 Am. St. Rep. 81, 7 So. 108; *Lagarde v. Anniston Lime & Stone Co.* 126 Ala. 496, 28 So. 199, 20 Mor. Min. Rep. 545; *North-western Land Asso. v. Grady*, 187 Ala. 219, 33 So. 874; *De Bardeleben v. Bessemer Land & Improv. Co.* 140 Ala. 621, 37 So. 511; *Morawetz, Priv. Corp.* ¶ 517, p. 483; *Morse, Banks & Bkg.* ¶ 127, p. 271, 4th ed. § 65; *Chicago City R. Co. v. Allerton*, 18 Wall. 233, 21 L. ed. 902; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Peckham* 3 A.L.R.—17.

*Iron Co. v. Harper*, 41 Ohio St. 100; *Wardell v. Union P. R. Co.* 103 U. S. 651, 26 L. ed. 509, 7 Mor. Min. Rep. 144; *Koehler v. Black River Falls Iron Co.* 2 Black, 716, 17 L. ed. 339; *Hall v. Alabama Terminal & Improv. Co.* 173 Ala. 414, 56 So. 235; *Cook, Corp.* 5th ed. § 649; *Moore v. Marsh*, 7 Wall. 515, 19 L. ed. 37; *Jackson v. Ludeling*, 21 Wall. 616, 22 L. ed. 492; *Wardell v. Union P. R. Co.* 103 U. S. 651, 26 L. ed. 509, 7 Mor. Min. Rep. 144; *Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 817.

Plaintiff is entitled to a recovery of the principal sums with interest.

*Moore v. Robison*, 6 Ohio St. 302; *Richards v. Skiff*, 8 Ohio St. 586; *Faran v. Robinson*, 17 Ohio St. 243, 93 Am. Dec. 617; *Loudenback v. Collins*, 4 Ohio St. 251; 28 Am. & Eng. Enc. Law, 2d ed. 726; *Colebrooke, Collateral Securities*, § 117; 38 Cyc. 2082(B), 2083 note 10, 2097; *Randolph, Com. Paper*, § 1732; *Jones, Collateral Securities*, § 575; *St. John v. O'Connell*, 7 Port. (Ala.) 481; *Cocke v. Chaney*, 14 Ala. 67; *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 51 L. ed. 596, 27 Sup. Ct. Rep. 391; *Globe Bank & T. Co. v. Martin*, 236 U. S. 238, 59 L. ed. 583, 35 Sup. Ct. Rep. 377; — Ky. —, 124 S. W. 879; *Miller v. New Orleans Acid & Fertilizer Co.* 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 176.

**Knappen**, Circuit Judge, delivered the opinion of the court:

The plaintiff, as receiver of the Alabama Trust & Savings Company, filed his bill in the court below to recover sums for which he alleged the National Bank was liable on account of dealings between that bank and the Savings Company and its officers. Upon final hearing on pleadings and proofs, the district court found defendant liable for the application of a balance of the Savings Company's deposit in the Na-

tional Bank, upon paper held by the latter bank, on which the Savings Company appeared as principal maker, but which was found to have been given for the benefit of certain of the Savings Company's officers. Plaintiff's remaining claims were rejected. Both parties have appealed.

At the outset we are met with defendant's contention that plaintiff is without authority to maintain this suit. The Savings Company is a banking corporation organized under the laws of Alabama. In the year 1911, upon a bill filed against it in a state chancery court of Alabama, by certain of its creditors, alleging its insolvency, plaintiff was appointed receiver, and later was given by the Alabama court discretionary authority to prosecute the instant suit, which was accordingly brought in a Federal district court in Ohio, there having been no receivership proceedings, ancillary or otherwise, in that state.

It is the settled rule that a mere chancery receiver is but an officer of the court appointing him, and that in the absence of some conveyance or statute vesting in him title to the debtor's property he cannot sue in the courts of a foreign juris-

diction for its recovery upon the mere order of the appointing court, or without other authority than that arising from his appointment as receiver; and that in the absence of actual conveyance (there was none in this case) the question whether the receiver has title is governed by the statutes of the state by whose court the appointment was made. *Booth v. Clark*, 17 How. 322, 15 L. ed. 164; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S. 561, 573, 49 L. ed. 1163, 1167, 25 Sup. Ct. Rep. 770; *Keatley v. Furey*, 226 U. S. 399, 403, 57 L. ed. 273, 275, 33 Sup. Ct. Rep. 121. On the other hand, it is equally well settled that, where the statute un-

der which the appointment was made confers such title on the receiver, —title conferred by statute. — he may sue as of right in the courts of the foreign jurisdiction; and such courts will, in respect to such question of title, accept the construction put upon the statute by the highest court of the state. *Bernheimer v. Converse*, 206 U. S. 516, 534, 51 L. ed. 1163, 1176, 27 Sup. Ct. Rep. 755; *Converse v. Hamilton*, 224 U. S. 243, 256, and following, 56 L. ed. 749, 754, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292. The question is, Under which classification does plaintiff receiver come?

Section 3509 of the Code of Alabama (1907) provides that "the assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may be marshaled and administered in courts of equity in this state."

Section 3511, which relates to proceedings for voluntary dissolution of corporations by action of stockholders, provides for the appointment by the chancery court of a receiver of "all the books, property, and assets of the corporation," and that such receiver shall, "*under the direction of the court*," collect all debts due to, and sell all the property of, the corporation, paying its debts in full or ratably and dividing the residue among stockholders.<sup>1</sup>

Section 3512, which relates to the dissolution of insolvent corporations generally, provides for the appointment of a receiver of all the corporate property and assets, requiring that officer to exercise and perform, "*under the direction of the court*," the powers and duties required of receivers under § 3511, and to "otherwise manage the affairs of the corporation pending final settlement thereof *as the court shall direct*."

Section 3560, which is confined to proceedings against insolvent banks, requires the attorney general (upon direction of the governor,

<sup>1</sup> All italics in this opinion ours.

based on the state treasurer's finding of insolvency) to institute, "in a court having jurisdiction in the county where the bank or parent bank is located," proceedings "to put the bank in the hands of some competent person;" such appointee being required to give bond in an amount to be fixed by the judge, and to "immediately take charge of the business of said bank, collecting its assets and paying off its liabilities, *under the law and rules of such court.*" It was under these statutes (although upon bill by private creditors) that plaintiff's appointment was made, and by which the question of his title is to be tested.

The decree, after reciting the corporate organization of the Savings Company under the general laws of Alabama, its insolvency, its suspension of business, and inability to resume the same with safety to the public, that its assets constitute a trust fund for the payment of its creditors and "should be marshaled and administered in this court," that upon final settlement it should be dissolved, and that a receiver "should now be appointed to administer its estate," directs that plaintiff "be and he is hereby appointed receiver of defendant, and empowered and directed to demand and take into his possession all the defendant's assets and property to which it is entitled and to recover the same, to be reduced to money and administered *under the further order of the court,*" with express authority to employ counsel and to bring actions at law or in equity "as he may be advised," and to incur expense necessarily incident thereto.

It will be seen that these statutes do not expressly confer title upon the receiver; that they, at least at first view, suggest generally a court direction and control,—an ordinary chancery receivership,—and that the order of appointment specifically provides for the administration of the bank's estate, including recoveries by suit, under the court's order.

In *Oates v. Smith*, 176 Ala. 39, 57 So. 438, which involved the right of a debtor to set off a debt of the bank acquired after its insolvency against a debt due the bank, the court, recognizing the rule that in ordinary cases of receivership the receiver gets no title to the debtor's assets, passed by the question whether the receiver was vested with the legal title, basing its decision upon the trust fund nature of the assets of the insolvent bank, which of itself forbade such set-off.

In *Montgomery Bank & T. Co. v. Walker*, 181 Ala. 368, 61 So. 951, which involved the power of the superintendent of banks, under § 10 of Act No. 84 of the General Acts of Alabama of 1911 (in effect when the instant receivership was created) to maintain suit to avoid a fraudulent transaction made by the bank's officials, the court cited *National Bank v. Kennedy*, 17 Wall. 19, 21 L. ed. 554, as asserting the power of a receiver under the National Bank Act, "as statutory assignee," to collect the assets of the bank; but the opinion contains no suggestion that the superintendent of banks was in fact such assignee. On the contrary, in asserting the constitutionality of the act, as against an alleged lack of due process, the court expressly said (page 378 of 181 Ala.) that it did not "understand the act as making this proceeding operate as a change in the ownership or legal title to the property, but the superintendent is in reality a receiver, who takes charge of the bank for the benefit of the stockholders, depositors, and other creditors."

In the later case of *Cobbs v. Vizard Invest. Co.* 182 Ala. 372, 62 So. 730, Ann. Cas. 1915D, 801, brought under § 3509, *supra*, for the administration of an insolvent bank, in denying the right of the receiver (for lack of interest in the distribution) to appeal from a decree allowing the claim of a creditor, the court (page 374 of 182 Ala.) characterized the receiver as "the mere agent of the court for the col-



lection and distribution of the assets of the insolvent corporation under orders of the court which fully protect him," etc., saying (page 375 of 182 Ala.): "The receiver is the mere creature of the court. He must give heed to his master's voice."

In the still later case of Coffey v. Gay, 191 Ala. 137, L.R.A.1915D, 802, 67 So. 681, which involved the right of a receiver of an insolvent bank, appointed under § 3560, supra, to appeal from an order in the principal suit denying the liability of stockholders for unpaid subscriptions, the proposition involved in Cobbs v. Vizard Invest. Co. was reasserted, and upon the same grounds there announced; the court quoting from the opinion in that case the language above set out, and further saying that "this suit the receiver was without authority to bring until he first obtained permission of the court of his appointment."

True, in the still later case of Hundley v. Hewitt, 195 Ala. 647, 71 So. 419, which involved the right of a receiver of an insolvent insurance company, appointed under § 4552 of the Code, to recover unpaid stock subscriptions (under § 3509, supra, and § 3744), the court, in support of the existence of such power, quoted the definition of the title of the "trustee in bankruptcy" as contained in Cartwright v. West, 173 Ala. 202, 55 So. 917, and expressed (page 654 of 195 Ala.) the opinion that "the receiver appointed in this case, acting under orders of the court appointing him,—a court of competent jurisdiction, with full power to settle the affairs of a dissolved corporation,—has rights and duties of a kindred character to those of a trustee in bankruptcy, so far as the question here concerned is involved."

But we find nothing in the opinion asserting that the receiver holds title to the property of the insolvent bank; the implications are all to the contrary.

The instant case is readily distinguishable from cases relied upon by plaintiff. In Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 26 L. ed. 337, the "temporary agent and receiver" of the insurance company (page 223 of 103 U. S.) was held (page 225 of 103 U. S.) to be "the statutory successor of the corporation for the purpose of winding up its affairs." In Bernheimer v. Converse and Converse v. Hamilton, supra, it was held that under the Minnesota statute, as interpreted by the supreme court of that state, as well as by the Supreme Court of the United States, "the receiver is not the ordinary chancery receiver or arm of the court appointing him, but a quasi assignee, and a representative of the creditors." And see Courtney v. Croxton (C. C. A. 6th C.) 152 C. C. A. 235, 239 Fed. 247, 249.

In Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888, the bank's receiver, which the Washington court (whose statute was involved) called a "quasi assignee for creditors," was declared by the Massachusetts court (page 579 of 175 Mass.) to be "the owner of the legal title to this fund as a trustee for the creditors." In Howarth v. Angle, 162 N. Y. 179, 47 L.R.A. 725, 56 N. E. 489, the Washington statute was similarly construed.

There is a marked, and not unnatural, tendency in the courts in favor of the construction, where possible, of statutory proceedings for the dissolution of corporations (as distinguished from ordinary creditors' suits) as vesting in the receiver the title to corporate assets (in Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 573, 49 L. ed. 1163, 1167, 25 Sup. Ct. Rep. 770, the receiver was appointed in a creditors' suit); and were it not for the decisions in Montgomery Bank & T. Co. v. Walker, Cobbs v. Vizard Invest. Co. and Coffey v. Gay, — supra, such construction of the Alabama statute would present less dif-

faculty. But this construction seems impossible without disregarding these three decisions, and in the face of the fact that neither of the other Alabama decisions cited contains anything necessarily inconsistent with the holdings in the three cases mentioned. In so saying, we have not overlooked the fact that in *Cobbs v. Vizard Invest. Co.* and *Coffey v. Gay*, the orders sought to be appealed from were made in the court of principal administration.

We are thus constrained to hold that the Alabama statute confers upon the receiver in the instant case

—title to  
assets—suit  
in other  
jurisdiction.

no title to the bank's  
assets, and thus no  
right to maintain  
the instant suit; for

(as said in *Great Western Min. & Mfg. Co. v. Harris*, supra, in which the appointing court had authorized the action by the receiver), in the absence of statutory authority therefore, the receiver's right "to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction in which it is sought by means of a receiver to subject property to the control of the court has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered." Page 576 of 198 U. S., 49 L. ed. 1168, 25 Sup. Ct. Rep. 774.

It follows that in the present state of the record the defendant is entitled to a dismissal of the suit, not-

withstanding its apparent failure to call to the attention of the court below the proposition on which our decision is based; for, if plaintiff had no title and no right of action in the court below, that court was without power to render decree in his favor. See *Great Western Min. & Mfg. Co. v. Harris*, supra, at pages 577, 578 of 198 U. S. A defense that plaintiff has no title to the asserted right of action is always open.

Appeal—ques-  
tioning title  
of plaintiff.

A disposition by this court of the appeal without determination of the merits is unfortunate, and it is with reluctance that we have reached the conclusion that there is no escape from it. But lack of title in plaintiff is not a mere "technicality," in the ordinary meaning of that term, for there is always, theoretically at least, a possibility that defendant may be subjected to further suit by the owner of the title and right of action. The present difficulty could readily have been avoided by ancillary receivership, and the dismissal of the case will not necessarily preclude further proceedings. Whether an ancillary receivership, and an ancillary bill thereunder, would save the present suit from dismissal, we need not decide. See *Coal & Iron R. Co. v. Reherd* (C. C. A. 4th C.) 123 C. C. A. 155, 204 Fed. 859, 882. Such a question, if presented, would properly be addressed to the court below; and counsel have not been heard upon it here.

The decree of the District Court is reversed, and the record remanded to that court, with directions to take further proceedings not inconsistent with this opinion.

Petition for rehearing denied, January 8, 1918.

Affirmed by the Supreme Court of the United States, December 9, 1918 (U. S. Adv. Ops. 1918-19, p. 52), 248 U. S. 73, 63 L. ed. 134, 39 Sup. Ct. Rep. 27.

## ANNOTATION.

**When receiver of corporation deemed to be vested with title to assets so as to entitle him to sue in a foreign jurisdiction.**

The scope of this annotation is a somewhat narrow one, its purpose being to ascertain, so far as possible, the force and applicability of the rule that a receiver having title to the assets of a corporation may sue in a foreign jurisdiction. It is not intended to cover the question, upon which there is a variety of judicial opinion, of the extent to which the courts of another jurisdiction will give effect to a title vested in a receiver by voluntary conveyance or operation of law.

**Rule that receiver having title may sue not one of right but of comity.**

Although expressions are to be found in some cases which indicate an understanding that the effect of the rule that a receiver having title to the assets of a corporation may sue in a foreign jurisdiction is to confer upon a receiver vested with the title to the assets of the corporation an absolute right to sue outside the jurisdiction of his appointment (compare language of the reported case (*STERRETT v. SECOND NAT. BANK*, ante, 257) and of *Hopkins v. Lancaster* (1918) 254 Fed. 190, that such a receiver "may sue as of right in the courts of the foreign jurisdiction"), other cases indicate that such rule only states a condition which must exist before a receiver will be admitted to sue in another jurisdiction. That the latter is the true view is also indicated by the fact that the state courts (although sometimes differing as to the character of the transfer which will be considered as involuntary) refuse to recognize, except as a matter of comity, transfers of property to a receiver or other judicial officer which are not of a voluntary character; and it has been held that there is no provision of the Federal Constitution which requires them to do so. See *Reynolds v. Adden* (1890) 136 U. S. 348, 34 L. ed. 360, 10 Sup. Ct. Rep. 843.

**Character of transfer determined by law of situs of property.**

The courts of the actual situs of the property sought to be reached by a foreign assignee or receiver must for themselves determine whether a particular transaction is or is not such a voluntary assignment as will be upheld under the law and policy of the state. *Zacher v. Fidelity Trust & S. V. Co.* (1901) 45 C. C. A. 480, 106 Fed. 593.

**Force of rule that receiver having title may sue.**

Inasmuch as the privilege of maintaining suits is, except in the Federal courts, ordinarily accorded as a matter of comity to a foreign receiver, whether invested with title or not, the question under discussion is of importance only where a receiver seeks to sue in a Federal court outside the territorial jurisdiction of the court appointing him.

In the Federal courts the rule seems to be that a receiver whose rights with respect to the property and assets depend entirely upon his powers as an officer of the court, or upon the order of the court appointing him, and who has not been vested with the title by transfer or statute, will not, even as a matter of comity, be allowed to maintain a suit in the jurisdiction other than that of his appointment.

In *Kelly v. Dolan* (1914) 218 Fed. 966, affirmed in (1916) 147 C. C. A. 443, 233 Fed. 635, it is said: "A chancery receiver cannot bring an action in his own name outside of the jurisdiction of the court of his appointment, because he does not have the legal title to the property of the corporation or the chose in action, and his representative capacity will not extend beyond the limits of the jurisdiction by which he was appointed. The effect of a statutory receivership, however, may, by force of law, be to transfer to the receiver the legal title to the property of the corporation, in-

cluding choses in action. The juridical consequence of this is that such a receiver may bring suit outside of the jurisdiction of the authority appointing him, for the reason that he has the legal title, and therefore may enforce it by an action."

And in *Edwards v. National Window Glass Jobbers' Asso.* (1905) 139 Fed. 795, it is said: "The distinction apparent in all cases is as to whether the receiver has title or whether he is simply appointed an agent or officer of the court under its general equity powers. In the one case, through comity, he may be allowed to maintain a suit in a foreign jurisdiction where such a course would not conflict with local policy or the rights of creditors in such jurisdiction; while in the other, his powers are limited to the jurisdiction of the court appointing him. In the case of *Wigton v. Bosler* (1900; C. C.) 102 Fed. 70, Judge Dallas, in deciding, in the case before him, that a receiver was not entitled to sue in a jurisdiction outside of that in which he was appointed, questioned, but did not decide, whether, in view of the decisions of the Supreme Court of the United States, Federal courts would, in any case, through courtesy or comity, recognize the right of a receiver to sue in a foreign jurisdiction."

**When receiver deemed vested with title to assets.**

The right of a receiver to sue outside the jurisdiction of the court appointing him, so far as the right to do so depends upon his having title, appears to have been recognized principally in cases (such as *Relfe v. Rundle* (*Life Asso. of America v. Rundle*) (1880) 108 U. S. 222, 26 L. ed. 387; *American Nat. Bank v. National Benefit & Casualty Co.* (1895) 70 Fed. 420; *Avery v. Boston Safe-Deposit & T. Co.* (1896) 72 Fed. 700; *Hopkins v. Lancaster* (1918) 254 Fed. 190; *Planters Bank v. Bass* (1847) 2 La. Ann. 430; *Bockover v. Life Asso. of America* (1883) 77. Va. 85; and *Parker v. Stoughton Mill Co.* (1895) 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751) in which the receiver or other officer is constituted the virtual successor or representative of the corporation it-

self, upon the entry of a decree for its dissolution, and in cases (such as *Bernheimer v. Converse* (1907) 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; *Converse v. Hamilton*, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292; *Hale v. Hardon* (1899) 37 C. C. A. 740, 95 Fed. 774; *Goss v. Carter* (1907) 84 C. C. A. 402, 156 Fed. 746; *Irvine v. Putnam* (1911) 190 Fed. 321; *Irvine v. Elliott* (1913) 203 Fed. 82; *Irvine v. Baker* (1915) 225 Fed. 834; *John W. Cooney Co. v. Arlington Hotel Co.* (1917) — Del. —, 101 Atl. 879; *Howarth v. Lombard* (1900) 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; *Howarth v. Angle* (1900) 162 N. Y. 489, 47 L.R.A. 725, 56 N. E. 489; *Shipman v. Treadwell* (1913) 208 N. Y. 404, 102 N. E. 634) in which he is invested, by the law governing the stockholders' liability, with the right to enforce such liability, in which he is spoken of as a "quasi assignee" of the cause of action.

— mere appointment as receiver not enough.

It is uniformly held that, without statutory provisions to that effect, no transfer of title follows by operation of law from the appointment of a receiver of the property of the corporation, though authorized to sue.

Thus, a mere appointment as receiver, authorizing the appointee to sue in the state, either in his own name or in the name of the corporation, does not constitute him an assignee of the corporation's property, so as to entitle him to maintain an action in his own name outside the jurisdiction of the tribunal that appointed him. *Homer v. Barr Pumping Engine Co.* (1901) 180 Mass. 163, 91 Am. St. Rep. 269, 61 N. E. 883.

So, in *Hayward v. Leeson* (1900) 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656, where it appeared that a receiver appointed by a Tennessee court for an insolvent corporation was authorized by his appointment to collect, take possession of, preserve, and care for the assets of the corporation, and dispose of the same under the order of the court, and was directed to prosecute suits in the courts of Massa-

chusetts for the purpose of recovering from the promoters of the corporation assets which it was claimed they had unlawfully withdrawn, it was held that none of the proceedings in Tennessee operated as an assignment to the receiver of the choses in action in litigation, and therefore that the receiver could not sue thereon in his name in Massachusetts.

A receiver appointed upon a creditor's bill filed against a judgment debtor has no such authority as will enable him to go into a foreign jurisdiction to take possession of the debtor's property. *Booth v. Clark*, 17 How. (U. S.) 322, 15 L. ed. 164.

A receiver appointed under the Federal Bankruptcy Act, to collect and bring into custody the assets of the estate and preserve the same until a trustee is qualified to take title thereto, has no title to such assets, and therefore may not act officially outside of the district of his appointment. *Re Benedict* (1905) 140 Fed. 55; *Re Dunseath & Son Co.* (1909) 168 Fed. 973.

— effect of statutory powers.

The question, then, is, what sort of a statutory provision will constitute the receiver the representative of the corporation, as distinguished from the mere custodian of its property.

The Federal courts are bound by the decisions of the state courts as to the interpretation of the receiver's statutory powers. *Hopkins v. Lancaster* (1918) 254 Fed. 190; *STERRETT v. SECOND NAT. BANK* (reported herewith) ante, 257.

Under a statute which provides that, upon the rendition of a final judgment dissolving an insurance company or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policyholders of such company, and such other persons as may be interested in such assets, the superintendent of insurance has a standing in court outside the state. *Relfe v. Rundle* (*Life Asso. of America v. Run-*

*dle*) (1880) 108 U. S. 222, 26 L. ed. 837.

And see also, as holding that the superintendent of the state insurance department was vested with the assets of an insurance corporation upon the entry of a decree of dissolution, *Bockover v. Life Asso. of America* (1883) 77 Va. 85.

Under a statute prescribing the mode of proceedings against incorporated banks for a violation of their corporate franchises, and providing for the appointment of trustees to take charge of the assets of the company wherever the same may be found, either in the hands of the officers of the bank or its agents, trustees, or attorneys, to sue for and collect all debts due to the company, and the proceeds of the debts when collected, and of the property when sold, to apply as thereafter may be directed by law to the payment of the debts of the company, and a decree of the court adjudging the forfeiture of the franchise of a bank and appointing trustees, the trustees may be considered as clothed with the legal ownership of the assets of the bank, and may sue a debtor of the bank in another state. *Planters Bank v. Bass* (1847) 2 La. Ann. 480.

A receiver of the assets of a corporation, appointed, upon its dissolution, as its successor, is, in substance, a trustee appointed by the statutes and the courts to collect and distribute the assets of the corporation, and is vested with the title to them, and hence may sue in a Federal court sitting in another state upon a right of action belonging to such corporation. *Avery v. Boston Safe-Deposit & T. Co.* (1896) 72 Fed. 700.

The legal effect of a statute, although not expressly declaring the effect of the judgment of dissolution and the appointment of a receiver with reference to the property of the corporation, but which terminates the existence of the corporation and requires the receiver to wind up its affairs and apply its property and effects to the payment of its liabilities, is to invest him with full title to such property and effects wherever they

may be found. *American Nat. Bank v. National Ben. & Casualty Co.* (1895) 70 Fed. 420.

A receiver appointed under the Illinois statute providing for the dissolution of an insolvent corporation is invested with the title to all the assets of the dissolved corporation, wherever situated, and may accordingly sue in the courts of a state foreign to the state of his appointment. *Hopkins v. Lancaster* (1918) 254 Fed. 190.

Where it appears that the corporation itself is either actually dissolved, or in process of dissolution, and all its property is in the hands of the court, so far as there can be any ownership of such property under such circumstances it must be in the receiver, who may, therefore, enforce in a foreign state a chose in action forming part of the assets of the corporation. *Parker v. Stoughton Mill Co.* (1895) 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751.

But a receiver proceeding to wind up an insolvent corporation cannot bring suit in a foreign jurisdiction, where neither the statute authorizing the proceeding nor the decree of the court appointing the receiver discloses any title in him other than that of any ordinary receiver acting in an equity suit. *Covell v. Fowler* (1906) 144 Fed. 535.

And a receiver appointed to take charge of the assets of a corporation, according to the provisions of a statute providing for the winding up of such corporation,—neither the statute nor the order of the court appointing the receiver undertaking to vest in the receiver the title to the corporate assets,—cannot sue in a court of another jurisdiction except by comity of the courts whose decision he invokes. *Zacher v. Fidelity Trust & S. V. Co.* (1901) 45 C. C. A. 480, 106 Fed. 593.

In *Keatley v. Furey* (1912) 226 U. S. 399, 57 L. ed. 273, 33 Sup. Ct. Rep. 121, the court, although not deciding the question, expressed the opinion that a statute providing for the appointment of a receiver, upon the filing of a bill for the dissolution of a corporation, to "take charge of and administer"

the assets, and for the bringing of suit and the conveyance of property in the corporate name thereafter, and a conveyance made by a special commissioner to the receiver, were ineffectual to give the receiver a standing in court outside the jurisdiction in which he was appointed, the court saying that if the statute did not itself constitute the receiver the universal successor of the corporation, it may be doubted whether the deed had extraterritorial effect.

In *Joy v. Midland Sav. Bank* (1910) 26 S. D. 244, 128 N. W. 147, it was held that a receiver of a Nebraska corporation appointed by a Nebraska court under a statute forming a part of the charter of the corporation, authorizing the receiver to take charge of and wind up the corporate business, is a statutory receiver, and acquires against the corporation such legal title as is sufficient for the execution of the trust, though the Nebraska statute does not expressly vest title in him, and that the receiver becomes, under the statute, a successor to the corporation, and as such is entitled to full recognition in every state where the corporation may have interests; but on rehearing (1911) 28 S. D. 262, 138 N. W. 276, the court expressed itself as not fully satisfied as to the correctness of its former decision with respect to this phase of the case, and, a determination of the question not being essential to the proper disposition of the appeal, it was left undecided.

A receiver appointed for an insolvent corporation under a statute authorizing the appointment of "a receiver of all the assets and credits" of the company, and providing that the receiver, upon filing his bonds, shall take "possession of all the assets and credits" of the company, is vested with the legal title thereto, where no provision is made in the act for any formal conveyance to the receiver, and it cannot be supposed to have been the intention of the legislature to leave the title to its real estate in the insolvent company, subject to the risks of a judgment lien or other complications. *Atty. Gen. v. Atlantic*

Mut. L. Ins. Co. (1885) 100 N. Y. 279, 3 N. E. 193; Michel v. Betz (1905) 108 App. Div. 241, 95 N. Y. Supp. 844.

Under the provisions of the general corporation law of New York, §§ 232 and 239, that a receiver is "vested with all the property, real or personal, vested or contingent, of the corporation," and given power to sue and "recover all the property, debts, and things in action, belonging or due or to become due to such corporation, in the same manner and with the like effect, as such corporation might or could have done if no receivers had been appointed," a legal right of action against the directors for negligence vested in the receiver on his appointment. Kelly v. Dolan (1916) 147 C. C. A. 443, 233 Fed. 635.

The title conferred upon a receiver by a statute providing that "whenever in any case a receiver shall be appointed for a corporation or the trustees thereof, or any copartnership or joint stock company, and the order or decree of the court, judge, or chancellor shall be that the lands, tenements, goods, chattels, funds, assets, moneys, choses in action, rights and interests of every kind, name, and nature, either in law or equity, or any part thereof belonging to the same shall be placed in the hands of such receiver he shall from thenceforward until the further order or decree of the court, judge, or chancellor, have full possession, custody and control thereof, and shall be vested with the title so far as it shall be necessary to collect debts, preserve the assets and property, for the benefit of creditors and all persons interested and may and shall bring and prosecute and defend all suits in his own name that may be necessary for that purpose,"—falls far short of an absolute one, and is no greater nor of higher quality than is ordinarily passed to a receiver appointed under the general equity jurisdiction of the courts in chancery of the country, except as to the right to sue and defend suits in his own name; and such receiver may not, therefore, interplead in the courts of a foreign jurisdiction in order to get

possession of a fund claimed by the corporation. *Waters-Pierce Oil Co. v. American Exch. Bank* (1897) 71 Mo. App. 658.

— statutes giving right to enforce stockholder's liability.

Where the statute relating to stockholders' liability gives authority to a receiver to enforce such liability, the receiver may be considered as a quasi assignee and representative of the creditors, and may, therefore, sue in a foreign jurisdiction. *Bernheimer v. Converse* (1907) 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; *Converse v. Hamilton* (1912) 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292.

A receiver appointed by the Minnesota courts for the purpose of enforcing the liability of the stockholders in a Minnesota corporation may maintain an action in a Federal court of another territorial jurisdiction, against a stockholder resident therein. *Hale v. Hardon* (1899) 37 C. C. A. 240, 95 Fed. 774.

A receiver of an insolvent banking corporation has the legal title to the fund arising from the enforcement of the liability created by the provision of the Nebraska Constitution, as construed by the Nebraska courts, which provides that every stockholder in a banking corporation shall be individually liable to its creditors over and above the amount of his stock to an amount equal to his stock, and may, therefore, maintain an action in a foreign jurisdiction to recover the amount due from a stockholder. *Goss v. Carter* (1907) 4 C. C. A. 402, 156 Fed. 746.

An Ohio receiver has, under a statute empowering the court to authorize and direct a receiver appointed by it to prosecute actions in his own name as receiver for the enforcement in other jurisdictions of the double liability of stockholders, sufficient title to maintain an action in a Federal court in another state to enforce such liability. *Irvine v. Putnam* (1911) 190 Fed. 321; *Irvine v. Elliott* (1913) 203 Fed. 82; *Irvine v. Baker* (1915) 225 Fed. 834.

A receiver appointed in the courts

of Washington for a Washington corporation, charged with the enforcement of the liability imposed by statute upon its stockholders for debts of the corporation, is in the position of a quasi assignee for creditors and may, therefore, bring an action in another state to enforce such liability in his own name. *Howarth v. Lombard* (1900) 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; *Howarth v. Angle* (1900) 162 N. Y. 489, 47 L.R.A. 725, 56 N. E. 489.

A receiver appointed under §§ 3260 et seq. of the Revised Statutes of Ohio, providing for the enforcement of stockholders' liability, is a quasi assignee, invested with the creditors' right of action to enforce the liability of the stockholders, and may, as such, maintain an action in another state. *Shipman v. Treadwell* (1913) 208 N. Y. 404, 102 N. E. 634, affirming (1912) 150 App. Div. 57, 133 N. Y. Supp. 970, reargument denied in (1913) 209 N. Y. 545, 102 N. E. 1113.

In *John W. Cooney Co. v. Arlington Hotel Co.* (1917) — Del. —, 101 Atl. 879, it was held that the effect of the Act of 1913, 27 Del. Laws, p. 479, Rev. Code. § 3884, the provisions of which are not stated in the report of the case, is to make a receiver a quasi assignee of unpaid stock subscriptions, and so removes the limitation of an ordinary receiver to the territorial limits of the jurisdiction wherein he was appointed.

But the New York superintendent of banks, in suing in Tennessee to recover of a stockholder an assessment to pay the debt of the bank, does not possess the legal title to the claim sued on, but only the right to sue and collect, and hence can assert such claim only through the exercise of comity. *Van Tuyl v. Carpenter* (1915) 135 Tenn. 629, 188 S. W. 234.

A complaint alleging that, under plaintiff's appointment as liquidator of an insolvent banking corporation, "all the property, effects, and choses in action to which the said bank was or appeared to be entitled came into its custody or under its control," shows such title in the plaintiff as to entitle him to sue a resident stockholder for his proportionate liability

as such stockholder, inasmuch as the payment to the plaintiff would be so complete an acquittance of defendant's liability that it would stand as a bar to an attempted recovery by anyone else. *Royal Trust Co. v. Harding* (1913) 155 App. Div. 104, 140 N. Y. Supp. 9.

#### Miscellaneous.

A receiver will be deemed to be only an ordinary chancery receiver, although he is alleged to be vested with title to the assets of the corporation, where no statute or conveyance or assignment conferring title upon the receiver is set out. *Hardee v. Wilson* (1914) 129 Tenn. 511, 167 S. W. 475, Ann. Cas. 1916A, 94.

The receivers of an insolvent banking corporation may sue in another state on a bond and mortgage taken by them, and so may their successors. *Iglehart v. Bierce* (1864) 36 Ill. 133.

And a receiver claiming by a conveyance to him as such, and not depending alone on the decree vesting the property in him, may sue in the courts of a foreign jurisdiction to recover real estate. *Oliver v. Clarke* (1901) 45 C. C. A. 360, 106 Fed. 402.

#### Right to sue does not connote right to recover.

Although, as above stated, this note does not undertake to collect the cases upon the question as to the extent to which the title of a foreign receiver will be recognized, it seems proper to point out that the rule that a foreign receiver, if vested with title, may sue, does not necessarily mean that he may successfully assert such title.

Thus, in *Shloss v. Metropolitan Surety Co.* (1910) 149 Iowa, 382, 128 N. W. 384, the court, referring to the case of *Relfe v. Rundle* (Life Asso. of America v. Rundle) (1881) 103 U. S. 222, 26 L. ed. 637, said: "On this case and other cases expressly following it, counsel seeks to define some peculiar kind of receivership which shall not be subject to the rule of the courts of this state, that a foreign receiver cannot claim the funds of the company as against local creditors. We do not discover that any of the cases relied upon support such



a definition. The right of the creditors in this state to attach the funds of a foreign solvent corporation for the purpose of enforcing payment, notwithstanding the receivership in the state of the corporation's home, is not a matter of procedure, but one

of substantive law, and we fail to see how any statute in New York could authorize such receivership as would exempt the receiver from the limitations imposed on his power by the rules of law recognized in this state." E. S. O.

J. S. WINKLER et al., Doing Business as Winkler Oil Company, Appts.,  
v.

W. H. ANDERSON et al.

*Kansas Supreme Court—January 11, 1919.*

(104 Kan. 1, 177 Pac. 521.)

**Constitutional law — forbidding gas wells — taking of property.**

1. The statute (Gen. Stat. 1915, § 4979) making it unlawful to drill or operate oil or gas wells within 100 feet of the right of way of any steam or electric line of railway does not contravene the provisions of the Constitution of the state of Kansas, or the provisions of the Constitution of the United States, and is the product of a proper exercise of the police power of the state.

[See note on this question beginning on page 270.]

— police power — scope.

2. The police power extends not only to the protection of the public safety, health, and morals, but to the

promotion of the common convenience, prosperity, and welfare.

[See 6 R. C. L. 202 et seq.]

Headnote 1 by BURCH, J.

**APPEAL** by plaintiffs from a judgment of the District Court for Allen County in favor of defendants in an action brought to enjoin the enforcement of a statute making it unlawful to drill or operate oil or gas wells within a certain distance of any steam or electric line of railway. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. James A. Allen and John J. Jones, for appellants:

Injunction will lie against defendants for the purpose of preventing vexatious litigation, although said injunction may in a measure prevent and control criminal proceedings.

Atlanta v. Gate City Gaslight Co. 71 Ga. 126; Pueblo & A. Valley R. Co. v. Prowers County, 5 Colo. App. 129, 38 Pac. 112; M. Schandler Bottling Co. v. Welch, 42 Fed. 561; Emperor of Austria v. Day, 3 DeG. F. & J. 217, 45 Eng. Reprint, 861, 30 L. J. Ch. N. S. 690, 7 Jur. N. S. 639, 4 L. T. N. S. 494, 9 Week. Rep. 712; La Harpe v. Elm Twp. Gaslight, Fuel & P. Co. 69 Kan. 97, 76 Pac. 448; Springhead Spinning Co. v. Riley, L. R. 6 Eq. 558, 37

L. J. Ch. N. S. 889, 19 L. T. N. S. 64, 16 Week. Rep. 1138; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 209, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

The act under which the criminal proceedings were brought, and under which further criminal proceedings are contemplated, and for the enjoining of which this action is brought, is not a valid act.

Intoxicating-Liquor Cases, 25 Kan. 765, 37 Am. Rep. 284; Harbison v.

Knoxville Iron Co. 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955; State v. Broadbelt, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; Ex parte Brown, 88 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; State v. Chicago, M. & St. P. R. Co. 68 Minn. 381, 38 L.R.A. 672, 64 Am. St. Rep. 482, 71 N. W. 400; Young v. Com. 101 Va. 853, 45 S. E. 327; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 430, 3 Ann. Cas. 878; Re Kelso, 147 Cal. 609, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241; Re McCapes, 157 Cal. 26, 106 Pac. 229; Pacific States Supply Co. v. San Francisco, 171 Fed. 727; Ex parte Hadacheck, 165 Cal. 416; L.R.A.1916B, 1248, 132 Pac. 584; Iler v. Ross, 97 Am. St. Rep. 676 and note, 64 Neb. 710, 57 L.R.A. 895, 90 N. W. 869; Ex parte Hayden, 147 Cal. 649, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183, 82 Pac. 315; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 Ann. Cas. 936; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; State v. Chicago, M. & St. P. R. Co. 68 Minn. 381, 38 L.R.A. 672, 64 Am. St. Rep. 482, 71 N. W. 400.

Mr. W. H. Anderson for appellees.

Burch, J., delivered the opinion of the court:

The action was one to enjoin enforcement of the penal provision of the statute (Gen. Stat. 1915, § 4979), making it unlawful to drill or operate oil or gas wells within 100 feet of the right of way of any steam or electric line of railway. An injunction was denied, and the plaintiffs appeal.

The plaintiffs have an oil and gas lease of a strip of ground from 37 to 50½ feet wide, adjoining the right of way of the Atchison, Topeka & Santa Fe Railroad on the south. The right of way is 100 feet wide. The track is in the center of the right of way, and the plaintiffs have two producing wells within the limits denounced by the statute. The owners of a lease adjoining the plaintiffs' property on the south are operating a producing well 83 feet from the plaintiffs' south line.

The plaintiffs' lease is entirely valueless, if the statute be valid. The claim is that the statute was not the product of a proper exercise of the police power of the state, that it deprives the plaintiffs of property without compensation, and without due process of law, that it denies the plaintiffs the equal protection of the law, and that it abridges the privileges and immunities of the plaintiffs, contrary to the provisions of the Constitution of the state of Kansas, and of the Constitution of the United States.

The question is a very narrow one. The police power extends not only to the protection of the public safety, health, and morals, but also to the promotion of the common convenience, prosperity, and welfare. State v. Wilson, 101 Kan. 789, 794, L.R.A.1918B, 374, 168 Pac. 679. While oil and gas wells are not nuisances per se, and the business of drilling and operating them is ordinarily legitimate and harmless, it is conceivable that they may become detrimental in a high degree. The greed for mineral in a rich field becomes insatiate. Steam and electric railway rights of way may be exploited, and unless the works, structures, establishments, activities, and products of mining operations be kept at a safe distance from railway tracks, life and property might be endangered, commerce impeded, and the general welfare seriously affected. If the legislature acted from some such considerations as these, it possessed power to fix a limit within which drilling and operating should not intrude, and the court is unable to say that a free space of 100 feet is unreasonable.

Constitutional  
law—police  
power—scope.

—forbidding  
gas wells—  
taking of  
property.

The judgment of the District Court is affirmed.

All the Justices concur.

### ANNOTATION.

#### Constitutionality of statute prohibiting or regulating location of oil or gas wells.

In the reported case (*WINKLER v. ANDERSON*, ante, 268) it is held that, while oil and gas wells are not nuisances per se, it is conceivable that because of greed for mineral in a rich field, such wells might become objectionable so that since the police power extends not only to the protection of the public safety, health, and morals, but to the promotion of the common convenience, prosperity, and welfare, a statute making it unlawful to drill

or operate oil or gas wells within 100 feet of the right of way of any steam or electric line of railway is within the authority of the legislature under the police power, and does not fix an unreasonable limit in naming 100 feet as a safe distance.

An exhaustive search has revealed no other case passing upon the constitutionality of a statute prohibiting or regulating the location of oil or gas wells.  
R. H. H.

EDGAR SCHMITT, Superintendent of Police of the City of Evansville,  
Appt.,  
v.

F. W. COOK BREWING COMPANY.

*Supreme Court of Indiana—June 28, 1918.*

(— Ind. —, 120 N. E. 19.)

#### Intoxicating liquor — prohibition of manufacture.

1. There is no difference in constitutional principle between the prohibition of the sale of intoxicating liquor as a beverage, and the prohibition of its manufacture in order to stop the sale.

[See note on this question beginning on page 285.]

#### Injunction — against enforcement of Prohibition Statute — jurisdiction.

2. The court will, because of the property rights involved, and to avoid a multiplicity of suits, consider a bill to enjoin the enforcement of a general law prohibiting the manufacture and sale of intoxicating liquors, where the jurisdiction of equity is not questioned.

[See 14 R. C. L. 434-436.]

#### Constitutional law — power of legislature.

3. A state Constitution is merely a limit of power, and the legislature may pass any law which is not in violation of the limitation of the state or Federal Constitution.

[See 6 R. C. L. 153.]

#### Courts — power over legislation.

4. The court has no power to control legislative authority other than

the limitations expressed in the Constitution, even though it is repugnant to general principles of justice, liberty, and right.

[See 7 R. C. L. 1049.]

#### Constitutional law — prohibition of liquor traffic — destruction of property.

5. The prohibition of the manufacture and sale of intoxicating liquor, being for the protection of the health, morals, and welfare of the people, is not, although the business was previously recognized property, within the constitutional provision against taking property without compensation.

[See 6 R. C. L. 201.]

#### — police power — liquor traffic.

6. The liquor traffic is within the police power of the state.

[See 15 R. C. L. 253, 254.]

(— Ind. —, 120 N. E. 19.)

**— protection of contract rights.**

7. Charter rights, license rights, and contract rights are all subject to the inherent power of the government to protect the health, morals, and welfare of the public.

[See 6 R. C. L. 199, 200.]

**— stare decisis — police power.**

8. There are no property rights which are not subject to the police power, and therefore the principle of stare decisis does not apply to decisions under such power.

[See 6 R. C. L. 193-195; 7 R. C. L. 1001.]

**— violation of spirit.**

9. A law cannot be declared invalid for violating the spirit of the Constitution, if it is not prohibited by express letter.

[See 6 R. C. L. 70 et seq.]

(Spencer, J., dissents.)

**APPEAL** by defendant from a judgment of the Superior Court for Vanderburgh County overruling a demurrer to the complaint in an action brought to enjoin defendant from enforcing the provisions of the Prohibition Law. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Philip C. Gould, R. C. Minton, W. B. Wheeler, and Ele Stansbury, Attorney General, for appellant:

The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States which the 14th Amendment of the Constitution of the United States forbids the states to abridge.

*Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Farmville v. Walker*, 101 Va. 323, 61 L.R.A. 125, 99 Am. St. Rep. 870, 43 S. E. 558; *Jordan v. Evansville*, 163 Ind. 512, 67 L.R.A. 613, 72 N. E. 544, 2 Ann. Cas. 96; *Crane v. Campbell*, 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98.

The regulation, control, or prohibition of the sale and manufacture of intoxicating liquor is a proper exercise of the police power of the state.

*Schmidt v. Indianapolis*, 168 Ind. 631, 14 L.R.A. (N.S.) 787, 120 Am. St. Rep. 386, 80 N. E. 632; *McKinney v.*

**Statute — title — sufficiency.**

10. A title, "An Act Prohibiting the Manufacture, Sale, Gift, Advertisement or Transportation of Intoxicating Liquor," will cover provisions defining intoxicating liquor, prohibiting its possession, declaring places where it is kept to be nuisances, designating those who are to handle it, and providing what shall be prima facie violation of the law.

**Constitutional law — class legislation — permitting sale of liquors by class.**

11. A statute forbidding the manufacture and sale of intoxicating liquor does not become void as class legislation because the right of sale by registered pharmacists is permitted, and those who have liquor manufactured in the state are permitted to dispose of it outside of the state.

[See 15 R. C. L. 260.]

*Salem*, 77 Ind. 213; *State v. Durein*, 70 Kan. 1, 15 L.R.A. (N.S.) 908, 78 Pac. 152, 80 Pac. 987; *Jordan v. Evansville*, 163 Ind. 512, 67 L.R.A. 613, 72 N. E. 544, 2 Ann. Cas. 96; *Roberts v. State*, 4 Ga. App. 207, 60 S. E. 1082; *Meehan v. Board of Excise*, 73 N. J. L. 382, 64 Atl. 689; *Farmville v. Walker*, 101 Va. 323, 61 L.R.A. 125, 99 Am. St. Rep. 870, 43 S. E. 558; *Welsh v. State*, 126 Ind. 71, 9 L.R.A. 664, 25 N. E. 883.

The legislative power to deal with intoxicating liquor, whether it be to license, regulate, restrain, or prohibit the sale of such liquors, is unlimited.

*Schmidt v. Indianapolis*, supra; *State ex rel. Woodward v. Skeggs*, 154 Ala. 249, 46 So. 268; *State v. Frederickson*, 101 Me. 37, 6 L.R.A. (N.S.) 186, 115 Am. St. Rep. 295, 63 Atl. 535, 8 Ann. Cas. 48; *Atkins v. Randolph*, 31 Vt. 226; *Trageser v. Gray*, 73 Md. 250, 9 L.R.A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; *Farmville v. Walker*, 101 Va. 323, 61 L.R.A. 125, 99 Am. St. Rep. 870, 43 S. E. 558.

If a subject is within the police power of the state, the question whether the power is wisely or unwisely exercised is not a judicial one.

It is a cardinal principle of law that legislative discretion cannot be controlled by judicial decisions.

*Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 561, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287; *State ex rel. Clark v. Hawthorth*, 122 Ind. 462, 7 L.R.A. 240, 23 N. E. 946.

The legislature of the state has the right to determine what measures are appropriate or needful for the protection of the public morals, health, and safety, and unless a statute has no real substantial relation to those objects the courts cannot interfere.

*State v. Durein*, 70 Kan. 1, 15 L.R.A. (N.S.) 908, 78 Pac. 152, 80 Pac. 987; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Without the (constitutional) amendment the legislature would have power to prohibit the manufacture and sale of intoxicating liquors.

*State v. Weiss*, 84 Kan. 165, 36 L.R.A. (N.S.) 73, 113 Pac. 388; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Farmville v. Walker*, 101 Va. 323, 61 L.R.A. 125, 99 Am. St. Rep. 870, 43 S. E. 558; *Hart v. State*, 87 Miss. 171, 112 Am. St. Rep. 437, 39 So. 523; *Cook v. Marshall County*, 119 Iowa, 384, 104 Am. St. Rep. 283, 93 N. W. 372.

Even though the enforcement of a law may operate to destroy business theretofore lawful, and does seriously impair the value of property acquired under the sanction of a special law or charter, these considerations do not render the law invalid or prevent its enforcement, when the protection of the public health or the promotion of the general welfare requires it.

*Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. 424; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989.

If the principal subject is expressed in the title, then any number of provisions, germane to the general subject, may legitimately be embraced or embodied in the statute enacted.

*Clarke v. Darr*, 156 Ind. 692, 60 N. E. 688; *Bright v. McCullough*, 27 Ind. 223; *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 14 L.R.A. 566, 29 N. E. 595; *Maule Coal Co. v. Partenhimer*, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710.

It is only necessary that the title

to an act shall be sufficient notice of the contents of the act to incite an inquiry into the body of the act.

*Benson v. Christian*, 129 Ind. 535, 29 N. E. 26; *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 14 L.R.A. 566, 29 N. E. 595; *State v. Arnold*, 140 Ind. 628, 38 N. E. 820; *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; *Lewis v. State*, 148 Ind. 346, 47 N. E. 675; *Maule Coal Co. v. Partenhimer*, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710; *Burget v. Merritt*, 155 Ind. 143, 57 N. E. 714; *Clarke v. Darr*, 156 Ind. 692, 60 N. E. 688; *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005.

It is only the general subject of the act that is required by the Constitution to be expressed in the title.

*Isenhour v. State*, 157 Ind. 524, 87 Am. St. Rep. 228, 62 N. E. 40; *Gustavel v. State*, 153 Ind. 613, 54 N. E. 123; *Central U. Teleph. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; *Henderson v. State*, 137 Ind. 552, 24 L.R.A. 469, 36 N. E. 257; *Hingle v. State*, 24 Ind. 28.

An act of the legislature passed and approved by the governor is not to be declared invalid unless it be clearly, palpably, and plainly in conflict with the Constitution.

*Groesch v. State*, 42 Ind. 547; *State ex rel. Jameson v. Denny*, 118 Ind. 394, 4 L.R.A. 79, 21 N. E. 252; *Henderson v. State*, 137 Ind. 552, 24 L.R.A. 469, 36 N. E. 257.

The complaint does not show that the plaintiff will be deprived of the free use of its property for any lawful purpose.

*Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. 424; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989.

The doctrine of *stare decisis* does not apply to the case at bar.

*Denney v. State*, 144 Ind. 503, 31 L.R.A. 726, 42 N. E. 929; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47; *McKinney v. Salem*, 77 Ind. 213; *Jackson County v. State*, 155 Ind. 604, 58 N. E. 1037.

The appellee can acquire no property or vested right under the 14th Amendment of the United States Constitution or § 1 of article 1 of the Constitution of Indiana that cannot be taken away by the legislature.

*Boston Beer Co. v. Massachusetts*, 97 U. S. 33, 24 L. ed. 989; *Stone v.*

(— Ind. —, 120 N. E. 19.)

Mississippi, 101 U. S. 814, 25 L. ed. 1079; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 558, 58 L. ed. 726, 34 Sup. Ct. Rep. 364; Douglas v. Kentucky, 168 U. S. 496, 42 L. ed. 555, 18 Sup. Ct. Rep. 199; McKinney v. Salem, 77 Ind. 214; Moore v. Indianapolis, 120 Ind. 491, 22 N. E. 424; State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 813, 44 N. E. 469; 1 Woollen & T. Intoxicating Liquors, § 124; Preston v. Drew, 33 Me. 553, 54 Am. Dec. 639; Southern Exp. Co. v. High Point, 167 N. C. 103, 83 S. E. 254; Southern Exp. Co. v. Whittle, 194 Ala. 406, L.R.A.1916C, 278, 69 So. 652; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 326, 61 L. ed. 338, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98; Skelton v. State, 173 Ind. 462, 89 N. E. 860, 90 N. E. 897; State v. Woodward, 89 Ind. 110, 46 Am. Rep. 160; Cleveland, C. C. & I. R. Co. v. Harrington, 131 Ind. 436, 30 N. E. 37.

Messrs. Robinson & Stilwell, Philip W. Frey, George Shirts, Charles E. Cox, Samuel Parker, John T. Beasley, Baker & Daniels, and Roemler & Chamberlain, for appellee:

A practical construction for fifty-five years is against the power of the legislature to enact a state-wide prohibitory law.

State v. Gerhardt, 145 Ind. 447, 33 L.R.A. 313, 44 N. E. 469; Sopher v. State, 169 Ind. 188, 14 L.R.A.(N.S.) 172, 81 N. E. 913, 14 Ann. Cas. 27; Beebe v. State, 6 Ind. 501, 63 Am. Dec. 391; Herman v. State, 8 Ind. 545; Kinser v. State, 9 Ind. 543; O'Daily v. State, 9 Ind. 494, 10 Ind. 26; Howe v. State, 10 Ind. 423; Ingersoll v. State, 11 Ind. 464; Hollenbaugh v. State, 11 Ind. 556; Harrison v. Lockhart, 25 Ind. 112; Andrews v. Heiney, 178 Ind. 1, 43 L.R.A.(N.S.) 1023, 98 N. E. 628, Ann. Cas. 1915B, 1136; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200; Bennett v. Jackson, — Ind. —, 116 N. E. 921; Election Comrs. v. Knight, — Ind. —, 117 N. E. 565; Shea v. Muncie, 148 Ind. 25, 46 N. E. 138; Lyle v. State, 80 Tex. Crim. Rep. 606, 193 S. W. 680; McPherson v. State, 174 Ind. 60, 31 L.R.A.(N.S.) 188, 90 N. E. 610.

The contemporaneous construction requires application of the rule of stare decisis.

Lewis's Sutherland, Stat. Constr. §§ 479-484; 7 R. C. L. 1001-1008; Jasper County v. Allman, 142 Ind. 573, 39 3 A.L.R.—18.

L.R.A. 58, 42 N. E. 206; Givens v. State, 182 Ind. 561, 107 N. E. 78; I. F. Force Handle Co. v. Hisey, 179 Ind. 171, 100 N. E. 450; King v. Inland Steel Co. 177 Ind. 201, 96 N. E. 337, 97 N. E. 529; Moore-Mansfield Constr. Co. v. Indianapolis, N. & T. R. Co. 179 Ind. 356, 44 L.R.A.(N.S.) 816, 101 N. E. 296, Ann. Cas. 1915D, 917; Lyle v. State, 80 Tex. Crim. Rep. 606, 193 S. W. 680; Gearheart v. State, 81 Tex. Crim. Rep. 540, 197 S. W. 187; Glennan v. Rochester Trust & S. D. Co. 209 N. Y. 12, 52 L.R.A.(N.S.) 302, 102 N. E. 537, Ann. Cas. 1915A, 441; Lillard v. Melton, 103 S. C. 10, 87 S. E. 421; Rothschild v. Grix, 31 Mich. 150, 18 Am. Rep. 171; Northwestern Portland Cement Co. v. Atlantic Portland Cement Co. 174 Cal. 308, 163 Pac. 47; Gill v. Parker, 31 Vt. 610.

Both the title to the act and the act are double, which renders the act in violation of § 9 of article 4 of the state Constitution.

State v. Young, 47 Ind. 150; Bright v. McCullough, 27 Ind. 223; Shoemaker v. Smith, 37 Ind. 122; Henderson v. London & L. Ins. Co. 135 Ind. 23, 20 L.R.A. 827, 41 Am. St. Rep. 410, 34 N. E. 565; State ex rel. Hart v. Commercial Ins. Co. 158 Ind. 680, 64 N. E. 466; State ex rel. Western Constr. Co. v. Clinton County, 166 Ind. 162, 76 N. E. 986; Western U. Tele. Co. v. Braxtan, 165 Ind. 165, 74 N. E. 985; Moore-Mansfield Constr. Co. v. Indianapolis, N. & T. R. Co. 179 Ind. 356, 44 L.R.A.(N.S.) 816, 101 N. E. 296, Ann. Cas. 1915D, 917.

To sustain the Act of 1917 would be to violate the 14th Amendment to the United States Constitution and § 21 of article 1 of the state Constitution.

Mitchell v. Burlington, 4 Wall. 270, 18 L. ed. 350; Kenosha v. Lamson, 9 Wall. 478, 19 L. ed. 725; 7 R. C. L. p. 1010, § 36; Haskett v. Maxey, 134 Ind. 182, 19 L.R.A. 379, 33 N. E. 358; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; State Bank v. Knoop, 16 How. 869, 14 L. ed. 977; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Mechanics' & T. Bank v. Thomas, 18 How. 384, 15 L. ed. 460; Wright v. Sill, 2 Black, 544, 17 L. ed. 333; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Kuhn v. Fairmount Coal Co. 215 U. S. 371, 54 L. ed. 239, 30 Sup. Ct. Rep. 140; Aurora & L. Turnp. Co. v. Holthouse, 7 Ind. 59;

*Smead v. Indianapolis, P. & C. R. Co.* 11 Ind. 104; *Stephenson v. Boody*, 139 Ind. 60, 38 N. E. 331.

An arbitrary and unreasonable classification which confers privileges and immunities on certain persons which are denied to others is a violation of § 23 of article 1 of the state Constitution, and also of the equal protection clause of the 14th Amendment of the Federal Constitution.

*McKinstler v. Sager*, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854; *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 14 L.R.A. (N.S.) 418, 80 N. E. 529; *Ensley v. State*, 172 Ind. 198, 88 N. E. 62; *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L.R.A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Atchison, T. & S. F. R. Co. v. Vosburg*, 238 U. S. 56, 59 L. ed. 1199, L.R.A. 1915E, 953, 35 Sup. Ct. Rep. 675; *Gast Realty & Invest. Co. v. Schneider Granite Co.* 240 U. S. 55, 60 L. ed. 523, 36 Sup. Ct. Rep. 254; *McFarland v. American Sugar Ref. Co.* 241 U. S. 79, 60 L. ed. 899, 36 Sup. Ct. Rep. 498.

A law enacted in reference to the police power must not only be "general in its scope, but it must be definite, specific, and unambiguous in its provisions and requirements," to be valid.

*Railroad Commission v. Grand Trunk, Western R. Co.* 179 Ind. 255, 100 N. E. 852; *Tozer v. United States*, 4 Inters. Com. Rep. 245, 52 Fed. 917.

*Townsend, J.*, delivered the opinion of the court:

Appellee brewing company obtained a permanent injunction against appellant superintendent of the police of the city of Evansville, preventing the enforcement of the Prohibition Law, Acts 1917, p. 15. Appellant's demurrer to the complaint was overruled. He refused to plead further and judgment was rendered.

No question is raised as to the jurisdiction of a court of equity, and, owing to the alleged property rights and to avoid a multiplicity of actions, the cause will be considered.

The sole question presented is the constitutionality of the act.

It is claimed that the legislature has no power, under our Constitution, to prohibit the manufacture and sale of intoxicating liquors. This contention is erroneous; for it is admitted that the legislature may refer this to the people in county, township, city, or ward units and, if the majority desire, they may impose prohibition upon the minority, and it is admitted that this would be constitutional. This amounts to admitting that the majority may inflict on the minority that which is forbidden by the Constitution. This is based on the erroneous assumption that a state Constitution is a grant of power, and that when a legislature assembles something is taken from the people by it and something is left at home in the way of legislative function.

It is fundamental that a state Constitution is a limit of power. It simply divides sovereign power of the people in the state into the several departments of government, and all power inheres in the people, and they possess all of it except that which is granted to the United States in the Federal Constitution, and they may pass any law which is not in violation of the limitations in the state Constitution and not in violation of parts of the Federal Constitution applicable to the states.

If the present Constitution provided that all the people of the state should assemble once in two years, instead of the legislature, to enact laws, and all other provisions of the Constitution remained as they now are, it could not be that this body would have greater legislative power than the present legislative body. To admit this is to destroy the limitations in the Constitution and leave the minority unprotected. The very purpose of the limitations is to protect the people against themselves. The limitations are not to protect the people against the legislature alone. That protection is afforded by elections every two years. If the limitations in the Constitution

Injunction—  
against enforce-  
ment of Pro-  
hibition Statute  
—jurisdiction.

Constitutional  
law—power of  
legislature.

are not sufficient to protect the minority against the majority, that is for the convention. The legislature is just as supreme in the legislative field as all the people would be. Both are bound by the limitations in the Constitution.

This court is bound by the same Constitution and has no right to curtail legislative authority this side of the expressed limitations in it. Nor

**Courts—power over legislation.**

has this court power to revolutionize the fundamental law by reading limitations into it.

This court has nothing to do with the wisdom or unwisdom of the legislative act. A law may be repugnant to general principles of justice, liberty, and rights not expressed in the Constitution, and yet the courts have no power to strike it down. *State v. Gerhardt*, 145 Ind. 439, 450, 33 L.R.A. 813, 44 N. E. 469; *Praigg v. Western Paving & Supply Co.* 143 Ind. 358, 363, 42 N. E. 750; *Hirth-Krause Co. v. Cohen*, 177 Ind. 1, 12, 97 N. E. 1, Ann. Cas. 1914C, 708. The remedy in such a case is with the people in the legislative department, or in convention, forming a new Constitution.

Mr. Cooley says: "By the Constitution which they (the people of the state) establish, they not only tie up the hands of their official agencies, but their own hands as well." Cooley, Const. Lim. 7th ed. p. 56.

No provision of our Constitution has been pointed out which forbids the passage of laws to protect the health, morals, or welfare of the people in connection with the traffic in intoxicating liquor, even though such laws destroy

**Constitutional law—prohibition of liquor traffic—destruction of property.**

previously recognized property without paying for it. That the liquor traffic is within the police power of the state no one denies.

When this is admitted, there must

**—police power—liquor traffic.**

follow the power to take such steps as are reasonably suitable to carry out this purpose.

There is no difference in constitutional principle between the prohibition of the sale of intoxicating liquor as a beverage and the prohibition of

**Intoxicating liquor—prohibition of manufacture.**

the manufacture in order to stop the sale. The thing aimed at is the traffic in liquor as a beverage. If the people of the state, in order to stop the traffic in the beverage, deem it necessary to stop the manufacture, they have a right to do this as far as any limitations in our Constitution are concerned. When it is admitted that by local option ninety-two counties in the state may forbid absolutely the sale of intoxicating liquor without violating the provisions of the Constitution, it then follows that, in order to accomplish the same purpose, the people of the state may prohibit the manufacture. He who has a charter from the state to manufacture is deprived of his property, in part at least, when he loses the opportunity to sell in ninety-two counties of the state. From the standpoint of the constitutional limitations, there can be no difference in principle between the destruction of one dollar's worth of property and one million dollars' worth. Charter rights, license rights, contract rights are all subject to the inherent power of government to protect the health,

**Constitutional law—protection of contract rights.**

morals, or welfare of the public. *Skelton v. State*, 173 Ind. 462, 468, 89 N. E. 860, 90 N. E. 897; *Moore v. Indianapolis*, 120 Ind. 483, 491, 22 N. E. 424; *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302; *Pittsburgh, C. C. & St. L. R. Co. v. Chappell*, 183 Ind. 141, 147, 106 N. E. 403, Ann. Cas. 1918A, 627.

It is also insisted on behalf of appellee herein that it has been decided by this court that there is no power to prohibit the manufacture of intoxicating liquor under our Constitution, and that the case of *Beebe v. State*, 6 Ind. 501, 63 Am. Dec. 391, and a few cases following, settle that question. It cannot be



determined by those cases on what principle the court was acting. The question stood undecided for three years, and then the law was pronounced void without assigning any reasons as to whether it was considered void under the state Constitution or Federal Constitution. That law in some of its particulars would have been void at that time under the Federal Constitution, but since then there have been passed by the Federal Congress the Wilson Act and the Webb-Kenyon Act (26 Stat. at L. 313, chap. 728, 37 Stat. at L. 699, chap. 90, Comp. Stat. 1916, §§ 8738, 8739, 4 Fed. Stat. Anno. 2d ed. pp. 585, 593), both of which have been upheld by the Supreme Court of the United States. *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845. That law also provided for official agencies to dispense liquor, thus creating a monopoly on the part of the state in the traffic, and it may have been considered void for that reason. But since that time public monopolies have been justified in the control of intoxicating liquor, upon the ground that the nature of the traffic warrants its entire prohibition. See 15 R. C. L. pp. 267, 268, and authorities there cited.

The principle of *stare decisis*, if it existed, has no application to the police power because there can be no property rights which are not subject to this power. In *Pittsburgh, C. C. & St. L. R. Co. v. Chappell*, 183 Ind. 141, at 146, 106 N. E. 405, Ann. Cas. 1918A, 627, this court said: "A long and firmly settled principle of law which has grown out of a well-ordered civil society is that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall neither encroach injuriously on equal enjoyment of their property

by others who have an equal right to the enjoyment of their property, nor be injurious to the community. The law is also so fixedly settled as to be beyond controversy that rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the general safety of persons and property, in the same sense as are all contracts and all property, whether owned by private persons or by corporations. Laws carrying these principles into effect in particular instances are but a proper exercise of the police power by the legislature, and are not to be hindered or overthrown by the constitutional limitations named as is claimed by counsel. Indeed, the legislature cannot contract away its police power,—the power to legislate for the protection of the lives, health, and property of the citizens of the state."

And in the case of *King v. Inland Steel Co.* 177 Ind. 201, 212, 96 N. E. 337, 97 N. E. 529, this court said: "The rule of *stare decisis*, which counsel invoked to induce us to adhere to those decisions, cannot chain us to error. That may be so when decisions have become a rule of property, but not in decisions involving a subject-matter such as here affected."

If this were not so, mistaken decisions would destroy that very power of society to protect itself, and a new Constitution would be created by the courts. Courts cannot decide away that which the state cannot contract away. Courts cannot make a new fundamental law by erroneously reading limitations into the Constitution not therein expressed. The principle of *stare decisis* is a rule of property, the use of which does not affect the public welfare. It cannot be invoked to shut off police power. *State ex rel. George v. Aiken*, 42 S. C. 222, 26 L.R.A. 345, 20 S. E. 221.

There is no spirit pervading the Constitution outside of the expressed limitations in it which en-

ables this court to declare a law void. In the case of *Logansport v. Seybold*, 59 Ind. 225,

—violation  
of spirit.

Judge Perkins, speaking for the court at page 227, quotes from *Churchman v. Martin*, 54 Ind. 380, as follows: "By the Constitution of the state the legislative authority is vested in the general assembly. Const. art. 4, § 1; 1 Rev. Stat. 1876, p. 27. When, therefore, an act of the general assembly is passed, which violates no provision of the Federal or state Constitution, the judicial department cannot hold it to be void on the ground that it is wrong, or unjust, or violates the spirit of our institutions." *Welling v. Merrill*, 52 Ind. 350; *Horning v. Wendell*, 57 Ind. 171; *Townsend v. State*, 147 Ind. 624, 634, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; *Forsythe v. Hammond (C. C.)* 68 Fed. 774, 777.

Counsel for the appellee neither in their briefs nor in oral argument quote language from any decision of this court showing what particular provision of the Constitution forbids the prohibition of the manufacture and sale of intoxicating liquor. The whole trend of the decisions in this state on the Remonstrance Laws, License Laws, and the Local Option Laws shows that no such thing ever entered the mind of this court from the time of the *Beebe Case* and the cases immediately following it to the present time. But on the contrary, this court has repeatedly said the subject of the control of intoxicating liquor is entirely within the power of the people, through the legislature, to do anything that they deem necessary, not only to prohibit the sale, but, in order to effectuate that purpose, to even prohibit the manufacture of intoxicating liquor within the state. In *Welsh v. State*, 126 Ind. 71, at page 77, 9 L.R.A. 664, 25 N. E. 885, this court said: "All laws regulating and imposing burdens on the business are prohibitory in their character. There is no difference between an absolute prohibitory

law, a law providing for local option, and license law, except in the extent to which they prohibit the manufacture and sale of intoxicating drinks. An absolute prohibitory law deprives all within its reach from engaging in the business; a local option law prohibits all within a given locality from selling within that locality; while a license law prohibits all within the state, who have not obtained a license, from engaging in the business of retailing intoxicating liquors. Each of these is a restriction upon the common-law right of the individual citizen."

In the case of *State v. Gerhardt*, 145 Ind. 439, at 469, 33 L.R.A. 313, 44 N. E. 478, this court used the following language: "Acting upon the just assumption that the unrestricted sale of intoxicating liquors results in much evil, and that it is detrimental to society, the law-making power of each state in the Union has, in the exercise of its police power, assumed to control, regulate, or prohibit the business, as seemed to it best."

And in the same case (145 Ind. at page 468), the court says: "All laws which regulate or restrict the sale of such liquors, by imposing burdens or conditions upon the business, are in their nature or character to an extent, at least, prohibitory."

And in the case of *Sopher v. State*, 169 Ind. 177, at 194, 14 L.R.A. (N.S.) 172, 81 N. E. 919, 14 Ann. Cas. 27, this court said: "The right to pursue such vocation was not of such an inherent or inalienable nature as to place the business beyond the control of the legislative department. The latter might, in the exercise of its discretion, under the police power, in the interest of society and the public in general, either suppress or prohibit the traffic entirely, or permit it to exist under such necessary restrictions, regulations, and burdens as might be deemed proper to impose in order to mitigate or minimize the evils resulting from the traffic, and, as against the validity of such laws en-

acted by the legislature, the liquor dealer was not in a position to assert any inherent or inalienable right to the contrary."

See also to the same effect, *Schmidt v. Indianapolis*, 168 Ind. 631, 638, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 385, 80 N. E. 632; *Jordan v. Evansville*, 163 Ind. 512, 517, 67 L.R.A. 613, 72 N. E. 544, 2 Ann. Cas. 96; *Greencastle v. Thompson*, 168 Ind. 493, 501, 81 N. E. 497; *Delphi v. Hamling*, 172 Ind. 645, 651, 89 N. E. 308.

It is also contended by the appellee that there must be a limitation in the Constitution against complete prohibition of the manufacture and sale of intoxicating liquor, because it was proposed in the constitutional convention and rejected. This question has been brought to the attention of this court before and the history of that subject reviewed. The committee to which this question was referred in December, 1850, reported to the convention as follows: "The committee of the legislative departments, to whom were referred some sundry petitions and resolutions on the subject of the sale of ardent spirits, have had that subject under consideration and have appeared here to report that your committee deem it inexpedient to make any constitutional provision on this subject, as it more particularly belongs to the legislature. They therefore ask to be discharged."

And this court, after reviewing this history, in the case of *Sopher v. State*, 169 Ind. 177, at page 192, 14 L.R.A.(N.S.) 172, 81 N. E. 918, 14 Ann. Cas. 27, says: "By these deliberative acts of the convention which formed and molded our present Constitution, that body appears to have left the question in regard to the traffic in intoxicating liquors in the hands of the legislative department, where the convention found it at the time it convened."

The power of the states, under their constitutions and under the Federal Constitution, to prohibit the manufacture and sale of intoxicat-

ing liquor and to provide such means for the enforcement of prohibition as seems expedient to the legislature, is now so well settled that it is no longer an open question. *Re Crane*, 27 Idaho, 671, L.R.A.1918A, 942, 151 Pac. 1006; *Crane v. Campbell*, 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98, (see authorities there cited); *State v. Fabbri*, 98 Wash. 207, L.R.A.1918A, 416, 167 Pac. 133; *State v. Hemrich*, 93 Wash. 439, L.R.A.1917B, 962, 161 Pac. 79; *State v. Davis*, 77 W. Va. 271, L.R.A.1917C, 639, 87 S. E. 262; *Delaney v. Plunkett*, 146 Ga. 547, L.R.A.1917D, 926, 91 S. E. 561, Ann. Cas. 1917E, 685; *State ex rel. Black v. Delaye*, 193 Ala. 500, L.R.A.1915E, 640, 68 So. 993; *Cureton v. State*, 135 Ga. 660, 49 L.R.A.(N.S.) 182, 70 S. E. 332; *State v. Fargo Bottling Works Co.* 19 N. D. 396, 26 L.R.A.(N.S.) 872, 124 N. W. 387; *Motlow v. State*, 125 Tenn. 547, L.R.A.1916F, 177, 145 S. W. 177; *State v. Seaboard Air Line R. Co.* 169 N. C. 295, 84 S. E. 283; *Seaboard Air Line R. Co. v. North Carolina*, 245 U. S. 298, 62 L. ed. 299, 38 Sup. Ct. Rep. 96; *State v. Lovell* (1847) 47 Vt. 493; *State v. Durein*, 15 L.R.A.(N.S.) 908, and note (70 Kan. 1, 78 Pac. 152); *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845.

In the light of these authorities and the decisions of this court which we have heretofore set out, we hold that this act violates no provision of the state or Federal Constitution by prohibiting the manufacture and sale of intoxicating liquor.

It is also contended that the title is insufficient, and that the act is not consistent with the title. The title is as follows: "An Act Pro-

hibiting the Manufacture, Sale, Gift, Advertisement or Transportation of Intoxicating Liquor Except for Certain Purposes and under Certain Conditions."

The provision of our Constitution is that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. This provision is to prevent tricking the legislature into passing acts foreign to the one under consideration by it. *Hingle v. State*, 24 Ind. 29.

It will be seen by the authorities which we have heretofore set out that to prohibit the traffic the legislature may define as an intoxicant that which is far from intoxicating, in order to prevent the manufacture and sale of that which is intoxicating; that it may prevent the possession of liquor; that it may provide that the place where liquor is kept or manufactured may be declared a nuisance and closed; that it may designate those who are to handle and dispense liquor, and upon what terms; that it may forbid advertisements of liquor; that it may provide what shall make a prima facie case of violation of the law. All of

Statute—title—  
sufficiency.

these provisions are properly connected with the purpose of

the legislature to prevent the traffic in intoxicating liquor as a beverage, and are therefore within the title of the act.

It is next insisted that the act is void because it gives the right to registered pharmacists to deal in intoxicants under certain restrictions, and because those who have liquors manufactured in the state which are in bond may have possession and tax, pay, and dispose of such liquors outside of the state, and all others must get rid of the intoxicants which they have on hand within ten days of the time that the law goes into effect.

The "privileges and immunities" section of our Constitution, the "class" section, and the "general law" section, are not violated if an act is reasonably designed to protect

the health, morals, or welfare of the public. *State v. Wiggam*, — Ind. —, 118 N. E. 684.

The legislature must classify in nearly every act which it passes to protect society. To hold that it may not would be to overthrow nearly all of the laws that are made for the public welfare. If the legislature thought that this law could be better enforced by compelling all persons to remove liquors from the state except those having liquors manufactured in the state and in bond, it had a perfect right to

Constitutional  
law—class  
legislation—  
permitting sale  
of liquors by  
class.

do so. It is not for this court to try to excel legislative wisdom on the question of expediency.

The act is valid as to all provisions brought in question. The court erred in overruling appellant's demurrer to appellee's complaint.

Judgment is reversed, with instructions to the trial court to sustain the demurrer to the complaint.

Myers, Ch. J., concurs in conclusion.

Spencer, J., dissenting:

I am unable to agree with the majority of my associates that the manufacture of intoxicating liquors within the state of Indiana may lawfully be prohibited under the Constitution of the state, and, in view of the importance of the question at issue, I feel impelled to state the grounds of my dissent.

As is suggested by the majority opinion, this action was instituted by appellee to restrain appellant from enforcing the so-called Prohibition Law of 1917, on the ground that said law is unconstitutional and void. Various reasons for the position taken by appellee are set out in its complaint, but those to which I direct especial attention are contained in the following allegations:

"Plaintiff further says that on the — day of March, 1894, it was duly granted a corporate charter by the state of Indiana, upon a consideration paid by the plaintiff to the

state, by which said charter this plaintiff was duly authorized to do the business therein specified, in the state of Indiana and elsewhere, for a period of fifty years from and after said date as a corporation, with all the authority and powers conferred by law on corporations; that under and pursuant to the provisions of said charter this plaintiff was authorized to and did engage, and is now engaged, in Vanderburgh county, Indiana, exclusively in the business of the manufacture of beer, ale, and other liquor, and the sale thereof in barrels, kegs, bottles, and other packages throughout the United States of America and elsewhere; that, immediately after said incorporation aforesaid, this plaintiff purchased real estate in said Vanderburgh county, and improved the same by erecting thereon large and expensive buildings, and installed therein machinery at an expense of several hundred thousand dollars for the sole purpose for which this plaintiff was incorporated as aforesaid, and since said date continuously to the present time has been and now is using said property exclusively for the purposes aforesaid.

"And plaintiff further says that at the time said charter was granted as aforesaid, and continuously thereafter to the present time, the laws of the state of Indiana, as enacted and declared by the general assembly of the state and by the supreme judicial tribunals of the state, have made and do now make the business of the manufacture and sale of intoxicating liquor a lawful business, and have extended to property used in the manufacture and sale of such liquor the same protection extended to other property, and did then recognize, and since said time continuously have recognized and protected, the owner or owners of such property in the same manner as the owners of other property. And plaintiff further says that at the time of granting said charter as aforesaid, and continuously thereafter to the pres-

ent time, it has relied and acted upon the validity of said laws enacted and promulgated and in full force and effect as aforesaid, and, relying upon said laws as in force, has, during said time since its incorporation to the present time, invested in said city aforesaid more than \$1,000,000 in real estate, machinery, and improvements thereon; that said machinery and improvements were made and acquired and are suitable only for the purpose for which the same were made and acquired as aforesaid, and for the sole and exclusive purpose of the manufacture and sale of intoxicating liquors, under and pursuant to the charter granted to this plaintiff as aforesaid; and that said real estate so acquired and the improvements and machinery so placed thereon are now and during said time have been owned by this plaintiff, and are now of the value of more than \$1,000,000; that said improvements and machinery aforesaid are suitable only for the purpose of the manufacture of intoxicating liquors, and cannot be used, and are worthless, for any other purpose whatsoever; that, relying upon said laws as aforesaid and upon the said charter so granted to this plaintiff as aforesaid, this plaintiff purchased and improved said property as aforesaid; and that, if this plaintiff is deprived of the use of said property for the uses and purposes aforesaid, said property will be worthless and will be a total loss to this plaintiff. . . .

"And plaintiff further says that, at the time said charter aforesaid was granted by the state and was accepted by this plaintiff, the laws of the state as aforesaid entered into and became a part of said charter, and that said charter, when so granted and accepted, became and was and is a valid contract between this plaintiff and the state of Indiana, and plaintiff says that said defendant should be enjoined from enforcing the provisions of said Act of February 9, 1917, against this plaintiff, for the reasons that said

act is in violation of § 10 of article 1 of the Constitution of the United States, prohibiting a state from enacting a law impairing the obligation of contracts.

"And plaintiff further says that said Act of February 9, 1917, is unconstitutional and void, and should not be enforced against this plaintiff, for the reason that the Constitution of this state has not conferred upon the general assembly of this state authority to prohibit arbitrarily the use by any citizen of the state of any property which such citizen may lawfully acquire, nor has the legislature of this state been given any authority by the Constitution of this state to prohibit arbitrarily a citizen of Indiana from using property he may lawfully acquire in such manner and for such purpose as such citizen may deem best or most advantageous to himself, nor has the Constitution of this state conferred any authority, either expressly or impliedly, upon the general assembly of this state, to prohibit the manufacture and sale of any particular class or classes of personal property. . . .

"Plaintiff further says that said Act of February 9, 1917, should not be enforced against this plaintiff, and that the defendant should be enjoined and restrained from enforcing said act against this plaintiff for the reason that, if this plaintiff is prohibited from using its said property and buildings and machinery aforesaid for the purpose for which the same were constructed and acquired as aforesaid, the same will become of no value as property, and will become materially diminished in value, if not employed in the manufacture of malt liquor, for every purpose, and that the enforcement of said act by said defendant as aforesaid will be a taking of the property of this plaintiff without due process of law, in violation of constitutional provisions of this state and of the United States."

Appellant's demurrer admitted the truth of all facts pleaded in appellee's complaint, and it became the

duty of the trial court, and now of this court, to determine whether the pleader's conclusions as to the law are equally well-founded. In approaching this question I am not unmindful of a growing public sentiment that the use of intoxicating liquors has been seriously abused, and that traffic therein must be more strictly regulated. I recognize, also, that in a proper case, and as an aid to interpretation alone, public sentiment, when clearly defined, may be considered by the courts in determining what legislative intention is sought to be expressed in an enactment which is responsive to that sentiment. But this doctrine has no application where the sole issue to be decided is the right of the legislature, under the Constitution, to pass the act in question. As was once said by Rufus Choate, in speaking of the duty of a judge: "He shall know nothing about the parties, everything about the case. He shall do everything for justice, nothing for himself, nothing for his friends, nothing for his patron, nothing for his party. If on the one side are the executive power and the legislature and the people, the sources of his honors, the givers of his daily bread, and, on the other, an individual nameless and odious, his eye is to see neither great nor small, attending only to the trepidations of the balance. If a law is passed by a unanimous legislature, clamored for by the general voice of the public, and a cause is before him on it, in which the whole community is on one side and an individual nameless and odious on the other, and he believes it to be against the Constitution, he must so declare it or there is no judge."

The case at bar presents squarely an issue of constitutional authority, and the decision of that issue must rest on sound principles of constitutional law. In its ultimate analysis, the decision by the majority of the court that the legislature may lawfully prohibit the manufacture of intoxicating liquors is based on the theory that its act constitutes a

proper exercise of the police power of the state. The definitions of "police power," as announced by various authors and jurists, contain some confusion and ambiguity, but, in fact, "the police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil law maxim, 'Sic utere tuo, ut alienum non lædas.' "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, "Sic utere tuo, ut alienum non lædas," it being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others.' Any law which goes beyond that principle, which undertakes to abolish rights the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions."

Tiedeman, *Pol. Power*, p. 4, § 1.

With this principle in mind, the above author concludes, after a careful and extended discussion of his subject, "that no trade can be subjected to police regulation of any kind, unless its prosecution involves some harm or injury to the public or to third persons, and in any case the regulation cannot extend beyond the evil which is to be restrained. It has also been maintained, and I think satisfactorily established, that no trade can be prohibited altogether, unless the evil is inherent in the character of the trade, so that the trade, however conducted, and whatever may be the character of the

person engaged in it, must necessarily produce injury upon the public or upon individual third persons." Tiedeman, *supra*, p. 301, § 103.

When one has assented to the truth of these principles, as he must, in their application to other cases of police regulation of employments, "his inability to adhere to them in their application to the police regulation of the liquor trade indicates either a lack of courage to maintain his conviction in the face of popular clamor, or an obscurity of his judgment through his sympathetic emotions, which are aroused in considering the gigantic evil to be combated." Tiedeman, *supra*, p. 302.

Tested in the light of the above principles, which must serve as the basis for every proper exercise of the police power, it is apparent beyond question that the act now under consideration is invalid, at least in so far as it attempts to prohibit the manufacture of intoxicating liquors within the state. It is not to be doubted that the excessive use of intoxicants by the individual has contributed greatly to the increase of poverty and crime among the people, but that fact constitutes no valid objection against the right to manufacture the commodity. Physicians and scientists are equally certain that the excessive use of particular goods, especially animal flesh, is responsible to a great degree for the prevalence of physical suffering and disease (auto-intoxication), yet can the beef packer be prohibited from pursuing his trade on that account? The use and abuse of gasoline is daily exacting a heavy toll from the people of this country in motor accidents, yet no one will contend that the production of gasoline and similar substances may lawfully be prohibited. On what theory, then, is the manufacture of intoxicating liquors to be prohibited because their abuse by individuals tends to produce misery and want, when the same individual abuse of meat and gasoline may lead to equally distressing conditions without inducing lawful restraint on

their manufacture? Obviously, the distinction is arbitrary, and a legislative mandate against production ought no more to be sustained in the one case than in the other.

"The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation." Ch. J. Fuller, in *Lawton v. Steele* (1894) 152 U. S. 133, 144, 38 L. ed. 385, 391, 14 Sup. Ct. Rep. 499, 503.

Again, as was said by Mr. Justice Harlan, in *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, a case involving the constitutionality of the Kansas law, enacted under a specific mandatory declaration in the Constitution of that state, which law was upheld: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

This court said, by Hadley, Ch. J., in *Republic Iron & Steel Co. v. State* (1903) 160 Ind. 379, at page 386, 62 L.R.A. 136, 66 N. E. 1007, in quoting the words of Brown, J., in *Lawton v. Steele*, supra: "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

And this court, speaking for itself, further said: "It follows that

a statute, to be within the power, must be responsive to some public necessity, suitable to subserve it, and reasonable in its operation."

Again, this court, in *State v. Richcreek* (1906) 167 Ind. 217, at page 230, 5 L.R.A. (N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899, uses this expression in substance: The exercise of the police power is subject to the supervision of the courts, and such acts may be declared void when they violate some constitutional right.

There is nothing in the manufacture of intoxicating liquors which leads directly to public harm, and no evil which inheres in the character of that trade. Indeed, the beneficent uses of such liquors are recognized in the very act now under consideration, and this recognition, in itself, serves to overcome the only ground on which the prohibition of their manufacture can be sustained, viz.: "That the trade, however conducted, and whatever may be the character of the person engaged in it, must necessarily produce injury upon the public or upon individual third persons."

Section 5 of the act, among others, recognizes the right of an individual to have and to use intoxicants in his own home, and authorizes a registered pharmacist to sell intoxicating liquors for medicinal and sacramental purposes, thereby declaring, in effect, that there is a proper use for such liquors. This declaration and admission is necessarily destructive of the assumed power to prohibit their manufacture, for the right to engage in a proper business is a natural right which is entitled to constitutional protection. The assured right of possession and use on the part of the citizen necessarily implies the existence of an adequate lawful means of obtaining it and a proper source of supply, yet the act prohibits all citizens of Indiana from engaging in the production of that supply. This constitutes a discrimination in favor of citizens of other states, and is, in itself, sufficient to



condemn the law. Furthermore, it appears from appellee's complaint, and appellant's demurrer admits the truth of the averment, that its business as a manufacturer of intoxicating liquors is not confined to the state of Indiana, but extends "throughout the United States of America and elsewhere." On what possible theory can appellee be legally deprived of the right to manufacture its products in Indiana for shipment to territory where their sale is not prohibited? Certainly that business would have no reasonable relation to or effect on the health, morals, or general welfare of the people of this state, and its prohibition cannot be justified on any legal ground.

Many other objections against the validity of this act as a proper exercise of the police power may be suggested, but the points above made cannot, in reason, be successfully controverted. I know that numerous cases may be found which seem to recognize a power in the states to prohibit the manufacture and sale of intoxicating liquors as tending to promote the general welfare of the people, but on an examination of such cases, most of which are collected in the majority opinion, it will be found, either that they rest on constitutional provisions which differ from our own, or that the holding of the court in the particular instance is as arbitrary and lacking in basic reason as is the law which it sustains.

In brief, I subscribe fully to the conclusion reached by Mr. Tiedeman, after a careful consideration of all the constitutional reasons for and against the prohibition of the liquor trade, that "the prohibition of the manufacture and sale of spirituous and intoxicating liquors is unconstitutional, unless it is confined to the prohibition of drinking saloons, and the prohibition of the sale of liquor to minors, lunatics, confirmed drunkards, and persons in a state of intoxication. As has already been explained, there is an almost unbroken array of judicial opinions

against this position, and there is not any reasonable likelihood that there will be any immediate revulsion in the opinions of the courts. But it is the duty of a constitutional jurist to press his views of constitutional law upon the attention of the legal world, even though they place him in opposition to the current of authority." Tiedeman, Pol. Power, p. 311, § 103.

Tested solely by established principles of constitutional law, the absolute prohibition of the manufacture of intoxicating liquors is not a proper exercise of the police power of the state, and, on any other theory, legislation looking to that end must constitute a taking of private property without due process of law. 14th Amendment Const. United States.

The above conclusions, to which reason and logic unerringly lead, are sufficient to require an affirmance of the decision in this case, but there is an additional ground on which the decision of the trial court ought to be upheld. The majority opinion, which is solely a "case law" opinion, refers briefly to the case of *Beebe v. State* (1855) 6 Ind. 501, 68 Am. Dec. 391, and the decision subsequent thereto, and says: "It cannot be determined by those cases on what principle the court was acting. The question stood undecided for three years, and then the law was pronounced void without assigning any reasons as to whether it was considered void under the state Constitution or Federal Constitution."

I am unable to understand that statement. This court, in the *Beebe Case*, by a vote of three to one, expressly held that the Law of 1855, then under consideration, was void in so far as it undertook to prohibit the manufacture of intoxicating liquors within the state. Judge Perkins, with Judge Davison concurring, held that the act was to that extent violative of various sections of the Bill of Rights as set forth in the Constitution of Indiana, and particularly the provision in § 21 that

"no man's property shall be taken by law without just compensation." Judge Stuart expressly agreed with the conclusion that it was unconstitutional to prohibit the manufacture of liquor, although not assigning his reasons therefor, while Judge Gookins alone dissented on that proposition. It is true, as was later stated by Judge Perkins, in the case of *Ingersoll v. State* (1859) 11 Ind. 464, that those sections of the act which sought to prohibit the retail of intoxicating liquors were not judicially annulled until nearly three years had elapsed from the time of its going into effect, but the decision that the legislature, under the present Constitution of the state, has no power to enact a law prohibiting the manufacture of intoxicating liquor, was clearly defined, and has stood unchallenged to the present time. That decision was necessarily binding on the trial court in this case as the latest expression of the supreme judicial tribunal of the state on the issues involved, and it should be equally controlling in this appeal for either of two reasons. In the first place, it is sound in principle and therefore to be followed without question, but, if conceded to be erroneous as an original holding, it must now serve as the basis for a just application of the rule of *stare decisis*. The prevailing opinion holds that the latter rule "can-

not be invoked to shut off police power;" but, for reasons heretofore stated, I do not agree that its invocation in the present case would have that effect. Appellee's complaint alleges, and appellant's demurrer admits, that large sums of money have been invested and valuable property rights acquired on the strength of the charter contract granted by the state to appellee and on the rule theretofore announced in the decisions of this court that the legislature could not take from appellee, without fault on its part, the right to do business under that charter. The decision in *Beebe v. State*, *supra*, at least to the extent that it holds the legislature to be without such power, has become a rule of property in Indiana, and the rights acquired by appellee on the faith of that rule must be protected under the doctrine of *stare decisis*, if on no other ground. *Moore-Mansfield Constr. Co. v. Indianapolis N. & T. R. Co.* (1913) 179 Ind. 356, 391, 44 L.R.A.(N.S.) 816, 101 N. E. 296, Ann. Cas. 1915D, 917; *Pond v. Irwin* (1888) 113 Ind. 243, 247, 15 N. E. 272; *Frank v. Evansville & I. R. Co.* (1887) 111 Ind. 132, 136, 12 N. E. 105; *Diamond Plate Glass Co. v. Knot* (1906) 38 Ind. App. 20, 25, 77 N. E. 954.

The decision of the *Vanderburgh* superior court should be affirmed.

Petition for rehearing denied.

## ANNOTATION.

### Constitutionality of statute prohibiting the manufacture of intoxicating liquor.

The question as to the power of the state to regulate and control the sale of intoxicating liquors has been the source of much litigation, which has resulted in fully sustaining the power of the state in this regard. The reported case (*SCHMITT v. F. W. COOK BREWING Co.* ante, 270) goes a step further, and sustains the power not only to prohibit absolutely the sale of intoxicating liquors, but also the manufacture of such liquors within the state. As hereinafter pointed out,

however, the power of the state in this regard is fully sustained by cases, either passing upon the specific question or related questions.

A note showing the attitude of the courts on this question may not be inopportune, in view of the widespread agitation to test anew the validity and wisdom of the whole body of law relating to the liquor traffic, notwithstanding the recent amendment to the Federal Constitution.

As pointed out, on account of their

noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, the state, through the exercise of its police power, has the authority absolutely to prohibit the manufacture of intoxicating liquors within its borders; and prohibitory laws of this character are not violative of the Federal Constitution or the usual state constitutions. This rule is expressly sustained or recognized in the following cases:

**United States.**—*Boston Beer Co. v. Massachusetts* (1877) 97 U. S. 25, 24 L. ed. 989; *Foster v. Kansas* (1884) 112 U. S. 201, 205, 28 L. ed. 629, 696, 5 Sup. Ct. Rep. 8, 97; *Mugler v. Kansas* (1887) 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 278; *Kidd v. Pearson* (1888) 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Eberle v. Michigan* (1914) 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464, affirming (1911) 167 Mich. 477, 133 N. W. 519; *Clark Distilling Co. v. Western Maryland R. Co.* (1917) 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; *Crane v. Campbell* (1917) 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98, affirming (1915) 27 Idaho, 671, L.R.A.1918A, 942, 151 Pac. 1006; *Kansas v. Bradley* (1885) 26 Fed. 289; *Cantini v. Tillman* (1893) 54 Fed. 969.

**Alabama.**—*Ingram v. State* (1867) 39 Ala. 247, 84 Am. Dec. 782; *Fulton v. State* (1911) 171 Ala. 572, 54 So. 688.

**Georgia.**—*Cureton v. State* (1911) 135 Ga. 660, 49 L.R.A.(N.S.) 182, 70 S. E. 832; *Delaney v. Plunkett* (1917) 146 Ga. 547, L.R.A.1917D, 926, 91 S. E. 561, Ann. Cas. 1917E, 685; *Kunsberg v. State* (1918) 147 Ga. 591, 95 S. E. 12.

**Indiana.**—*SCHMITT v. F. W. COOK BREWING CO.* (reported herewith).

**Kansas.**—Constitutional Prohibitory Amendment (1881) 24 Kan. 700; *State v. Mugler* (1883) 29 Kan. 252, 44 Am. Rep. 634, affirmed in (1887) 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 278; *State v. Weiss* (1911) 84 Kan. 165, 36 L.R.A.(N.S.) 73, 113 Pac. 388.

**Maine.**—*State v. Dorr* (1889) 82 Me. 212, 19 Atl. 171.

**Michigan.**—*People v. Hawley* (1854) 3 Mich. 330.

**Tennessee.**—*Motlow v. State* (1912) 125 Tenn. 547, L.R.A.1916F, 177, 145 S. W. 177.

**Vermont.**—*State v. Lovell* (1874) 47 Vt. 493.

**Washington.**—*Gottstein v. Lister* (1915) 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008; *State v. Fabbri* (1917) 98 Wash. 207, L.R.A.1918A, 416, 167 Pac. 183.

**West Virginia.**—*State v. Davis* (1915) 77 W. Va. 271, L.R.A.1917C, 639, 87 S. E. 262.

Although a prohibitory law may operate to depreciate the principal value of property used for the purpose of brewing or manufacturing intoxicating liquors, it does not amount to the taking of property without compensation, within the purview of constitutional provisions against the taking of property without compensation. *Mugler v. Kansas* (1887) 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 278; *Cantini v. Tillman* (1893) 54 Fed. 969; *Busch v. Webb* (1903) 122 Fed. 655, appeal dismissed in (1904) 194 U. S. 640, 48 L. ed. 1162, 24 Sup. Ct. Rep. 857.

In this connection, it has been pointed out that if the public safety or morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience individuals or corporations may suffer, for all rights are held subject to the police power of the state, and the legislature cannot by contract divest itself of the right to exercise this power. *Boston Beer Co. v. Massachusetts* (1877) 97 U. S. 25, 24 L. ed. 989.

Nor does a prohibitory law of this character constitute such an interference with interstate commerce as to render it void on that ground. *Kidd v. Pearson* (1888) 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Delaney v. Plunkett* (1917) 146 Ga. 547, L.R.A.1917D, 926, 91 S. E. 561, Ann. Cas. 1917E, 685.

In *Beebe v. State* (1855) 6 Ind. 501, 63 Am. Dec. 391, it was apparently held that the state is without power to

prohibit the manufacture of whisky, ale, porter, and beer, as beverages. There is, however, some question as to the real holding in this case, and, as shown in the reported case (*SCHMITT v. F. W. COOK BREWING CO.*) such a prohibitory law would now be held constitutional.

In *State v. Walruff* (1886) 26 Fed. 178, it was held that a state may prohibit the manufacture of intoxicating liquor if the law is made applicable to manufacturers who thereafter engage in that business, but it cannot make the law applicable to those then engaged in the business, since to do so would amount to the taking of property without compensation. This holding is apparently in conflict with the decisions of the United States Supreme Court heretofore cited.

In *United States v. James* (1918) 256 Fed. 102, it is also held that a state possesses the power absolutely to prohibit the manufacture of intoxicating liquors for beverage purposes. It is further held that delegation to qualified voters of a county, or a subdivision thereof, of the right to determine

the question of prohibition of the sale of intoxicating liquors within its limits, does not confer upon them the right also to determine whether the manufacture of liquor shall be prohibited in its limits. The court reasoned that nowhere does the word manufacture appear, "and an affirmative answer to the question can only be given if it be held that the power to prohibit the sale necessarily involved the power to prohibit or authorize the manufacture. Apart from the principle of statutory construction, already adverted to, that every intendment must be indulged in favor of legislative power, common sense and common experience unite in declaring that not only is the power to prohibit the manufacture not a necessary content of the power to prohibit the sale, but that the two subjects are independent of each other, and so wholly distinct and separate in their physical incidents and character as that not even the most strained construction could extend the word 'sale' to include or embrace the word 'manufacture.'" A. G. S.

### NEWBURGER-MORRIS COMPANY, Resp.,

v.

J. FREDERICK TALCOTT et al., Exrs., etc., of James Talcott, Deceased, Appts.

*New York Court of Appeals — December 28, 1916.*

(219 N. Y. 505, 114 N. E. 846.)

#### Account stated — consignor and factor.

1. Monthly statements of account pending the continuance of the contract by a factor who has undertaken to make advances on consignments to his principal are not final demands for payment, which will constitute accounts stated and bear interest from time of rendition; especially if the statements made are indefinite and general, and leave the principal ignorant of items and names.

[See note on this question beginning on page 293.]

#### Interest — compound — validity.

2. A promise to pay interest upon interest is void if made at a time before simple interest has accrued.

[See 15 R. C. L. 36.]

#### — promise to pay — consideration.

3. A promise made in advance to

pay interest on an account stated means simple interest, since a promise to pay compound interest would be invalid.

[See 15 R. C. L. 36.]

#### — compound interest.

4. A promise to pay compound in-

terest after simple interest has accrued must be supported by forbearance or other consideration.

[See 15 R. C. L. 37.]

**Account stated — retention of account.**

5. An account stated may result from the retention of accounts current without objection.

[See 1 R. C. L. 207, 211.]

**Factors — advances — fund for reimbursement.**

6. In the absence of an agreement to the contrary, the goods consigned to a factor are the primary fund to which he must look for reimbursement for advances made.

[See 11 R. C. L. 773, et seq.]

**Account stated — between principal and factor.**

7. There are times and occasions when an account stated may arise between principal and factor.

[See 11 R. C. L. 769.]

**— definition.**

8. An account stated means that the parties have come together and agreed upon the balance of indebtedness so that an action to recover the balance, as upon an implied promise of payment, may thenceforth be maintained.

[See 1 R. C. L. 207.]

**Appeal — finding of facts — effect.**

9. Findings of facts by the trial court, supported by evidence, are conclusive in the court of appeals.

[See 2 R. C. L. 202.]

**Factor — commission — amount.**

10. Under a contract between consignor and factor which is to continue for one year and thereafter subject to termination upon thirty days' notice, by which the factor is to have a certain commission on the first \$100,000 of sales, and a less commission on all sales after that amount, the higher commission can be charged only once, not on the first \$100,000 of sales in each year.

[See 11 R. C. L. 753.]

**— lien for counsel and detective fees.**

11. A consignor who surreptitiously removes and directs concealment of merchandise consigned to a factor, in order to escape the factor's lien, is chargeable with expenses of counsel and detectives employed by the factor to protect his rights, where the contract gives him a lien for all expenses and outlays of every sort, including legal expenses, and for all liabilities incurred by the factor by reason of any act of the consignor.

[See 11 R. C. L. 773-774, 777.]

**APPEAL** by defendants from an order of the Appellate Division of the Supreme Court, First Department, modifying and affirming an interlocutory decree of a Special Term, Part III., for New York County in plaintiff's favor, in an action for an accounting for money and property received by defendant's testator under a certain factor's contract. *Modified.*

The facts, so far as material, are stated in the opinion of the court.

The questions certified were as follows:

1. Is the defendant under the contract, plaintiff's Exhibit 1, entitled to charge interest compounded monthly at the rate of 6 per cent on all monthly debit balances due from the plaintiff to the defendant?

2. Did the accounts current, plaintiff's Exhibit 22, rendered by the defendant to the plaintiff, become accounts stated and settled, and is the plaintiff precluded under the pleadings and findings from objecting on the accounting to the items in said accounts which are in derogation of the contract?

3. Has the defendant a right under the contract, plaintiff's Exhibit

1, to charge the plaintiff 9½ per cent commission on the sale of the consigned goods after the first \$100,000 of sales had been made?

4. Is the defendant only entitled to charge a commission of 5 per cent on all sales over and above \$100,000, to be computed on the net amount of sales of the consigned goods during the lifetime of the contract?

5. Has the defendant the right to charge the plaintiff with the fees of attorneys and detectives employed by him for his own protection in a controversy arising in and about the severance of the relations between them, under the contract, plaintiff's Exhibit 1, and in the protection, as

against the plaintiff, of defendant's lien and interest in the security which he claimed to hold?

Messrs. Julius Henry Cohen and Theodore B. Richter, for appellants:

The accounts current rendered by the defendant to the plaintiff, and retained by it without objection, constituted accounts stated, and are no longer subject to attack or review.

Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Stenton v. Jerome, 54 N. Y. 480; Spellman v. Muehlfeld, 166 N. Y. 245, 59 N. E. 817; Daintrey v. Evans, 148 App. Div. 275, 132 N. Y. Supp. 126; Manchester Paper Co. v. Moore, 104 N. Y. 680, 10 N. E. 861; Standard Oil Co. v. Van Etten, 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178; Seymour v. Marvin, 11 Barb. 80; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99; Stern v. Ladew, 47 App. Div. 331, 62 N. Y. Supp. 267; Southard v. Curley, 134 N. Y. 148, 16 L.R.A. 561, 30 Am. St. Rep. 642, 31 N. E. 330; Consolidated Fruit Jar Co. v. Wisner, 103 App. Div. 453, 93 N. Y. Supp. 128.

A plaintiff bringing an action in equity for an accounting must prove a demand and refusal.

1 Cyc. 438; Magauran v. Tiffany, 62 How. Pr. 251; Southworth v. Smith, 27 Conn. 356, 71 Am. Dec. 72; Kennicott v. Leavitt, 37 Ill. App. 435; Brauer v. Oceanic Steam Nav. Co. 178 N. Y. 339, 70 N. E. 863.

Since defendant continued to make advances in reliance upon plaintiff's acceptance of the method of computing commissions on sales adopted by the defendant and consented to by the plaintiff, plaintiff is now estopped from attacking it.

Jacobs v. Morange, 47 N. Y. 57; Weed v. Weed, 94 N. Y. 243.

Defendant was entitled to compute interest on all debits and credits monthly on the rendition of each account current.

Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99; Caliot v. Walker, 2 Anstr. 495, 2 Eng. Reprint, 946; Smith v. Marvin, 27 N. Y. 187; Barrow v. Rhinelander, 1 Johns. Ch. 555.

Plaintiff is, under the terms of the contract, chargeable with the reasonable expenses incurred by the defendant in protecting the property subject to his lien against the plaintiff's fraud.

Schouler, Bailm. & Carr. 1905 ed. pp. 98, 99, §§ 180, 192; Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. 624;

3 A.L.R.—19.

Hills v. Smith, 28 N. H. 369; Field v. Sibley, 74 App. Div. 81, 77 N. Y. Supp. 252, affirmed in 174 N. Y. 514, 66 N. E. 1108; Bank of Staten Island v. Silvie, 89 App. Div. 465, 85 N. Y. Supp. 760; Davenport v. National Bank of Commerce, 127 App. Div. 391, 112 N. Y. Supp. 291; Griggs v. Howe, 2 Abb. App. Dec. 291; Hays v. Riddle, 1 Sandf. 248; Ballingall v. Hunsberger, 16 Pa. Super. Ct. 117; Hurst v. Coley, 22 Fed. 183; Planters' Rice-Mill Co. v. Merchants' Nat. Bank, 78 Ga. 574, 3 S. E. 327.

Messrs. Erwin, Fried, & Czaki, for respondent:

The accounts current rendered never were intended to be or became accounts stated or settled, and all of the transactions between the parties are open to investigation on the accounting.

Rishel v. Weil, 31 Misc. 70, 63 N. Y. Supp. 178; Derby v. Yale, 13 Hun, 273; Liscomb v. Agate, 67 Hun, 388, 22 N. Y. Supp. 126; Perkins v. Hart, 11 Wheat. 237, 256, 6 L. ed. 463, 468; Barker v. Hoff, 52 How. Pr. 382; Staiger v. Klitz, 136 App. Div. 874, 122 N. Y. Supp. 107; Harvey v. West-Side Elev. (Patented) R. Co. 13 Hun, 392; Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 289, 51 N. E. 986; Spain v. Talcott, 165 App. Div. 815, 152 N. Y. Supp. 611; Donald v. Gardner, 44 App. Div. 235, 60 N. Y. Supp. 668.

Defendants' testator under the contract was not entitled to charge interest compounded monthly on all monthly debit balances.

Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99; Schutz v. Morette, 146 N. Y. 137, 40 N. E. 780; Williamsburgh Sav. Bank v. Solon, 136 N. Y. 465, 32 N. E. 1058; Reusens v. Arkenburgh, 135 App. Div. 75, 119 N. Y. Supp. 821; Quackenbush v. Leonard, 9 Paige, 334; Van Benschooten v. Lawson, 6 Johns. Ch. 813, 10 Am. Dec. 383; State v. Jackson, 1 Johns. Ch. 13, 7 Am. Dec. 471; 19 Cyc. 155; Kennedy v. Gibbs, 15 Ill. 406; Re Atwood, 3 App. Div. 578, 38 N. Y. Supp. 338; Gihon v. Stanton, 9 N. Y. 477; Mumford v. American L. Ins. & T. Co. 4 N. Y. 463.

The charge of 9½ per cent commission after the first \$100,000 of sales had been attained cannot be sustained and was properly disallowed.

Coulter v. Board of Education, 63 N. Y. 365; Trinity Church v. Higgins, 48 N. Y. 532; Schroeder v. Frey, 114 N. Y. 266, 21 N. E. 410; Appleby v. Astor

F. Ins. Co. 54 N. Y. 253; Witty v. Matthews, 52 N. Y. 512; Brown v. Curtiss, 2 N. Y. 225; Kinney v. D. H. McBride & Co. 88 App. Div. 92, 84 N. Y. Supp. 958; Collier v. Miller, 137 N. Y. 332, 33 N. E. 374; Thompson v. Simpson, 128 N. Y. 270, 28 N. E. 627.

The contract gave defendants' testator no right to charge plaintiff with the fees of attorneys and detectives employed by him for his own protection, in a controversy arising in and about the severance of the relations between them, and in the protection, as against plaintiff, of his lien and interests in the security which he held.

Boise v. Talcott, 212 Fed. 268; Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 91 Fed. 19; Doddridge County Oil & Gas Co. v. Smith, 173 Fed. 389; Willard v. White, 56 Hun, 581, 10 N. Y. Supp. 170; Work v. Tibbits, 87 Hun, 352, 34 N. Y. Supp. 308; Green v. Winter, 1 Johns. Ch. 26, 7 Am. Dec. 475; Havana City R. Co. v. Ceballos, 49 App. Div. 263, 63 N. Y. Supp. 417.

Cardozo, J., delivered the opinion of the court:

The action is one for an accounting by a principal against a factor. The plaintiff agreed to consign to the defendant its goods then owned, and also all goods acquired during the term of the agreement. The defendant was to sell them, and was to collect the accounts. He agreed to make advances on demand up to 50 per cent of the net cost of the merchandise and 75 per cent of the net value of outstanding accounts. He was to receive for his services "9½ per cent commission on the first \$100,000 of sales," and 5 per cent on all sales above that amount. Interest was to be "charged on the account current . . . at the rate of 6 per cent per annum." The agreement was dated June 21, 1909, but business was not begun under it till September 1, 1909. It was to continue from its date "to and including September 1, 1910, and thereafter subject to termination at any time upon thirty days' written notice given by either of said parties to the other." The plaintiff gave notice of termination on September 29, 1911.

During this period of their deal-

ings the defendant sent the plaintiff monthly accounts current. The first account was rendered on October 1, 1909, and the last on September 1, 1911. The trial judge found that the plaintiff retained them; that it made no objection to any of them till October, 1911; that they were untainted by fraud; and that plaintiff read and understood them. He refused, however, to find that they were "intended by the defendant and understood by the plaintiff as complete statements of the account between the parties for the period covered thereby." In these statements the plaintiff is charged with the defendant's advances, his disbursements, and his commissions. It is credited with his collections, which are not itemized. To explain the computation of commissions, there is appended a schedule of "sales as reported." This schedule gives the total sales for each day. It does not give the items and does not name the purchasers. The debit balance in each statement includes interest on advances and on other charges. The balance thus reached is carried forward into the next following statement, and bears interest again. Interest is thus compounded monthly. During the first year of business commissions are charged on the first \$100,000 of sales at the rate of 9½ per cent, and thereafter at the rate of 5 per cent. During the second year, beginning September 1, 1910, this process is repeated. The trial court and the appellate division held that the charge of compound interest was unlawful. They held also that commissions at the rate of 9½ per cent were due on \$100,000 of sales during the first year, and not on \$100,000 in each year. Those are the chief items in dispute. Some minor items of disbursement will be referred to later.

1. The charge of compound interest was correctly disallowed. The rule is settled that a promise to

Interest—  
compound—  
validity.

pay interest upon interest is void if made at a time be-

fore simple interest has accrued. *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99. The provision in the contract, that interest shall be "charged on the account current . . . at the rate of 6 per cent per annum," must, therefore, mean simple interest.

—promise  
to pay—  
consideration.

Any other promise, made at the outset of the dealings, would be invalid. There are times, however, when a promise to pay compound interest will be enforced, if made after simple interest has accrued; and the promise may be the implied one that results from the statement of an account. Even in such cases, there must be forbearance or other consideration to

—compound  
interest.

make the promise good. *Young v. Hill*, supra. There was no promise here unless the retention of the accounts current establish an account stated.

The trial court held that it did not, and we find no error in the ruling. There is no doubt that an account stated may sometimes result from the retention of accounts

Account stated—  
retention of  
account.

current without objection. *Knickerbocker v. Gould*, 115 N. Y. 533, 537, 22 N. E. 573; *Spellman v. Muehlfeld*, 166 N. Y. 245, 59 N. E. 817. But the result does not always follow. It varies with the circumstances that surround the submission of the statements (*Harvey v. West Side Elev. (Patented) R. Co.* 13 Hun, 392; *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 300, 51 N. E. 986); and those circumstances include, of course, the relation between the parties. Here the relation was that of principal and factor under an agreement that was to last at least a year, and indefinitely thereafter unless terminated by notice of thirty days. Not till the contract was at an end did the duty to make advances cease. Not till then did the right to recover past advances accrue. Indeed, it is doubtful whether even then there was any personal liability until the security

had been exhausted by the enforcement of the lien. The rule in this state is that, in the absence of some agreement to the contrary, the consigned goods are the primary fund

Factors—  
advances—  
fund for  
reimbursement.

to which the factor must look for reimbursement. *Gihon v. Stanton*, 9 N. Y. 476; *Hidden v. Waldo*, 55 N. Y. 294, 297; *Re Atwood*, 3 App. Div. 578, 581, 38 N. Y. Supp. 338. The same rule prevails in other jurisdictions. *Joseph P. Murphy Co's Estate*, 214 Pa. 258, 5 L.R.A. (N.S.) 1147, 63 Atl. 745, 6 Ann. Cas. 308; *Balderston v. National Rubber Co.* 18 R. I. 338, 49 Am. St. Rep. 772, 27 Atl. 507; *Frothingham v. Everton*, 12 N. H. 239; *Kraft v. Fancher*, 44 Md. 204, contra, *Beckwith v. Sibley*, 11 Pick. 482; *Dolan v. Thompson*, 126 Mass. 183. We do not need to determine whether any provisions of this contract have varied the general rule. If they have, they have done it so doubtfully and obscurely that the consignor might not unreasonably act upon a contrary assumption. In any event it knew, whether the goods were the primary fund for reimbursement or not, that the consignee's duty to advance was a continuing one while the contract remained in force. The debit balances shown by these monthly statements did not, therefore, constitute a present debt.

Account stated—  
consignor  
and factor.

They did not speak the language of present demand for payment or adjustment. They were like the statements rendered by one partner to another which were considered in *Hughes v. Smither*, 23 App. Div. 590, 594, 49 N. Y. Supp. 115, affirmed on opinion below in 163 N. Y. 553, 57 N. E. 1112. The implication was that they were "offered merely as a basis for subsequent liquidation." *Hughes v. Smither*, supra. They were provisional advances. They were not definitive demands.

We do not suggest a doubt that there are times and occasions when an account stated may arise be-



tween principal and factor. Dows  
 —between v. Durfee, 10 Barb.  
 principal and 218, 215. It will  
 factor. arise, for example,

at the close of their dealings when  
 balances are adjusted and payments  
 made. It will arise while dealings  
 continue if the intent to settle the  
 accounts is found, and the inference  
 will be drawn the more readily  
 where the relation between the par-  
 ties is terminable at will. But the  
 very meaning of an account stated  
 is that the parties have come to-

—definition. together and agreed  
 upon the balance  
 of indebtedness, in simul compu-  
 tassent, so that an action to recover  
 the balance as upon an implied prom-  
 ise of payment may thenceforth be  
 maintained. Volkening v. De Graaf,  
 81 N. Y. 268, 271. In this case, the  
 implication of a promise of pay-  
 ment has been rebutted. We have  
 pointed out that the balance ulti-  
 mately due was still unliquidated  
 when the monthly statements were  
 received. To this we add that the  
 statements were indefinite and gen-  
 eral, and left the plaintiff ignorant  
 of items and of names. In such cir-  
 cumstances, we cannot say, and  
 least of all as a matter of law, that  
 the retention of the advices without  
 objection was a statement of the  
 account. The trial judge refused

to find that a set-  
 tlement was intend-  
 ed. His ruling has  
 support in the evidence, and is con-  
 clusive in this court.

2. Commissions at the rate of 9½  
 per cent were properly restricted to  
 sales during the first year. If the  
 parties intended to make a fresh  
 start each year, they certainly did  
 not say so. In the words of Scott,  
 J., writing at the appellate division,  
 there was not "a contract for a year  
 with annual renewals, but a single  
 contract running

Factor-  
 commission-  
 amount. for one year at all  
 events, and there-  
 after continuing until terminated  
 by a notice from one of the parties  
 to the other." We do not need to  
 determine whether there is enough

ambiguity in the language of the  
 contract to permit its apparent  
 meaning to be varied through the  
 statement of accounts. We have  
 seen that there were no statements  
 of account; and hence the apparent  
 meaning is controlling. The silent  
 retention of the accounts current, if  
 it had any force at all, was at the  
 utmost a mere admission. It did not  
 override the contract.

3. Toward the close of the deal-  
 ings the defendant was informed  
 that the plaintiff was secretly re-  
 moving merchandise so as to escape  
 the defendant's lien. The defendant  
 thereupon employed counsel and de-  
 tectives. The trial court found  
 that expenses thereby incurred  
 were proper charges against the  
 consigned goods. The appellate di-  
 vision held the contrary. It found,  
 however,—“that the situation dis-  
 closed to the defendant . . . was  
 such as to lead him, in the exercise  
 of due diligence and reasonable pre-  
 caution, to take the steps aforesaid  
 for the protection of his rights and  
 interests, and that the defendant in  
 taking such steps acted in good  
 faith.” It found also that the ex-  
 penses were occasioned by “the  
 aforesaid acts of the plaintiff in  
 surreptitiously removing merchan-  
 dise and in directing the conceal-  
 ment of merchandise.”

We think the plaintiff is charge-  
 able with expenses thus incurred.  
 The contract says that the defend-  
 ant shall have a —lien for  
 lien not only for all counsel and  
 advances, but also detective fees.  
 for all “his expenses and his said  
 commissions, and all outlays of  
 every sort, including all legal ex-  
 penses and reasonable counsel fees  
 and for all liabilities which shall be  
 made or incurred by James Talcott  
 in connection with the said busi-  
 ness, or by reason of any act done  
 or omitted by Greene-Newburger  
 Company” (the plaintiff's prede-  
 cessor). If a stranger had con-  
 verted or threatened to convert the  
 goods, the consignee would have  
 been entitled to reimbursement for  
 detective and counsel fees incurred

in the effort to get them back. We think his rights are no different when the conversion has been threatened by the consignor. In each case the consignee is acting to protect and preserve his lien.

The order should be modified in accordance with this opinion. The first, second, and third questions

should be answered in the negative, and the fourth and fifth questions in the affirmative. No costs of this appeal are allowed to either party.

Willard Bartlett, Ch. J., and Chase, Collin, Cuddeback, and Pound, JJ., concur. Hogan, J., absent.

## ANNOTATION.

### Account stated as between principal and factor.

The earlier view of the rule that the rendition of an account and its retention by the party to whom sent, without objection within a reasonable time, give it the force and effect of an account stated, was that it was applicable to merchants only; but modern usage regards it as applicable to all classes of business men. It has been treated as applicable as between a factor or commission merchant and his principal in

**United States.**—*Talcott v. Chew* (1885) 27 Fed. 273; *Eichel v. Sawyer* (1890) 44 Fed. 845; *Wittkowski v. Harris* (1894) 64 Fed. 712; *Allen-West Commission Co. v. Patillo* (1898) 33 C. C. A. 194, 61 U. S. App. 94, 90 Fed. 628; *McManus v. Sawyer* (1915) 231 Fed. 231.

**Alabama.**—*Langdon v. Roane* (1844) 6 Ala. 518, 41 Am. Dec. 60; *Burns v. Campbell* (1882) 71 Ala. 271.

**Illinois.**—*Bailey v. Bensley* (1877) 87 Ill. 556.

**Iowa.**—*Everingham v. Halsey* (1899) 108 Iowa, 709, 78 N. W. 220.

**Louisiana.**—*Ledoux v. Porche* (1846) 12 Rob. (La.) 543; *Dunbar v. Bullard* (1847) 2 La. Ann. 810; *Freeman v. Howell* (1849) 4 La. Ann. 196, 50 Am. Dec. 561; *Darby v. Lastrapes* (1876) 28 La. Ann. 605; *Sentell v. Kennedy* (1877) 29 La. Ann. 679; *Allen v. Nettles* (1887) 39 La. Ann. 788, 2 So. 602; *Flower v. O'Bannon* (1891) 43 La. Ann. 1042, 10 So. 376.

**New Hampshire.**—*Austin v. Ricker* (1881) 61 N. H. 97.

**New Jersey.**—*Brown v. Vandyke* (1858) 8 N. J. Eq. 795, 55 Am. Dec. 250.

**New York.**—*Smith v. Marion* (1863)

27 N. Y. 187; *Bruen v. Hone* (1848) 2 Barb. 586; *Dows v. Durfee* (1850) 10 Barb. 213; *Cartwright v. Greene* (1866) 47 Barb. 9; *Harris v. Ely* (1852) Seld. Notes, 87.

**Pennsylvania.**—*Bevan v. Cullen* (1847) 7 Pa. 281; *Thompson v. Fisher* (1850) 18 Pa. 310; *Hall v. Sloan* (1873) 9 Phila. 138.

**West Virginia.**—*Ruffner v. Hewitt* (1874) 7 W. Va. 585.

In such cases, however, it must always be understood that the account truly and honestly represents the actings of the factor. *Smedley v. Williams* (1849) 1 Pars. Sel. Eq. Cas. (Pa.) 359.

And where the one rendering the account knows that he has included items against the other that he had no right, under the contract, to include, the retention of the account does not make it an account stated or create an estoppel. *Blanck v. Pioneer Min. Co.* (1916) 93 Wash. 26, 159 Pac. 1077.

An account rendered which does not pretend to be a final adjustment and settlement of the transaction between the parties, but which is simply for the purpose of giving information, will not become an account stated by mere failure to object to it. See *Glasscock v. Rosengrant* (1892) 55 Ark. 376, 18 S. W. 379; *Harrison v. Henderson* (1903) 67 Kan. 202, 72 Pac. 878; *Lockwood v. Thorne* (1858) 18 N. Y. 286; *Harvey v. West Side Elev. (Patented) R. Co.* (1878) 13 Hun (N. Y.) 392.

The principle that an account rendered will be deemed an account stated from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a rea-

sonable time, cannot be applied where the only evidence as to the rendition of an account was to the effect that an account current was transmitted by the factor to his principal from time to time, it not appearing that in such account a balance was struck, and that the business and correspondence of the parties had subsequently proceeded as before without objection. *Freeman v. Howell* (1849) 4 La. Ann. 196, 50 Am. Dec. 561.

A principal who received the account current of his factors in February, and retained it without objection until the time his bill for an accounting was exhibited in January of the following year, must be deemed impliedly to have admitted the correctness of the account, although such admission will not operate so conclusively against him as to prevent him from surcharging and falsifying. *Langdon v. Roane* (1844) 6 Ala. 518, 41 Am. Dec. 60.

Where the parties lived in the same city and were in the habit of almost daily intercourse, the retention of the account for upwards of five weeks without objection, coupled with the fact of the principal's dealing with the factor upon the old footing, estops him from going into the question whether the sales had or had not been made at an inadequate price. *Smedley v. Williams* (1849) 1 Pars. Sel. Eq. Cas. (Pa.) 359.

So, where a commission merchant rendered an account of sale to his consignor, who drew upon him for proceeds, the silence of the consignor for more than six months thereafter raised a legal presumption of his assent. *Hall v. Sloan* (1873) 9 Phila. (Pa.) 138.

In *Allen-West Commission Co. v. Patillo* (1898) 33 C. C. A. 194, 61 U. S. App. 94, 90 Fed. 628, it was held that a failure for two years to object to a statement of account rendered by a factor, which included a charge for commissions on property not shipped to him, but on which he claimed commissions under his contract, rendered the account a stated one.

An account of sales, rendered by a factor to his principal from time to

time, and containing items of charges for storage and insurance to which no objection was made until the commencement of the suit, may be regarded as prima facie evidence of the correctness of the account. *Bailey v. Bensley* (1877) 87 Ill. 556.

The principal cannot object to charges of interest on the balances carried forward from preceding statements of account. *Allen v. Nettles* (1887) 39 La. Ann. 788, 2 So. 602; *Flower v. O'Bannon* (1891) 43 La. Ann. 1042, 10 So. 376.

If the principal has accepted without objection statements of account from his factor in which the gross price received on sales was not stated, but merely the net price after deducting charges for cartage, demurrage claims by the railroad company, and commission, he is bound by them if they were in fact correct, and cannot complain that by reason of the statements of the account in this way the factor should be deprived of his commission. *Everingham v. Halsey* (1899) 108 Iowa, 709, 78 N. W. 220.

#### Circumstances tending to rebut presumption of acquiescence.

To give an account rendered the force of an account stated because of silence on the part of the person receiving it, the circumstances must be such as to justify an inference of assent on his part to its correctness.

In determining whether the retention of an account rendered by a factor amounts to an implied admission of and acquiescence in its correctness, the circumstances attending the previous dealings between the parties, tending to show their feelings and relations with each other, must be taken into consideration. *Wittkowski v. Harris* (1894) 64 Fed. 712.

Where a factor transmitted to his principal accounts of two different sales of the same goods, the principal, after having approved the first, was not bound to notice or object to the second at the peril of its being taken as a stated account and held to be binding upon him. *Cartwright v. Greene* (1866) 47 Barb. (N. Y.) 9.

The rule that a failure to object to

an account rendered will give it the effect of an account stated is inapplicable as between parties to an executory contract, and to the mutual accounts rendered by one party to the other. *Dodge v. Brown* (1914) 74 W. Va. 466, 82 S. E. 262.

Where the factor holds title to and asserts a lien upon the principal's goods, so that the principal could not, during the term of their contract, en-

force his objection to the compounding of interest on monthly balances without the risk of wrecking his business, his retention of subsequent monthly statements rendered by the factor in which interest is compounded does not preclude him from subsequently contesting the factor's right to do so. *Spain v. Talcott* (1915) 165 App. Div. 815, 152 N. Y. Supp. 611.

E. S. O.

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WILLIAM EGLESTON, Intervener, Plff. in Err.,

v.

TRUST COMPANY OF GEORGIA, Exr., etc., of Thomas Egleston, Deceased.

*Georgia Supreme Court — October 18, 1917.*

(147 Ga. 313, 93 S. E. 878.)

**Will — discretion as to objects of bounty — effect.**

1. A provision in a codicil, "that any person not named for bequests by being overlooked by me, and who the executors feel was an oversight, be provided for liberally, and before provision is made for any charitable object," is unenforceable, because it is too indefinite and too uncertain.

[See note on this question beginning on page 297.]

— rule for construction.

2. Every will is so much a thing of itself and, generally, so unlike other

wills, that it must be construed by itself as containing its own law.

Headnote 1 by GILBERT, J.

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**ERROR** to the Superior Court for Fulton County to review a decree construing the will of Thomas Egleston, deceased. *Affirmed.*

Statement by Gilbert, J.:

The Trust Company of Georgia, as executor of the will of Thomas Egleston, deceased, filed a petition for construction of the will, and for general direction. William Egleston filed his intervention. A codicil to the will contained, among other provisions, the following: "And that any person not named for bequests by being overlooked by me, and who the executors feel was an oversight, be provided for liberally, and before provision is made for any charitable object." The judge of the superior court in his decree held that this provision is "too indefinite to be effectual, and is in-

capable of being carried out by the executor and the advisory trustees, or either of them, and is therefore void and of no effect." This ruling is excepted to upon the ground that it is contrary to law; and also, among other grounds, because "said provision is a valid and binding testamentary disposition; and upon the ground that said provision is not too indefinite to be effectual; and upon the ground that said provision does not lack certainty; and, further, upon the ground that it is not so broad and far-reaching in its scope as to endanger the carrying out of the general scheme of the testator's will, and being inconsis-

ent with its real intention; and because it is not incapable of being executed on the ground that the executor and advisory trustees cannot ascertain whether a person was overlooked by the testator, or whether the failure to provide for a person was an oversight."

Messrs. Moise & Riddell for plaintiff in error.

Messrs. Anderson & Rountree, King & Spalding, H. A. Alexander, C. H. Cohen, and R. S. Cohen for defendant in error.

Gilbert, J., delivered the opinion of the court:

The validity of the foregoing excerpts from the codicil depends upon whether the executor and advisory trustees can determine (1) what "persons" were "overlooked;" (2) whom the executors felt were thus "overlooked" by "oversight;" and (3) what would be a liberal provision for such persons. Without attempting to analyze, reconcile, or explain the almost endless views upon the question involved, to be found in decisions and other authorities, we are of the opinion that the provision of the codicil is unenforceable, because it is too indefinite and too uncertain. The proposed bequest is not limited to friends or relatives, or to any class of "persons." It might be possible to determine what would be a liberal provision, in the light of the value of the entire estate and the bequests already made certain, provided an intelligent and reasonably accurate limit could be fixed to the number of beneficiaries entitled to take under the provision. But we do not see how it could be determined that any particular person not named for a bequest in the will was "overlooked" by the testator, due to "oversight." The mere fact of relationship or friendship, together with a failure to receive mention in the will, does not necessarily imply an "oversight." Every will is so much a

thing of itself, and, generally, so unlike other wills, that it must be construed by itself

*Will—rule for construction.*

as containing its own law. *Olmstead v. Dunn*, 72 Ga. 850. This is especially true of the will now under consideration. The intention of the testator, ascertained from the words of the will, under the law existing at the time it takes effect, and subject thereto, is the paramount guide; but where that intention is expressed in terms too indefinite and uncertain to permit enforcement, it amounts to no expression of intention. The intention of this testator as to other dispositions of his property was clearly and unmistakably expressed in the will; and the courts should adhere to that which is without doubt, rather than wander into the dangerous and doubtful paths of uncertainty. In the case of *Minot v. Atty. Gen.* 189 Mass. 176, 75 N. E. 149, the court had under consideration the terms of a will where the testator bequeathed a part of his estate to "any of testator's relatives, whom 'without reason' he might have overlooked, such sum as might seem to . . . his executors, under all the circumstances, fitting, suitable, and proper." This provision was held void for uncertainty and indefiniteness. In the opinion the court said: "When an attempt is made to define the class of relatives intended, there is nothing disclosed by any extrinsic facts from which it can be determined that any of the testator's relatives whom he may have omitted were unintentionally overlooked. If construed to mean relatives whom he may have forgotten, we are no nearer a definition; for there is no standard provided by him by which to ascertain how far he may have remembered and purposely omitted them, or, without such an intention, failed to recall them when making a testamentary disposition of his property. Before any distribution could be made, the executors or the court would be called upon to decide,

and must determine, not who were the testator's relatives at the time of his death, but what members of this class had been forgotten by him. Manifestly this would be a practical impossibility." In that case the bequest was limited to relatives. Otherwise the case is very similar to this case.

The trial court did not err in adjudging that the provisions of the codicil in question were void and of no effect.

—discretion as to objects of bounty—effect.

Judgment affirmed.

All the Justices concur, except Fish, Ch. J., and Beck, P. J., absent.

## ANNOTATION.

### Validity of provision in will vesting discretion in executor or third person as to objects of testator's bounty.

#### I. Introductory, 297.

#### II. Provision held invalid, 297.

#### III. Provision held valid, 299.

##### 1. Introductory.

The purpose of this note is to present the decision involving the question whether a testamentary provision, whereby the testator gives to his executor or to a third person discretionary power to select the person or persons who shall receive his bounty, is valid. It excludes all cases dealing with testamentary provisions for the creation of charitable, educational, religious, or precatory trusts, except where such a provision is intermingled with one within the scope of this note. It also excludes all cases dealing with a general devise or bequest in trust to be distributed as the trustee may see fit or think proper, and all cases dealing with the creation of a power of appointment.

##### II. Provision held invalid.

It is an elementary rule that to create a valid testamentary gift or trust, the instrument should clearly show the person or persons to whom it is to be applied, and the absence of a definite and ascertainable beneficiary is, as a general rule, fatal to the validity thereof.

As was said in *Nichols v. Allen* (1881) 130 Mass. 211, 39 Am. Rep. 445: "A trust which by its terms may be applied to objects which are not charitable in the legal sense, and to persons not defined by name or class, is too indefinite to be carried out."

This rule has been applied in each

of the following cases, wherein it was held that a testamentary provision, giving an executor or a third person discretionary power to select the person or persons who were to receive a bequest or devise, was void for lack of definiteness or certainty: *Wilce v. Van Anden* (1911) 248 Ill. 358, 140 Am. St. Rep. 212, 94 N. E. 42, 21 Ann. Cas. 153; *Nichols v. Allen* (1881) 130 Mass. 211, 39 Am. Rep. 445; *Minot v. Atty. Gen.* (1905) 189 Mass. 176, 75 N. E. 149; *Walter v. Walter* (1908) 60 Misc. 383, 113 N. Y. Supp. 465, affirmed in (1909) 133 App. Div. 893, 118 N. Y. Supp. 268, which is affirmed in (1910) 197 N. Y. 606, 91 N. E. 1122; *Weller v. Weller* (1899) 22 Tex. Civ. App. 247, 54 S. W. 652; *Vezey v. Jamson* (1822) 1 Sim. & Stu. 69, 57 Eng. Reprint, 27; *Ross v. Ross* (1893) 25 Can. S. C. 307; *Higginson v. Kerr* (1898) 30 Ont. Rep. 62; *McIsaac v. Beaton* (1905) 37 Can. S. C. 143, 3 Ann. Cas. 612.

The rule heretofore stated is aptly illustrated in *Vezey v. Jamson* (1822) 1 Sim. & Stu. 69, 57 Eng. Reprint, 27, wherein it appeared that a testator gave the residue of his estate to his executors in trust to dispose of in their discretion, either for charitable or public purposes, or to any "person or persons," or otherwise, as they might see fit; and it was held, the gift being expressly on trust, that the trustees could not hold it for their own benefit; and, the purpose of the trust being so general and undefined as to be incapable of execution by the court, a trust resulted for the next of kin.

In *Nichols v. Allen* (1881) 130

Mass. 211, 39 Am. Rep. 445, it appeared that a testatrix devised her residuary estate to her executors, "to be by them distributed to such persons, societies, or institutions as they may consider most deserving;" and it was held that the executors took in trust, but that, the testatrix not having defined the trust sufficiently to enable the court to execute it, the residuary estate passed to her next of kin by way of a resulting trust.

A case somewhat analogous to that of the reported case (*EGLESTON v. TRUST CO. OF GEORGIA*, ante, 295) arose in *Minot v. Atty. Gen.* (1905) 189 Mass. 176, 75 N. E. 149, wherein it appeared that the testator authorized his executors, or the survivor of them, to use the estate bequeathed for charitable objects, and "for the purpose of giving to any relative of mine, whom without apparent reason I may have overlooked, such sum as may seem to them or him, under all the circumstances, fitting, suitable, and proper." The court said that there was "an intention plainly expressed to include certain of his relations, though they may be indefinitely described," and held that the several purposes were not charitable in a legal sense, and, as the fund could be applied for such purpose as the executors might deem proper, there was no charitable trust created. The court further said: "When an attempt is made to define the class of relatives intended, there is nothing disclosed by any extrinsic facts from which it can be determined that any of the testator's relatives whom he may have omitted were unintentionally overlooked. . . . He might have said, Any relative whom I may have omitted, and it may be that this could be held to mean those for whom he had not provided, but who, in the event of his intestacy, would have shared in the distribution of his estate. . . . Of course, under such a construction, those who were to take could be readily determined; but his purpose evidently was not so broad, for he adds a limiting and discriminating phrase, 'whom without apparent reason I may have overlooked.' While the general in-

tention of the testator that the residue of his estate should be held by the executors in trust is fully apparent, the unfortunate terms he employed to express this permits the fund, as we have said, to be wholly applied for objects which are not charitable in law; or for purposes so uncertain as not to be capable of identification; or for the benefit of relatives not named, and who, by reason of the descriptive limitation imposed by him, cannot otherwise be ascertained. The whole trust, therefore, becomes too indefinite for the court to administer, and a resulting trust must be decreed in favor of his next of kin."

A similar ruling was given in *Higginson v. Kerr* (1898) 30 Ont. Rep. 62, wherein it appeared that a testator provided as follows: "I desire that my executors herein named shall have full power to make such and any disposition of the residue and remainder of my property and estate as they, in their judgment, may deem best, and to make due inquiry into the financial and social standing of my relatives in Ireland, and, after an investigation and a proper knowledge is obtained, to make such grants and disposition of a portion of my estate and property as they in their judgment consider best, to such relation." The court held that this attempted disposition was void, saying: "The direction respecting the testator's relations in Ireland is that, after inquiry shall have been made, and after the investigation and proper knowledge obtained, the executors are to make grants and disposition of a portion of the estate and property, as they in their judgment consider best, to such relations. 'A portion' of the estate is mentioned, not stating what portion or what proportion, or affording any means of determining what portion or proportion of the estate and property. The subject is, therefore, quite undefined, and this alone would be fatal to the validity of the attempted disposition. But this is not all, for the objects of the attempted disposition are also indefinite. Both the subject and the object of this disposition, or attempted disposition, are left undefined and wholly

in the discretion or judgment of the executors. This disposition is, as I think, void."

In *Ross v. Ross* (1898) 25 Can. S. C. 307, it appeared that a testator bequeathed a part of his estate to his brother, to be used for certain charitable purposes, and "amongst poor relatives as he may judge best." It was held that the quoted provision was too vague to be enforced. The court said: "'Poor relations' must be interpreted as meaning 'heirs at law.' The word 'poor' is too vague and uncertain to have any meaning attached to it, and must therefore be rejected. The word 'relations,' then standing alone, must be restricted to some particular class, for if it were to be construed generally, as meaning all relatives, it would be impossible ever to carry out the directions of the will. The line must, therefore, be drawn somewhere, and can only be drawn so as to exclude all except those whom the law, in the case of an intestacy, recognizes as the proper class among whom to divide the property of a deceased person who dies intestate, namely, his heirs."

Where a testator bequeathed a sum of money to an individual "for the purpose of dividing the same among such needy relatives . . . of my deceased mother . . . as he in his discretion and judgment may select," it was held that the words used did not create a trust, and that the personal representatives of the legatee were entitled to the sum. *Walter v. Walter* (1908) 60 Misc. 383, 113 N. Y. Supp. 465, affirmed in (1909) 133 App. Div. 893, 118 N. Y. Supp. 268, which is affirmed in (1910) 197 N. Y. 606, 91 N. E. 1122.

In *Wilce v. Van Anden* (1911) 248 Ill. 358, 140 Am. St. Rep. 212, 94 N. E. 42, 21 Ann. Cas. 153, it appeared that the testator authorized his trustees, after certain contingencies, to give so much of a fund "as they may think best and proper to any one or more of my brothers or sisters that may stand in need of the same, in the judgment of my said trustees, and the remainder thereof shall be devoted by said trustees, in their discretion, to

the advancement of the cause of temperance, or in aid of one or more manual training schools in said city of Chicago." It was held that, as the trustees had power to give the entire fund to the brothers and sisters, the whole provision was void for uncertainty. The court said: "In the first place, it is uncertain what, if any, amount will remain upon the death of the annuitants; and, secondly, the trustees have a discretion as to whether they will give what remains, if any, after the death of the annuitants, to a needy brother or sister, or donate it to charity."

In *McIsaac v. Beaton* (1905) 37 Can. S. C. 143, 3 Ann. Cas. 612, it was held that an absolute estate devised to a testator's widow, "to be by her disposed of amongst my beloved children as she may judge most beneficial to her and them," did not constitute a trust which a court of equity could administer or enforce. See also *Re McDougall* (1904) 8 Ont. L. Rep. 640.

A similar decision was rendered in *Weller v. Weller* (1899) 22 Tex. Civ. App. 247, 54 S. W. 652, wherein it appeared that a testator gave his estate to his wife "and her heirs forever, to have and to hold in her own use and benefit until my heirs become of age, and for her to divide equally the amount due to each that she in her judgment shall be entitled to." It was held that a fee-simple estate was vested in the wife, and that the words quoted did not create a trust.

### III. Provision held valid.

In each of the following cases a testamentary provision, whereby an executor or a third person was given discretionary power to select the person or persons who should receive the testator's bounty, was held to be sufficiently definite to constitute a valid and enforceable gift: *Lear v. Manser* (1916) 114 Me. 342, 96 Atl. 240; *Goodale v. Mooney* (1881) 60 N. H. 528, 49 Am. Rep. 334; *Carroll v. Adams* (1907) 105 N. Y. Supp. 967; *Green v. Collins* (1845) 28 N. C. (6 Ired. L.) 139; *Stubbs v. Sargon* (1837) 2 Keen, 255, 48 Eng. Reprint, 626, affirmed in (1838) 3 Myl. & C. 507, 40 Eng. Re-



print, 1022, 7 L. J. Ch. N. S. 95, 2 Jur. 150; *Re Cawthrope* (1914) 26 Ont. Week. Rep. 762, 6 Ont. Week. N. 716.

In *Goodale v. Mooney* (1881) 60 N. H. 528, 49 Am. Rep. 334, it appeared that the will in question provided as follows: "I place the remainder of my property in the hands of my executors, to be distributed by them after my decease, among my relatives and for benevolent objects, in such sums as in their judgment shall be for the best." It was held that a valid bequest in trust was created, the court saying: "His intent, as thus disclosed, appears to have been to distribute his property to his relatives and for charitable objects; and we think it is a fair construction of the residuary clause to hold that the trustees might distribute the remainder of his estate to such relatives within the Statute of Distributions (*Varrell v. Wendell* (1846) 20 N. H. 431) as are needy, and to such charitable objects as he gave specific legacies to. The use of the word 'relatives' excludes all others as individuals. In authorizing his executors to dispose of the remainder to the distributees in such sums as in their judgment shall be best, he evidently had in view the necessities of his relatives, as well as the comparative claims for benevolent support of charitable institutions."

In *Green v. Collins* (1845) 28 N. C. (6 Ired. L.) 139, wherein it appeared that a testator left the residue of his estate to his wife, "to be divided amongst my children as she thinks proper," it was held that an express trust was created which carried the capital and profits until a division to the children in such proportions as the mother might appoint. The court said: "To language so unequivocal it is vain to oppose suppositions that as the testator ought to have provided for his wife, and as he left it to her discretion to make a division among their children, therefore he might have intended to leave it also in her discretion to keep a part or all for herself. If he had such an intention, it is not to be found in the will; but the contrary, very plainly."

Where it appeared that a testatrix

directed her residuary estate to be divided into three shares, one share going to a niece, "for her to divide as she thinks best" with her mother, sister, and four brothers, it was held that, as the will indicated the purpose of the testatrix to devise her property to her nephews and nieces, the bequest was in trust for the persons named. *Carroll v. Adams* (1907) 105 N. Y. Supp. 967.

In *Stubbs v. Sargon* (1837) 2 Keen, 255, 48 Eng. Reprint, 626, it appeared that the testatrix devised certain property to her trustees "in trust to dispose and divide the same unto and amongst my partners, who shall be in copartnership with me at the time of my decease, or to whom I may have disposed of my business, in such shares and proportions as my trustees shall think fit or deem advisable." It further appeared that the testatrix had no partners at the time of her decease, she having disposed of her business prior thereto. It was held that the persons among whom the trustees were to divide the property were the persons to whom she had sold the business.

In *Re Cawthrope* (1914) 26 Ont. Week. Rep. 762, a direction in a will wherein it appeared that the testatrix provided that "all the residue of my estate not hereinbefore disposed of I give and bequeath unto those of my relations who are needy, in such amounts, and to such of the same, as my executors see fit in their discretion," was held valid, the court saying: "In this case there is, I think, a gift of the residue of the estate, to be distributed among such of the needy relations of the testatrix, and in such amounts, as the executor may see fit; a gift which the court would carry into effect if the executors failed to exercise their power over it; but with which the court will not interfere if the executors in good faith, and uninfluenced by improper motives, exercise within a reasonable time their power over it."

In *Lear v. Manser* (1916) 114 Me. 342, 96 Atl. 240, it appeared that the testator gave the residue of his estate to his executor in trust, "to be paid

by him to such person or persons, or to such institution, as shall care for me in my last sickness, such payment to be made to the person or persons, or institution, or any or all of them, as may, in the discretion of my said executor, be equitably entitled thereto." It further appeared that the testator, who was an elderly man, having no nearer relatives than nieces, boarded with a woman for a period of nineteen months prior to his death, and that she cared for him in his last illness; and it was held that she was the person who cared for the testator in his "last sickness," and that the property held by the executor in trust was to be paid to her as the sole beneficiary thereunder. The court said: "In the case at bar the testator did not identify by name the beneficiary of his bequest. But did he not, by the terms of his will, make his intended beneficiary capable of identification with certainty? That is the precise question here involved. The beneficiary intended was to be 'such person or persons, or institution, as shall care for me in my last sickness.' That was the specific description by which the cestui que trust was to be identified. The

provision had respect to the then future when there would be some person or persons, or institution, that had cared for the testator in his last sickness. No one can doubt what is the meaning of the words, 'care for me in my last sickness.' What particular person or persons, or institution, did furnish that care is a provable fact, and in our view readily provable. Indeed, it is established with entire certainty that Mrs. Bradbury is the person who cared for the testator in his last sickness. No one else claims to have done so." Compare, however, *Murdock v. Bridges* (1897) 91 Me. 124, 39 Atl. 475, wherein it appeared that the donor, by a nontestamentary writing, gave her property to W. E. Murdock in trust to pay her debts and then provide for her husband during his life, and after his death "the balance shall go to the people who have cared for me, as W. E. Murdock shall think best." The court held that the trust could not be carried out, for want of certainty as to the beneficiaries, it being a pure benevolence, and not a charity.

H. B.

## EX PARTE SAM FARB.

*California Supreme Court—July 30, 1918.*

(— Cal. —, 174 Pac. 320.)

### Constitutional law — forbidding contract — tips.

1. A statute forbidding a contract between master and servant that tips received by the servant shall belong to the master is unconstitutional, as depriving the parties of due process of law.

[See note on this question beginning on page 310.]

### — protection of contracts.

2. Contracts to work, contracts to employ, and liberty freely to make such contracts are protected by the Constitution.

[See 6 R. C. L. 271.]

### — regulation — police power.

3. The police power extends to the regulation of the contract right conferred by the Constitution.

[See 6 R. C. L. 271, 273.]

### Legislature — discretionary power.

4. The legislature has a large dis-

cretion in determining the proper subjects for the exercise of the police power and as to the methods of putting that power into force by statutes.

[See 6 R. C. L. 203.]

### Courts — power to supervise legislation.

5. The courts must determine whether or not the legislative discretion to control the right of private contract has been exercised in such manner as to interfere unduly with the constitutional right of contract.

[See 6 R. C. L. 272, 273.]

(Richards, J., dissents.)

APPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed for violation of the statute regulating tips. *Petitioner discharged.*

The facts are stated in the opinion of the court.

Messrs. Oscar Samuels and J. Samuels, for petitioner:

Parties may enter into any lawful contract without legislative interference.

Whitebreast Fuel Co. v. People, 175 Ill. 51, 51 N. E. 853; Jordon v. State, 51 Tex. Crim. Rep. 531, 11 L.R.A.(N.S.) 603, 103 S. W. 633, 14 Ann. Cas. 616; People v. Marcus, 110 App. Div. 255, 97 N. Y. Supp. 322; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240.

An agreement between employer and employed, that the employer shall own tips received by the employee in the course of employment, is valid.

Zappas v. Roumeliote, 156 Iowa, 709, 137 N. W. 935.

Under the guise of police power the legislature cannot interfere with the constitutional rights of a citizen in the conduct of a harmless and legitimate business, beyond the point required for protection of the public.

Yee Gee v. San Francisco, 235 Fed. 757; Ex parte Hayden, 147 Cal. 649, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183, 82 Pac. 315; Republic Iron & Steel Co. v. State, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005; Coppage v. Kansas, supra.

Messrs. A. T. Roche and C. M. Fickert, for respondent:

The law at bar, though one of first impression, does not violate any of the announced principles of such legislation under the police power of the state and does not violate any constitutional provision of either the state or the Federal Constitutions.

Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, L.R.A.1915D, 458, 102 N. E. 25; Deyoe v. Superior Ct. 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28; Re Spencer, 149 Cal. 396, 117 Am. St. Rep. 137, 86 Pac. 896, 9 Ann. Cas. 1105; Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; State Public Utilities Commission ex rel. Clow v. Romberg, 275 Ill. 432, P.U.R.1917B, 355, 114 N. E. 191; Opinion of Justices, 103 Me. 506, 19 L.R.A.(N.S.) 422, 69 Atl. 627, 13 Ann. Cas. 745; Re Smith, 143 Cal. 368, 77 Pac. 180; Re

Martin, 157 Cal. 51, 26 L.R.A.(N.S.) 242, 106 Pac. 235; State v. Cullom, 138 La. 395, 70 So. 338; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; Railroad Commission v. Grand Trunk Western R. Co. 179 Ind. 255, 100 N. E. 852; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, L.R.A.1917B, 198, 147 N. W. 195; Nolen v. Riechman, 225 Fed. 812; State v. J. J. Newman Lumber Co. 103 Miss. 263, 45 L.R.A.(N.S.) 858, 60 So. 215; Bazemore v. State, 121 Ga. 619, 49 S. E. 701; Wiseman v. Tanner, 221 Fed. 694; Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; State ex rel. Ornstine v. Cary, 126 Wis. 135, 11 L.R.A.(N.S.) 174, 105 N. W. 792; State v. Balch, 178 Mo. 392, 77 S. W. 547; Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; State v. Latham, 115 Me. 176, L.R.A.1917A, 480, 98 Atl. 578; People v. Weiner, 271 Ill. 74, L.R.A.1916C, 775, 110 N. E. 870, Ann. Cas. 1917C, 1065; Grainger v. Douglas Park Jockey Club, 78 C. C. A. 199, 148 Fed. 518, 8 Ann. Cas. 997; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 764; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854.

Mr. John T. Williams for the sheriff.

Melvin, J., delivered the opinion of the court:

A writ of habeas corpus was issued upon the petition of Sam Farb, found guilty under a complaint charging him with violation of chapter 172 of the Statutes of California of 1917. It is conceded by petitioner's counsel that the one question involved in a final determination of this matter is whether or not that part of the statute is constitutional which prohibits an employer from entering into a contract requiring an employee to surrender to the employer all tips or gratuities received for services rendered to the public on behalf of the employer.

The part of the act pertinent to this discussion is as follows: "Any employer or agent or representative of an employer or other person having authority from his employer to hire, employ or direct the services of other persons in the employment of said employer, who shall demand or receive directly or indirectly from any person then in the employment of said employer, any fee, gift or other remuneration or consideration, or any part or portion of any tips or gratuities received by such employee while in the employment of said employer, in consideration or as a condition of such employment or hiring or employing any person to perform such services for such employer or of permitting said person to continue in such employment, is guilty of a misdemeanor." Stat. 1917, p. 257.

It is the contention of petitioner that this statute permits a violation of the right of employers and employees freely to enter into contracts, that it is in conflict with the provisions of the Federal and state Constitutions, and that it seeks to make an improper extension of the police power of the state.

Respondent seeks to justify the statute upon the ground that it is designed to relieve the public against fraud and imposition arising from the employer's failure to notify the public that the gratuities bestowed upon employees go to the employer; and upon the further ground that the legislature is empowered to enact such laws to "provide for the comfort, health, safety, and general welfare of any and all employees." Cal. Const. art. 20, § 17½. It is further contended in opposition to the writ that regulation will not accomplish the removal of the evil to be overcome, and that therefore the legislature has the right to prohibit any agreement whereby an employer may enjoy any part of the gratuities tendered to the employee.

At the outset it is to be noted that the statute under review does not, by its terms or otherwise, seek to limit or reduce the bestowal of

tips or the practices by which either the keepers of places of public resort or those employed therein may try to wheedle or extort contributions from customers. That the custom of tipping has in many communities grown into proportions that astonish and dismay the person of moderate wealth is undoubtedly true; and that in many establishments one seeking accommodation must either tip or go unserved is equally well known. Therefore we may well concede that the police power might be invoked to prevent, by regulation, some of the evils arising from the tipping custom in those places where it has developed almost into organized blackmail. We cannot see how the statute before us would have any tendency by its operation to benefit the public generally. Indeed, it would rather have the opposite tendency, because the waiter or other employee engaged in serving the public would probably seek very keenly to coax or extort contributions from his customers if he were the sole beneficiary of such payments, while his enthusiasm and art would be less heartily enlisted in getting from customers gifts to be enjoyed exclusively or principally by the employer. The statute, if defensible at all, must be upheld therefore as a measure tending reasonably to protect employees in their health or safety, or to preserve their morals, or to promote their general welfare. That contracts to work, contracts to employ, and liberty freely to make such contracts come under the protection of the very first article of our Constitution, is undoubtedly true. It is also true that the constitutional guaranty freely to make such agreements, while apparently absolute, is qualified by the legislative authority to enact proper laws under the police powers of the state.

Constitutional  
law—protection  
of contracts.

—regulation—  
police power.

It is also true that a large discretion is vested in the legislature in determining, not only the proper sub-

jects for the exercise of the police power, but the methods of putting that power in force by statutes. Yet the courts must determine, in passing upon the constitutionality of such laws, whether or not that discretion has been exercised in such manner as to interfere unduly with the right of contract. We might quote very many authorities from many jurisdictions to illustrate the principles upon which such questions as that now before us should be determined, but we find a brief and sufficient declaration of them in Mr. Justice Shaw's language, in the opinion of this court in a matter involving the right of the limitation by law of the hours of work for women in certain occupations. We refer to *Re Miller*, 162 Cal. 687-693, 124 Pac. 428, where the following language was used:

**Legislature—discretionary power.**

**Courts—power to supervise legislation.**

"Because of the great value to mankind and the consequent paramount importance of the preservation of individual liberty, it is universally admitted and held that the police powers of the legislature are not absolute or unlimited. These personal rights cannot be taken away or impaired at the mere will of the legislature, nor at all, unless public welfare demands it. So far as the effect on himself alone is concerned, each person has the absolute right to judge for himself whether the hard labor which he voluntarily performs is for his best interest or not. The legislature cannot judge for persons in this respect, and interfere solely to prevent them from injuring themselves by excessive labor. The injury must be of such character and extent and to such a number of persons that it may be reasonably supposed that it will cause injury to others, that is, to the community in general, or, as it is expressed, to the public health and general welfare. *Lawton v. Steele*, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499.

"The means adopted to produce

the public benefit intended, or to prevent the public injury, must be reasonably necessary to accomplish that purpose, and not unduly oppressive upon individuals. The determination of the legislature as to these matters is not conclusive, but is subject to the supervision of the courts, and, if the above qualities are wanting, a law arbitrarily interfering with the right of contract, or imposing restrictions upon lawful occupations, will be held void."

In *Miller v. Wilson*, 236 U. S. 373, at page 380, 59 L. ed. 628, 630, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342, 343, involving the same statute, Mr. Justice Hughes thus briefly described the question arising in all cases of this sort: "As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint,—not immunity from reasonable regulation to safeguard the public interest,—the question is whether the restrictions of the statute have reasonable relation to a proper purpose."

Upon the principles above announced, courts have not hesitated to sustain statutes enacted in pursuance of the police power, having the legitimate function of protecting the health or morals of certain classes, but they have been equally ready to apply constitutional rules to the overthrow of laws which, under the guise of such regulation, have interfered with the freedom of contract. It will suffice for the purposes of this discussion to cite a few of the leading cases of that kind. In *Adams v. Tanner*, 244 U. S. 590, 594, 61 L. ed. 1336, 1342, L.R.A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973, the Supreme Court of the United States considered a law enacted by the people of the state of Washington, by which it was declared unlawful for any employment agent to demand or receive, either directly or indirectly, from any person seeking employment, any fee for furnishing him or her with employment or information leading thereto. The statute was held to be in violation of the

guaranty of liberty secured by the 14th Amendment. In the course of the prevailing opinion in that case, Mr. Justice McReynolds, answering the contention that certain abuses had grown up in connection with the business of conducting employment agencies, used the following language: "Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

This language is peculiarly apt in view of the arguments advanced in defense of the statute here under review. We are cited to the incident of a man who employed girls to attend to the checking of hats. These girls were required, as a condition of retaining their employment, to put all tips into a locked box through a slot, and were compelled to comply with the requirements that they should wear dresses and aprons having no pockets, lest they might secrete some of the money and take it away with them. Such an exaction would, of course, be humiliating to the employee, but one desiring to avoid it might resign.

In *Coppage v. State*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240, a statute of the defendant in error, making it a misdemeanor for an employer to require an employee to agree not to become a member of any labor organization during the time of the employment, was held repugnant to the "due process" clause of the 14th Amendment. After citing *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, to the effect that the

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right to sell and the right to purchase labor are correlative, and each subject to regulation by contract, Mr. Justice Pitney, who wrote the opinion of the court, said (236 U. S. 12):

"Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception or to the continuance of that relationship? And may he not insist upon an express agreement, instead of leaving the terms of the employment to be implied? Can the legislature in effect require either party at the beginning to act covertly; concealing essential terms of the employment,—terms to which, perhaps, the other would not willingly consent,—and revealing them only when it is proposed to insist upon them as a ground for terminating the relationship? . . . Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?"

"These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will."

The statute before us is not defensible as a regulatory measure upon any of the grounds which have operated to uphold laws prescribing hours of labor, conditions of workshops, and the like; but this court is urged to uphold it upon the ground that it is designed to protect the public from fraud. We are told that gratuities are bestowed not

upon the employer, but upon the employee, as a reward for promptness or politeness or skill beyond the mere performance of his duty to serve his master's customers, and that when this personal gift is appropriated by the employer a fraud upon the giver is perpetrated. If we concede the correctness of this contention, for the purposes of discussion, still we must declare the statute void, as seeking to overcome by prohibition of any contract between employer and employee, a deception which would instantly disappear if the former were required to post in his place of business a notice of the terms of the contract, whereby he was to have the benefit of gratuities. It can hardly be doubted that an employer might (as a few of them do) forbid the employee, under pain of dismissal for disobedience, to accept any tips. This would be no fraud upon the customer. How then would the customer be defrauded if he were informed that he might not give a tip to the employee, but might bestow a gratuity upon the employer? To ask the question answers it. The law does not tolerate the prohibition of something which may be regulated in such way as to overcome any evils which may be incidentally connected with it. As was said in *Adams v. Tanner*, supra: "Appellant's occupation as agent for workers cannot exist unless the latter pay for what they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation. 'You take my house when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live!'"

In other words, even if it be conceded that the object of the statute is to protect the public from fraud, existing because of keeping people in ignorance of the ultimate disposition of tips bestowed upon employees, the means used to accomplish that object are most unreason-

able. It has been held in California that while the legislature might well regulate or prohibit the transportation of diseased fruit, or prevent deception in the labeling of it, a law requiring every package of fruit to bear a label, naming the county and immediate locality in which the fruit was grown, could not be upheld as a legitimate exercise of the police power. *Ex parte Hayden*, 147 Cal. 649, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183, 82 Pac. 315. It has also been held that, while regulations to prevent deception of the public by the offer of stale eggs as fresh ones are beneficial laws and should be upheld, this object would not be attained by laws requiring each egg brought from without the state of California to bear a printed declaration of the fact of its importation. *Re Foley*, 172 Cal. 744, 158 Pac. 1034, Ann. Cas. 1918A, 180. These and other authorities which might be cited confirm the doctrine that reasonable regulation, where it is practicable, is the only method by which incidental evils sometimes attaching to a legitimate business or calling may be overcome and abolished.

In the foregoing discussion it has been conceded for the purposes of argument that concealment from the customer of the contract by which gratuities are enjoyed by the employer amounts to a fraud upon the said customer. There is nothing essentially immoral in the contract itself, whereby the employee agrees to work for a certain wage and to surrender all tips to his employer. Supreme court of Iowa (correctly, we think) approved an instruction to the effect that while the plaintiff, a bootblack, would be entitled to any gifts by way of tips, the employer might, if he could, prove an agreement on plaintiff's part to turn the tips over to him. *Zappas v. Roumeliote*, 156 Iowa, 709, 137 N. W. 935. If it is lawful, as between employer and employee, to provide for the ownership of tips given into the possession of the latter, it can hardly be said that the patron's ignorance

of it makes the contract unlawful. A waiter, for example, might buy a suit of clothes and agree with the tailor that he would apply all tips to the payment of the bill for the garments until the stipulated price should be fully paid. Would the patrons bestowing those gratuities be defrauded by their ignorance of the contract? Assuredly they would not. Yet such a contract does not differ in principle from one whereby the servant agrees to forego the enjoyment of tips for the sake of his salary, and of retaining his position. In either case it would make no difference whether the extra payment or gift were bestowed because of the good quality of the food (for which the waiter might not be responsible); or the comfort of the chair (for which the barber might deserve no credit); or because of the beauty of the girl in the hatroom, the sweet voice of the cabaret singer, the deftness of the bootblack, or any other attribute or excellence of a personal nature. Even if we concede that the gratuity is essentially a personal earning of the employee, nevertheless it must be true that one may enter into a contract involving the expenditure of one's earnings.

The statute under review is void because it is in conflict with the "due process" provision of the Constitution of the United States, and with § 13 of article 1 of the Constitution of California.

Petitioner dismissed from custody.

We concur: Shaw, J.; Sloss, J.; Wilbur, J.; Lorigan, J.

Angellotti, Ch. J., concurring:

I am of the opinion that, in so far as the act under discussion prohibits any contract between the employer and the employee that all or any tips and gratuities received by the employee while in the employment of the employer shall belong and be paid to the employer, or that prohibits any demand or receipt by the employer from the employee of the tips and gratuities to which he

is entitled under any such contract, it is in violation of provisions of the Federal and state Constitutions. In my opinion the only conceivable ground upon which this portion of the act might be upheld is that it was essential to the protection of the public against fraud. As is shown by the prevailing opinion, the only possible fraud on the public is the keeping of them in ignorance of the ultimate disposition of tips and gratuities conferred by them. That this evil might be sufficiently overcome by reasonable regulation short of absolutely prohibiting a contract between the employee and employer is also sufficiently shown in the opinion. This being so, the authorities amply sustain the conclusion that there can be no such prohibiting of contract. See also *Re Kelso*, 147 Cal. 609, 2 L.R.A. (N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241.

I therefore concur in the judgment discharging the petitioner.

Richards, Judge pro tem. dissenting:

I dissent. The statute under review in this proceeding was not chiefly designed, as the prevailing opinion seems to indicate, "to protect employees in their health or safety, or to preserve their morals, or to promote their general welfare." Its chief and obvious purpose was to deal with the relation or transaction arising between patrons of places of public resort for service, pleasure, or instruction, and the servitors in such places, wherein the former seeks to insure or reward promptness, fidelity, and courtesy on the part of the latter in the performance of some particular service, by the giving to such servitor a sum of money popularly known as a "tip." In the individual instance the offering is usually small and the service slight, but in the concrete a very large proportion of the general public is affected by what has grown to become an almost universal custom. Every person who travels in this age of travel, or who patronizes hotels or restaurants, or attends theaters, lectures, or other public places of amusement or in-



struction, is affected by the custom of giving and receiving tips.

Whether or not it is a pernicious custom, savoring of extortion, and furnishing a fertile soil for flunkeyism, favoritism, and partiality in respect to those elements of promptness, fidelity, and courtesy to which patrons of such public places or conveniences are equally entitled without the voluntary offering or the compulsion of such gratuities, the law in question does not attempt to determine. All that it does is to say that the employer and the servitor shall not make an agreement between themselves, the effect of which would be to divert the gratuity given by the individual patron from the person for whom it was intended, and thus destroy the incentive to prompt, faithful, and courteous service which prompted the gift. Can it be said that a statute which has for its object the preservation of the spirit, intent, and effect of a relation and agreement to which, in the concrete, the general public is the most largely interested party, is invalid when it seeks to prevent the proprietor and the servitor from making another agreement, to which the general public is not a party, the effect of which is to divert the consideration, destroy the incentive, and render ineffectual the relation created by the former agreement? To my mind the right of freedom of contract does not extend so far as to embrace the freedom to make one contract which shall violate the spirit, intent, and obligation of another, particularly when that other is one of a class of like agreements so infinite in number as to affect the public at large.

In addition to this, however, the contract, the freedom to enter into which is upheld by the prevailing opinion, is one which is in its essence unconscionable and fraudulent, and is also one which in many if not most instances is devoid of that very element of freedom as to one of the parties by which it is sought to be justified. It is uncon-

scionable, because by its terms the employer, as the proprietor of the place or service in connection with which the tip is received by his employee, is not entitled to it, since he is already fully paid for whatever he furnishes by his regular charges, which cover and compensate him for the fullest measure of promptness, fidelity, and courtesy toward his patrons on the part of his employees. To permit him to exact more is not only to legalize an overcharge, but is also to encourage discriminations in the price and quality of his service as between those of his patrons who do and those who do not submit to the overcharge. It is fraudulent in respect to those patrons, because it secretly aims to take from them that which they intended for another, and because its effect is to destroy the very incentive for doing those things for which the gratuity was given. The porter, the waiter, the bellboy, the chambermaid, who either willingly or unwillingly enters into a contract with his or her employer by which the tip is to be surrendered, has no longer any interest in doing promptly, faithfully, and courteously the service which the tip was given to insure, and, to the extent of the inevitable lapses in the efficiency of such service, the immediate patron, and by extension the general public, is defrauded of its due.

The suggestion in the prevailing opinion that all this would be avoided by the simple expedient of having the proprietor post in his establishment a notice to the effect that all tips paid to his employees were by agreement to belong to the employer has, it is true, the merit of simplicity, but has nothing else to recommend it. That such notices, as a matter of common knowledge, have never been posted anywhere, may be taken to be sufficient proof that the publication of such an agreement by that means would defeat the very purpose for which the agreement was made, by stopping the flow of tips at once, since the public would have no interest in giving tips to

servitors who had no longer any interest in doing the service with the degree of promptness, fidelity, and courtesy which the tip was given to induce. Besides, it is not the province of the courts to suggest similar ways of remedying admitted evils as a reason for refusing to uphold those which the legislature has seen fit to adopt, in the exercise of its right of selection in the choice of remedies. In so far as the elements of freedom of contract, as between the proprietor and his employee, is concerned, upon which emphasis is laid in the prevailing opinion, it may be safely said that the trend of modern authority and decision is against the longer acceptance of that outworn fiction upon which Adam Smith predicated much of his impractical economics. How much is there of mutual freedom of contract between the proprietor, who has his choice and time in the matter of selecting his servants, and the average applicant for the position of waiter or bellboy or chambermaid, whose every hour of unemployment is a step nearer to starvation? We have already banished this fiction from many of our statutes and decisions, regulating the obligations and liabilities arising out of the relation of master and servant. Why, then, should we invoke it to defeat a piece of salutary legislation, framed in the public interest, and intended not only to forbid fraud upon the public, but also to prevent employers from compelling their employees, under the pretense of an agreement which would not as a rule, from the very nature of things, be voluntary, to yield up to their employers that which they have no right to appropriate? The illustration used in the prevailing opinion of the waiter agreeing with his tailor to turn over to him his tips in payment for a suit of clothes has no possible aptitude,

since in that case the incentive is left in the waiter to earn the tips in order that he may the sooner enjoy the clothes, while no such incentive remains when, by previous agreement or compulsion, his employer appropriates his tips; and, if it be argued that he would still strive to deserve the tip in order to hold the job, then what becomes of the argument based upon his supposititious freedom of contract?

The cases cited in support of the views expressed in the prevailing opinion have no application to the instant case, since their facts bear no similitude to those of the case at bar. The statute under review is novel, and the case is one of first impression. The subject with which the statute deals is one in which the public interest is so far involved as to bring it properly within the purview of the police powers of the state. It is practically conceded in the prevailing opinion that the legislature might well and safely have enacted a statute abolishing altogether the custom of tipping, and declaring it unlawful to permit this practice in any place of public resort, for the reason, as well stated therein, "that the custom of tipping has in many communities grown into proportions that astonish and dismay persons of moderate wealth, and that in many establishments one seeking accommodation must either tip or go unserved." That the state has the almost unlimited power to regulate that which it has full power to destroy has been too frequently decided to require the citation of authority. The statute in question is a step in the way of such regulation which should be sustained upon all the grounds urged in its support.

The writ should therefore be discharged, and the petitioner remanded.

### ANNOTATION.

#### Constitutionality of law regulating right to tips as between master and servant.

The only case found passing upon the constitutionality of the law regulating the right to tips as between an employer and employee, is the reported case (*EX PARTE FAEB*, ante, 301) which holds that while, primarily, tips to a servant belong to the latter, nevertheless it is lawful for an employee and his employer to contract that the latter shall have an interest therein; and hence a law is unconstitutional, as interfering with the right to contract, which prohibits the employer from contracting with his employee that the latter shall account to the former for all tips received. This position finds support in *Wilcocks v. Phillips* (1843) 1 Wall. Jr. 47, Fed. Cas. No. 17,639, which holds that the question as to the right to "kumshaw"

a present to a captain of a ship is to be determined according to general custom, and usage, and that the owner of the ship is not entitled to such presents, or any part thereof, unless it is the custom and usage for the captain to account therefor. That the employer and employee, in the absence of a statute at least, have a right to contract for the disposition of tips, is sustained in *Zappas v. Roumeliote* (1912) 156 Iowa, 709, 137 N. W. 935, which holds that while, primarily, tips received by a bootblack belong to him personally, yet nevertheless, if the master establishes by the burden of proof an agreement on the part of the employee to turn the tips over to him, he is entitled to the same.

A. G. S.

MRS. LEILA TATE, Plff. in Err.,

v.

T. H. MULL.

*Georgia Supreme Court — August 16, 1917.*

(147 Ga. 195, 93 S. E. 212.)

#### Nuisance — dust as.

1. The operation of a cotton ginnery so as to force the cottonseed into a seed house by "air suction," which method causes a great quantity of dust to be expelled through the cracks of the seed house and into the dwellinghouse of an adjacent proprietor, to his great discomfort and injury, is an invasion of his property rights and amounts to a nuisance.

[See note on this question beginning on page 312.]

#### Injunction — when proper remedy.

2. If the injury caused to the adjacent property be continuing, so as to cause a constantly recurring grievance, injunction is an available remedy.

[See 14 R. C. L. 846, 347; 20 R. C. L. 479.]

#### Estoppel — to object to nuisance.

3. The construction of the ginnery without objection from the adjacent proprietor will not debar such proprietor from complaining of a nuisance and resultant injury, due to the improper operation of the ginnery.

[See 20 R. C. L. 496.]

#### Nuisance — duty as to use of property.

4. A landowner has no right to conduct a lawful business on his own land in such a way as to invade and injure his neighbor's property.

[See 20 R. C. L. 438 et seq.]

#### Injunction — against nuisance.

5. In order to maintain an injunction

tion against the maintenance of a nuisance it must appear that by reason of its gravity, or permanent character, or both, the plaintiff cannot be adequately compensated in damages,

or that the injury must be continuing so as to cause a constantly recurring grievance.

[See 14 R. C. L. 347; 20 R. C. L. 479.]

**ERROR** to the Superior Court for Floyd County to review a judgment in favor of defendant in an action brought to enjoin the operation of a cotton ginnery and gasoline engine, and for damages. *Reversed.*

Statement by Evans, P. J.:

Mrs. Leila Tate is the owner of a small cottage occupied by herself, her husband, and their children. T. H. Mull owns an adjoining tract of land upon which he has constructed a cotton ginnery. Mrs Tate brought an action against Mull, alleging that the gasoline engine used in propelling the machinery of the gin created unusual noises, which were very trying to her nerves and health; that the defendant erected a seed house midway between the ginnery and her house, into which seed house he forced the seed by air suction, which method caused a great quantity of dust to be forced through the cracks of the seed house, and the same would settle in her house and on the floors and furniture; that the dust and lint defiled the air, rendering it unhealthy for her to live in her home; and that the operation of the ginnery is a nuisance. The prayer was for damages, and for an injunction against the operation of the ginnery and engine. On the trial, the plaintiff submitted proof tending to show that a short time after she built her home the defendant erected his ginnery; that no objection to its erection was made by her at that time; that the ginhouse is about 35 or 40 yards from the plaintiff's residence, and the seed house is halfway between the ginnery and the residence; that the seed is forced into the seed house from the ginnery by means of air suction; that there are cracks between the planks of the seed house, and through these cracks the dust and lint from the seed are expelled and settle over the floors and window sills and on the furniture in the plaintiff's house; that the ginnery when in operation makes a

great deal of noise, being propelled by a gasoline engine which is continually back-firing and making a noise like the discharge of a shotgun; that when the gin is running it is necessary to close all the doors of the residence and let the windows down, in order to engage in ordinary conversation; that the plaintiff's property was worth \$300 before the ginnery was erected, and it is not worth more than a third of that amount since the ginnery was put in operation. After the plaintiff and her husband and two other witnesses had testified to this effect, and while a witness for the plaintiff was upon the stand, he was asked to state the effect of the operation of the cotton gin upon the residence as affecting its desirability for a home. The court interposed and informed counsel for the plaintiff that the question of an injunction was not in the case, and he would instruct the jury to find against an injunction, because plaintiff had allowed the defendant to construct the ginnery without attempting to prohibit the same; but that he would allow the case to proceed for the recovery of damages. The plaintiff's counsel thereupon renounced all right to recover damages, and insisted that under the evidence he was entitled to go before the jury on the question as to whether the operation of the ginnery, under circumstances disclosed in the evidence, should be enjoined as amounting to the maintenance of a nuisance. Thereupon the court directed a verdict in favor of the defendant against the plaintiff, denying an injunction.

Messrs. Harris & Harris for plaintiff in error.

Messrs. McHenry & Porter for defendant in error.

Evans, P. J., delivered the opinion of the court:

The Civil Code, § 4457, defines a nuisance as "anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinary reasonable man." The operation of a cotton gin is not per se

**Nuisance—  
duty as to use  
of property.**

a nuisance, but it may become so under certain circumstances.

A landowner has no right to conduct a lawful business on his own land in such a way as to invade and injure his neighbor's property. The evidence was to the effect that the defendant erected a seed house near his ginnery and a few yards from the plaintiff's residence, into which seed house he forced the seed from the ginnery by air suction, which method caused a great quantity of dust to be forced through the cracks of the seed house and to settle in the plaintiff's home and on the floors and the furniture therein, the effect of which was to depreciate the value of the home by \$200. From this evidence the jury would be authorized to find that the defendant was maintaining an actionable nuisance.

**—dust as.**

Ginnery, 122 Ga. 29, 49 S. E. 746. In order to

**Injunction—  
against  
nuisance.**

obtain an injunction against the maintenance of a nuisance, it must appear that by reason of its gravity, permanent character, or both,

the plaintiff cannot be adequately compensated in damages, or that the injury must be continuing so as to cause a constantly recurring grievance. *Farley v. Gate City Gaslight Co.* 105 Ga. 323, 337, 31 S. E. 193. Although the plaintiff waived her right to damages, if the jury should find from the evidence that the manner in which the gin was operated constituted a nuisance, with resultant injury to the plaintiff's property, and the nuisance was a continuing one, the plaintiff would be

**—when proper  
remedy.**

entitled to an injunction against its continued maintenance. The circumstance that the ginnery was constructed in close proximity to the plaintiff's residence, without objection on her part, does not deprive her of her right to bring an action to enjoin the operation of the ginnery in such a way as to make it a nuisance. The doctrine of estoppel does not apply where a landowner sees his neighbor erecting a building to be used in a lawful enterprise, where there is nothing to suggest that the machinery

therein employed will be so improperly operated as to injure and damage his property. The plaintiff is not entitled to an injunction against the operation of the ginnery in a proper manner; but if it is made to appear that its operation is in such manner as to amount to a continuing nuisance, she would be entitled to an injunction against the defendant maintaining such nuisance. *Faulkenbury v. Wells*, 28 Tex. Civ. App. 621, 68 S. W. 327.

**Estoppel—  
to object to  
nuisance.**

Judgment reversed.

All the Justices concur.

## ANNOTATION.

### Dust as nuisance.

#### I. Introductory, 313.

#### II. What dust constitutes nuisance:

- a. Dust sufficient to constitute nuisance, 313.

#### II.—continued.

- b. Dust insufficient to constitute nuisance, 319.

#### III. Anticipatory nuisance from dust, 321.

*I. Introductory.*

This note collates the cases passing on the question whether dust, including sawdust, marble dust, coal dust, and other forms of dust and dirt, constitutes a nuisance. It does not include cases involving coal dust emanating from steam engines or railroads or the cases involving the burning of soft coal as a nuisance, nor does it discuss smoke as a nuisance.

*II. What dust constitutes nuisance.**a. Dust sufficient to constitute nuisance.*

Any dust which substantially interferes with the comfortable enjoyment of adjacent premises constitutes a nuisance.

**Alabama.**—*Harris v. Randolph Lumber Co.* (1912) 175 Ala. 148, 57 So. 458.

**Georgia.**—*Ponder v. Quitman Ginery* (1905) 122 Ga. 29, 49 S. E. 746.

**Illinois.**—*Cooper v. Randall* (1869) 53 Ill. 24; *Wylie v. Elwood* (1890) 184 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570; *Chicago-Virden Coal Co. v. Wilson* (1896) 67 Ill. App. 448; *Winters v. Winters* (1898) 78 Ill. App. 417.

**Kentucky.**—*Mahan v. Doggett* (1905) 27 Ky. L. Rep. 103, 84 S. W. 525.

**Maine.**—*Norcross v. Thoms* (1862) 51 Me. 503, 81 Am. Dec. 538.

**Maryland.**—*Jackson v. Shawinigan Electro Products Co.* (1917) 132 Md. 123, 103 Atl. 458.

**Missouri.**—*Blackford v. Heman Constr. Co.* (1908) 132 Mo. App. 157, 112 S. W. 287.

**New Jersey.**—*Kroecker v. Camden Coke Co.* (1913) 82 N. J. Eq. 373, 88 Atl. 955.

**New York.**—*Fish v. Dodge* (1847) 4 Denio, 311, 47 Am. Dec. 254; *Hutchins v. Smith* (1872) 63 Barb. 251; *Catlin v. Patterson* (1887) 10 N. Y. S. R. 724; *Dunsbach v. Hollister* (1888) 49 Hun, 352, 2 N. Y. Supp. 94, affirmed in (1892) 132 N. Y. 602, 30 N. E. 1152; *Moon v. National Wall Plaster Co.* (1900) 31 Misc. 631, 66 N. Y. Supp. 33, affirmed in (1900) 57 App. Div. 621, 67 N. Y. Supp. 1140; *Pritchard v. Edison Electric Illuminating Co.* (1904) 92 App. Div. 178, 87 N. Y. Supp. 225,

affirmed in (1904) 179 N. Y. 364, 72 N. E. 243.

**Pennsylvania.**—*Sullivan v. Jones & L. Steel Co.* (1904) 208 Pa. 540, 66 L.R.A. 712, 57 Atl. 1065.

**Texas.**—*Citizens Planing Mill Co. v. Tunstall* (1913) — Tex. Civ. App. —, 160 S. W. 424; *Faulkenbury v. Wells* (1902) 28 Tex. Civ. App. 621, 68 S. W. 327.

**England.**—*Pwllbach Colliery Co. v. Woodman* [1915] A. C. 634, W. N. 108, 84 L. J. K. B. N. S. 874, 113 L. T. N. S. 10, 31 Times L. R. 271, Ann. Cas. 1915D, 833.

**Canada.**—*Cairns v. Canada Ref. & Smelting Co.* (1914) 6 Ont. Week. N. 562, 26 Ont. Week. Rep. 490.

**Blacksmith shop.**

In *Norcross v. Thoms* (Me.) supra, it appeared that the defendant moved his blacksmith shop within a few feet of the plaintiff's hotel, and, by reason of the cinders, dust, and ashes arising from the shop, the plaintiff was injured in his property and suffered a loss. It was held that the business as so located and operated was a nuisance.

**Carpet-cleaning plant.**

In *Rodenhausen v. Craven* (1891) 141 Pa. 546, 23 Am. St. Rep. 306, 21 Atl. 774, it appeared that a carpet-cleaning establishment was conducted by the defendant. When carpets were being cleaned, dust and moths sifted into the adjoining house, causing considerable annoyance. The owner was not even able to lay his carpets. In affirming an injunction restraining defendants from maintaining a nuisance, it was held that a carpet-cleaning establishment was not per se a nuisance, but it might become so by the manner in which the business was conducted. The court said: "The evidence fully justified the finding of the master that defendant's stable and carpet-cleaning establishment were nuisances. While such establishments are not necessarily nuisances, or nuisances per se, they may become so by reason of their location and the manner in which the business is conducted. It is necessary to have carpets cleaned, and this involves a place where such work may be done; but

care should be exercised to locate such establishments where they will cause the least annoyance to others. In this case, the defendants selected a neighborhood devoted to private residences, and immediately adjoining the complainant's house. The natural result followed, and his home was rendered uncomfortable by the dust and moths from the carpets in the process of cleaning. This was not an imaginary grievance; it was a reality,—a nuisance of a very serious character."

**Coal or coke handling.**

In *Kroecker v. Camden Coke Co.* (N. J.) *supra*, a bill to enjoin the operation of certain works which produced smoke, dust, soot, dirt, gases, and vapors, and caused discomforts, and depreciated the value of real estate in that neighborhood, it appeared that the dust was caused by the loading, unloading, and dumping of soft coal and coke. In granting the relief sought it was held that dust, smoke, soot, dirt, and cinders constituted a nuisance. The court said: "It was attempted to be shown by the defendant in this case that there was more or less smoke arising from other factories and from locomotives in the same neighborhood where complainants live, but, after giving full consideration to all the evidence on this subject, and having regard to the smoke almost incessantly emitted from one or more of the defendant's 150 coke ovens, day and night, and especially having regard to the unceasing activity of the steam bucket dipping up and dumping down soft coal and coke, a ton and a half at a time, each time creating a cloud of dust, day and night, as well as considering the enormous quantity of coal and coke thus handled every twenty-four hours, I am of opinion that the smoke from the defendant's ovens, taken with the coal dust and coke dust produced by this coal-handling apparatus, created a completely new state of things as regards the complainant's premises, and that such smoke and dust materially interfere with the comfort of human existence in the complainants' houses, and, as seen in *Crump v. Lambert* (1867) L. R. 3 Eq. (Eng.) 409,

15 L. T. N. S. 600, 15 Week. Rep. 417, these are separately actionable."

In *Wylie v. Elwood* (1890) 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570, it appeared that the defendants maintained a coal shed and handled large quantities of coal by means of steam-driven machinery, causing large quantities of coal dust and dirt to invade the plaintiff's house. The action was for damages sustained by the plaintiff by reason of the coal dust and dirt settling on books, furniture, clothing and food, and other places. A question arising as to the right of plaintiff to maintain the suit, as the act complained of was in the nature of a public nuisance, the court held that while the nuisance was public in nature, the plaintiff, having suffered special damages, could recover therefor. It was said: "In the case at bar, if the coal dust falls upon the furniture, food, and clothing in the appellee's house, he suffers a special damage to his own property, even though it be true that coal dust from the same coal shed falls upon the man who passes on the street in front of his door, or upon similar articles of property in his neighbor's house. If the noise of the grinding machinery deafen him in his own dwelling, the rest and quiet, which he is entitled to enjoy in his home, are disturbed, and he is none the less injured because the home of his neighbor is rendered unendurable from the same cause. Injury to a vested right is a sufficient special damage to maintain an action against the promoter of a public offense."

In *Pwllbach Colliery Co. v. Woodman* [1915] A. C. (Eng.) 634, Ann. Cas. 1915D, 833, it appeared that both the plaintiff and the defendants were lessees of the same lessor, and that coal dust from the defendants' plant blew on the premises of plaintiff, invading his house and causing injury to his meats. The court said: "The jury found that this was a nuisance, but that the operations of the company were carried on in a reasonable manner and in the ordinary way in which such operations are usually carried on in the county of Glamorgan.

Also they found that the nuisance was not caused by the negligence of the company. At the trial, judgment was entered for the defendant company, but the court of appeals reversed that judgment, and now it comes before your Lordships. It is quite clear that if a nuisance has been committed no one can excuse it by simply saying: I only did what is usually done in this county, and I was not in any way negligent. No doubt the character of the locality may be considered when the question is whether or not there has been any nuisance, but here that question is settled by the jury's verdict. Nor is it material that the company are absolved from negligence. Their duty to their neighbor is not merely to take care so as to avoid causing a nuisance. Their duty is to abstain from causing one and all, unless, of course, they have a right to cause one, as, for example, by statute, or by consent of the complaining party or of someone whose consent binds him." The court further held that the jury had found that the nuisance complained of consisted in dust entering complainant's house, and settling on his meats and sausages. It was said: "In the present case the jury found the defendants guilty of nuisance. The nuisance consists in allowing a quantity of coal dust to escape from their works onto and into the plaintiff's shop, to the damage of the sausages and meat which the plaintiff keeps and sells there."

In *Chicago-Virden Coal Co. v. Wilson* (1896) 67 Ill. App. 443, it appeared that the plaintiff was injured by smoke, gas, and dust being carried into his house and injuring his furniture and apparel, and causing great physical discomforts. The defendants were building a switch on an embankment of slack which ignited spontaneously, which caused the smoke, gas, and dust. It was held that these constituted a nuisance.

The relief sought in *Kroecker v. Camden Coke Co.* (1913) 82 N. J. Eq. 373, 88 Atl. 955, was for an injunction restraining the operation of the defendant's works in such manner as to produce dust, smoke, soot, dirt, gases,

and vapors. The court held that the works, by reason of the dust, soot, cinders, and smoke, were a nuisance. It was said: "I conclude, therefore, that at the time of the filing of the bill, and before and afterwards, down to the completion of the taking of the testimony, the defendant's works in this aspect of the case, that is, with respect to smoke, cinders, soot, and dirt, occasioned a nuisance of which each of the complainants, being an owner or occupier of property in that neighborhood, has a right to complain, and from which they and each of them have a right to relief in this court."

#### Cotton gin.

In *Ponder v. Quitman Ginnery* (1905) 122 Ga. 29, 49 S. E. 746, it appeared that the defendants maintained a cotton gin close to the plaintiff's house, and that dust, dirt, and lint were thrown into the air by artificial means, which damaged the plaintiff, settling on furniture, carpets, etc. It was held that the plaintiff was entitled to recover damages. The court said: "The action is one for damages accruing from the erection and maintenance of a private nuisance. The tortious act complained of is the operation of a ginnery, situated in close proximity to the plaintiff's premises, in such a manner as to seriously interfere with her enjoyment thereof as a home. 'A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste; it must be such as would affect an ordinary reasonable man.' Civ. Code, § 3861. The plaintiff has a natural right to the enjoyment of the unpolluted air; and if the defendant corporation, by contaminating the air with dust, dirt, and lint, thrown into the air by artificial means and blown into her dwelling, to her hurt and discomfort, has interfered with her enjoyment of the premises, the defendant must respond to her in damages. *Swift v. Broyles* (1902) 115 Ga. 885, 58 L.R.A. 390, 42 S. E. 277; *Farley v. Gate City Gaslight Co.*



(1898) 105 Ga. 331, 31 S. E. 193. With respect to this alleged unlawful interference with her right of property, at least, the petition set forth a cause of action."

The reported case (*TATE v. MULL*, ante, 310) holds that a cotton gin, while not a nuisance per se, may become so if operated in such a manner as to cause injury to a neighboring landowner by reason of the dust emitted therefrom.

In *Faulkenbury v. Wells* (1902) 28 Tex. Civ. App. 621, 68 S. W. 327, the suit was for damages caused by the operation of a cotton gin on adjoining premises. By reason of its operation, an owner of adjacent property was damaged by the noise, dust, smoke, and lint. The trial judge charged the jury that if they found that the gin created noise, dust, lint, or smoke, interfering with the comfortable enjoyment of adjoining property and house, then the plaintiff was entitled to recover. The court, holding that these instructions were correct, said: "The court instructed the jury that the business in which defendants were engaged was lawful and not necessarily a nuisance, but might become so, when conducted in such close proximity to a private residence as to materially interfere with the comforts of such residence as a home. The jury was further instructed that if the defendants in the operation of the gin created and generated noise, dust, lint, or smoke, and that the same were carried into the house of Wells, and were calculated to and did, in material respects, interfere with Wells and his family in the comfortable enjoyment of their home, and that they were thereby subjected to the annoyances and discomforts alleged, then the plaintiffs were entitled to recover the damages sustained by Wells and wife in his lifetime. Appellants complain of these charges on the ground that they authorize the jury to find the gin to be a nuisance from the mere fact of its proximity to the Wells residence. The complaint is without merit. The charges, considered together, clearly negative the construction contended for by appellants, and

authorized a recovery by the plaintiffs only in case the jury found that the gin, as located, constructed, and operated, constituted a nuisance. The charges given by the court rendered unnecessary the giving of additional instructions in regard to the right of appellants to pursue the business sought to be enjoined. Appellants offered to prove that it would cost them about \$1,000 to move their plant to another location. The proposed testimony was excluded. This ruling of the court was correct. If the gin was a nuisance, appellees were entitled to have it abated."

#### **Electric light plant.**

In *Pritchard v. Edison Electric Illuminating Co.* (1904) 92 App. Div. 178, 87 N. Y. Supp. 225, affirmed in (1904) 179 N. Y. 364, 72 N. E. 243, it appeared that the plaintiff was damaged by noise, vibration, smoke, soot, dust, cinders, and ashes, caused by the operation of the defendant's plant. It was held in affirming the judgment in favor of plaintiff that, the jury having found that the business constituted a nuisance, it was no defense to prove that the business could not have been conducted without being a nuisance. The court said: "The use to which the defendant put this property was no less a nuisance because no care in the operation of the machinery supplied would prevent it from being one. It is not alleged that the defendant negligently conducted its business, or that the machinery was not proper for that purpose, but that the generation of electricity upon these premises by proper machinery, carefully used, necessarily caused the vibration, dirt, dust, cinders, and odors that made the conduct of such a business in such a locality a nuisance; and the jury by their verdict having found that it was such a nuisance, it was no defense to prove that such a business could not have been conducted in such a locality without its being a nuisance."

#### **Factory.**

In *Jackson v. Shawinigan Electro Products Co.* (1918) 132 Md. 128, 103 Atl. 453, it appeared that the operation of a manufacturing plant caused

a near-by owner of building lots damage by reason of noise, dust, smoke, vapor, etc., being blown upon the land. It was held, in reversing a judgment for the defendant, that there was sufficient evidence that such conditions amounted to a nuisance, even though the property was unimproved building lots. The court said: "There can be no doubt that there was legally sufficient evidence of such conditions as would amount to a nuisance if the property of the appellant was improved, but the appellee contends that the evidence does not show actual physical discomfort or a tangible visible injury to the property, it being unimproved, and hence it claims that there can be no recovery. There are authorities which have announced the rule in such terms as give some ground for that contention, but when they are applied to such conditions as are alleged to exist in this case, there can be no difficulty about them. The attorneys for the appellee quoted from §§ 511 and 640 of Wood on Nuisances at some length, but the next paragraph of § 511 concludes as follows: 'Where there are no buildings upon the premises, but the land is laid out into building lots, which by reason of the nuisance are reduced in value, a recovery may be had for the difference between the value of the lots with the nuisance there, and their value if no nuisance existed.' In the note are cited *Peck v. Elder* (1849) 3 Sandf. (N. Y.) 126, and *Dana v. Valentine* (1842) 5 Met. (Mass.) 8. If that was not so, great injustice would be done owners of vacant land who had begun or intended to develop it. Of course, the fact of the properties of the plaintiffs being improved is of importance in nuisance cases, as when they are improved the plaintiffs can recover certain damages which they cannot recover when unimproved; but why a defendant should be made liable to A, who has a house on his lot, but not to B, whose lot is unimproved, if the nuisance in fact lessens the value of B's lot, or prevents him from selling it, is not easy to reconcile with the general principle of law that holds the owner of property responsible for

so using his property that he injures others."

In *Fish v. Dodge* (1847) 4 Denio (N. Y.) 311, 47 Am. Dec. 254, it appeared that the defendant demised part of his premises adjoining that of the plaintiff to carry on the business of boiler making, which caused damage to the plaintiff by reason of the noise and dust which entered into her house. The plaintiff kept a boarding house and was damaged by the boarders leaving. It was held that although the making of boilers was lawful, still, if it was carried on in such a manner as to cause annoyance to the plaintiff, she was entitled to recover.

In *Sullivan v. Jones & L. Steel Co.* (1904) 208 Pa. 540, 66 L.R.A. 712, 57 Atl. 1065, it appeared that in the manufacture of steel a certain fine iron ore was used which, during the process, flew over the near-by property, damaging furniture, carpets, roofs, fabrics, trees and other property. In granting an injunction the court said: "The right of a man to use and enjoy his property is as supreme as his neighbor's, and no artificial use of it by either can be permitted to destroy that of the other. To this rule, if at times there are apparently some exceptions, the present case is not one of them."

#### Flour mill.

In *Cooper v. Randall* (1869) 53 Ill. 24, it appeared that a flouring mill was operated on a lot adjacent to the plaintiff's premises, causing large quantities of chaff, dust, smut, and dirt to invade plaintiff's dwelling. It was held that the operation of the mill constituted a nuisance.

#### Limekiln.

In *Hutchins v. Smith* (1872) 63 Barb. (N. Y.) 251, it appeared that smoke, dust, and gases were diffused on lands adjoining limekilns. The court held that they constituted a nuisance, saying: "The plaintiff is entitled to enjoy his premises free from the presence of the smoke, gas, and dust proceeding from the defendant's kiln, and the defendants have no right thus to pollute the air and disturb the

comfortable habitation and the enjoyment of the plaintiff's premises."

**Sand pile.**

In *Dunsbach v. Hollister* (1888) 49 Hun, 352, 2 N. Y. Supp. 95, affirmed in (1892) 132 N. Y. 602, 30 N. E. 1152, it appeared that a dealer in sand maintained a large pile of molding sand near the plaintiff's house. When the wind blew, it blew the sand about her house and it percolated into it, settling on furniture, carpets, curtains and the like. The court held, in affirming a judgment in favor of plaintiff, that a business lawful in itself may be so conducted as to constitute a nuisance, saying: "The defendant's business is lawful, if properly conducted; it is not a nuisance per se, but may be so negligently conducted as practically to become a nuisance. . . . The rule that you must use your own so as not to injure another is not of universal application . . . but the rule has at least this extent: you must not use your own so as to injure another if you obviously can, with reasonable care and without unreasonable effort or expense, avoid it. The question becomes one of relative obligation or duty, and the violation of this duty is negligence. Now here, can there be any doubt which is the more reasonable: that the defendant shall build sheds or put some covering over his sand, or that the plaintiff must abandon her property?"

**Stone or ore handling.**

In *Moon v. National Wall Plaster Co.* (1900) 31 Misc. 631, 66 N. Y. Supp. 38, affirmed in (1900) 57 App. Div. 621, 67 N. Y. Supp. 1140, it appeared that, owing to remediable defects in the machinery of a plant calcining gypsum rock and manufacturing wall plaster, it threw obnoxious dust on premises of the adjoining owner. The court held that this constituted a nuisance.

In *Cairns v. Canadian Ref. Co.* (1914) 26 Ont. Week. Rep. 490, it appeared that particles of arsenic dust escaped from the defendant's works and were deposited on the plaintiff's premises to such an extent as to cause him material injury, poisoning his water and stock. In proceedings to

restrain this escape of arsenic dust, it was held that the arsenic dust constituted a nuisance. The court said: "The defendants have no right to permit so dangerous a material as arsenic to escape from their premises into the atmosphere, and thence be carried by the wind upon the land of the plaintiff and others; and the plaintiff is entitled to an injunction restraining the defendants from continuing and repeating the nuisance complained of in such a manner as to injuriously affect the plaintiff's said lands, or the plaintiff in his ownership and occupation thereof."

In *Blackford v. Heman Constr. Co.* (1908) 132 Mo. App. 157, 112 S. W. 287, it appeared that the defendants maintained a stone crusher which created a fine limestone dust. This dust percolated into the house of plaintiff, settling on carpets, dishes, furniture, and the like, and was a source of constant discomfort and annoyance. It was held, in affirming the grant of an injunction restraining the defendants from discomforting complainant by the escape of limestone dust, that this constituted a nuisance. The court said: "And likewise the defendants may be enjoined from permitting the escape of fine limestone dust which disturbs the comfortable enjoyment of the plaintiff's premises."

**Threshing machine.**

In *Winters v. Winters* (1898) 78 Ill. App. 417, it appeared that plaintiff's furniture was injured and his family annoyed by chaff, dust, and smoke blown into his house from a threshing machine. The court said: "The nuisance complained of was the setting of a grain-threshing machine within 200 feet of the plaintiff's dwelling, and the threshing of grain there a whole day, whereby dust, chaff, and smoke were blown into his house, to the annoyance of his family and the injury of his furniture. The plaintiff showed a clear right to recover."

**Woodworking plant.**

In *Catlin v. Patterson* (1887) 10 N. Y. S. R. 724, it appeared that complainants were damaged by smoke, dust, and soot coming into their premises and destroying their merchandise,

as a result of the defendant's conducting the business of woodworking. It was held in granting the injunction that the smoke, soot and dust constituted a nuisance. The court said: "I have examined the testimony with care, and have also taken a personal view of the premises of the parties and their surroundings, and have come to the conclusion that the smoke, smells, dust, and soot of which the plaintiffs complain proceed from the defendant's premises, and that they are so annoying to the plaintiffs as to constitute a nuisance."

In *Harris v. Randolph Lumber Co.* (1912) 175 Ala. 148, 57 So. 453, a demurrer to a declaration maintaining that near-by dwellings were rendered uncomfortable to tenants by reason of smoke, soot, and dust emanating from near-by mills was sustained. It was held in reversing the ruling that the declaration showed a sufficient cause of action for a nuisance consisting of dust, smoke, and soot.

In *Citizens Planing Mill Co. v. Tunstall* (1913) — Tex. Civ. App. —, 160 S. W. 424, it was alleged, among other things, that the planing mill of appellants caused great quantities of dust, smoke, and noxious vapors to be blown into complainant's house, causing damage and great inconvenience. It was held that the planing mill was a nuisance.

In *Mahan v. Doggett* (1905) 27 Ky. L. Rep. 103, 84 S. W. 525, the action was for damages caused by the operation of a sawmill. It appeared that a chute which carried off sawdust deposited it within a few feet of the plaintiff's property. The finer particles of dust invaded his house, causing injury to furniture, clothing, meals, carpets, and other contents, and also injured his garden. It was held in affirming a judgment in favor of plaintiff that a person is entitled to enjoy his property in comfort, free from molestation and without its being injured. The court said: "The plaintiff was entitled not only to use his own property without its being injured by defendant, but he had the right to enjoy it in peace and in comfort, free from such molestation. If

appellee's complaint was true, and the verdict of the jury found that it was, he was entitled to recover for the discomforts suffered by him and his family, in addition to the actual damage done to his property; or he was entitled to recover for such discomforts, even though his property sustained no actual damage."

In *Miller v. Gates* (1916) 62 Ind. App. 37, 112 N. E. 538, it was alleged among other things that a sawmill had been erected on an adjoining lot, which created dust, smoke, and other objectionable substances. These substances drifted into the residence of plaintiff and covered the contents thereof. It was held that there was sufficient set up in the complaint to show the creation of a nuisance.

*b. Dust insufficient to constitute nuisance.*

Where the dust caused by the operation of a business is only occasional, and the resultant injury is slight, the operation of the business will not be restrained. *Davis v. Whitney* (1894) 68 N. H. 66, 44 Atl. 78; *Hutchins v. Smith* (1872) 63 Barb. (N. Y.) 251; *Butterfield v. Klaber* (1876) 52 How. Pr. (N. Y.) 255; *Roscoe Lumber Co. v. Standard Silica Cement Co.* (1901) 62 App. Div. 421, 70 N. Y. Supp. 1130; *Bentley v. Empire Portland Cement Co.* (1905) 48 Misc. 457, 96 N. Y. Supp. 831; *Hamm v. Gunn* (1908) 51 Tex. Civ. App. 424, 113 S. W. 304; *Gose v. Coryell* (1910) 59 Tex. Civ. App. 504, 126 S. W. 1164; *Montreuil v. Ontario Asphalt Block Paving Co.* (1911) 19 Ont. Week. Rep. 942, 2 Ont. Week. N. 1512; *Oakley v. Webb* (1916) 38 Ont. L. Rep. 151, 33 D. L. R. 35, 11 Ont. Week. N. 132, 27 Ont. Week. Rep. 544.

*Cement works.*

In *Bentley v. Empire Portland Cement Co.* (1905) 48 Misc. 457, 96 N. Y. Supp. 831, it appeared that whenever the wind was in a certain direction cinders, ashes, and cement dust were blown onto near-by premises. The rental value thereof was decreased \$25 per year. This was a prayer to restrain the operation of these cement works which caused the annoyance. The court, while conced-

ing that this constituted a nuisance, refused the prayer for an injunction on the grounds that the injury was only occasional, depending upon the direction of the wind, and was so slight as to enable the complainant to be compensated in damages.

In *Roscoe Lumber Co. v. Standard Silica Cement Co.* (1901) 62 App. Div. 421, 70 N. Y. Supp. 1130, a bill was brought to restrain the operation of defendant's works. It appeared that both the plaintiff's and the defendant's places of business were in a manufacturing section. After holding that the dust was insufficient to constitute a nuisance, the court said: "The rule sought to be applied in this case, if once established, would practically close every factory in the state, and no considerations of public policy or private right demand any such sacrifice of material industries."

In *Montreuil v. Ontario Asphalt Block Paving Co.* (1911) 19 Ont. Week. Rep. 942, a motion for an interim injunction restraining the defendants from allowing limestone dust, smoke, and foul odors to escape from their factory, it appeared that there had been an amelioration of these conditions. It was held that the situation, although a nuisance still remained, was not so intolerable as to necessitate the granting of this motion. The court said: "It can hardly be contended that there is not some nuisance even now, but I do not think that the situation is so intolerable for plaintiff, or his alleged injury so irremediable in its nature, as to create a necessity to anticipate the regular formal disposition at the hearing."

#### **Cotton gin.**

In *Gose v. Coryell* (1910) 59 Tex. Civ. App. 504, 126 S. W. 1164, a proceeding to restrain the operation of a cotton gin, the court held that where the severe relief of injunction is sought it must appear, in addition to the proof ordinarily necessary to establish the existence of a nuisance, that the defendant is acting unreasonably; and that the question of the reasonableness of his conduct is a question of fact to be determined from the testimony tending to show the ex-

pense or loss of abandoning the gin or removing it to some other locality free from similar objections by adjacent owners, and whether or not such other locality can be had at all.

In *Hamm v. Gunn* (1908) 51 Tex. Civ. App. 424, 118 S. W. 304, it appeared that a cotton gin had been in operation only for a short time, and that but a few bales of cotton had been ginned. It was held that the evidence was too inconclusive and unsatisfactory to support a decree restraining the operation of the business. The court said: "It appears that at the time of the trial but few bales of cotton had been ginned at all, and the foregoing is substantially all of the testimony on the subject. In our judgment, the evidence is altogether too inconclusive and unsatisfactory to support the decree. The right to abate nuisance is a well-established doctrine of courts of equity, for it is a maxim of our law that the owner of property must so use it as not to materially injure another. But it cannot be successfully contended that a gin is a nuisance per se."

#### **Limekiln.**

In *Hutchins v. Smith* (1872) 63 Barb. (N. Y.) 251, the plaintiff prayed for an injunction restraining the further operation, running, or using of limekilns. It was held that this was too broad, since the kilns were harmless, and the use of them alone was to be restrained. The court said: "The plaintiff demands, in his prayer, an injunction restraining the defendants 'from further running, operating, or using said limekilns.' The language is too broad. The kilns are harmless; it is the use of them in the manner mentioned which is to be restrained. Possibly they may be used in such a way as not to interfere with the plaintiff's rights."

#### **Marble-polishing plant.**

In *Butterfield v. Klaber* (1876) 52 How. Pr. (N. Y.) 255, a proceeding to enjoin the use on adjoining premises of machinery adapted to the polishing of marble, it became material whether marble dust constituted a nuisance. It was held on this point that there was not a sufficient annoy-

ance produced by the dust to warrant the intervention of a court of equity. The court said: "I must find as a fact in the case that the operation of such machinery does not produce a dust whereby any portion of the plaintiff's premises is rendered unfit for habitation."

#### **Sheddy mill.**

In *Davis v. Whitney* (1894) 68 N. H. 66, 44 Atl. 78, it appeared that the plaintiff was damaged by lint, dust, and smoke of a sickening odor, created by a shoddy mill operated by defendant. The substances complained of obliged her to keep her windows and doors shut, and on several occasions she was compelled to absent herself from the house for a period of several weeks. The referee having found that the use of the defendant's lands was reasonable, the court impliedly held that the substances complained of did not constitute a nuisance.

#### **Stone-cutting plant.**

In *Oakley v. Webb* (1916) 38 Ont. L. Rep. 151, 33 D. L. R. 35, it appeared that by reason of the business of stone cutting being carried on, on adjoining premises, the complainants were annoyed by the noise and dust. The trial judge having found that neither the noise nor dust constituted a nuisance, the complainants appealed. It was held, dismissing the appeal, that for a person to carry on a business is a legal right, and so it is for another to enjoy his premises, and in order to show that a business amounts to nuisance it must be shown that in the exercise of his right to carry on the business he invaded the right of the one complaining. The court said: "The right of the respondent to carry on his business is a legal right; so is that of the appellant and his family to enjoy their life in reasonable comfort. To enjoin the respondent, it is necessary to show that in the exercise of his right he wrongfully invades that of the appellant; in other words, that his business is so carried on as to amount to a nuisance, and so is an unlawful invasion of the competing right of the appellant. The character of the neighborhood is an important element

in determining the standard of comfort which may be insisted upon."

#### **III. Anticipatory nuisance from dust.**

Where the erection of a building for the purpose of carrying on a business is sought to be restrained because of the likelihood that a nuisance will result from the dust, dirt, lint, or sand, or the like, caused by the business, it must appear beyond a reasonable doubt that these substances are necessarily incidental to the business, and due regard must be given to the character of the community. *Rouse v. Martin* (1883) 75 Ala. 510, 51 Am. Rep. 463; *Robinson v. Dale* (1910) 62 Tex. Civ. App. 277, 131 S. W. 308; *Moore v. Coleman* (1916) — Tex. Civ. App. —, 185 S. W. 936; *Rogers v. John Week Lumber Co.* (1903) 117 Wis. 5, 93 N. W. 821.

In *Rouse v. Martin* (Ala.) *supra*, a bill to restrain the erection of a structure to be used as a cotton gin, it was alleged that the atmosphere would be rendered impure and unwholesome by the smoke, dust, and small particles of lint, cotton, and other substances incidental to such business. It was held, in dissolving an injunction, that a very strong case must be presented in order to obtain an injunction for an anticipated nuisance, and that, if there is a reasonable doubt as to the probable effect of an alleged nuisance, the courts will not interfere until there has been a test of the use of the property. The facts presented by the bill, it was held, were not such as to authorize the court to allow an injunction. The court said: "Where the injury complained of is not a nuisance *per se*, but may become so by reason of circumstances—being uncertain, indefinite, or contingent—equity, as we have said, will not interfere. . . . A very strong case must, therefore, be made by the bill, and if there be a reasonable doubt as to the probable effect of an alleged nuisance, either on the proof, affidavits, or on the construction of the facts stated in the bill, there will be no interference until the matter is tested by experiment in the actual use of the property. . . .

Smoke, offensive odors, or disagreeable noise and vibration may, of course, constitute a nuisance so imperiling the comfort of one's existence, his health, or the safety of his property, as to call for injunctive relief at the hands of a court of equity. This is upon the principle that if one makes an unreasonable or unlawful use of his property, 'so as to produce material annoyance, inconvenience, discomfort, or hurt to his neighbor, he will be guilty of a nuisance to his neighbor.' *Campbell v. Seaman* (1875) 63 N. Y. 568, 20 Am. Rep. 567. It is just sequence of the maxim, "*Sic utere tuo ut alienum non lædas.*" In determining the question of interference, the court will look at the facts which are stated in the bill, giving little or no weight to the mere opinion of the complainant that they will constitute a nuisance, unless such a conclusion clearly follows by proper inference from these facts. So, of the denials of the answer, on a motion to dissolve an injunction which may have been granted. *Catlin v. Valentine* (1842) 9 Paige (N. Y.) 575, 38 Am. Dec. 567, 1 High, Inj. § 790. Let us briefly apply the foregoing principles to this case. It is clear that the building sought to be erected by the defendants cannot be regarded as a nuisance, but only the use to which it is to be devoted. This is admitted to be a useful business, which is common to the country, and one which should not be discouraged by too ready an interference by the strong arm of the courts. Taking the facts as alleged in complainants' bill, and discarding all allegations which may properly be regarded as mere matters of opinion, and keeping in view that the injury sought to be prevented is merely apprehended by anticipation, and must, therefore, be a matter greatly of speculation, we cannot say that the chancellor has come to an erroneous conclusion. We do not clearly see that it is not reasonably possible for the business to be conducted so as not to be a nuisance."

In *Robinson v. Dale* (1910) 62 Tex. Civ. App. 277, 131 S. W. 308, the suit

was instituted to restrain the erection and operation of a proposed cotton gin, because the complainant's property would be injured by reason of dust, lint, smoke, and the like. It was held, in dissolving an injunction, that a cotton gin was not per se a nuisance, and that the burden of proving that the particular gin that was proposed to be built would be a nuisance was on the complainant. The court said: "The construction and operation of a cotton gin near private residences is not per se a nuisance, and we think the burden was upon appellees to show that the particular kind of gin appellants proposed to construct, when constructed as appellants proposed to construct it, would cause, when operated near private residences, the annoyances appellees anticipated. Testimony that other kinds of cotton gins, constructed in a different way, when so operated, caused such annoyances, did not, we think, tend to show that the gin appellants proposed to build, when operated, would cause them." The court further held that, although the courts will not restrain an act or operation which may become a nuisance, if, after the operation of the gin, it becomes a nuisance by reason of the dust, lint, sand, smoke, and the like, then the court will restrain its further operation, saying: "If, in the actual operation of the gin after it has been constructed as proposed, it should thereafter be made to appear that on account of noise, vibration, dust, cotton lint, or smoke therefrom appellees are deprived of the comfortable enjoyment of their respective homes, they may be entitled to relief by injunction, as well as to a recovery of such damages as they are able to show that they have thereby suffered."

But in *Moore v. Coleman* (1916) — Tex. Civ. App. —, 185 S. W. 936, the suit was instituted to restrain the erection of a proposed cotton gin. The ground on which the bill was founded was stated to be that, by reason of dust, dirt, sand, and lint, the gin would render the use of neighbor-

ing homes and churches intolerable, and would injure and destroy the vegetation and trees thereabouts. It was held, in affirming an injunction, that a cotton gin was not per se a nuisance, but may become such by reason of noise, dust, dirt, sand, and the like caused thereby. The court said: "It is true that the authorities hold that a cotton gin is not a nuisance per se, but may become so by reason of the manner or place of its operation. . . . But a cotton gin which causes noise, vibration, dust, and cotton lint, or smoke, so that owners are deprived of the comfortable enjoyment of their homes, is . . . a nuisance. . . . It may be laid down broadly, as a general rule, that any act, omission, or use of property that results in polluting the atmosphere with noxious or offensive odors, gases, or vapors, thereby producing material discomfort and annoyances to those residing in the vicinity, or injuring their health or property, is a nuisance. *Ft. Worth v. Crawford* (1889) 74 Tex. 404, 15 Am. St. Rep. 840, 12 S. W. 52. *Wood, Nuisances*, 1883 ed. § 3. While it is not every use to which property is devoted, causing incidental discomfort and annoyance to those residing in the vicinity, that will give rise to the right of injunction in order to abate it, yet the surrounding circumstances, the location of the alleged nuisance, the necessity vel non of the objectionable features of the use, will be considered by the courts in order to determine the right and propriety of granting the relief prayed."

In *Rogers v. John Week Lumber Co.* (1903) 117 Wis. 5, 93 N. W. 821, it appeared that it was proposed to erect a planing mill in a residential section. The suit was instituted to enjoin such erection. A temporary injunction had been denied. An answer had been interposed, and on the trial the defendant interposed a demurrer ore tenus. The demurrer was sustained on the ground that the denial of the temporary injunction was an adjudication. In reversing the judgment, the court held that there was no adjudication, and further held that, while a planing mill is not a nuisance per se, it may become so by reason of dust, dirt, smoke, and noise, saying: "Doubtless the trial court was right in stating that a planing mill is not a nuisance per se, but it is equally clear that an industry which is not a nuisance per se may be shown to be conducted in such a manner or in such a place as to be in fact a nuisance. . . . Does the complaint before us state facts showing that such an injury is threatened to the plaintiff? We think it does. It states, in substance, that the mill is to be located in a residence portion of the city, within 90 feet of plaintiff's dwelling; that its operation will necessarily create a great amount of steam, dust, dirt, smoke, and noise, which will penetrate plaintiff's house, making it necessary to keep his windows and doors closed at all times, and rendering his home unfit to live in. We think these allegations are sufficient to bring the case within the rules above cited."

R. C. L.

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WATTS, WATTS, & COMPANY, Limited,

v.

UNIONE AUSTRIACA DI NAVIGAZIONE, etc.

*United States Supreme Court—November 4, 1913.*

(248 U. S. 9, 63 L. ed. 100, 39 Sup. Ct. Rep. 1.)

**Appeal — entry of United States into war — effect on litigation.**

1. The changed conditions consequent upon the entrance of the United States into the European War since the rendition below of a decree which



affirmed the dismissal without prejudice, upon grounds of expediency, of a libel in personam, filed after the British declaration of war, by a British corporation against an Austro-Hungarian corporation, to recover for coal supplied to the latter's steamers before the war, at Algiers, a dependency of the French Republic, supported by an attachment of one of such vessels, necessitate the setting aside of the decree dismissing the libel and the remanding of the cause for further proceedings, subject to the condition that no action be taken below (except such, if any, as may be required to preserve the security and the rights of the parties in statu quo) until, by the restoration of peace between the United States and Austria-Hungary, or otherwise, it may become possible for the respondent to present its defense adequately.

[See note on this question beginning on page 327.]

—rendering proper judgment —  
changed conditions.

2. The Federal Supreme Court, in the exercise of its appellate jurisdiction, has power not only to correct error in the decree entered below, but to make such disposition of the case as justice may at the time require, and in determining this question the court must consider changes in fact and in law which have supervened since the entry of such decree.

[See 2 R. C. L. 263.]

Evidence — judicial notice — intercourse between residents of enemy states.

3. Judicial notice will be taken by the Federal Supreme Court that during the existing war between the United States and Austria-Hungary free intercourse between residents of the two countries has been physically impossible.

[See 15 R. C. L. 1090, 1122-1126.]

PETITION for a Writ of Certiorari to the United States Circuit Court of Appeals, Second Circuit, to review a decree which affirmed a decree of the District Court for the Eastern District of New York, dismissing without prejudice a libel in personam, filed after the British declaration of war, by petitioner, to recover for coal supplied to respondent's steamers before the war, at Algiers, supported by an attachment of one of such vessels. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John M. Woolsey, J. Parker Kirlin, and Cletus Keating for petitioner.

Messrs. Charles S. Haight and Clarence Bishop for respondent.

Mr. Justice Brandeis delivered the opinion of the court:

On August 4, 1914, Great Britain declared war against Germany, and on August 12, 1914, against Austria-Hungary. Prior to August 4, Watts, Watts, & Company, Limited, a British corporation, had supplied to Unione Austriaca di Navigazione, an Austro-Hungarian corporation, bunker coal at Algiers, a dependency of the French Republic. Drafts on London given therefor having been protested for nonpayment, the seller brought, on August 24, 1914,

a libel in personam against the purchaser in the district court of the United States for the eastern district of New York. Jurisdiction was obtained by attaching one of the steamers to which the coal had been furnished. The attachment was discharged by giving a bond which is now in force. The respondent appeared and filed an answer which admitted that the case was within the admiralty jurisdiction of the court; and it was submitted for decision upon a stipulation as to facts and proof of foreign law.

The respondent contended that the district court, as a court of a neutral nation, should not exercise its jurisdictional power between alien belligerents to require the

transfer, by process of judgment and execution, of funds by one alien belligerent to another,—an act which it alleged was prohibited alike by the municipal law of both belligerents. The libellant replied that performance of the contract by respondent, that is, the payment of a debt due, was legal by the law of the place of performance, whether that place be taken to be Algiers or London; that it was immaterial whether it was legal by the Austro-Hungarian law, since Austria-Hungary was not the place of performance; and that the enforcement of legal rights here would not infringe the attitude of impartiality which underlies neutrality. The district court held that it had jurisdiction of the controversy, and that it was within its discretion to determine whether it should exercise the jurisdiction; since both parties were aliens and the cause of action arose and was to be performed abroad. It then dismissed the libel without prejudice, saying: "From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries [Great Britain and Austria-Hungary] forbids a payment by one belligerent subject to his enemy during the continuance of war. This court, in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it." 224 Fed. 188, 194.

The dismissal by the district court was entered on May 27, 1915. On December 14, 1915, the decree was affirmed by the circuit court of appeals, on the ground that it was within the discretion of the trial court to determine whether to take or to decline jurisdiction (*The Belgenland*, 114 U. S. 355, 29 L. ed. 152, 5 Sup. Ct. Rep. 860), and that the exercise of this discretion should not be interfered with, since no abuse was shown (143 C. C. A. 412, 229 Fed. 136). On June 12, 1916, an application for leave to file a petition for writ of mandamus to compel the court of appeals to re-

view the exercise of discretion by the district court was denied (241 U. S. 655, 60 L. ed. 1224, 36 Sup. Ct. Rep. 726), and a writ of certiorari was granted by this court (241 U. S. 677, 60 L. ed. 1232, 36 Sup. Ct. Rep. 726). The certiorari and return were filed July 21, 1916. On December 7, 1917, the President issued a proclamation declaring that a state of war exists between the United States and Austria-Hungary. The case was argued here on April 17, 1918.

This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require.

Appeal—rendering proper judgment—changed conditions.

*Butler v. Eaton*, 141 U. S. 240, 35 L. ed. 713, 11 Sup. Ct. Rep. 985; *Gulf, C. & S. F. R. Co. v. Dennis*, 224 U. S. 503, 506, 56 L. ed. 860, 861, 32 Sup. Ct. Rep. 542. And in determining what justice now requires, the court must consider the changes in fact and in law which have supervened since the decree was entered below. *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, 478, 60 L. ed. 387, 391, 392, 36 Sup. Ct. Rep. 212; *Berry v. Davis*, 242 U. S. 468, 61 L. ed. 441, 37 Sup. Ct. Rep. 208; *Jones v. Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; *Dinsmore v. Southern Exp. Co.* 183 U. S. 115, 120, 46 L. ed. 111, 113, 22 Sup. Ct. Rep. 45; *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *The Rachel v. United States*, 6 Cranch, 329, 3 L. ed. 239; *United States v. The Peggy*, 1 Cranch, 103, 109, 110, 2 L. ed. 49–51. In the case at bar the rule is the more insistent, because, in admiralty, cases are tried de novo on appeal. *Yeaton v. United States*, 5 Cranch, 281, 3 L. ed. 101; *Irvine v. The Hesper*, 122 U. S. 256, 266, 30 L. ed. 1175, 1178, 7 Sup. Ct. Rep. 1177; *Reid v. Fargo*, 241 U. S. 544, 60 L. ed. 1156, 36 Sup. Ct. Rep. 712.

Since the certiorari was granted, the relation of the parties to the court has changed radically. Then, as earlier, the proceeding was one between alien belligerents in a court of a neutral nation. Now, it is a suit by one belligerent in a court of a cobelligerent against a common enemy. A suit may be brought in our courts against an alien enemy. *McVeigh v. United States*, 11 Wall. 259, 267, 20 L. ed. 80, 81. See also *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617. If the libel had been filed under existing circumstances, security for the claim being obtained by attachment, probably no American court would, in the exercise of discretion, dismiss it and thus deprive the libellant not only of its security, but perhaps of all possibility of ever obtaining satisfaction. Under existing circumstances dismissal of the libel is not consistent with the demands of justice.

The respondent, although an alien enemy, is, of course, entitled to defend before a judgment should be entered. *McVeigh v. United States*, supra. See also *Windsor v. McVeigh*, 93 U. S. 274, 280, 23 L. ed. 914, 916; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841. It is now represented by counsel. But intercourse is prohibited by law between subjects of Austria-Hungary outside the United States and persons in the United States. Trading with the Enemy Act of October 6, 1917, § 3 (c) [40 Stat. at L. 411, chap. 106, Comp. Stat. —, § 3115½b], Public—No. 91—65th Congress. And we take notice of the fact that free inter-

course between residents of the two countries has been also physically impossible. It is true that, more than three years ago, a stipulation as to the facts and the proof of foreign law was entered into by the then counsel for respondent, who has died since. But reasons may conceivably exist why that stipulation ought to be discharged or modified, or why it should be supplemented by evidence. We cannot say that, for the proper conduct of the defense, consultation between client and counsel and intercourse between their respective countries may not be essential even at this stage. The war precludes this.

Under these circumstances, we are of opinion that the decree dismissing the libel should be set aside and the case remanded to the District Court for further proceedings, but that no action should be taken there (except such, if any, as may be required to preserve the security and the rights of the parties in statu quo) until, by reason of the restoration of peace between the United States and Austria-Hungary, or otherwise, it may become possible for the respondent to present its defense adequately. Compare *The Kaiser Wilhelm II.* L.R.A. 1918C, 795, 159 C. C. A. 88, 246 Fed. 786; *Robinson v. Continental Ins. Co.* [1915] 1 K. B. 155, 161, 162, [1914] W. N. 393, 84 L. J. K. B. N. S. 238, 112 L. T. N. S. 125, 31 Times L. R. 20, 59 Sol. Jo. 7, 20 Com. Cas. 125.

Reversed.

Evidence—  
judicial notice—  
intercourse  
between  
residents of  
enemy states.

Appeal—entry  
of United States  
into war—effect  
on litigation.

## ANNOTATION.

## Effect of war on litigation pending at the time of its outbreak.

## I. In courts of first instance:

- a. Where plaintiff is an enemy subject resident in the enemy's country, 327.
- b. Where plaintiff is an enemy subject resident in a neutral or allied country, 332.
- c. Where plaintiff is an enemy subject, but resides in the state of the forum, 332.
- d. Where an enemy subject is the party defendant, 332.
- e. War conditions as ground for continuance, 333.

## II. In appellate courts, 334.

## I. In courts of first instance.

## a. Where plaintiff is an enemy subject resident in the enemy's country.

The general rule is that an alien enemy, resident in his own country, may not prosecute an action instituted before the commencement of the war. *Bell v. Chapman* (1813) 10 Johns. (N. Y.) 183; *Rothbarth v. Herzfeld* (1917) 179 App. Div. 865, 167 N. Y. Supp. 199, affirmed without opinion in (1918) 223 N. Y. 578, 119 N. E. 1075; *Panee v. Soler* (1917) 101 Misc. 693, 167 N. Y. Supp. 901; *Nord Deutsche Ins. Co. v. John L. Dudley Jr. Co.* (1918) 169 N. Y. Supp. 303, affirmed in (1918) — App. Div. —, 169 N. Y. Supp. 1106; *Hungarian General Credit-bank v. Titus* (1918) 182 App. Div. 826, 169 N. Y. Supp. 926; *Currie v. The Josiah Harthorn* (1862) Fed. Cas. No. 3,491a; *Speidel v. N. Barstow Co.* (1917) 243 Fed. 621; *Le Bret v. Papillon* (1804) 4 East, 502, 102 Eng. Reprint, 923, 7 Revised Rep. 618; *Robinson v. Continental Ins. Co.* [1915] 1 K. B. (Eng.) 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914] W. N. 393, 59 Sol. Jo. 7; *Porter v. Freudenberg* [1915] 1 K. B. (Eng.) 857, 5 B. R. C. 548, W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 313, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215; *Canadian Stewart Co. v. Perih* (1915) Rap. Jud.

*Quebec* 25 B. R. 158; *Luczyzki v. Spanish River Pulp & Paper Mills Co.* (1915) 34 Ont. L. Rep. 549.

So, a suit instituted by a corporation organized under the laws of a foreign country, and doing business there, will be stayed, where, during its pendency, war broke out between such country and that of the forum. *Hungarian General Creditbank v. Titus* (1918) 182 App. Div. 826, 169 N. Y. Supp. 926; *Nord Deutsche Ins. Co. v. John L. Dudley Jr. Co.* (1918) 169 N. Y. Supp. 303, affirmed in (1918) — App. Div. —, 169 N. Y. Supp. 1106.

One view as to the reason for such disability is expressed in *Sparenburgh v. Bannatyne* (1797) 1 Bos. & P. 163, 126 Eng. Reprint, 837, in which it was said by Eyre, Ch. J.: "I take the true ground upon which the plea of alien enemy has been allowed is that a man professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and the jurisdiction of our courts. Such is the case of an outlaw."

But the true reason seems to be that stated in *Viola v. Mackenzie* (1915) Rap. Jud. *Quebec* 24 B. R. 31, 24 D. L. R. 208, where it is said that the restriction of a right to sue does not result from the incapacity of the foreigner, but from the fact that the enemy country will profit by executing a judgment in his favor.

So, also, in 1 Bacon, Abridgment, "Aliens," D, it is said: "By the policy of the law alien enemies shall not be admitted to actions to recover effects which may be carried out of the Kingdom, to weaken ourselves and enrich the enemy."

The modern tendency is toward a relaxation of the severity of the general rule above stated, and the standing in court of an enemy plaintiff is

generally recognized. The courts will permit him to take such action as may be necessary to preserve his rights, though he may not enforce them where the effect will be to augment the enemy resources.

**Effect of Hague Convention.**

The common-law rule by which an alien enemy is precluded from enforcing his right of action during the continuance of war is not abrogated by article 23 (h) of chapter 1, § 2, of the Annex to the Hague Convention of 1907, by which it is forbidden to "declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings;" but such provision is, in view of its collocation, to be read as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's country, which will prevent the inhabitants of that territory from using their courts of law in order to assert or protect their civil rights. *Porter v. Freudenberg* [1915] 1 K. B. (Eng.) 857, 5 B. R. C. 548, W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 318, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215.

**Effect of the Trading with the Enemy Act of 1917.**

The Trading with the Enemy Act of 1917 does not permit the prosecution by a nonresident alien enemy, of any suits in the courts during the war, except in cases provided in such act. *Hungarian General Creditbank v. Titus* (1918) 182 App. Div. 826, 169 N. Y. Supp. 926.

Subsection a of § 5 of the Trading with the Enemy Act, which provides, among other things, that the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons, to do business as provided in subsection a of § 4 of the act, and to perform any acts made unlawful, without such license, by sections of the act, does not authorize the granting of a license to prosecute a suit. *Ibid.*

**Where enemy subject is the real party in interest.**

The disability of a nonresident alien enemy to sue extends to suits in which a nonresident enemy is the real party in interest. Thus, an action is not maintainable by an agent on behalf of his principal, where the principal is an alien enemy (*Brandon v. Nesbitt* (1794) 6 T. R. 23, 101 Eng. Reprint, 415, 3 Revised Rep. 109, 2 Eng. Rul. Cas. 649), or by a trustee for the benefit of an alien enemy (*Crawford v. The William Penn* (1815) Pet. C. C. 106, Fed. Cas. No. 3,372), as the public policy which forbids that the property sued for should be carried out of the country to enrich the enemy would be violated equally in the one case as in the other. It has, however, been held that it is no defense to an action that the plaintiff sued in trust for an alien enemy (*Daubuz v. Morshead* (1815) 6 Taunt. 332, 128 Eng. Reprint 1062, 16 Revised Rep. 623); doubtless on the theory that the ground of the objection goes rather to the enforcement of the judgment than to the maintenance of the suit.

That the plaintiffs in an action, who, since its institution, have become alien enemies, had, long prior to the war, assigned the cause of action to trustees for the benefit of certain creditors some of whom were resident in the state of the forum, does not prevent a suspension of the prosecution of the action, where the assignment expressly provided that the trustees should have no voice in its conduct or settlement, and it appears that they would be required to distribute the bulk of the proceeds of the judgment, after paying the domestic creditors, to alien enemies. *Rothbarth v. Herzfeld* (1917) 179 App. Div. 865, 167 N. Y. Supp. 199, affirmed without opinion in (1918) 223 N. Y. 578, 119 N. E. 1075.

So, an action for wrongful death cannot be maintained by the administrator of a decedent, where the persons for whose benefit the action is given are alien enemies. *Dangler v. Hollinger Gold Mines* (1915) 34 Ont. L. Rep. 78.

But in *Weiditschka v. Supreme Tent-*

K. M. (1919) — Iowa, —, 170 N. W. 300, it was held that an action brought by an administrator to enforce a benefit certificate issued to his decedent will not be postponed until the termination of the war because of the enemy character of the heirs, in as much as the administrator is under the control of the court, and may be directed by it to retain the fund for distribution after the termination of the war.

And in *Krachanake v. Acme Mfg. Co.* (1918) 175 N. C. 435, L.R.A.1918E, 801, 95 S. E. 851, Ann. Cas. 1918E, 340, it was suggested that the reasons which prevent alien enemies, under certain conditions, from resorting to our courts, do not prevail where the subject of the recovery will be in charge of a guardian appointed by the court, and cannot be removed from the state without the consent of the court, so that the danger of its being used to strengthen the hands of the enemy is entirely removed.

**Where enemy subject is only a nominal party.**

But the fact that one of the plaintiffs, who is merely a nominal party, and who cannot control the suit nor collect the judgment, is a public enemy, is no ground for dismissing the petition of the beneficial plaintiff, who is not an enemy. *Hoskins v. Gentry* (1865) 2 Duv. (Ky.) 285; *Mercedes Daimler Motor Co. v. Maudslay Motor Co.* [1915] 31 Times L. R. (Eng.) 178, 32 Rep. Pat. Cas. 149, [1915] W. N. 54.

An action will not be dismissed where it is shown that the alien enemy is only a nominal plaintiff, or the coplaintiff of a nonbelligerent who is a substantial plaintiff, or a denizen or inhabitant of the United States. *Stumpf v. A. Schreiber Brewing Co.* (1917) 242 Fed. 80 (dictum).

**Where enemy subject is one of two or more plaintiffs.**

Where it is pleaded in abatement that one of the plaintiffs is an alien enemy, the other plaintiff may move to amend his writ by striking out the name of his coplaintiff. *Arnold v. Sergeant* (1783) 1 Root (Conn.) 86.

But a suit asserting an indivisible

right, such as a suit for the infringement of a patent, brought by a partnership, some of the members of which are alien enemies resident in the enemy's country, will not be dismissed as to the nonresident plaintiffs, but will be stayed during the continuance of the war. *Speidel v. N. Barstow Co.* (1917) 243 Fed. 621.

**Actions for preservation of existing rights.**

It has been held that an action for the preservation of the rights of the complainants as stockholders in a domestic corporation, and also in the interest of the corporation for the protection of its rights against the action of the defendants, will not be stayed upon the ground that the complainants are alien enemies, in the absence of anything to show that the legitimate interests of the United States will be thereby affected. *Posselt v. D'Espard* (1917) 87 N. J. Eq. 571, 100 Atl. 893.

**Mode of disposal of pending suit.**

The weight of authority is to the effect that, where an action has been commenced before the war, the proceeding is only suspended. See

*United States.—Elgee v. Lovell* (1865) Woolw. 102, Fed. Cas. No. 4,344; *Plettenberg v. Kalmon* (1917) 241 Fed. 605; *Speidel v. N. Barstow Co.* (1917) 243 Fed. 621.

*Alabama.—Lautz v. Heynigen Brokerage Co.* (1918) — Ala. —, 80 So. 72 (obiter).

*Florida.—Russ v. Mitchell* (1865) 11 Fla. 80.

*Iowa.—Weiditschka v. Supreme Tent, K. M.* (1919) — Iowa, —, 170 N. W. 300.

*Massachusetts.—Hutchinson v. Brock* (1814) 11 Mass. 119; *Levine v. Taylor* (1815) 12 Mass. 8.

*New York.—Bell v. Chapman* (1813) 10 Johns. 183; *Rothbarth v. Herzfeld* (1917) 179 App. Div. 865, 167 N. Y. Supp. 199, affirmed without opinion in (1918) 223 N. Y. 578, 119 N. E. 1075; *Nord Deutsche Ins. Co. v. John L. Dudley Jr. Co.* (1918) 169 N. Y. Supp. 303, affirmed in (1918) — App. Div. —, 169 N. Y. Supp. 1106; *Farenholtz v. Meinshausen* (1918) 181 App. Div. 474, 168 N. Y. Supp. 869; *Hungarian*

*General Creditbank v. Titus* (1918) 182 App. Div. 826, 169 N. Y. Supp. 926.

Canada.—*Luczycki v. Spanish River Pulp & Paper Mills Co.* (1915) 34 Ont. L. Rep. 549; *Korziwiski v. Harris Constr. Co.* 18 Quebec Pr. Rep. 97, as digested in *Canadian Annual Dig.* 1916, col. 12.

Unless the action itself ought not to be maintained. *Weiditschka v. Supreme Tent, K. M.* (Iowa) *supra*.

In other cases it has been held that, where the plaintiffs become alien enemies subsequently to the institution of the suit, the action should be dismissed rather than continued on the docket. *Howes v. Chester* (1861) 33 Ga. 89; *Dumenko v. Swift Canadian Co.* (1914) 32 Ont. L. Rep. 87.

These decisions, however, are not generally regarded as sound. In *Weiditschka v. Supreme Tent, K. M.* (1919) — Iowa, —, 170 N. W. 300, it is said that the authority of *Howes v. Chester* (Ga.) *supra*, is considerably impaired, since it turned out that there was no alien enemy involved—citing *Texas v. White* (1869) 7 Wall. (U. S.) 700, 19 L. ed. 227. It is also pointed out by Judge Speer in *Plattenburg v. Kalmon* (1917) 241 Fed. 605, that the opinion must be regarded as academic. And *Boyd, C.*, in *Luczycki v. Spanish River Pulp & Paper Mills Co.* (1915) 34 Ont. L. Rep. 549, said that the *Dumenko Case* (Ont.) *supra*, is founded on *Le Bret v. Papillon* (1804) 4 East, 502, 102 Eng. Reprint, 923, 7 Revised Rep. 618, and *Brandon v. Nesbitt* (1794) 6 T. R. 23, 101 Eng. Reprint, 415, 3 Revised Rep. 109, 2 Eng. Rul. Cas. 649, but that “in *Brandon v. Nesbitt* the plaintiff was an alien enemy at the outset, and so was never rightly in court. *Le Bret v. Papillon* is in point, for there the action was rightly brought, but its course was intercepted by declaration of war. The defendant's contention was made by way of dilatory plea, and the judgment was that the plaintiff should be barred from further having and maintaining the action. Nothing is said as to costs, and in form the action was not dismissed. In the *Dumenko Case*, the judgment may well be rested on the fact that the plaintiff was in default

in giving security for costs. By the order, if security was not given the action was to be dismissed. The plaintiff, the alien enemy, moved to obtain an extension of time, which favor will not be granted to an alien enemy, and the action was well dismissed with costs.”

The fact that an action brought by a plaintiff resident in the enemy's country cannot be prosecuted during the period of the war will not excuse the failure, upon the death of the plaintiff, promptly to substitute his personal representative. *Farenholtz v. Meinshausen* (1918) 181 App. Div. 474, 168 N. Y. Supp. 869.

In this case, however, the court took into consideration the difficulty of communication between this country and Germany, by allowing a period of one year for the substitution of the personal representative of the deceased plaintiff.

It has been held that the fact that since the institution of the action the plaintiff therein has become an alien enemy may be made the basis of a motion to dismiss, and need not be set up by a supplemental answer as one of the issues in the case. *Rothbarth v. Herzfeld* (1917) 179 App. Div. 865, 167 N. Y. Supp. 199, reversing (1917) 100 Misc. 470, 166 N. Y. Supp. 744.

#### **Right to make claim against bankrupt's estate.**

The right to recover a debt being only suspended during, and not extinguished by, the war, an alien enemy may make a claim in a bankruptcy proceeding, though dividends thereon will be withheld until the conclusion of peace. *Ex parte Boussmaker* (1806) 13 Ves. Jr. 71, 38 Eng. Reprint, 221, 9 Revised Rep. 142.

But an alien enemy resident in the enemy's country cannot be heard, during the war, to complain of the rejection of a claim filed by him against a bankrupt's estate. *Re Wilson* (1915) 84 L. J. K. B. N. S. (Eng.) 1893, [1915] *Hansell, Bankr. R.* 189.

#### **Whether plaintiff's disability may be waived.**

Although there is some conflict of opinion, the better view appears to be

that the disability to sue, arising from the fact that the plaintiff is an alien enemy, may not be waived, the objection not being a matter of privilege in the defendant, but being based upon considerations of public policy, of which the court should be held bound to take notice.

Thus, in *Jansen v. Driefontein Consol. Mines* [1902] A. C. (Eng.) 484, 5 B. R. C. 810, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268, Lord Davey observed that he had some doubt whether the objection of alien enemy might be waived, it being one based on considerations of public policy, of which the court should be held bound to take notice. This dictum is cited with approval in *Bassi v. Sullivan* (1914) 32 Ont. L. Rep. 14; and a similar doubt was expressed in *Robinson v. Continental Ins. Co.* [1915] 1 K. B. (Eng.) 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914] W. N. 393, 59 Sol. Jo. 7.

And in *Dorsey v. Kyle* (1869) 30 Md. 512, 96 Am. Dec. 617, it is said that the plea of alien enemy is not a matter of privilege, but a disability that suspends the right to maintain an action in the courts of the country to which the party is an enemy.

So, also, it has been held that where, during the pendency of an action, the plaintiff becomes an alien enemy, the court has no legal power to render judgment (*Brooke v. Filer* (1871) 35 Ind. 402); and that a decree rendered in a cause instituted before the commencement of war, the parties to which resided on opposite sides of the military line, and were consequently enemies to each other, is without legal validity. *Stephens v. Brown* (1884) 24 W. Va. 234.

But the error, if any, in permitting an action brought by an alien enemy to proceed to judgment, becomes immaterial where peace has been concluded. *Bishop v. Jones* (1866) 28 Tex. 294.

The view that the disability to sue, arising from the fact that the plaintiff is an alien enemy, may be waived, is supported by *McNair v. Toler*

(1875) 21 Minn. 175, where the action was instituted before the war, and in which it was held that the objection that the plaintiff was technically an alien enemy, like all other objections to his capacity to sue, was waived by the omission to plead it in abatement.

And in *Barna v. Gleason Coal & Coke Co.* (1919) — W. Va. —, 98 S. E. 158, the statement is made in the syllabus by the court that "the fact that plaintiff is an alien enemy is defensive, and ordinarily unavailing without timely plea;" but the point cannot be regarded as having been necessarily decided, inasmuch as the plaintiff was a resident alien.

In *Heiler v. Goodman's Motor Exp. Van & Storage Co.* (N. J.) post, 336, it was held that the defense of alien enemy, in order to be considered in an action at law, should be made a part of the record, and stated with accuracy by an appropriate pleading or motion; and that it is not favored by intendment.

And see also *Burnside v. Matthews* (1873) 54 N. Y. 78, where it was said that as the defense was merely technical and dilatory, growing out of a supposed temporary disability, it must, to be effectual, be pleaded specially and with certainty, to a particular intent.

It should, perhaps, be pointed out that these decisions, while permitting the recovery of judgment in the absence of objection duly taken, are in no wise inconsistent with the view that the court may, of its own motion, refuse process for its enforcement during the war.

#### **Effect of restoration of peace.**

A plea of alien enemy is defeated by the conclusion of a treaty of peace (*Johnson v. Harrison* (1815) Litt. Sel. Cas. (Ky.) 226); and a suit, not being abated during the war, cannot be abated after the conclusion of peace (*Hamersley v. Lambert* (1817) 2 Johns. Ch. (N. Y.) 508).

#### **Intervention by alien enemy property custodian.**

An alien enemy custodian appointed by the President under the Trading with the Enemy Act may intervene, and take over and continue the prose-



cution of an action instituted by one who has become an alien enemy. *Rothbarth v. Herzfeld* (1917) 179 App. Div. 865, 167 N. Y. Supp. 199.

An action instituted by a corporation of enemy nationality, before the outbreak of war, will be stayed upon motion, notwithstanding a delay may greatly impair the remedy; but the alien enemy custodian may, if he sees fit to do so, intervene, and take over and continue the prosecution of the action. *Nord Deutsche Ins. Co. v. John L. Dudley Jr. Co.* (1918) 169 N. Y. Supp. 303, affirmed in (1918) — App. Div. —, 169 N. Y. Supp. 1106.

**Right to enforce judgment.**

The court will refuse to dissolve an injunction against the enforcement of a judgment where, since the injunction was obtained, the judgment creditors have become alien enemies. *Taylor v. Morgan* (1812) 2 Mart. (La.) 263.

Where the plaintiff has obtained a decision in his favor before the outbreak of a war which rendered him an alien enemy, the court will not sign or enter a decree, but will suspend proceedings until the restoration of peace. *Stumpf v. A. Schreiber Brewing Co.* (1917) 242 Fed. 80.

Where the plaintiff in a suit becomes an alien enemy after judgment, the court will not, on motion, stay or set aside the execution, but the defendant may avail himself of his remedy at law. *Vanbrynen v. Wilson* (1808) 9 East, 321, 103 Eng. Reprint, 596; *Buckley v. Lyttle* (1813) 10 Johns. (N. Y.) 117.

**b. Where plaintiff is an enemy subject resident in a neutral or allied country.**

As to whether an enemy subject residing in an allied or neutral country is debarred from prosecuting an action during the continuance of the war, there is a difference of opinion.

In *Re Sutherland* (1915) 31 Times L. R. (Eng.) 248, it is held that an action can be maintained by a person of enemy nationality, who is neither residing nor carrying on business in an enemy country, but resides in either an allied or neutral country, and carries on business through his partners in that allied country.

But in *Russel v. Skipwith* (1814) 6 Binn. (Pa.) 241, the opinion is expressed that the residence of an alien enemy subject in a neutral country cannot form an exception to the reason or policy of the general principle, "because, if he can withdraw the money into a neutral country, he may readily transfer it from thence into his own country."

The opinion was expressed in a Canadian case, *Newman v. Bradshaw* (1916) 22 B. C. 420, 28 D. L. R. 769, 33 West. L. R. 945, that a German subject, resident in a neutral country, but not naturalized there, was debarred during the war from seeking redress in a Canadian court; but definite disposition of the motion to set aside the writ was deferred until the trial.

**c. Where plaintiff is an enemy subject, but resides in the state of the forum.**

The outbreak of war does not affect the right of an enemy subject, resident in the jurisdiction, to continue to prosecute an action. See annotation appended to *Heiler v. Goodman's Motor Exp. Van & Storage Co.* post, 341.

As to the effect of internment as a civilian prisoner of war upon the right to prosecute a pending suit, see the annotation above referred to.

**d. Where an enemy subject is the party defendant.**

The reason of policy which suspends the right of action of an alien enemy during the war does not apply where the suit is not by one of the enemy to collect his resources, but by a citizen, to put himself in funds; hence, an action by a resident in the state of the forum, pending at the outbreak of the war or begun since the outbreak of war, may be prosecuted during its continuance, provided, of course, the defendant can be reached by process.

*United States.*—*Masterson v. Howard* (1873) 18 Wall. 99, 21 L. ed. 764; *Cocks v. Izard* (1871) Fed. Cas. No. 2,934.

*Florida.*—*Russ v. Mitchell* (1865) 11 Fla. 80.

*Illinois.*—*Seymour v. Bailey* (1872) 66 Ill. 288.

**Kentucky.**—*Buford v. Speed* (1875) 11 Bush, 338.

**Maryland.**—*Dorsey v. Kyle* (1869) 30 Md. 512, 96 Am. Dec. 617; *Dorsey v. Thompson* (1872) 37 Md. 25.

**Minnesota.**—*McNair v. Toler* (1875) 21 Minn. 175.

**Missouri.**—*De Jarnette v. De Giverville* (1874) 56 Mo. 440.

**New Jersey.**—*Compagnie Universelle de Telegraphie et de Telephonie Sans Fil v. United States Service Corp.* (1915) 84 N. J. Eq. 604, 95 Atl. 187.

**New York.**—*Griswold v. Waddington* (1818) 15 Johns. 57.

**Tennessee.**—*Rodgers v. Dibrell* (1880) 6 Lea, 69.

**England.**—*Porter v. Freudenberg* [1915] 1 K. B. 857, 5 B. R. C. 548, W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 313, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215; *Robinson v. Continental Ins. Co.* [1915] 1 K. B. 155, 31 Times L. R. 20, 84 L. J. K. B. N. S. 238, 20 Com. Cas. 125, 112 L. T. N. S. 125, [1914] W. N. 393, 59 Sol. Jo. 7.

But though a nonresident alien enemy may be made a party defendant, he may not, of course, prosecute a counterclaim. *Robinson v. Continental Ins. Co.* (Eng.) supra.

The liability of an alien enemy to be sued carries with it the right to use all the means and appliances of defense. *Seymour v. Bailey* (1872) 66 Ill. 288; and see also *Compagnie Universelle de Telegraphie et de Telephonie Sans Fil v. United States Service Corp.* (1915) 84 N. J. Eq. 604, 95 Atl. 187.

He is entitled to appear by attorney, and be heard in his defense. "It would be revolting to the rules of justice which govern a court to drag therein a party, and then say to him, Although you are properly before the court, you are an alien enemy, and shall not be heard, yet judgment shall be rendered against you." *Russ v. Mitchell* (1864) 11 Fla. 80.

He may appear by attorney to defend proceedings for the confiscation of his property, and may sue out a writ of error. *McVeigh v. United States* (1871) 11 Wall. (U. S.) 259, 20 L. ed. 80.

There is no rule of the common law which prevents a nonresident alien enemy appearing and conducting his defense. *Robinson v. Continental Ins. Co.* [1915] 1 K. B. (Eng.) 155, [1914] W. N. 93, 84 L. J. K. B. N. S. 238, 112 L. T. N. S. 125, 31 Times L. R. 20, 59 Sol. Jo. 7, 20 Com. Cas. 125.

He may have a discovery for the purpose of conducting his defense, just as he will be allowed process to compel the attendance of his witnesses. *Albretcht v. Sussmann* (1813) 2 Ves. & B. 323, 35 Eng. Reprint, 342, 13 Revised Rep. 110.

If hampered in the preparation of his case, in his witnesses, or in other ways, it may, however, be proper to grant a postponement. See remarks in *Robinson v. Continental Ins. Co.* (Eng.) supra.

But it seems that in the event of the defendant's succeeding in the action, no order which will entitle him to payment of costs during the war ought to be made, and his right to issue execution should be suspended until the cessation of the state of hostilities. *Robinson v. Continental Ins. Co.* (Eng.) supra.

#### *e. War conditions as ground for continuance.*

Upon refusing to dismiss a libel in admiralty for repairs to a vessel belonging to a citizen of another country, the court should hold the case, to give the owner of the vessel an opportunity to present his proof, although a state of war exists between his nation and that where the court is sitting. *The Kaiser Wilhelm II.* (1917) L.R.A.1918C, 795, 159 C. C. A. 88, 246 Fed. 786.

And in *City Nat. Bank v. Dresdner Bank* (1919) 255 Fed. 225, the court held that it would not undertake to decide a question involving the rights of alien enemies resident in the enemy's country, but would continue the cause until peace should be declared, in order to give them an opportunity to come in and propound their claims, and offer their testimony in support thereof.

In *Ax v. Meyer* (1917) 179 App. Div. 615, 166 N. Y. Supp. 934, it was held that, by reason of the interference

with the means of intercommunication between this country and Holland, arising out of the war, a stay of proceedings pending the execution and return of a commission to take testimony in Holland would not be vacated because of the failure of the plaintiff to take steps to procure the issuance of the commission and the settlement of the interrogatories, on account of his inability to obtain from his assignor in Holland the specific information to enable him to prepare proper interrogatories, unless the defendant would stipulate to concede the matter upon which the taking of such testimony was necessary.

In *Kent v. Fraser* (1918) 181 App. Div. 813, 168 N. Y. Supp. 1036, it was held that there was no abuse of discretion on the part of the trial court, in denying the defendant's motion for an indefinite postponement of trial on the ground of the absence in Germany of a material witness, who was alleged by the affidavits of the moving party, upon information and belief, to be in the service of the German government and in its army, where it did not appear where the witness was, or whether he was still alive.

The trial court cannot be said to have abused its discretionary power in refusing a continuance in an action brought by one who was subsequently interned as a dangerous alien, where plaintiff had been present at a former trial of the cause, upon which it appeared that the contract, for breach of which he was suing, had been negotiated by his agent, and it did not appear that plaintiff knew much of the facts upon which he relied, and his testimony had been preserved, and was accessible. *Lutz v. Van Heynigen Brokerage Co.* (1918) — Ala. —, 80 So. 72.

## *II. In appellate courts.*

The entrance of the United States into the war against Germany and Austria, with the resultant reversal by the Supreme Court, as chronicled in the reported case (*WATTS, W. & Co. v. UNIONE AUSTRIACA DI NAVIGAZIONE*, ante, 323), of the action of the court below in dismissing the libel, on the ground that the courts of a neutral

nation should, in the exercise of jurisdiction founded on comity, decline to entertain an action brought for the purpose of compelling a payment by one belligerent subject to an enemy subject during the continuance of the war, where such a payment is forbidden by the laws of both belligerents, prevented the decision of a question which is stated by the court of first instance to have been presented for judicial determination apparently for the first time.

A similar situation was presented in *The Kaiser Wilhelm II.* (1917) L.R.A. 1918C, 795, 159 C. C. A. 88, 246 Fed. 786, in which a libel had been filed by a British corporation against a steamship owned by a German corporation, which contended that the Federal court should not exercise its jurisdiction, because the countries of both litigants were at war with each other, and that prior to the filing of the libel the government of Germany had issued a moratorium, whereby payment of all indebtedness by German to British subjects was forbidden during the war. It was therefore contended that the present enforcement of this claim would compel such German subject to violate the law of its country, and thereby subject itself to pains and penalties. On the hearing, the court, in an opinion reported at (1916) 230 Fed. 717, sustained the contention of the German company, and dismissed the libel. Pending an appeal from its decree the whole situation was changed by the existence of war between the United States and Germany, and the taking of the libeled ship by the United States government; and it was accordingly held that the libel should be reinstated, and the case held, to give the owner of the vessel an opportunity to present his proof.

From the failure of the United States Supreme Court, in the case of *Owens v. Hanney* (1813) 9 Cranch (U. S.) 180, 3 L. ed. 697, to accede to the contention of counsel that the court ought not to affirm the judgment, it would seem that, if war breaks out during the pendency of a writ of error, the plaintiff in error cannot take advantage of the fact that the original

plaintiff is an alien enemy, but the judgment may be affirmed.

The rights of an appellee are not affected by a change of his status, from that of alien friend to that of alien enemy, since the appeal was perfected. *Superior & P. Copper Co. v. Davidovitch* (1918) 19 Ariz. 402, 171 Pac. 127, 16 N. C. C. A. 801.

A writ of error to review a judgment in favor of an alien residing in his own country, who became an alien enemy before disposition thereof, need not be held in abeyance; but the judgment, being upheld, should be modified so as to direct payment to the clerk of the court, and by him to be transferred to the alien property custodian; without prejudice, however, to the right of any person not an alien enemy, to establish an interest therein. *Birge-Forbes Co. v. Heye* (1918) 160 C. C. A. 536, 243 Fed. 636, writ of certiorari granted in (1918) 246 U. S. 676, 62 L. ed. 933, 38 Sup. Ct. Rep. 426.

Where an appellant becomes, by the outbreak of war, an alien enemy during the pendency of an appeal, the appeal will not necessarily be dismissed, but may be held in abeyance. *Ozbolt v. Lumbermen's Indemnity Exch.* (1918) — Tex. Civ. App. —, 204 S. W. 252.

In *Taylor v. Albion Lumber Co.* (1917) 176 Cal. 347, L.R.A.1918D, 185, 168 Pac. 348, it was held that an alien enemy may prosecute an appeal from an adverse judgment rendered before the war, where a dismissal of the appeal would be, in effect, an affirmation of the judgment perpetually barring his claim.

But an English case holds that an alien enemy, who is plaintiff in an action commenced before the outbreak of war, has no right of appeal, such right being suspended until the conclusion of peace. *Porter v. Freuden-*

*berg* [1915] 1 K. B. (Eng.) 857, 5 B. R. C. 548, W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 313, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215.

And see also, to the same effect, *Canadian Stewart Co. v. Perih* (1915) Rap. Jud. Quebec 25 B. R. 158, in which it was held that an appellee, who is a nonresident alien enemy, is not to be regarded as having the status in the appellate court of a defendant resisting the demand the appellant makes to have the judgment reversed.

An English case likewise holds that where two coplaintiffs have given notice of appeal before the outbreak of war, and one of them has, on the outbreak of war, become an alien enemy, the appeal must be suspended during the war. *Actien-Gesellschaft Für Anilin Fabrikation v. Levinstein* (1915) 31 Times L. R. (Eng.) 225, 32 Rep. Pat. Cas. 140, 112 L. T. N. S. 963, [1915] W. N. 85, 84 L. J. Ch. N. S. 842.

Where an alien enemy is a party defendant he may appeal against any decision, final or interlocutory, that may be given against him. *Porter v. Freudenberg* (Eng.) supra; *McVeigh v. United States* (1870) 11 Wall. (U. S.) 259, 20 L. ed. 80.

An appeal will not be dismissed because the defendants, or parties in the attitude of defendants, taking the appeal, are nonresident alien enemies. *Re Thiede* (1918) — Neb. —, 169 N. W. 435.

An alien enemy who is respondent to a petition for revocation of a patent, and against whom the operation of a decree revoking the patent is suspended by an appeal, cannot claim that the hearing of the appeal must be suspended during the war. *Porter v. Freudenberg* (Eng.) supra.

E. S. O.

WILLIAM J. HEILER, Appt.,  
v.  
GOODMAN'S MOTOR EXPRESS VAN & STORAGE COMPANY.

*New Jersey Court of Errors and Appeals—November 18, 1918.*

(— N. J. —, 105 Atl. 233.)

**Alien — right of enemy to prosecute suit.**

1. Plaintiff, a citizen of Germany residing in this state and earning his living here, sued for damages sustained by reason of a collision between his motorcycle and an automobile van. At the trial it appeared that he was born in Germany, had never been naturalized in this country, and was living and working in this state as aforesaid. Held, that it was improper to nonsuit him on the ground that he was an alien enemy, first, because the defense had not been pleaded or otherwise entered upon the record; secondly, because the alien enemy rule is not applicable to a citizen of an enemy country peaceably residing and doing business here with the implied license and permission of our government; there being nothing to show that he was within any of the classes denounced by the Trading with the Enemy Act or any presidential proclamation.

[See note on this question beginning on page 341.]

**Trial — leave to withdraw juror.**

2. Leave to withdraw a juror is a favor, not a right, and rests within the sound discretion of the trial court.

**Alien — action — defense.**

3. The defense of alien enemy, in order to be considered in an action at law, should be made a part of the record, and stated with accuracy by an appropriate pleading, or motion under our present practice. It is not favored by intendment.

**— right to maintain action.**

4. No action can be maintained either by or in favor of an alien enemy.

**— who is.**

5. A subject of a sovereign with which this country is at war, who resides and conducts business here, is not an alien enemy within the rule that such persons cannot maintain actions in the courts of this country.

Headnotes 1-3 by PARKER, J.

**APPEAL** by plaintiff from a judgment of nonsuit by the Supreme Court of an action brought to recover damages for personal injuries alleged to have been caused by the negligent operation of defendant's automobile van. *Reversed.*

The facts are stated in the opinion of the court.

Mr. John Winans for appellant.

Mr. Randolph Perkins for appellee.

**Parker, J.**, delivered the opinion of the court:

The suit was to recover damages for personal injuries claimed to have been sustained by the plaintiff below, by reason of a collision between a motorcycle on which plaintiff was riding and an automobile van belonging to and operated

by a servant or servants of the defendant. At the trial the plaintiff was nonsuited on the sole ground that he was an alien enemy of the United States, and was therefore barred from maintaining an action. This is urged as error, and also that the court refused the application of the plaintiff, when the question of nonsuit was under consideration and argument, to withdraw a juror and award a mistrial.

The alienage of the plaintiff was not made to appear until the latter part of his cross-examination, and it is worth while to quote, at this point, the exact testimony in that regard:

Q. You say—where were you born, Mr Heiler?

A. What's that?

Q. Where were you born?

A. Germany.

Q. When?

A. August 16, 1895.

Q. Are you a naturalized American citizen?

A. No, sir.

Q. So you were born in Germany?

A. Yes, sir.

Q. You are not an American citizen?

A. No, sir.

This seems to be everything in the testimony upon the point. The alienage and enmity of plaintiff were not in any manner set up in the pleadings, nor was any application made at the trial to amend the answer or place this defense upon the record by a special motion as provided by the Practice Act of 1912 (Act March 28, 1912 [Pamph. Laws, 377]). The motion was made as a motion to nonsuit, purely incidental to the progress of the trial upon a complete record.

The alleged error of the court in refusing to withdraw a juror may be dismissed in a few words, and, indeed, is in no way essential to the determination of the main question now involved, although it is worth while to advert to it as a matter of practice. The general rule, as laid down recently by this court, is that the refusal to withdraw a juror and thereby produce a mistrial is a matter that rests in the discretion of the trial judge, and is not assignable for error. *Bradley v. D. E. Cleary Co.* 86 N. J. L. 338, 90 Atl. 1015. The same rule obtains in New York, where it has been said by the court

Trial—leave  
to withdraw  
juror.

of appeals of that  
state that "leave to  
withdraw a juror is

a favor, not a right, and has always been held to rest within the

sound discretion of the court." *Cattano v. Metropolitan Street R. Co.* 173 N. Y. 565, 572, 66 N. E. 565, 13 Am. Neg. Rep. 566; *Chesebrough v. Conover*, 140 N. Y. 382, 388, 35 N. E. 633, 635. Conceding for present purposes that exceptional circumstances might remove the case from the operation of this rule, we find nothing in the case at bar to justify such a course.

With respect to the granting of the motion to nonsuit, however, we consider that there was clear error, and this for two reasons: First, because the issue was not raised upon the pleadings; and secondly, and more fundamentally, because plaintiff was not shown to be within the class of alien enemies barred from maintaining an action, either by the rules of the common law, or under the recent statutes of Congress applicable to that subject.

The fundamental rule, as laid down in the books, is that no action can be maintained, either by or in favor of an alien enemy.

Alien—right  
to maintain  
action.

*Brandon v. Nesbit*, 6 T. R. 23, 101 Eng. Reprint, 415, 3 Revised Rep. 109, 2 Eng. Rul. Cas. 649. But the rule seems to be equally well settled that this defense must be set up by a special plea. The authorities are somewhat confused as to whether the plea at common law was to be classified as a plea in

—action—  
defense.

abatement or a plea in bar, but, for present purposes, this is immaterial. 1 Chitty, Pl. pp. 481, 483, 514. The precision required in such a plea is indicated by our early case of *Coxe v. Gulick*, 10 N. J. L. 328, where the plaintiff was an alien, but not an enemy, and as such was disqualified by the existing law from holding real estate in this state. A leading case is *Burnside v. Matthews*, 54 N. Y. 78, where the court intimated that if the defense had been properly set up it would have prevailed, but refused to recognize it because it was not pleaded. Similar cases in Massachusetts, with annotations, are *Sewall v. Lee*, 9 Mass. 363, Mar-

tin v. Woods, 9 Mass. 377, and cases in the footnote to page 366. In the English case of *Ex parte Boussmaker*, 13 Ves. Jr. 71, 33 Eng. Reprint, 221, 9 Revised Rep. 142, Lord Chancellor Erskine remarked that a court of law would not take notice of the objection (of alien enemy) without a plea, and even in chancery it was held that there was no presumption in favor of the plea, and that the facts must be strictly set up. *Burk v. Brown*, 2 Atk. 397, 26 Eng. Reprint, 640. Under the Practice Act of 1912 and rules germane thereto, it would seem that this defense may be made by a motion substituted for plea in abatement (Rule 56 of 1903) or by answer if considered as a plea in bar at common law. The precise form in which the defense is put upon the record is not so material as that it shall be squarely placed upon the record, and with reasonable precision, corresponding to that required at common law. As already stated, this was not done; and the defense was therefore not maintainable as a matter of practice.

But there is a broader and more fundamental reason for holding that there was error in denying the plaintiff his right to prosecute the action, viz., that he was not shown to be within the class to which the rule is applicable. That rule, as just quoted from the English ruling cases, uses the words "alien enemy," but does not undertake to define or limit the term, although it has been most carefully defined in the cases, both in England and in this country. In the leading case of *Wells v. Williams*, 1 Ld. Raym. 282, 91 Eng. Reprint, 1086, defendant pleaded that the plaintiff was an alien enemy, and came into England without a safe-conduct, and concluded in bar, to which the plaintiff replied that, at the time of the making of the bond sued on, plaintiff was and still is in England by the license and under the protection of the King. To this the defendant demurred, but the court held that one who comes into the country in time of peace

without a safe-conduct and lives here thereafter under the protection of the King, and a war afterwards begins between the two nations, may still maintain an action. The case is also reported in 1 Salk. 46, 91 Eng. Reprint, 45, and Lutw. pt. 1, p. 34, 125 Eng. Reprint, 18.

In 1793, the case of *Daubigny v. Davallon* was decided by the court of exchequer, and, without going into the precise issues of the case, it is sufficient to quote from the deliverance by Lord Chief Baron Macdonald in 2 Anstr. at page 467, 145 Eng. Reprint, 937: "However the law may originally have stood, it is now settled that alien friends have a right to institute suits in the King's courts for the recovery of their rights; they come into this country, either, as was formerly the case, with a letter of safe-conduct, or under a tacit permission which presumes that authority. So, if they continue to reside here after a war breaks out between the two countries, they remain under the benefit of that protection, and are impliedly temporary subjects of this Kingdom. But if the right of suing for redress of the injuries they received were not allowed them, the protection afforded would be incomplete and merely nominal."

It is worthy of note that Judge Story, in his treatise on Equity Pleading, has frankly incorporated this deliverance into the text of his work. Story, Eq. Pl. § 52.

While, on the one hand, aliens who are subjects of a hostile country, but living and conducting their affairs within the jurisdiction by the sanction and under the protection of the government, are not included within the class of alien enemies to which the rule applies, so, on the other hand, natural-born subjects and citizens living within a hostile country, and conducting their affairs there, are brought within the rule by reason of those facts, and for a fundamental reason of public policy well recognized in the books, viz., that no

—right of  
enemy to  
prosecute suit.

benefit to the enemy country, direct or indirect, should be permitted to accrue or result from the maintenance of the action. And so, in a case where parties plaintiff, though natural-born citizens, were resident and doing business in a hostile country, they were not permitted to maintain their claim in the English courts. *M'Connell v. Hector*, 3 Bos. & P. 113, 127 Eng. Reprint, 61. In that case, Lord Alvanley, Chief Justice, said: "The question is, whether a man who resides under the allegiance and protection of a hostile state for all commercial purposes is not to be considered to all civil purposes as much an alien enemy as if he were born there. If we were to hold that he was not, we must contradict all the modern authorities upon this subject."

The law was fully and, in our view, most satisfactorily laid down by Lord Reading, somewhat obiter, perhaps, but justifiably, in view of the importance of the question, in a group of cases decided together, and which may be cited under the name of *Porter v. Freudenberg* [1915] 1 K. B. 857, especially at pages 867 and 868, 5 B. R. C. 548, Ann. Cas. 1917C, 215, where he held that the object of the rule is to prevent anything that will be of advantage to the enemy state. "Trading with a British subject," he said, "or the subject of a neutral state carrying on business in the hostile territory, is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy state, and therefore, for the purpose of enforcement of civil rights, they are equally treated as alien enemies. It is clear law that the test for this purpose is not nationality, but the place of carrying on the business." He cited the cases of *Wells v. Williams* and *M'Connell v. Hector*, supra, and also the more recent case of *Jansen v. Driefontein Consol. Mines* [1902] A. C. at pages 505, 506, 5 B. R. C. 810, where it is held that "an Englishman carrying on business in an enemy's country is

treated as an alien enemy in considering the validity or invalidity of his commercial contracts. . . . Again, the subject of a state at war with this country, but who is carrying on business here, or in a foreign neutral country, is not treated as an alien enemy. The validity of his contracts does not depend on his nationality, nor even on what is his real domicile, but on the place or places in which he carries on his business or businesses."

Lord Reading, in the *Porter Case*, criticized this passage as somewhat inaccurate, because the court had in mind only a trading corporation as a party, and did not deal with persons residing and not doing business in enemy territory.

The doctrine that place of residence and of conducting business is an essential test in the application of the rule of alien enemy was recognized in this country as early as 1812, and by so eminent an authority as Chancellor Kent, then sitting as chief justice of the state of New York, in the case of *Clarke v. Morey*, 10 Johns. 69. The plea in that case set up that the plaintiff was an alien enemy, to wit, a subject of Great Britain, with which the United States was at war, and had not been made a citizen of the United States by naturalization or otherwise, but entered and came into the United States and still remains therein without any letters of safe-conduct from the President of the United States, or any license to be, reside, or remain therein. To this the plaintiff demurred, and Chief Justice Kent, after dealing with the technical sufficiency of the plea, said that it would be presumed from the record that plaintiff came to reside here before the war, and therefore no letters of safe-conduct nor license from the President were required; that the license is implied by the law and the usage of nations; if he came here since the war, a license is also implied, and the protection continues until the Executive shall think proper to order the plaintiff out of the United States,



but that no such order is stated or averred. He called attention to the fact that the Act of Congress of July 6, 1798, respecting alien enemies, granted permission to the alien to remain, though his sovereign be at war with us. "A lawful residence," he said, "implies protection and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy no less than to justice and humanity." Further on, he added: "And it has now become the sense and practice of nations and may be regarded as the public law of Europe (the anomalous and awful case of the present violent power on the continent excepted) that the subjects of the enemy (without confining the rule to merchants), so long as they are permitted to remain in the country, are to be protected in their persons and property, and to be allowed to sue as well as to be sued."

This decision seems to have stood ever since as the law. The recent New York case of *Arndt-Ober v. Metropolitan Opera Co.* 182 App. Div. 513, 169 N. Y. Supp. 944, is to the same effect. There are several recent cases on the subject in the court of chancery of this state, particularly that of *Tortoriello v. Seghorn*, — N. J. Eq. —, 103 Atl. 393, where Vice Chancellor Foster points out that subjects of the German Empire, residing in this country and not within the act known as the Trading with the Enemy Act of October 6, 1917 (40 Stat. at L. 411, chap. 106, Comp. Stat. —, § 3115½a), or the proclamation of the President dated February 5, 1918, are not disqualified as alien enemies from performing a contract into which they had entered. He says most pertinently: "Congress, in the Trading with the Enemy Act, aside from the power thereby vested in the President, has made the test of enemy character depend upon residence, or official or agency relation, and not upon nationality, or mere alienage. The President by his proclamation has extended the ban upon trading only to such aliens as

have been or may be arrested and interned in the custody of the War Department for the duration of the war. . . . As a result of this forbearance, aliens not so classified have been at liberty to continue in the pursuit of their business and trade, including the receipt, banking, and expenditure of money belonging to them, without the slightest governmental interference or supervision."

The pertinent sections of the act of Congress are quoted in the opinion just cited, and need not be here repeated. It is sufficient to note that this act was probably passed with due consideration of the equitable and just rule of the common law laid down in both the English and American decisions.

When we come to apply the rule to the case at bar, there is absolutely nothing to show that the plaintiff was either within the class of alien enemy to which the common-law rule applies, or within the inhibitions of the act of Congress or the presidential proclamation. All that appears is that he was of German birth, residing in this country. He was engaged in an apparently peaceful and beneficial occupation in Bayonne, going from and returning to Hoboken every day. The presumption was and is that he is within the class of peaceable citizens of the enemy country, living here under the protection of our laws and attending to their everyday affairs without participation in the hostilities. To say that such a person should not be allowed to sue for the —who is. purpose of collecting his daily wages, or bring an action of damages for assault and battery upon him, or, as in the present case, an action of damages for personal injury sustained by reason of alleged negligence, is to run counter to the rule laid down by so many decisions of which a few have been cited above. Clearly he was entitled to maintain his action and not wait until the ending of the war, at which

time the evidence of important witnesses might be lost or other things might happen which would seriously interfere with the proper presentation of the case. Whether, in case plaintiff should secure a verdict and judgment, he should be permitted to collect the judgment, is a matter not before us at this time, and is more properly for the consid-

eration of the official alien property custodian in view of such facts as may be ascertained by him touching the actual relations of plaintiff with the land of his birth and allegiance, not appearing in the printed book before us. Upon that record, the judgment of nonsuit must be reversed, and the case remanded for a venire de novo.

### ANNOTATION.

#### Right of resident alien who is a subject of an enemy country to prosecute suit during war.

As to the effect of war on pending litigation, generally, see annotation appended to *Watts, W. & Co. v. Unione Austriaca di Navigazione*, ante, 323.

It is a settled rule that a subject of the enemy country residing in the state of the forum, and peacefully carrying on his ordinary vocation, is not under disability in the civil courts, and may therefore institute an action during the continuance of the war, or prosecute one already instituted before the war.

**United States.**—*Otteridge v. Thompson* (1814) 2 Cranch, C. C. 108, Fed. Cas. No. 10,618; *Crawford v. The William Penn* (1815) Pet. C. C. 106, Fed. Cas. No. 3,372; *Speidel v. N. Barstow Co.* (1917) 243 Fed. 621; *The Oropa* (1919) 255 Fed. 132.

**Illinois.**—*Seymour v. Bailey* (1872) 66 Ill. 288.

**Iowa.**—*Weiditschka v. Supreme Tent, K. M.* (1919) — Iowa, —, 170 N. W. 300 (obiter).

**Maryland.**—*Hepburn's Case* (1830) 3 Bland, Ch. 95.

**Massachusetts.**—*Parkinson v. Wentworth* (1814) 11 Mass. 26.

**Michigan.**—*Mittelstadt v. Kelly* (1918) — Mich. —, 168 N. W. 501.

**New Jersey.**—*HEILER v. GOODMAN'S MOTOR EXP. VAN & STORAGE CO.* (reported herewith) ante, 336.

**New York.**—*Clarke v. Morey* (1813) 10 Johns. 69; *Fritz Schultz Jr. Co. v. Raimes & Co.* (1917) 99 Misc. 626, 164 N. Y. Supp. 454, affirmed on another ground in (1917) 100 Misc. 697, 166 N. Y. Supp. 567; *Arndt-Ober v. Metropolitan Opera Co.* (1918) 102 Misc.

320, 169 N. Y. Supp. 304, affirmed in (1918) 182 App. Div. 513, 169 N. Y. Supp. 944.

**North Carolina.**—*Krachanake v. Acme Mfg. Co.* (1918) 175 N. C. 435, L.R.A.1918E, 801, 95 S. E. 851, Ann. Cas. 1918E, 340.

**Pennsylvania.**—*Russell v. Skipwith* (1814) 6 Binn. 241.

**Virginia.**—*Bagwell v. Babe* (1828) 1 Rand. 272.

**Washington.**—*State ex rel. Constandi v. Darwin* (1918) 102 Wash. 402, L.R.A.1918F, 1012, 173 Pac. 29.

**West Virginia.**—*Barna v. Gleason Coal & Coke Co.* (1919) — W. Va. —, 98 S. E. 158.

**England.**—*Wells v. Williams* (1697) 1 Ld. Raym. 282, 91 Eng. Reprint, 1086, 1 Salk. 46, 91 Eng. Reprint, 45, Lutw. pt. 1, p. 34, 125 Eng. Reprint, 18; *Daubigny v. Davallon* (1793) 2 Anstr. 467, 145 Eng. Reprint, 937; *Thurn & Taxis (Princess) v. Moffitt* [1915] 1 Ch. 58, [1914] W. N. 379, 31 Times L. R. 24, 59 Sol. Jo. 26, 84 L. J. Ch. N. S. 220, 112 L. T. N. S. 114.

**Ireland.**—*Volkl v. Rotunda Hospital* [1914] 2 Ir. R. 543, 48 Ir. L. T. 213.

**Canada.**—*Bassi v. Sullivan* (1914) 32 Ont. L. Rep. 14, 18 D. L. R. 452; *Oskey v. Kingston* (1914) 32 Ont. L. Rep. 190, 20 D. L. R. 959; *White v. T. Eaton Co.* (1916) 36 Ont. L. Rep. 447, 30 D. L. R. 459; *Viola v. Mackenzie, M. & Co.* (1915) Rap. Jud. Quebec 24 B. R. 31, 24 D. L. R. 208; *Ragusz v. Les Commissaires du Havre de Montreal* (1916) Rap. Jud. Quebec 26 B. R. 87; *Fabry v. Finlay* (1916) Rap. Jud. Quebec 50 C. S. 14, 32 D. L. R. 673;

*Kristo v. Hollinger Consol. Gold Mine* (1917) 41 Ont. L. Rep. 51; *Sap v. Picard* (1918) 20 Quebec Pr. Rep. 178, as digested in Canadian Ann. Dig. 1918, col. 9.

The test of the right to sue is residence, and not nationality; where the alien enemy is, and not what he is. *Krachanake v. Acme Mfg. Co.* (1918) 175 N. C. 435, L.R.A.1918E, 801, 95 S. E. 851, Ann. Cas. 1918E, 340.

A fortiori, he may assign his claim, and the assignee may recover judgment. *Fabry v. Finlay* (1916) Rap. Jud. Quebec 50 C. S. 14, 32 D. L. R. 678.

An alien enemy commorant in the jurisdiction by the license of the government, and under its protection, may sue, though he came in time of war without a safe-conduct. *Wells v. Williams* (1697) 1 Ld. Raym. 282, 91 Eng. Reprint, 1086, 1 Salk. 46, 91 Eng. Reprint, 45, 1 Lutw. pt. 1, p. 34, 125 Eng. Reprint, 18.

The fact that the plaintiff is a woman, whose husband is actually engaged in hostile warfare, does not alter the situation where the basis of the action is a right individual to herself. *Thurn & Taxis (Princess) v. Moffitt* [1915] 1 Ch. (Eng.) 58, [1914] W. N. 379, 31 Times L. R. 24, 59 Sol. Jo. 26, 84 L. J. Ch. N. S. 220, 112 L. T. N. S. 114.

A resident alien enemy who, under the law, has a right to a license to pursue his usual occupation, may maintain a proceeding for a writ of mandamus to compel its issuance. *State ex rel. Constanti v. Darwin* (1918) 102 Wash. 402, L.R.A.1918F, 1012, 173 Pac. 29.

There is nothing in the terms of the Trading with the Enemy Act of October 6, 1916, to alter the rule that the resident subjects of an enemy nation are entitled to invoke the process of our courts, so long as they are guilty of no act inconsistent with the temporary allegiance which they owe to the government of the United States. *Arndt-Ober v. Metropolitan Opera Co.* (1918) 102 Misc. 320, 169 N. Y. Supp. 304, affirmed in (1918) 182 App. Div. 513, 169 N. Y. Supp. 944.

The Treaty of 1799, 8 Stat. at L. 174, between the Kingdom of Prussia and the United States, which was reaffirmed by the Treaty of 1828, 8 Stat. at L. 378, in providing that "if war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months, to collect their debts and settle their affairs, and may depart freely, carrying off all their effects, without molestation or hindrance," and in providing that this provision shall not be annulled or suspended by war, would seem to confer upon alien enemies of German nationality, notwithstanding the existence of a state of war, the right to collect their debts by whatever process or remedy the United States or its several states and territories afford, pursuant to the provisions of the Federal Constitution that the treaties of the United States with foreign powers shall be the law of the land, anything in the Constitution or laws of the several states to the contrary notwithstanding. *Fritz Schultz Jr. Co. v. Raimés & Co.* (1917) 99 Misc. 626, 164 N. Y. Supp. 454 (dictum).

In order to entitle an alien subject of an enemy country, residing within the local jurisdiction, to sue, it is not necessary for him to allege and prove that he is not a spy and has not committed acts of hostility, but the exception should be invoked by the one who relies upon it. *Viola v. Mackenzie, M. & Co.* (1915) Rap. Jud. Quebec 24 B. R. 31, 24 D. L. R. 208.

It has been held that the court cannot, on grounds of public policy, stay an action on the ground that moneys derived from its prosecution will be used in giving aid and comfort to the enemy. *Fritz Schultz Jr. Co. v. Raimés & Co.* (1917) 99 Misc. 626, 164 N. Y. Supp. 454, affirmed in (1917) 100 Misc. 697, 166 N. Y. Supp. 567; *White v. T. Eaton Co.* (1916) 36 Ont. L. Rep. 447, 30 D. L. R. 459.

In *The Oropa* (1919) 255 Fed. 132, it was held that a libel by a seaman to recover his wages would not be dismissed because libellant, who had signed as a seaman in an Italian port

on an Italian vessel, and had, prior to the bringing of his suit, declared an intention to become a citizen of the United States, was a citizen and subject of Austria, with which the United States was at war, but that the suit should be continued until the conclusion of peace in order that the libellant might not lose the opportunity, through the departure of the vessel, to try the question of his wages.

**Effect of internment.**

It has been held that a resident alien of enemy nationality is not debarred from maintaining an action by the circumstance of his internment as a civilian prisoner of war. *Schaffenius v. Goldberg* [1916] 1 K. B. (Eng.) 284, 7 B. R. C. 842, 113 L. T. N. S. 949, 32 Times L. R. 133, 60 Sol. Jo. 105, 85 L. J. K. B. N. S. 374, affirming (1915) 32 Times L. R. 31.

But in *Lutz v. Van Heynigen Brokerage Co.* (1918) — Ala. —, 80 So. 72, it was held that one who had been interned as a dangerous alien might be considered as having substantially the status of an alien enemy.

In *Harasymczuk v. Montreal Light, Heat & P. Co.* (1916) Rap. Jud. Quebec 25 B. R. 252, it was held that an alien subject of an enemy country, interned in time of war in Canada because he had no work and would have been a public burden, did not, by reason of such internment, lose his right to prosecute an action for damages occasioned by the death of his son.

The taking of an inventory of the property of the community theretofore existing between the parties will not be suspended on the ground that defendant is an interned enemy. *Swaile v. Trieber*, 17 Quebec Pr. Rep. 428, as digested in Canadian Ann. Dig. 1916, col. 12.

An alien enemy plaintiff, in an ac-

tion which has been suspended by judgment on the ground that he was interned as a suspected person, has a right, if he obtains his freedom, to demand a rescission of the orders staying the proceeding. *Gusetu v. Laing* (1917) 18 Quebec Pr. Rep. 971, as digested in Canadian Ann. Dig. 1917, col. 12.

A prisoner of war taken in an act of hostility may, it seems, sue while in confinement. See *Sparenburgh v. Banatyne* (1797) 1 Bos. & P. 163, 126 Eng. Reprint, 837, 2 Esp. 581, 4 Revised Rep. 772, in which it was held that a native of a neutral state taken in an act of hostility on board an enemy's fleet is not disabled from suing while in confinement on a contract entered into as a prisoner of war; and in which it was intimated that the same conclusion would have been reached had the plaintiff been an enemy born.

A prisoner of war, however, is not entitled to the privilege of the writ of habeas corpus to examine into the propriety of his detention (*Three Spanish Sailors' Case* (1780) 2 W. Bl. 1324, 96 Eng. Reprint, 775), even though he is the subject of a neutral power and has been forcibly compelled to serve on board the enemy's ship, where he was taken. *Rex v. Schiever* (1759) 2 Burr. 765, 97 Eng. Reprint, 551.

And the rule that the court will not entertain an application for habeas corpus from a prisoner of war has been held to apply to a civilian subject of an enemy state, who has been interned as a measure of public safety. *Rex v. Vine Street Police Station* [1916] 1 K. B. (Eng.) 268, 7 B. R. C. 868, 113 L. T. N. S. 971, 85 L. J. K. B. N. S. 210, 80 J. P. 49, 32 Times L. R. 3; *Re Gusetu* (1915) 24 Can. Crim. Cas. 427; *Ex parte Graber* (1918) 247 Fed. 882. E. S. O.

NORTHWESTERN OIL & GAS COMPANY, Plff. in Err.,  
v.

ELMER L. BRANINE et al.

*Oklahoma Supreme Court — October 8, 1918.*

(— Okla. —, 175 Pac. 533.)

**Mines — oil and gas lease — consideration — surrender clause — mutuality.**

1. Where a cash bonus of \$160 was paid for an oil and gas lease which provided that lessee should commence the drilling of a well within twelve months from the date thereof or pay a quarterly rental of \$40, and further provided that the lessee might at any time upon the payment of a further sum of \$2, and as accrued liabilities, surrender the leased premises and terminate all future liabilities under the lease, held, that the cash bonus supports each and all the covenants in the lease; and held, further, that the presence of a surrender clause in said lease did not render the same void for want of mutuality, nor confer on the lessor the right to terminate said lease at will.

*[See note on this question beginning on page 378.]*

**Contract — duty of courts to enforce.**

2. The court must give effect to the meaning and intention of the parties as expressed in the language of their contract, in the absence of anything to show legal impediment to prevent their entering into any contract they saw fit, or their expressing it in the language of their own choice.

*[See 6 R. C. L. 835.]*

**Option — mutuality.**

3. The essence of an option contract is that it is not mutual, for the optionee pays his money or performs his promise for the right of electing whether or not he will require performance by the other party, and the optionor relinquishes his right of choice.

*[See 6 R. C. L. 603.]*

**— mutual right of nonperformance.**

4. The rule that contracts which are optional as to one party are also optional as to the other applies only to contracts that are wholly executory and unperformed, and consist of mutual promises each the consideration of the other.

*[See 6 R. C. L. 603.]*

**Landlord and tenant — option in lease — want of mutuality.**

5. The fact that an oil and gas lease confers upon the lessee the option of

drilling or paying or taking advantage of the surrender clause to terminate the lease does not render the same void for lack of mutuality.

*[See 18 R. C. L. 1212 et seq.]*

**Mines — oil and gas lease — rights under “unless lease.”**

6. The lessee in an “unless lease” has an option to continue the lease in force so long as he pays the rentals in the manner provided, and may terminate the same at will by a failure to pay the rental when due; but the lessor has no right to terminate the lease so long as the lessee complies with its terms.

*[See 18 R. C. L. 1212 et seq.]*

**— rights under “or lease.”**

7. Payment of rentals by the lessee in an “or lease” according to the terms of the lease, even when containing a surrender clause, is not necessary to keep it alive from time to time, nor does the failure to pay automatically terminate the contract; but while the lessor may waive the forfeiture clause and may sue and recover the rentals due, the lessee may terminate the lease at any time by availing himself of the right to do so contained in the surrender clause, and by paying all the accrued rentals due at the time of surrender.

*[See 18 R. C. L. 1212 et seq.]*

Headnote 1 by HARDY, J.

(— Okla. —, 175 Pac. 533.)

**ERROR** to the District Court for Kay County to review a judgment in favor of plaintiffs in an action brought to cancel and remove as a cloud upon their title, a certain oil and gas lease. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. George S. Ramsey, G. Earl Shaffer, William H. England, Edgar A. de Meules, Malcolm E. Rosser, Villard Martin, and J. Berry King, for plaintiff in error:

The \$160 cash bonus is sufficient consideration to support each and every term in the lease, including the right of the lessee to postpone development upon paying \$1 per acre per year, however, not longer than five years from the date of the lease.

*Kachelmacher v. Laird*, 92 Ohio St. 324, 110 N. E. 935, Ann. Cas. 1917E, 1117; *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 604, 106 Fed. 764; *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 804; 2 Elliott, Contr. §§ 1543, 1544; *Guffey v. Smith*, 237 U. S. 101, 116, 59 L. ed. 856, 865, 35 Sup. Ct. Rep. 526; *Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey*, 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545; *Lovett v. Eastern Oil Co.* 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360; *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A.(N.S.) 848, 76 S. E. 961; *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762; *Gillespie v. Fulton Oil & Gas Co.* 236 Ill. 188, 86 N. E. 219; *Eyre v. Potter*, 15 How. 42, 59, 14 L. ed. 592, 600; *Lawrence v. McCalmont*, 2 How. 426, 429-453, 11 L. ed. 326-336; *Davis v. Wells, F. & Co.* 104 U. S. 159, 166, 26 L. ed. 686, 690; *Olds v. Marshall*, 93 Ala. 141, 8 So. 284; *Grimball v. Mastin*, 77 Ala. 553; *McMillan v. Philadelphia Co.* 159 Pa. 142, 28 Atl. 220.

Two dollars is a sufficient consideration to support the right of the lessee to surrender the lease.

*Ehrig v. Adams*, — Okla. —, 152 Pac. 594; *Moore v. Adams*, 26 Okla. 48, 108 Pac. 392; *Eyre v. Potter*, 15 How. 42, 60, 14 L. ed. 592, 600; *Guffey v. Smith*, 237 U. S. 101, 116, 59 L. ed. 856, 865, 35 Sup. Ct. Rep. 526; *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 801; *Allegheny Oil Co.*

*v. Snyder*, 45 C. C. A. 604, 106 Fed. 764; *Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey*, 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545; *Lovett v. Eastern Oil Co.* 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360; *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A.(N.S.) 848, 76 S. E. 961; *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762; *Gillespie v. Fulton Oil & Gas Co.* 236 Ill. 188, 86 N. E. 219.

The conditional surrender clause oil and gas lease for a definite number of years, when supported by a cash bonus, is a valid and binding contract; does not create a tenancy at will nor reserve to the lessor the right to compel the lessee to surrender the lease; a cash bonus supports each and every covenant in the lease, including the right of the lessee to postpone development throughout the entire five-year term, upon paying the lessor the delay money agreed upon.

*Central Trust Co. v. Chicago Auditorium Asso.* 240 U. S. 582, 591, 60 L. ed. 811, 815, L.R.A.1917B, 580, 36 Sup. Ct. Rep. 412; *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 545; *Hill Oil & Gas Co. v. White*, — Okla. —, 157 Pac. 710; *Guffey v. Smith*, 237 U. S. 115, 59 L. ed. 864, 35 Sup. Ct. Rep. 526; *McCullough v. Smith*, 156 C. C. A. 335, 243 Fed. 834; *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 801; *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 604, 106 Fed. 764; *Downey v. Gooch*, 240 Fed. 527; *Lindlay v. Raydure*, 239 Fed. 928; *Shaffer v. Marks*, 241 Fed. 139; *Dann v. Spurrier*, 3 Bos. & P. 399, 127 Eng. Reprint, 218, 7 Revised Rep. 797, 2 Eng. Rul. Cas. 756; *Doe ex dem. Webb v. Dixon*, 9 East, 15, 103 Eng. Reprint, 478; *Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey*, 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803; *New American Oil & Min. Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; *Eclipse Oil Co.*

v. South Penn Oil Co. 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; Lovett v. Eastern Oil Co. 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360; South Penn Oil Co. v. Snodgrass, 71 W. Va. 438, 43 L.R.A.(N.S.) 848, 76 S. E. 961; Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 762; Reserve Gas Co. v. Carbon Black Mfg. Co. 72 W. Va. 757, 79 S. E. 1002; Brown v. Fowler, 65 Ohio St. 507, 63 N. E. 76; Central Ohio Natural Gas & Fuel Co. v. Eckert, 70 Ohio St. 127, 71 N. E. 281; Pierce Fordyce Oil Asso. v. Woodrum, — Tex. Civ. App. —, 188 S. W. 249; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; Saunders v. Busch-Everett Co. 138 La. 1049, 71 So. 153; Leonard v. Busch-Everett Co. 139 La. 1099, 72 So. 749; Cochran v. Gulf Ref. Co. 139 La. 1010, 72 So. 718; Marks v. Gorla Bros. 121 Va. 491, 93 S. E. 675; Hooks v. Forst, 165 Pa. 238, 30 Atl. 846, 18 Mor. Min. Rep. 139; Effinger v. Lewis, 32 Pa. 367.

Messrs. John J. Hildreth, Ezra Branine, Harry W. Hart, Charles E. Branine, and H. R. Branine, for defendants in error:

If the lessee does anything under the lease except to cancel and surrender the same, it does so of its voluntary choice, as the terms of the lease do not require or bind it to do anything else.

Brown v. Wilson, — Okla. —, L.R.A. 1917B, 1184, 160 Pac. 94; Frank Oil Co. v. Belleview Gas & Oil Co. 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902; Duff v. Keaton, 33 Okla. 92, 42 L.R.A.(N.S.) 472, 124 Pac. 291; Superior Oil & Gas Co. v. Mehlin, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 545; Hill Oil & Gas Co. v. White, 53 Okla. 748, 157 Pac. 710.

Hardy, J., delivered the opinion of the court:

Elmer L. Branine and Mary E. Branine commenced an action on the 18th day of January, 1917, against the Northwestern Oil & Gas Company to cancel and remove as a cloud upon their title a certain oil and gas lease, the pertinent parts of which are as follows:

"Agreement, made and entered into the 3d day of August, A. D.

1915, by and between Elmer L. Branine and Mary E. Branine, his wife, of Hunnewell, Oklahoma, parties of the first part, lessors, and Northwestern Oil & Gas Company, party of the second part, lessee, witnesseth:

"That the said parties of the first part for and in consideration of the sum of \$1 to them in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements herein-after contained on the part of the party of the second part to be paid, kept, and performed, has granted, demised, leased, and let, and by these presents do grant, demise, lease, and let unto the said second part —, their heirs, executors, administrators, successors, or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, power stations, and structures thereon to produce and take care of said products, all that certain tract of land situate in the county of Kay, state of Oklahoma, described as follows, to wit:

"The southeast quarter ( $\frac{1}{4}$ ) of sec. fifteen (15), township (29) north, range (1) west of section 15, township 29, range 1, and containing 160 acres, more or less. It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter as oil and gas, or either of them, are produced from said land by the party of the second part, their heirs, administrators, executors, successors, or assigns. . . .

"The party of the second part hereby agrees to complete a well on said premises within one year from the date hereof, or to pay at the rate of forty (\$40) dollars for each additional three months such completion is delayed from the time above mentioned for the full completion of such well, until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during

the remainder of the term of this lease. . . .

"The party of the second part, its successors or assigns, shall have the right at any time, on the payment of \$2 to the party of the first part, their heirs or assigns, to surrender this lease for cancelation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine; provided, this surrender clause and the option therein reserved to the lessee shall cease and become absolutely inoperative immediately and concurrently with the institution of any suit in any court of law or equity by the lessee to enforce this lease, or any of its terms, or to recover possession of the leased land, or any part thereof, against or from the lessors, their heirs, executors, administrators, successors or assigns, or any person or persons. All covenants or agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors, administrators, and assigns."

It appears from the agreed statement of facts that \$160 was paid to plaintiffs at the time of the execution of said lease, and that all of the rentals were tendered by the lessee before the date they were payable, in strict conformity with the terms of the lease, but that said tenders were refused by plaintiffs.

It is agreed that the sole question presented is whether the presence of a surrender clause in the lease, whereby the lessee might, on the payment to lessors of the sum of \$2, surrender said lease and relieve itself from any further liability thereunder, rendered the lease unilateral and voidable for want of mutuality and conferred a corresponding right on the lessors to terminate said lease at will, and to refuse to accept rentals when tendered, though tendered in strict conformity with the terms of the lease.

Plaintiffs rely on the case of *Brown v. Wilson*, — Okla. —, L.R.A.1917B, 1184, 160 Pac. 94, and concede that, if the decision in that

case does not govern here, the judgment of the trial court in plaintiff's favor, canceling the lease, should be reversed and the cause remanded.

At the time the lease was executed, it was not certainly known whether oil and gas, or either of them, would be found upon the premises, and the development thereof would naturally be attended with the hazards incident to the development of unproved territory. Should a failure result, the loss would be borne wholly by the lessee, while, on the contrary, should development prove successful, the lessor, without having run any risk incident to the exploration, would receive a substantial part of the proceeds from the oil and gas produced therefrom. With this situation in the minds of the parties, it was one of the stipulations in the lease that, if a well should not be commenced within twelve months from the date thereof, the lessee should have the right to delay operations by paying to the lessors \$40 per quarter. The lease itself is couched in plain and unambiguous language, and there is no claim made of any fraud, deception, or unfair dealing by the lessee in procuring it. There is no legal impediment shown which would prevent the parties from entering into any contract which they saw fit, nor from expressing it in language of their own choice, and under these circumstances it is the duty of the court to give effect

to the meaning and intention of the parties as expressed in the language of the contract, and the court has no right to make a contract for the parties different from that actually entered into by them. Rev. Laws 1910, § 949; *Cohn v. Clark*, 48 Okla. 500, L.R.A.1916B, 686, 150 Pac. 467.

It is contended by plaintiffs that the lease in question does not bind the lessee to drill or pay, and therefore they have the right to terminate same because of the presence of the surrender clause there-

Contract—  
duty of courts  
to enforce.



in. Just here we believe it will be helpful to inquire what is the status of the parties under the contract, and what are their respective rights and liabilities. Plaintiffs claim that the oft-repeated doctrine that "contracts which are unperformed, that are optional as to one party, are also optional as to the other," applies. Is the contract in question one of the character to which this rule is properly applicable? The mere fact that it may constitute an option is not sufficient to bring it within the operation of this rule, for it is of the very essence of an option contract that they are not mutual, for the optionee pays his money or performs his promise

**Option—  
mutuality.**

for the right of electing whether he will require performance by the other party, and the optioner relinquishes his right of choice for the consideration received by him. *Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey*, 76 Kan. 42, 12 L.R.A. (N.S.) 745, 90 Pac. 803; *Poe v. Ulrey*, 233 Ill. 57, 84 N. E. 46.

The rule urged only has application to contracts that are wholly executory and unperformed, in that they consist of mutual promises, each the consideration of the other, and where it is optional with one of the parties whether he will perform his promises, in which cases it is

**—mutual right  
of non-  
performance.**

also optional with the other. 9 Cyc. 327; 13 C. J. 331, § 179; *Lindlay v. Raydure* (D. C.) 239 Fed. 928. The lease herein involved was not wholly executory and unperformed. So far as the lessors were concerned, the lease was wholly executed, and by its terms there was granted to the lessee an estate in possession, which vested immediately on its execution and delivery, under which lessees had the right, according to the terms of the lease, for a period of five years to make exploration on the leased premises. *Frank Oil Co. v. Belleview Gas & Oil Co.* 29 Okla. 719, 43 L.R.A. (N.S.) 487, 119 Pac. 260;

*Brennan v. Hunter*, — Okla. —, 172 Pac. 49. Nor was the lease wholly executory as to the lessee. The consideration of \$160 had been paid to and accepted by the lessors at the time of its execution, and four successive quarterly payments had been tendered by the lessee in strict conformity with the terms of the lease. There was, therefore, part performance by the lessee.

The fact that the lease conferred upon the lessee the option of drilling or paying or taking advantage of the surrender clause and terminating the lease did not render same void for lack of mutuality. Options in

**Landlord and  
tenant—option  
in lease—want  
of mutuality.**

leases granting to the lessee the privilege of purchasing the leased premises are valid, and such an option has been recognized in this state. *Jones v. Moncrief-Cook Co.* 25 Okla. 856, 108 Pac. 403. And no good reason can exist why an option to terminate a lease of the character here involved, when supported by a consideration, should not be upheld. *Lindlay v. Raydure*, supra. In fact, leases of this character have been before this court in a number of cases, and their validity has been recognized. *Burress v. Diem*, 23 Okla. 776, 101 Pac. 1116; *Cohn v. Clark*, 48 Okla. 500, L.R.A. 1916B, 686, 150 Pac. 467; *McKee v. Grimm*, — Okla. —, 157 Pac. 308.

The decision in *Brown v. Wilson* held that the \$1 paid upon the execution of the lease supported only the first term, or the period in which a well should be commenced, and supported no other condition of the lease. When this construction was placed upon the contract therein involved, it logically followed that the remaining conditions of the lease were without consideration. The decision in that case was also based upon the ground that lessees had made default in the payment of rentals according to the terms of the contract, and that the lessor had the right, under the forfeiture clause, to declare the lease at an end. It is urged that that portion of the

(— Okla. —, 175 Pac. 535.)

opinion holding that the surrender clause rendered the lease unilateral and subject to be terminated at the option of the lessee was in conflict with previous decisions of this court. If it be kept in mind that the \$1 paid upon the execution of the lease was held not to support any condition of the lease other than the boring period, there would be no conflict. A number of cases decided by this court have presented for consideration leases wherein was contained a surrender clause, and, prior to *Brown v. Wilson*, in every instance leases have been upheld.

Before reviewing the opinions upon this point, it is well to observe a general distinction between the different kinds of leases which are in common use in this state. Most of them naturally fall in two classes, commonly designated as the "or lease" and the "unless lease," and leases belonging to these respective classes possess such marked distinctions in the rights and liabilities of the parties thereunder that these distinctions should not be lost sight of. Under what is known as the "unless lease," the lessee, so long

Mines—oil and  
gas lease—  
rights under  
"unless lease."

as he pays the rentals in the manner provided, has an option to continue

the lease in force. *Frank Oil Co. v. Belleview Gas & Oil Co.* 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; *Deming Invest. Co. v. Lanham*, 36 Okla. 773, 44 L.R.A.(N.S.) 50, 130 Pac. 260. Such a lease is subject to termination at the will of the lessee, which privilege may be exercised by a mere failure to pay the stipulated rental at the time due, upon the happening of which the lease automatically terminates, and the lessor cannot maintain an action against the lessee for rentals. But even in an "unless lease" the lessor has not the right to terminate the lease as long as the lessee complies with its terms.

In *Frank Oil Co. v. Belleview Gas & Oil Co.* supra, the lease provided that if no well was commenced within one year from date the lease

should become null and void, unless the lessee should pay \$80 for each year thereafter such completion was delayed. It was held that this provision did not bind the lessee to pay any rent for the land or for delay in commencing operation, but that said lease amounted to an option preventing the lessor after receiving the consideration for any period from leasing to another, and that lessee had the option to keep the lease alive by making the payments in accordance with the terms of the lease. In *Deming Invest. Co. v. Lanham*, supra, the court held that the lessor in an "unless lease" could not recover rentals thereunder, and in this case the court reiterated the doctrine that the lessee had the option, by paying the rentals, to keep the lease alive. The lease in the last-cited case contained a surrender clause. If, under these leases, the lessee had the option, as the court clearly said he had, to keep the lease alive by paying the prescribed rentals, certainly the lessor could not terminate same at will, for the existence of the option by the lessee is inconsistent with and negatives the existence of this right on the part of the lessor.

On the other hand, under the "or lease," even when containing a surrender clause, the payment of rentals by the lessee, according to the terms of the lease, is not necessary to keep it alive from time to time, nor does the failure to pay automatically terminate the contract, as under the "unless lease," and where the lessee makes default in the payment of rentals the lessor may waive —rights under  
"or lease,"  
the forfeiture clause

and may sue and recover rentals due according to the terms of the lease. *Burress v. Diem*, *Cohn v. Clark*, and *McKee v. Grimm*, — supra. The lessee, however, may terminate the lease at any time by availing himself of the right to do so contained in the surrender clause and by paying all the accrued rentals due at the time of surrender.

Cohn v. Clark, and Burress v. Diem, *supra*.

It is a contradiction to say that the lessor in an "or lease" may waive his right to declare a forfeiture for nonpayment of rentals and sue for and recover such rentals until a surrender is made in accordance with the surrender clause, and then say that the presence of this clause renders the lease void for want of mutuality. If the lease was void for this cause, the right upon the part of the lessor to sue for rentals would not exist. In the three cases cited when this court sustained a recovery by the lessor, the validity and binding force of these contracts was recognized, for a recovery could not be upheld upon any other theory, while the court has refused to compel the execution of a lease containing a surrender clause in conformity with an agreement to do so. *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 545; *Hill Oil & Gas Co. v. White*, 53 Okla. 748, 157 Pac. 710. And has also refused specific performance of such a lease, when executed, for the reason that the surrender clause therein contained gave to the lessee the option to terminate same at any time. *Kolachny v. Galbreath*, 26 Okla. 772, 38 L.R.A. (N.S.) 451, 110 Pac. 902. And has also held that such contracts will be strictly construed against the lessee. *Ibid.*; *Frank Oil Co. v. Belleview Gas & Oil Co.* 29 Okla. 719, 43 L.R.A. (N.S.) 487, 119 Pac. 260. These holdings are far from saying that such contracts are void when based upon a consideration. In the *Hill Oil & Gas Co. Case*, the rule was correctly stated that "contracts unperformed [without sufficient consideration], which are optional as to one, . . . are optional as to both." This statement implies a clear recognition of the validity of an optional contract when based upon a sufficient consideration. In none of the previous decisions of this court, involving either an "or" lease or an "unless" lease, is there any support found for

the contention that the presence of a surrender clause in a lease based upon a sufficient consideration, which has been executed voluntarily by parties capable of contracting, and which is free from any of the elements that render a contract void or voidable, confers upon the lessor a corresponding right to forfeit the lease at his option, without any agreement to that effect, and without the payment or promise of payment of any consideration therefor.

Development was not the sole consideration for the lease. The bonus of \$160 supported each and every term, including the right to postpone development upon paying a stipulated rental in conformity with the covenants of the lease, and the option to surrender upon paying the stipulated sum of

—oil and gas—  
lease—  
consideration—  
surrender  
clause—  
mutuality.

\$5. The lease was for five years, and as long thereafter as oil and gas were found in paying quantities, the lessor agreeing to commence a well within twelve months, or in lieu thereof to pay the stipulated rentals. Of course, if no cash bonus had been paid, development would be the sole consideration. Such is the holding of the courts where there was no cash bonus, or where the consideration was nominal and was disregarded. Also, if there had been no agreement to delay drilling beyond a period of one year, then the court might say that unless the premises were developed within that period the lease might be terminated. But here the parties have expressly agreed for a good and sufficient consideration that the lessee may postpone development upon the payment of a certain sum of money. This condition was doubtless suggested by the undeveloped condition of the district in which the leased premises are situated, and by the risks incident to exploring for oil and gas. This covenant was satisfactory to the lessor at the time, and we know of no reason why the deliberate agree-

(— Okla. —, 175 Pac. 533.)

ment of the parties, expressed in language of their own choice, which is unambiguous, should not be given that effect and meaning which it was intended should be given thereto. The court has no right to fractionize the contract or divide it up into sections, and say that the cash bonus supports any particular covenant to the exclusion of another, when such construction would be contrary to the clear intention of the parties, as gathered from the face of their written agreement. The conclusion that the cash bonus paid upon the execution and delivery of the lease supports each and all of the terms and conditions contained therein, including the surrender clause, is sustained by all the courts, except in those cases where a nominal consideration was rendered and was held insufficient. *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 604, 106 Fed. 764; *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 804; *Guffey v. Smith*, 237 U. S. 101, 116, 59 L. ed. 856, 865, 35 Sup. Ct. Rep. 526; *Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey*, 76 Kan. 42, 12 L.R.A. (N.S.) 745, 90 Pac. 803; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545; *Lovett v. Eastern Oil Co.* 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 12B, 360; *South Penn Oil Co. v. Hodggrass*, 71 W. Va. 438, en. for. L.A. (N.S.) 848, 76 S. E. 9; *Henderson v. the right, E.* 65 W. Va. 127, 63 N. E. 76.

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762; *Gillespie v. Fulton Oil Co.* 236 Ill. 188, 86 N. E. 219; *McMillan v. Philadelphia Co.* 159 Pa. 142, 28 Atl. 220.

It would be manifestly inequitable to permit the lessor who has entered into a contract that is free from fraud and received a substantial consideration therefor, to retain that consideration, avoid the lease, and deprive the lessee of the privilege or option which it has purchased and paid for. I am therefore of the opinion that the presence of the surrender clause in the lease involved did not render it void for want of mutuality and did not confer on the lessor the right to terminate the lease at will, and that the judgment of the trial court should be, and the same is, hereby reversed, and this cause remanded.

All the Justices concur, except *Owen, J.*, concurs in conclusion; *Turner, J.*, not participating.

*Kane, J.*, concurring:

I concur fully in the conclusion and reasoning of the court as stated in the opinion just handed down. I wish, however, to further support my concurrence by reference to the additional reasoning and authorities to the same effect, contained in my dissenting opinion in the overruled case of *Brown v. Wilson*, — Okla. —, L.R.A. 1917B, 1184, 160 Pac. 94.

#### NOTE.

The reported case (*NORTHWESTERN OIL & GAS CO. v. BRANINE*, ante, 344) should be read in connection with *RICH v. DONAGHEY*, post, 352; and the note following the latter case at page 378.

FRED S. RICH, Plff. in Err.,  
v.

M. P. DONAGHEY et al.

*Oklahoma Supreme Court — December 3, 1918.*

(— Okla. —, 177 Pac. 86.)

**Mines — oil and gas lease — option to surrender — consideration — mutuality.**

1. The owners of a tract of 60 acres of land executed an instrument, denominated an oil and gas lease, by the terms of which they granted, demised, leased, and let the same to another, his heirs, executors, administrators, and assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, power stations, and structures thereon, to procure and take care of said products. The grant was for a term of five years from date and as long thereafter as oil or gas, or either of them, was produced by said party. The instrument recited a consideration of \$1 paid by the lessee to the lessors. The lessee agreed to deliver to lessors one eighth of the oil produced and saved from the premises; to pay a certain stipulated sum per annum for each gas well, and for gas utilized from each oil well. The lessee further agreed to complete a well on said premises within six months, or pay at the rate of \$15 for each additional month such completion was delayed. The instrument contained the further provision that the lessee should have the right at any time, on payment of \$1 to the lessors, to surrender the lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms should cease and determine. In an action by the owners of the land to cancel the instrument and remove same as a cloud on their title, commenced prior to the expiration of the term of five years, it appearing that no well had been commenced, but that the lessee had made timely payments or tender of all sums stipulated to be paid for delay in completing a well, held, (a) that the consideration recited in the face of the instrument is sufficient to support the grant of the exclusive right to occupy the land and explore the same for oil and gas and to take and remove such as may be found therein for the entire term specified, and also the right of the lessee, on compliance with the conditions expressed, to terminate the same; (b) that the agreement is not void for the want of mutuality; (c) that, although no well had been commenced on the premises, the lessors had not the option to refuse timely tender of payments for delay in completing a well and terminate the grant, or to compel a surrender thereof; (d) that the instrument does not create a tenancy at will within the operation of the rule that an estate at the will of one party is equally at the will of the other.

[See note on this question beginning on page 378.]

— title to oil and gas.

2. The owner of land has, on account of their vagrant and fugitive nature, no absolute right or title to the oil or gas which may permeate

the strata underlying the surface of his land, as in the case of coal or other solid minerals, fixed in and forming a part of the soil itself.

[See 18 R. C. L. 1205, 1206.]

—right to operate for oil.

3. The owner of land under which lie oil and gas has an exclusive right, subject to legislative control against waste and the like, to erect structures on the surface of the land, and explore therefor by drilling wells through underlying strata, and to take therefrom and reduce to possession, and thus acquire absolute title as personal property to, such oil and gas as may be obtained therefrom.

[See 18 R. C. L. 1207.]

—grant of right.

4. The right of the owner of lands permeated by oil and gas to drill wells, and to dig and reduce these products to possession, is an incorporeal hereditament, and the proper subject of sale, and may be granted or reserved.

[See 18 R. C. L. 1207.]

—interest granted.

5. A lease, conferring the right, for a specified time, to mine and operate upon the lessor's premises for oil and gas, grants to the lessee a present vested interest in the land.

[See 18 R. C. L. 1210 et seq.]

Contract — unilateral — validity.

6. A unilateral contract is one in which there is a promise on one side only, the consideration on the other side being executed; such contracts are not void for want of mutuality.

[See 6 R. C. L. 687.]

—absence of consideration.

7. A contract made up of mutual

promises in which the promise of one party is not absolutely binding, or a promise without consideration, cannot be enforced against the one making the absolute or the sole promise for want of consideration.

[See 6 R. C. L. 683-685.]

—consideration — sufficiency.

8. One dollar is a sufficient consideration to support a conveyance of land or other agreement.

See 6 R. C. L. 652 et seq.; 8 R. C. L. 962, 963.]

—mutual options.

9. The rule that unperformed contracts, optional as to one of the parties, are optional as to both, applies only to contracts consisting of mutual promises wholly executory and unperformed.

[See 6 R. C. L. 603, 604.]

Mines — cancellation of lease.

10. Inadequacy of consideration alone is not sufficient to justify a court of equity in canceling an oil and gas lease regularly executed.

[See 6 R. C. L. 678; 18 R. C. L. 1210.]

Landlord and tenant — lease for term

— conversion into lease for years.

11. The lessee's option to terminate a grant for a definite term in the nature of a term for years, before the expiration of the term, does not convert the grant into one in the nature of a tenancy at will.

[See 16 R. C. L. 606, 607.]

(Owen, J., dissents.)

ERROR to the District Court for Pontotoc County to review a judgment in favor of plaintiffs in an action brought to cancel and remove an oil and gas lease as a cloud on their title to a certain tract of land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. West, Sherman, & Davidson for plaintiff in error.

Messrs. Prichard & Allen, for defendants in error:

The lessee was given the right, by virtue of the surrender clause, to pay for delay in development, or surrender the lease for cancellation, and thereby terminate the contract.

Brown v. Wilson, — Okla. —, L.R.A. 1917B, 1184, 160 Pac. 94; Eastern Oil Co. v. Beatty, — Okla. —, 177 Pac. 104.

Miley, J., delivered the opinion of the court:

This action was commenced in the 3 A.L.R.—23.

court below on the 9th day of September, 1915, by defendants in error as plaintiffs therein, to cancel and remove, as a cloud upon their title to a certain tract of 60 acres of land, an oil and gas lease which they had executed thereon and delivered to the plaintiff in error, defendant below, on the 29th day of December, 1914. There was judgment for the plaintiffs, to reverse which this proceeding in error was prosecuted. The pertinent provisions of the lease are as follows:

"Agreement made and entered in-

to the 29th day of December, 1914, by and between M. P. Donaghey and Sallie Donaghey, of Ada, Oklahoma, party of the first part, lessors, and Fred S. Rich, of Oil City, Pennsylvania, party of the second part, lessees.

"Witnesseth, that the said party of the first part, for and in consideration of the sum of \$1 to them in hand well and truly paid by the said party of the second part, and receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the party of the second part to be paid, kept, and performed, have granted, demised, leased, and let, and by these presents do grant, demise, lease, and let, unto the said second party, his heirs, executors, administrators, successors, or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, powers, stations, and structures thereon, to procure and take care of said products, all that certain tract of land situated in the county of Pontotoc, state of Oklahoma, described as follows, to wit: The south half ( $\frac{1}{2}$ ) of the northwest quarter (N. W.  $\frac{1}{4}$ ) of the northwest quarter (N. W.  $\frac{1}{4}$ ), and the southwest quarter (S. W.  $\frac{1}{4}$ ) of the northwest quarter (N. W.  $\frac{1}{4}$ ) of section 28, township 4 north, range 6 east of the Indian base and meridian, and containing sixty (60) acres, more or less.

"It is agreed that this lease shall remain in force for a term of five years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the party of the second part, his heirs, administrators, executors, successors, or assigns.

"In consideration of the premises, the said party of the second part covenants and agrees:

"First. To deliver to the credit of the first parties, their heirs or assigns, free of cost, in the pipe line to which the wells may be connected, the equal one-eighth part of all

oil produced and saved from the leased premises.

"Second. To pay the first party two hundred and  $\frac{no}{100}$  dollars each year in advance for the gas from each well where gas only is found, while the same is being used off the premises, and the first parties to have gas free of cost from any such well for four stoves and twelve inside lights in the principal dwelling house on said land during the same time, at their own risk, by making their own connections with the well.

"Third. To pay the first party for gas produced from any oil well and used off the premises at the rate of \$50 per year for the time during which such gas shall be used, said payments to be made each three months in advance.

"The party of the second part agrees to complete a well on said premises within six months from the date hereof, or pay at the rate of fifteen and  $\frac{no}{100}$  dollars for each additional month such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of the lease. . . .

"All payments which may fall due under this lease may be made directly to M. P. Donaghey, of Ada, Oklahoma, or deposited to his credit in Oklahoma State Bank, of Ada, Oklahoma.

"The party of the second part, its successors or assigns, shall have the right at any time, on the payment of \$1 to the parties of the first part, their heirs or assigns, to surrender this lease for cancelation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine; provided, this surrender clause, and the option therein reserved to the lessee, shall cease and become absolutely inoperative immediately and concurrently with the institution of any suit in any court

of law or equity by the lessee to enforce this lease, or any of its terms, or to recover possession of the leased land or any part thereof, against or from the lessor, his heirs, executors, administrators, successors, or assigns, or any other person or persons. All covenants and agreements herein set forth between the parties hereto shall extend to their successors, heirs, executors, administrators, and assigns."

In his brief the plaintiff in error states the issues made by the pleadings as follows:

"The petition of the plaintiffs, after setting forth the execution and delivery of the lease, alleges:

"That said defendant has wholly failed, neglected, and refused to comply with any of the terms, covenants, agreements, and conditions of said lease contract in this, that said defendant has made no start or effort to commence a well on said premises, nor has done or performed any act showing any intention on his part to commence said well; neither has said defendant made payment for the delay in completion of such well, as provided in said contract. That the defendant has never entered upon, nor taken possession of, said premises, but has wholly abandoned the same, and made default of his right, title, or interest to and in said premises.

"That said lease contract provides that the party of the second part, the defendant herein, shall have the right at any time, on the payment of \$1 to the parties of the first part, the plaintiffs herein, to surrender this lease for cancellation, after which all payments and liabilities under and by virtue of its terms shall cease and determine; that heretofore, to wit, on the 1st day of September, 1915, the plaintiffs herein sent by registered letter the \$1 provided by said lease to the defendant, with the written request that the said defendant should release of record said contract; that on the 8th day of September, 1915, the said defendant refused to release of record said contract.

"Plaintiffs further allege that wells have been sunk on lands adjacent to plaintiff's said land, and oil or gas produced in said wells, and gas is being extracted from under the adjacent land, and that it is necessary for plaintiffs to have their said land mined and operated to conserve the oil and gas contained in and under their said land; . . . that plaintiffs will suffer great and irreparable damage and loss by reason of oil and gas being extracted from their said lands through wells now in operation on adjacent land."

"It is alleged that the lease ought to be canceled as a cloud upon title of plaintiffs, and the prayer is that they have judgment against the defendant, canceling said lease upon the grounds stated.

"The defendant answered, denying the allegation of nonpayment of rentals, and alleging affirmatively that he had in fact paid, or tendered, the rentals as provided in the lease, and that he had performed, and was performing, all the conditions and requirements of his lease.

"The answer denied that oil or gas was being extracted from adjoining lands; and further set forth that the defendant intended, in good faith and with due and proper diligence, to operate the land for oil and gas, and to protect the same from being drained by exploration or development on the surrounding land, and denied the right of the plaintiffs to the relief prayed for on the grounds stated in their petition."

This statement of the issues is not controverted by defendants in error. The cause came on to be heard by the court upon the issues thus joined. The court made findings of fact to the effect that the lessors, as owners of the land, executed and delivered the lease as above stated; that no well had been drilled or completed on the premises within six months from the date of the lease, but that the first two months' payments accruing, after the expiration of said six months' period, were duly made by lessee and accepted by the lessors; that the payment for the



third month was duly tendered by the lessee to the lessors, which they refused to accept, but tendered the lessee the sum of \$1 and form of release of said oil and gas lease, and demanded that the lessee execute the same; that the lessee refused to accept the said sum and to execute said release, and deposited the said sum of \$15 for the third month's delay to the credit of the lessors in the bank designated as the depository thereof; that the lessee had deposited all sums accruing under the terms of said lease for delay in completion of a well to the date of the trial in said bank to the credit of the lessors, but which sums had not been withdrawn by them.

The trial court concluded upon the facts so found that, "because of the surrender clause in said lease, the said lease was unilateral and void, and that the lessors, under the terms of said surrender clause, had the right, notwithstanding the payment and tender of rentals, to surrender the same at any time, upon the payment to the lessee of \$1, and that, having exercised said right, they were entitled to have said lease canceled as a cloud on their title to the lands covered by said lease," and judgment was rendered accordingly. There was no finding that the lessee had abandoned the premises, as alleged in the petition; neither was there a finding that the lessee was guilty of negligence in permitting the land to be drained of oil or gas by operations on adjoining premises. There was no finding of fact upon which to base a decree of forfeiture or cancelation of the lease for failure to make payments for delay, or the failure to perform any condition or covenant therein.

The parties agree that the only question to be decided by this court is whether the trial court erred in the conclusions just quoted, decreeing a cancelation of the lease upon the facts found.

In the consideration of the questions presented it will perhaps prove helpful if notice be first taken of the rights of the lessee created by the

written instrument in question. At the time of its execution the plaintiffs were the owners in fee simple of the land. By virtue of such ownership they had, on account of the "vagrant and fugitive nature" of the substances, constituting "a sort of subterranean *feræ naturæ*" (Re Indian Territory Illuminating Oil Co. 43 Okla. 307, 142 Pac. 997), no absolute right or title to the oil or gas <sup>Minerals—title to oil and gas.</sup> which might permeate the strata underlying the surface of their land, as in the case of coal or other solid minerals fixed in, and forming a part of, the soil itself. *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576.

But with respect to such oil and gas, they had certain rights designated by the same courts as a qualified ownership thereof, but which may be more accurately stated as <sup>—right to operate for oil.</sup> exclusive right, subject to legislative control against waste and the like, to erect structures on the surface of their land, and explore therefor by drilling wells through the underlying strata, and to take therefrom and reduce to possession, and thus acquire absolute title as personal property to such as might be found and obtained thereby. This right is the proper subject of sale, and <sup>—grant of right.</sup> may be granted or reserved. *Barker v. Campbell-Ratcliff Land Co.* — Okla. —, L.R.A. 1918A, 487, 167 Pac. 468. The right so granted or reserved, and held separate and apart from the possession of the land itself, is an incorporeal hereditament; or more specifically, as designated in the ancient French, a *profit à prendre*, analogous to a profit to hunt and fish on the land of another. *Kolachny v. Galbreath*, 26 Okla. 772, 38 L.R.A. (N.S.) 451, 110 Pac. 902; *Funk v. Haldeman*, 53 Pa. 229, 7 Mor. Min. Rep. 203; *Phillips v. Springfield Crude Oil Co.* 76 Kan. 783, 92 Pac. 1119. Considered with respect to duration, if the grant be

to one and his heirs and assigns forever, it is of an interest in fee. Funk v. Haldeman, 53 Pa. 229, 7 Mor. Min. Rep. 203. An interest of less duration may be granted, and that for a term of years has been denominated by this court a chattel real. Duff v. Keaton, 33 Okla. 92, 42 L.R.A. (N.S.) 472, 124 Pac. 291. Such right is an interest in land. 14 Cyc. 1144; Heller v. Dailey, 28 Ind. App. 555, 63 N. E. 490. If granted in the homestead of the family, the wife must join in the conveyance. Carter Oil Co. v. Popp, — Okla. —, 174 Pac. 747. A grant thereof is an alienation within the meaning of the acts of Congress removing restrictions (Eldred v. Okmulgee Loan & T. Co. 22 Okla. 742, 98 Pac. 929), or imposing restrictions (Parker v. Riley, 155 C. C. A. 572, 243 Fed. 42), on the alienation of allotted Indian land, and is a conveyance within the meaning of § 9, Act Cong. May 27, 1908, chap. 199 (35 Stat. at L. 315, 3 Fed. Stat. Anno. 2d ed. p. 890), providing that "no conveyance of any interest of any full-blood Indian heir" in land inherited from any deceased allottee of the Five Civilized Tribes shall be valid unless approved by the county court. Hoyt v. Fixico, — Okla. —, 175 Pac. 517.

Bearing these principles in mind, it will at once be seen that by this instrument the plaintiffs granted to the defendant a present vested interest in their land.

Brennan v. Hunter, — Okla. —, 172 Pac. 49; Northwestern Oil & Gas Co. v. Branine, — Okla. —, ante, 344, 175 Pac. 533. That is, the right for at least five years, of mining and operating thereon for oil and gas, which includes, of course, the right to explore therefor, and to extract therefrom and reduce to possession, as their personal property, such as may be found. In other words, it was a grant of the exclusive right, for the time specified, to take all the oil and gas that could be found by drilling wells upon the particular tract of land, with the accompany-

ing incidental right to occupy so much of the surface as required to do those things necessary to the discovery of and for the enjoyment of the principal right so to take oil or gas. No more nor greater right, except perhaps as to duration, with respect to oil and gas, could be granted. Although there had been in terms a purported conveyance of all the oil and gas in the place, yet, by reason of the nature of these substances, no title thereto or estate therein would have vested, but only the right to search for and reduce to possession such as might be found; and when reduced to possession, not merely discovered, title thereto and an estate therein as corporeal property would vest. Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A. (N.S.) 451, 110 Pac. 902; Frank Oil Co. v. Bellevue Gas & Oil Co. 29 Okla. 719, 43 L.R.A. (N.S.) 487, 119 Pac. 260; Hill Oil & Gas Co. v. White, 53 Okla. 748, 157 Pac. 710. Though denominated a lease, and in deference to custom will be so referred to herein, the instrument before us, strictly speaking, is not such, but is in effect a grant in praesenti of all the right to the oil and gas to be found in the lands described, with the right for a term of five years to enter and search therefor, and, if found, to produce and remove them, not only during said term, but also as long thereafter as either is produced, and to occupy so much of the surface of the land as may be necessary for the purpose of exploration or production, or both.

The trial court held that the contract granting this present vested interest in the land was "unilateral and void." Strictly speaking, a unilateral contract is one in which there is a promise on one side only, the consideration on the other side being executed. Evidently the term was not used in that sense by the trial court, for such contracts are not void, but are equally as valid as bilateral contracts, consisting solely of mutual promises to

—Interest  
granted.

Contract—  
unilateral—  
validity.

do some future act, in which the consideration of the promise of one party is a promise on the part of the other. The term, "unilateral," is often used to express absence of mutuality. In the case of contracts made up solely of mutual promises, each the consideration for the other, where the promises of one party are so expressed as not to be absolutely binding on him, but to be performed only if such party so wills, or a promise on but one side and no consideration therefor, the one who makes the absolute

—absence of  
consideration.

promise in the one case, or the sole promise in the other, is not bound to perform. The reason sometimes given is that the contract is unilateral, or void for the want of mutuality. The real reason is that there is not a sufficient consideration for the promise. "Consideration is essential; mutuality of obligation is not, unless the want of mutuality would leave one party without a valid or available consideration for his promise." 6 R. C. L. p. 686. Therefore, what the trial court no doubt meant was that the lessee neither gave nor made a binding promise of anything of value for the grant of the right to explore the land and produce the oil or gas, if any found thereon. In other words, that there was not a sufficient consideration for the grant. In this the court erred.

It is provided by statute in this state that a written instrument is presumptive evidence of a consideration. Rev. Laws 1910, § 934. Also that the burden of showing a want of consideration lies with the party seeking to invalidate it. Id. § 935. Any benefit conferred, or agreed to be conferred, upon the lessors by the lessee, to which the lessors were not lawfully entitled, or any prejudice (detriment) suffered, or agreed to be suffered, by the lessee, other than such as he was at the time of the execution of the instrument bound to suffer, is a good consideration. Id. § 926.

Among the considerations ex-

pressed in this instrument are the covenants and agreements of the lessee to pay certain stipulated royalties for oil, and for each gas well, and to complete a well within six months, or pay at the rate of \$15 for each additional month such completion is delayed. It will be conceded that this agreement to develop, and the prospective royalties, or the monthly payments in lieu of development, standing alone, would constitute a sufficient consideration. But it is contended that under the clause in the instrument conferring on the defendant the option to surrender the lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine, the lessee was not bound to perform these promises, or, as it is said, not bound to do anything. This statement would appear to be too sweeping. Instead of not being bound to do anything, the lessee is obligated thereunder to do one of three things: (1) Drill and complete a well in a fixed time, or (2) surrender all his rights and pay in addition the sum of \$1, or (3) pay during the term of five years, or until surrender, \$15 per month for each additional month the completion of a well is delayed. The lessee cannot escape from all these obligations. He may escape two of them, but he is absolutely bound to do one of the three. If he does the first, and fails to find oil or gas, he will suffer a detriment, and, if oil or gas is discovered, will confer a benefit on the lessor by way of royalties on the oil and gas produced. If he does the second, he will suffer a detriment and confer a corresponding benefit on the lessor. If he does neither of these, he is absolutely obligated to the other, and the amounts agreed to be paid for the delay may be recovered in an action therefor. *Cohn v. Clark*, 48 Okla. 500, L.R.A.1916B, 686, 150 Pac. 467; *McKee v. Grimm*, — Okla. —, 157 Pac. 308. If the lessee should choose to perform what may seem to be the least onerous obliga-

tion, and surrender, the lessor will obtain some benefit and the lessee suffer some detriment, at least to the extent of \$1. It would seem, therefore, that under these alternative obligations to develop, or surrender, or pay for delay, a consideration is not wanting. The fact that the lessee must pay \$1 at the time he exercises the right of surrender should, it would seem, afford ground for distinguishing decisions holding that the lessee was not obligated to anything, where, under the leases there under consideration, the lessee was not obligated to pay anything at the time of the surrender, or in which it was provided that the lease should terminate and become void as to both parties unless a stipulated sum was paid for delay. But, putting that aside, if we give the surrender clause the sweeping effect claimed, and assume that by virtue thereof the lessee has given no binding promise to drill or pay, or do anything, and treat the instrument as though it recited no promise whatever, or imposed no obligations to pay royalties, and to develop, or pay a fixed sum at stated times in lieu thereof, it does not follow that the instrument is without sufficient consideration. Grants of this character are not dependent for their validity on an agreement to pay royalties and the consequent expressed or implied covenant to develop. They may be for any other consideration agreeable to the parties and valuable in law. The consideration may be wholly executed. Section 930, Rev. Laws 1910. It may be in money only, paid at the time of the execution and delivery of the instrument. Such moneyed consideration, in addition to the covenants before referred to, is recited to have been paid and its receipt acknowledged in the face of the instrument. It is true that the amount recited is small, being only \$1, but a dollar is the unit of value, and is a thing of value in fact and in the eye of the law; many sales and transactions are had daily in

which that sum is the sole consideration. That \$1 is a sufficient consideration to support a conveyance of land or an agreement is supported by the overwhelming weight of authority. *Lawrence v. McCalmont*, 2 How. 426, 11 L. ed. 326; *Davis v. Wells, F. & Co.* 104 U. S. 159, 26 L. ed. 686; *Olds v. Marshall*, 93 Ala. 138, 8 So. 284; *Southern Bell Teleph. & Teleg. Co. v. Harris*, 117 Ga. 1001, 44 S. E. 885; *Mason v. Moulden*, 58 Ind. 1; *St. Clair v. Marquell*, 161 Ind. 56, 67 N. E. 693; *Fairley v. Fairley*, 34 Miss. 18; *Weissenfels v. Cable*, 208 Mo. 515, 106 S. W. 1028; *Stamper v. Venable*, 117 Tenn. 557, 97 S. W. 812; *Jacobson v. Nealand*, 122 Iowa, 372, 98 N. W. 158; *Nave v. Marshall*, 9 Ohio Dec. 415; *Ferguson's Appeal*, 117 Pa. 426, 11 Atl. 885; *Watkins v. Robertson*, 105 Va. 269, 5 L.R.A.(N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33; *Tonera v. Henderson*, 3 Litt. (Ky.) 235.

The validity of a conveyance of land upon a consideration of \$1 has been recognized by this court. *Ehrig v. Adams*, — Okla. —, 169 Pac. 645; *Henley v. Davis*, — Okla. —, 156 Pac. 337. If \$1 is sufficient to support a conveyance of the whole estate in land, it necessarily follows that it is sufficient to support a grant of a less interest therein. So, if the sole consideration paid for the grant had been the \$1 paid as recited in the instrument, it would not follow that the same is void. While such consideration may appear to be insignificant, and as the sole consideration for the grant may, according to circumstances, be inadequate, yet we are not here concerned with the question of the amount or adequacy of the consideration, but only with the question of whether there is any consideration. The \$1 is not the sole consideration, however. It may be urged that it is not the real consideration, but that development and prospective royalties, as has been said in some decisions, were the real or moving consideration. That state-

—consideration—  
sufficiency.

ment would hardly be accurate here, since the parties agreed that development might be deferred throughout the five-year term, and provided stipulated monthly payments in lieu thereof. It would be more accurate to say that one of the considerations, perhaps the principal one, for the grant was the covenant to develop and yield prospective royalties, or pay in lieu thereof. In this connection, it is argued that, by virtue of the surrender clause, the lessee has the option of terminating the lease, and thereby to escape the obligation to develop or pay in lieu thereof, and thus defeat the main purpose or object of the lessor in making the grant, and therefore that it is likewise optional with the lessor to refuse payments for delay and to compel a surrender. To support this argument, the somewhat misleading, though euphonious, epigram, "that contracts unperformed, optional as to one of the parties, are optional as to both," is invoked. That rule can have no application here. It applies to con-

—mutual  
options.

tracts consisting entirely of mutual promises wholly executory and unperformed, the promises on one side being the sole consideration for the promises on the other, and in which, if it is optional with one of the parties whether he will perform his promises, it is said that, prior to performance of such promises by him, it is optional with the other whether he will perform his promises. It is but another way of stating the rule of mutuality before referred to. The epigram, as amended by Mr. Justice Hardy, in *Hill Oil & Gas Co. v. White*, 53 Okla. 748, 157 Pac. 710, is a more accurate statement of the true rule. It was there said that "contracts unperformed, without sufficient consideration, which are optional as to one, are optional as to both." As pointed out in *Northwestern Oil & Gas Co. v. Branine*, — Okla. —, ante, 344, 175 Pac. 533, the contract here under consideration was not wholly executory and

unperformed. So far as the lessors are concerned, the lease was fully executed, and by its terms there was granted to the lessee an interest in the land to explore the same for oil and gas, and to produce such as might be found, which interest vested immediately upon execution and delivery of the instrument. Nor was the lease wholly unperformed on the part of the lessee with respect to the covenant now under consideration. He had made two of the monthly payments for delay, which had been accepted, and had tendered the payment for the third month before demand was made for cancelation, and has since performed the promise to pay for delay by depositing the amounts due in the designated bank, in strict conformity with the terms of the agreement. However, if it be assumed that the agreement, being fully executed on one side and partly performed on the other, does not make the rule inapplicable, yet the fact that the agreement is founded on an independent consideration, namely, the \$1 paid by the lessee at the execution and delivery of the instrument, does have that effect.

In 13 C. J. 336, it is said: "When there is an agreement founded on a consideration, it is not invalid for the want of mutuality because one party has an option while the other has not, or, in other words, because it is obligatory on one and optional with the other. . . . And the option to relinquish a right acquired under a contract will not render it unilateral."

In 6 R. C. L. p. 687, it is said: "An option, supported by a consideration, furnishes another illustration of a contract which is valid notwithstanding the lack of mutuality. It is no objection to the validity of the contract that the holder of the option is under no obligation to exercise it."

These principles have been recognized and applied by this court. *Waters-Pierce Oil Co. v. Progressive Gin Co.* — Okla. —, 159 Pac. 349.

In the case of Northwestern Oil & Gas Co. v. Branine, *supra*, this court recently held valid a lease in all respects similar to the one now before us, where a consideration of \$160 was paid, and containing covenants for the payment of royalties, for drilling a well within a fixed time, or periodical payments for delay, and providing that the lessee might surrender the same upon payment of \$2, after which all payments and liabilities thereafter to accrue under and by virtue of its terms should cease and determine. In that case we expressly held that, when supported by a sufficient independent consideration, leases of the character here involved are not void for the want of mutuality. The only difference between that case and this is that in this the amount of the consideration is smaller. The cases cannot be distinguished in principle on that ground. The following authorities hold that \$1 is a sufficient consideration to bind the lessor in a surrender clause lease such as we have here under consideration: *Guffey v. Smith*, 237 U. S. 101, 116, 59 L. ed. 856, 865, 35 Sup. Ct. Rep. 526; *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 801; *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 604, 106 Fed. 764; *Lindley v. Raydure* (D. C.) 239 Fed. 928; *McCullough v. Smith*, 156 C. C. A. 335, 243 Fed. 823; *Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey*, 76 Kan. 42, 12 L.R.A. (N.S.) 745, 90 Pac. 803; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N. E. 281; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545; *Lovett v. Eastern Oil Co.* 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360; *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A. (N.S.) 848, 76 S. E. 961; *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E.

762; *Gillespie v. Fulton Oil & Gas Co.* 236 Ill. 188, 86 N. E. 219.

In *Murray v. Barnhart*, 117 La. 1023, 42 So. 489, the supreme court of Louisiana held a lease invalid which was supported by a consideration of \$1. By the provisions of the Code which obtains in that state the consideration for a contract of sale "must be serious;" "it must not be out of proportion with the value of the thing," which is a principle of the civil law. In the decision of that case the court was careful to distinguish decisions by courts in states where the common law prevails. The court correctly stated that in common-law jurisdictions the rule is "that the slightest consideration is sufficient to support the most onerous obligation. The inadequacy, as has been said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced," while in their jurisdiction the rule is as above stated. That decision has been followed in that jurisdiction in *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.* 119 La. 793, 44 So. 501; *Long v. Sun Co.* 132 La. 601, 61 So. 684, and other cases. For the reasons stated those cases are not authorities in this jurisdiction, where the common-law rule as to consideration governs.

That court does not hold that when a lease providing stipulated royalties to be paid lessors is supported by a consideration sufficient under their law to support a contract—that is, a "serious" consideration, and not out of proportion with the value of the thing—that the same is void for want of mutuality, in that the lessee is not obligated to drill or pay a stipulated sum in lieu thereof. *Saunders v. Busch-Everett Co.* 138 La. 1049, 71 So. 153, was an action by the lessor against the lessee to annul leases on two different tracts of land, containing, respectively, 1,745 acres and 100 acres, on the ground that same were void for want of mutuality. The leases were for a consideration

of \$261.75 and \$14.97, respectively, or about 15 cents per acre, and reserved to the lessor one eighth of the oil produced and saved, and lessee agreed to pay \$200 per annum for each gas well. There was a condition in each to the effect that, in case a well was not commenced in one year, then the grant should immediately become null and void as to both parties, and provided that the lessee might prevent such forfeiture from quarter to quarter for five years by paying the lessor the sums of \$261.75 and \$14.97, respectively, per year until such well was commenced. The leases further provided that, if oil or gas was discovered, then the same should remain in force and effect for twenty-five years from that date, and as much longer as oil or gas might be produced in paying quantities. The court, in sustaining the leases, held the purpose thereof was to confer the right to drill without imposing an obligation to do so, and after reviewing the provisions of their Code and the previous decisions of the court, some of which are cited above, held that there was nothing in the purpose or nature of the contract which contravened any law of that state; and further held that, if the transaction be considered a sale, it could not be said, under the circumstances in evidence, that the price (being the payments made at the execution of the lease and subsequently for delay) was not "serious," or "was out of all proportion to the value of the thing."

In *Federal Oil Co. v. Western Oil Co.* (C. C.) 112 Fed. 373, 22 Mor. Min. Rep. 25, in the United States circuit court, specific performance at the suit of the lessee was refused, of a lease reciting a consideration of \$1. The lease covered 80 acres of land, provided for the payment to the lessor of a royalty of one eighth of the oil, and \$100 per year for each gas well; and further provided that, in case no well was commenced within one day, the lease should become null and void unless the lessee should thereafter pay in

advance at the rate of \$8.75 for each month such commencement was delayed; and also that a second well should be completed ninety days after first well, and a well each ninety days thereafter until seven were in, then rental to cease. The lessee was given the right to cancel and annul the contract or any part thereof at any time. The lease specified no terms, and provided no limitation of time beyond which commencement of operations could be postponed by the monthly payments. The decision was on a demurrer to the verified bill, in which it was alleged that the interest acquired by the lessee exceeded in value the sum of \$2,000. Speaking of the consideration of \$1, the district judge said: "If there was no further consideration which the lessee was bound to yield to the lessors, a court of equity would be bound to refuse the enforcement of the lease. The consideration would be so trifling, compared with the value of the leasehold interest, as to shock the moral sense. An agreement may be enforceable at law, and there may be no sufficient ground for its cancelation in equity; and yet, upon a fair and just consideration of the attendant and collateral circumstances, the court may be satisfied that the contract is unconscionable, and refuse to decree its performance. Before granting a decree the court must be satisfied not only of the existence of a valid contract free from fraud and enforceable at law, but also of its fairness and of its harmony with equity and good conscience; and any fact showing that the contract is unfair, unjust, and against good conscience will justify the court in refusing to decree its performance."

The terms of the lease with reference to development and payments for delay are reviewed in the decision, and it was held on the whole to be so unfair, unjust, and against good conscience as to justify the court in refusing a decree of specific performance, "though the

contract might be enforceable at law, and there was no sufficient ground for its cancelation in equity." The decision was affirmed by the circuit court of appeals in *Federal Oil Co. v. Western Oil Co.* 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429, upon the ground stated; and also for the further reason that, to afford the relief, "the contract must be such that the court is able to make an efficient decree for its specific performance, and to enforce the decree when made," and "equity will not specifically enforce a contract against one party when it cannot be specifically enforced against the other." Under the terms of the lease in that case, the lessee could not be compelled to either drill or pay, even after obtaining a decree and possession thereunder, nor did the lessee in his bill offer performance. Specific performance was refused for that reason by this court in *Kolachny v. Galbreath*, 26 Okla. 772, 38 L.R.A. (N.S.) 451, 110 Pac. 902. But these decisions have no application to this case. In the first place, this is not a suit by the lessee for specific performance, but a suit by the lessors for cancelation. The decisions in that case, instead of holding that an oil and gas lease for a consideration of \$1 and an agreement to drill, or pay for delay, coupled with an option to the lessee to surrender, are invalid and unenforceable at law, or subject to cancelation in equity, by implication hold to the contrary. In addition, there is no allegation or finding here as to the value of the interest acquired by the lessee; therefore it cannot be said in this case that the \$1 consideration is "so trifling, compared with the value of the leasehold interest, as to shock the moral sense," nor is there any allegation or finding here from which the real value can be determined. It may be that the \$1 is all or even more than the oil and gas interest is worth.

Furthermore, if this was a suit by the lessee for specific performance, instead of by the lessors for cancelation, or if it should be assumed

that the principles upon which *Federal Oil Co. v. Western Oil Co.* was decided are applicable to a suit for cancelation, the decision would have no application to the facts of this case. In *Smith v. Guffey*, 120 C. C. A. 436, 202 Fed. 106, the circuit court of appeals, upon the authority of the *Federal Oil Co. v. Western Oil Co.* supra, denied the lessee equitable relief to enforce or protect his rights under a lease different from the one involved in the case followed, but similar to the one here under consideration. The lease involved in *Smith v. Guffey* was for a recited consideration of \$1, for a term of five years, and as long thereafter as either oil or gas was produced. The lessee covenanted to pay certain stipulated royalties, and to complete a well within nine months, or pay at the rate of 25 cents per acre quarterly in advance for each additional three months such completion was delayed. The lease contained a surrender clause providing that the lessee, "upon the payment of one dollar (\$1) at any time, . . . shall have the right to surrender this lease for cancelation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine and this lease become absolutely null and void." But the Supreme Court of the United States, on appeal, reversed the decision of the circuit court of appeals (*Guffey v. Smith*, 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526). Referring to the contention that the lease was so unfair and inequitable in its terms that relief in equity should be denied the lessee, the court in a unanimous opinion, after detailing the circumstances in which it was given, said: "The consideration for the lease, viz., \$1, paid to the lessor, and the covenants and agreements of the lessee, cannot be pronounced unreasonable. Similar leases, resting upon a like consideration, often have been sustained in cases not distinguishable from this. The lease was to remain in force five years, and as much longer as oil



or gas was being produced from the premises; in other words, it was to expire in five years unless oil or gas was produced within that time. The lessee expressly covenanted to drill a well within nine months or to pay a rental of 25 cents per acre per year, quarterly in advance, for such time as the completion of the well was delayed beyond that period, the delay, of course, not to extend beyond the primary term of five years. The terms of the covenant doubtless were suggested by the undeveloped condition of the district, and by the expense and risk incident to exploring for oil and gas. They evidently were satisfactory to the lessor at the time, and the record discloses no reason for holding that in the circumstances they were unreasonably liberal to the lessee. Some criticism is directed against the reserved option to surrender, but it is difficult to perceive how it could be declared inequitable. If it was not exercised the lessee would be bound by his covenants, and if exercised the lessor would be free to deal with the premises as he chose. A surrender was not to affect any existing liability, but only to avoid those 'thereafter to accrue.' A like clause is in the subsequent lease, and, according to the evidence and several reported decisions, is of frequent occurrence in such instruments. We conclude that there is nothing in the terms of the lease which requires that equitable relief be withheld."

So, whatever may be said of the soundness of the principles on which *Federal Oil Co. v. Western Oil Co.* was decided as abstract propositions, it is quite clear that they are no longer applicable in Federal equity jurisprudence to leases of the character here under consideration. The same may be said of *Huggins v. Daley*, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377, which was a suit in equity by the lessee to enforce his rights under a lease materially different from that here involved. Nor would this court refuse specific

performance at the suit of the lessee of the lease here under consideration, for the additional reason above mentioned in the decision of the circuit court of appeals in *Federal Oil Co. v. Western Oil Co.* 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429, and by this court in *Kolachny v. Galbreath*, 26 Okla. 772, 38 L.R.A. (N.S.) 451, 110 Pac. 902. Under the surrender clause in the lease now before us, unlike that involved in those cases, it is provided that the option to the lessee to terminate and avoid further liability thereunder shall cease and become absolutely inoperative immediately and concurrently with the institution of any suit in any court of law or equity by the lessee to enforce the same, etc., by the terms of which, upon the commencement of a suit to enforce the lease, the lessee places himself in a position where performance by him can be compelled, and the court can make an efficient decree, and enforce it when made, and not be doing a vain and useless thing. *Pucini v. Bumgarner*, — Okla. —, 175 Pac. 537.

For aught that was decided in *Kolachny v. Galbreath*, *supra*, or any other case in this court, except *Brown v. Wilson*, — Okla. —, L.R.A. 1917B, 1184, 160 Pac. 94, *infra*, or by the Federal courts in the cases cited, the lessee in this lease would be entitled to a decree of specific performance or other equitable relief to enforce or protect his rights acquired thereunder. It has been suggested that *Guffey v. Smith*, *supra*, being based upon and following the construction placed upon similar oil and gas leases by the supreme court of Illinois, as to the right acquired by the lessee, should be distinguished and not followed in this jurisdiction, because it is asserted that this court has differently defined the character of interest so acquired by the lessee. What was said in *Guffey v. Smith* as to the character of the interest acquired by the lessee under the Illinois decision related to the discussion pertaining to the nature of the relief the lessee

was seeking, and it was decided that because, under the Illinois decisions, the lessee acquired a present vested right, "a freehold interest," in the premises, the suit was not one in the nature of specific performance of an executory contract, but, in a practical sense, one to prevent waste. For that reason, the rule that a contract cannot be specifically enforced in favor of one, if it cannot be specifically enforced against him, was held by that court not to apply. But the character of the interest of the lessee had no bearing whatever on the question upon which the case is above cited, viz., whether the lease is so unfair and inequitable in its terms that relief in equity should be withheld.

Moreover, there is no substantial difference between the earlier holdings of this court and of the Illinois court as to the character of the interest acquired by the lessee under the instrument here under consideration. We have already defined the character of the right acquired by the lessee under the lease in question. It would prolong this opinion to an unreasonable length to review all the Illinois decisions on the subject, and compare the same with what we have said on the subject. The matter is discussed or referred to in the following Illinois cases: *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Gillespie v. Fulton Oil & Gas Co.* 236 Ill. 188, 86 N. E. 219, 239 Ill. 326, 88 N. E. 192; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46; *Ulrey v. Keith*, 237 Ill. 284, 86 N. E. 696; *Bruner v. Hicks*, 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 889; *Daughetee v. Ohio Oil Co.* 263 Ill. 518, 105 N. E. 308.

The propositions stated in those cases may be briefly summarized as follows: (1) That oil and gas are not capable of distinct ownership in place; (2) a grant of oil and gas in situ does not vest title thereto, or any estate therein, or pass anything which can be the subject of ejectment or other real action; (3) the lessee, under the form of lease here

involved, acquires the right to go upon the premises, erect and maintain all necessary structures, and explore for oil and gas, and, if found, produce them according to the terms of the lease; (4) a lease being a "conveyance of an interest in land," if upon land occupied as a homestead, the wife must join therein; (5) under a lease containing a clause giving the lessee the right to terminate the same at any time, the lessee cannot have a decree of specific performance—all of which is in harmony with the conclusions of this court. In Illinois it is held that a lease for a definite term of years, and as long thereafter as either oil or gas is produced, is "of unlimited duration," and that such lease, giving the right to enter on land and explore for and produce oil and gas, creates a "freehold interest" in the land. This court has not had occasion to determine whether such right should be termed a "freehold interest," or is limited to a term of years, and therefore "not an incorporeal freehold right in the real estate," as was held by supreme court of West Virginia in *State v. South Penn Oil Co.* 42 W. Va. 80, 24 S. E. 688. Whether the right be termed a freehold interest or one for years is of no importance. Under the decisions of the Illinois court and of this court, the substantial rights acquired by the lessee are the same. A statute of Illinois (*Hurd's Rev. Stat.* 1905, chap. 94, § 7) provides that "when the owner of any land shall convey, by deed or lease, any mining right therein, such conveyance shall be considered as so separating such right from the land that the same shall be taxable separately." It was held in *People ex rel. Carrell v. Bell*, 237 Ill. 332, 19 L.R.A.(N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511, that an oil and gas lease for one year, and as long thereafter as oil or gas was found in paying quantities, conveyed a mining right within the meaning of the statute, and was subject to ad valorem taxation separately. In *Re Indian Territory Il-*

luminating Oil Co. 43 Okla. 307, 142 Pac. 997, while holding an oil and gas lease is property, this court further held that same was not subject to ad valorem taxation separately from the land, our statutes not having so provided. Instead of taxing leases, or such "mining right" ad valorem, by statute in this state a gross production tax is levied in lieu of all other taxes upon leases or mining rights. Sess. Laws 1916, p. 102, chap. 39. *Large Oil Co. v. Howard*, — Okla. —, — A.L.R. —, 163 Pac. 537. Therefore, the only difference between the decisions of the Illinois court and this court as to the right acquired by the lessee under an oil and gas lease for a definite term, and as long thereafter as oil or gas is produced, is, that court has designated such right "a freehold interest in land," while we have designated it "an interest in land," without saying whether such interest amounts to a freehold; and in the two states such interests are taxed by different methods, which results, not from a difference in conception of the character of the interest, but from the applicable statutes pertaining to taxation thereof. These differences afford no ground for distinguishing the decisions by the supreme court of Illinois, and followed by the court in *Guffey v. Smith*, that the clause giving the lessee the option to surrender "does not create a tenancy at will, or give the lessor an option to compel a surrender, and does not make the lease void as wanting in mutuality." [237 U. S. 113, 59 L. ed. 863, 35 Sup. Ct. Rep. 526.]

There appears to be some conflict in decisions of the several courts of civil appeals of Texas on the question. There are some decisions by those courts, and there are expressions in others, which support the contention that leases of the character here involved are void for the lack of mutuality. Others of those courts, and all of the expressions of the supreme court of that state to which our attention has been called, are to the contrary. In

*National Oil & Pipe Line Co. v. Teel*, — Tex. Civ. App. —, 67 S. W. 545, two leases were involved. Each recited a consideration of \$1 for the payment of certain stipulated royalties, and provided, if operations were not begun and prosecuted with due diligence within two years, that the grant should become null and void, and further provided that the lessee might prevent such forfeiture from year to year by paying in advance \$100 until a well was completed. No time was fixed beyond which the commencement of operations could not be deferred and a forfeiture avoided by the payments for delay. The action was by the lessor against the assignee of the lessee, to cancel, one of the grounds therefor being the alleged fraud of the lessee in procuring the lease. The court of civil appeals affirmed the decree of the trial court canceling the lease, upon the ground that the contract could not be regarded as a sale, but an option, because the real consideration was the development of the property, for which no definite term was fixed; and that the owners might rescind in the absence of any equities, owing to work having been begun, it being held that some time for performance was requisite to an option. It will be noted that the case at bar is distinguishable from that, a fixed time within which a well must be completed being prescribed in the contract here under consideration. However that may be, the supreme court of Texas entertained a different view of the questions decided by the court of civil appeals. In their opinion in the case (95 Tex. 586, 68 S. W. 979), on the question of the validity of option contracts, the supreme court said: "A naked agreement, by which one promises to convey to another an interest in land in consideration of money to be paid or acts to be performed by such other, but which does not bind the other to pay or perform the consideration, as the case may be, cannot be enforced. In such case there is a want of mutuality in the agreement. The one

party promises to do something; the other does not promise absolutely to do anything; hence, there is no consideration to support a contract, and it is void. On the other hand, a promise to give an option is valid if supported by an independent consideration. For example, if a sum of money be paid for the option, the promisee may, at his election, enforce the contract. Each of the contracts in this case purports upon its face to have been executed in consideration of the payment of \$1; and, though the plaintiff below pleaded that no consideration was paid, there was no evidence that the recitals as to the consideration in the contracts were not true. Whether the recital of '\$1,'—commonly called a nominal consideration,—is sufficient to support the contracts, we need not discuss, though there is very high authority for holding that such recital is sufficient for the purpose."

The court thereupon treated the contracts as if supported by a consideration, and affirmed the judgment on the ground of fraud in the procurement thereof.

In *Witherspoon v. Staley*, — Tex. Civ. App. —, 156 S. W. 557, in an action to cancel a mineral lease, the court of civil appeals reversed a judgment denying cancellation, with direction to render judgment for complainants. The lease there involved recited a consideration of \$25 paid and certain stipulated royalties, was for a term of five years, and as long thereafter as oil or gas and other minerals were found in paying quantities, and provided that, if operations by drilling or mining were not commenced and prosecuted with due diligence within sixty days, then the grant should become null and void, and also provided that the lessee might prevent such forfeiture from year to year by paying the lessor the sum of \$25 every sixty days until operations commenced. Payments for delay were made for a period expiring January 28, 1911. On that date operations had not been commenced,

and no further payments for delay were tendered until January 30, 1911, which the lessor refused to accept, and declared the lease at an end. The court held the lease terminated for failure to commence operations and to comply with the condition to prevent same. There was some language used which has been construed as indicating that the lease was void for want of mutuality, though on a former appeal of the same case another court of civil appeals had expressly held the lease was "not void as being unilateral." *Witherspoon v. Staley*, — Tex. Civ. App. —, 138 S. W. 1191. In refusing a writ of error to review the last decision, the supreme court (159 S. W. xxiii. made the following notation: "Refused upon the ground that the contract was forfeited. We do not commit ourselves to the proposition that the contract was void merely because it was a contract for an option, and was unilateral in its character, as held by the court of civil appeals. Granting that it was unilateral and a mere contract for an option, it may have been enforceable as such a contract because supported by a consideration paid and limited to a definite time."

See *Owens v. Corsicana Petroleum Co.* — Tex. Civ. App. —, 169 S. W. 200.

*Owens v. Corsicana Petroleum Co.* supra, was an action by the lessor for cancelation. The lease was of a tract of 188 acres; recited a consideration of \$28.20 paid; was for a term of ten years, and as much longer as oil, gas, and other minerals were produced; provided stipulated royalties to be paid lessor, the lessee agreeing to complete a well in one year or pay \$28.20 each three months in advance until the end of the term, or until a well was completed or the lease surrendered; and further provided that the lessee should have the option, upon payment of \$5 and all amounts then due thereunder, to surrender the lease for cancelation, and thereafter be discharged from all payments, obligations, and covenants, where-

upon the grant should become null and void. The court of civil appeals held the lease void. It construed the contract as vesting no interest in the land, but a mere option; that the lessee was not obligated to develop or make the payments for delay, or to do anything except pay \$5 under the surrender clause, which sum it held to be merely nominal and no consideration for the grant. The reason for the conclusion reached by that court is perhaps best expressed in the following portion of the opinion on rehearing: "In this case we think the original payment of \$28.20 was a sufficient consideration for the option for the first year, and, since the parties so stipulated, the payment of a like amount was a sufficient consideration for the extension of the lease without development for each three months during which it was paid and accepted, and, in our opinion, appellant could, by the acceptance of said rent at the beginning of each quarter, have bound herself to the end of the term; but, there being no obligation upon the part of appellee to pay the rent, and no binding promise having been made by it to do anything further than to pay \$5 and overdue rent whenever it decided to surrender the lease, she was not bound to accept it when tendered at the beginning of any quarter, unless in the meantime appellee had in good faith begun to explore and develop the land."

The supreme court, however, granted a writ of error to review the judgment of the court of civil appeals, making the following notation at the time: "We are of the opinion that the holding that the lease contract was void because unilateral was erroneous. It appears to have been supported by a valuable consideration paid, though it be regarded as a contract for an option and as unilateral in character. A contract to give an option is valid if supported by an independent consideration. We think it questionable, however, whether a contract by which the opposite party

agrees to do a definite thing within a limited period, or, in lieu of it, to pay a specified amount, can be regarded as unilateral."

See *Pierce Fordyce Oil Asso. v. Woodrum*, — Tex. Civ. App. —, 188 S. W. 245, 249.

In *Pierce Fordyce Oil Asso. v. Woodrum*, *supra*, another of the courts of civil appeals held a lease of a tract of 2,038 acres for a term of one year, and as long thereafter as oil or gas was found in paying quantities, which recited a cash consideration of \$1, the lessee agreeing to pay a royalty of one eighth the oil and gas produced, and to begin operations in six months, or pay 50 cents per acre for delay of an additional six months, and granting the lessee the option to surrender the lease at any time upon the payment of \$1, was not void as being unilateral. See also *Griffin v. Bell*, — Tex. Civ. App. —, 202 S. W. 1035, which was an action to cancel a lease, in which the lessee was not obligated to drill or pay for delay, and for which a consideration of \$70 was paid. The court of civil appeals affirmed a judgment denying the relief, holding that "the contract was not subject to cancellation on account of its unilateral character on its face, imposing an obligation only on plaintiffs, since mutual promises are necessary only when there is no other consideration."

Notwithstanding some earlier decisions and dictum to the contrary, the later decisions of the courts of civil appeals of Texas, and all of the expressions of the supreme court of that state to which our attention has been called, are in harmony with the great weight of authority that leases of the character in question, though development and prospective royalties be regarded as the moving consideration to the lessor, and it is optional with the lessee whether he shall drill, or pay for delay, or surrender and terminate the agreement, are not void for the want of mutuality, when supported by an independent valuable consideration; and also that \$1 is a valuable consid-

eration, and sufficient to support a contract for an option.

There is no finding that the recital in the instrument under consideration of \$1 paid as a consideration was a mere formality—a fiction—and was not a statement of the fact of the actual payment and receipt of that sum. It may be true that in some instances no consideration was paid or agreed to be paid, though the instrument recites the payment of \$1 or other small sum. On the other hand, that is not always the case. Quite a number of decisions will be found in the books where the recited consideration of \$1 for leases of tracts of different areas was found to have been actually paid, and others in which, there being no proof to the contrary, it was assumed that such was the case. Therefore, we cannot assume in this case that the \$1 was not one of the considerations, or that the parties did not contract in reference thereto; and we have no right to disregard the \$1, and treat the instrument as though the covenant to develop or pay in lieu thereof was the sole consideration. If they so desired, the lessors had the right to dispose of their property, or any interest therein, for \$1; and, having acknowledged that they did so, we will not presume that they did not, because of the agreement that under certain conditions they were to receive a further and greater consideration during the life of the grant. Nor will we assume that the consideration is inadequate. There is no finding to that effect, or of facts or circumstances from which the same can be inferred. Moreover, if it should be assumed that the consideration is inadequate, it would not follow that the lessor was entitled to cancellation. This court has repeatedly held that inadequacy of consideration alone

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equity in canceling

a deed regularly executed. *Lewis v. Allen*, 42 Okla. 584, 142 Pac. 384; *Chandler v. Roe*, 46 Okla. 349, 148

Pac. 1026; *Miller v. Folsom*, 49 Okla. 74, 149 Pac. 1185; *Henley v. Davis*, — Okla. —, 156 Pac. 337; *Welch v. Ellis*, — Okla. —, 163 Pac. 321.

In *Welch v. Ellis* the rule is stated by this court as follows: "Ordinarily, an adult person of sound mind may dispose of his real estate in any manner and for any consideration he sees fit, and the deed therefor will not be set aside, in the absence of fraud, duress, or mistake. Mere inadequacy of price, or any other inequality in the bargain, does not per se constitute a ground to avoid the bargain. Courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar position or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, are considerations, not for courts of justice, but for the party himself, to deliberate upon. 1 Story, Eq. Jur. § 244."

This court in *Miller v. Folsom*, 49 Okla. 74, 149 Pac. 1185, in an opinion by Justice Turner in a suit to cancel a deed on the ground of incompetency and inadequacy of consideration, said: "If he was as ignorant of values as the court inferred, the most that can be said is that plaintiff might be likened to one who becomes the owner of a precious stone of unknown value to him, and who sells it for a small part of its value without informing himself of its actual worth. It goes without saying that he must suffer the result of his own folly, and that a court of equity will not aid him to recover the property for the reason that he was chargeable with the duty to inquire of its worth before making the sale. Plaintiff also might be likened to one who is the owner of a field containing a treasure under its soil of which he was ignorant. It cannot be said that equity will set aside his deed conveying it to one who had purchased it,

without fraud or undue influence, for a small part of its value."

In *Eyre v. Potter*, 15 How. 42, 14 L. ed. 592, a suit in equity to cancel a deed, the Supreme Court of the United States, speaking of the question of the adequacy of the consideration to support the conveyance, said:

"The parties, if competent to contract and willing to contract, were the only proper judges of the motive or consideration operating upon them; and it would be productive of the worst consequences if, under pretexts however specious, interests or dispositions subsequently arising could be made to bear upon acts deliberately performed, and which had become the foundation of important rights in others. Mere inadequacy of price, or any other inequality in a bargain, we are told, is not to be understood as constituting per se a ground to avoid a bargain in equity; for courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or otherwise, or profitable, or unprofitable, are considerations not for courts of justice, but for the party himself to deliberate upon. Vide *Story*, Eq. § 244, citing the cases of *Griffith v. Spratley*, 1 Cox, Ch. Cas. 383, 29 Eng. Reprint, 1213; *Copis v. Middleton*, 2 Madd. Ch. 409, 56 Eng. Reprint, 386, 17 Revised Rep. 226, and various other cases.

"Again, it is ruled that inadequacy of consideration is not of itself a distinct principle of equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is what it will produce, and it admits of no precise standard. One man, in the disposal of his property, may sell it for less than another would. If courts of equity were to unravel all

these transactions, they would throw everything into confusion, and set afloat the contracts of mankind. Such a consequence would of itself be sufficient to show the injustice and impracticability of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief."

In some cases where the consideration for a conveyance or contract is so grossly inadequate as to shock the conscience, it is held that cancellation will be decreed, not because the price or consideration is inadequate, but because the inadequacy is so great as to amount to evidence of fraud; fraud, and not inadequacy of consideration, being, even in such cases, the ground for the interposition of equity. *Bruner v. Cobb*, 37 Okla. 228, L.R.A.1916D, 377, 131 Pac. 165. It does not appear from the statement of the issues in this case that cancellation was sought on the ground of fraud in the procurement of the leases, mistake, the capacity of the parties to contract, or their free consent thereto, or any other ground on which the adequacy of the consideration is material. Nor was there any finding of fact to justify a decree of cancellation on any of those grounds.

So far as consideration is concerned, under the issues in this case, the only question to be considered is whether there was any valuable consideration paid, or agreed to be paid, by the lessee to the lessors. Under the findings of the trial court, not only have the lessors failed to discharge the burden imposed on them by statute to show that there was no consideration, but from the recital of the instrument it is seen that there was a consideration, and one of value, in the eyes of the law.

In *Brown v. Wilson*, — Okla. —, L.R.A.1917B, 1184, 160 Pac. 94, it was not held that \$1 was not a valuable or sufficient consideration, but, on the contrary, it was distinctly recognized as such. In that case the lease was for a recited consideration of \$1 and the covenants and agree-

ments of the lessee therein contained. It was for a term of ten years and as long thereafter as oil or gas was produced. Certain stipulated royalties on the oil and gas produced were provided, and the lessee covenanted to complete a well within four months, or pay at the rate of \$80 in advance for each additional three months such completion was delayed; and it also contained a surrender clause. In the majority opinion it was said that the only consideration for the lease, as a whole, was development, and, with reference to the \$1, it was said: "We hold that the dollar paid Ruhl [the lessor] at the time of the execution and delivery of the lease was the sole and only consideration paid to hold the lease for the four-month term within which the lessee had to enter and complete a well, and that such consideration did not extend to uphold any other stipulation in the lease; and, further, that the agreement on the part of the lessee to pay delay money after that time was a provision made for the sole purpose of prolonging the lease."

In other words, the "contract" in that case was held to be an agreement to lease for successive quarterly terms, after an initial term of four months, and the payment of, or a binding obligation to pay, a distinct and independent consideration for each succeeding quarter was held essential. By construction, the \$1 was held to support the lease for the first term of four months only; and since, as it was held, by reason of the surrender clause the lessee was not obligated to develop or pay the stipulated sum of \$80 for each of the succeeding quarters, there was no consideration for the agreement to lease after the first term of four months. Had it been then thought that the \$1 supported the lease for the term of ten years instead of only the first four months thereof, it is probable that the majority of this court would have reached a different conclusion in that case on the question now under consideration. The error in that

opinion, in this connection, as we now see it, was in the portion we have quoted above, that the \$1 consideration supported only a four-months term, and did not extend to and uphold any other stipulation in the lease. That portion of the opinion has been overruled in effect by the recent decision of this court in *Northwestern Oil & Gas Co. v. Branine*, — Okla. —, ante, 344, 175 Pac. 533, in which it was said, per Hardy, J.: "The court has no right to fractionize the contract or divide it up into sections, and say that the cash bonus supports any particular covenant to the exclusion of another, when such construction would be contrary to the clear intention of the parties as gathered from the face of their written agreement."

The form of the written agreement in the *Branine* Case and the one in this is the same. The only difference between the two agreements is as to the amount of the consideration, and, as before stated, that is not material to the questions raised in this case as to the alleged invalidity of the grant for want of consideration. We cannot construe the grant here into one for six months from its date, with an option to extend the same beyond that term for successive monthly periods, without doing violence to the clear intention of the parties as expressed in unambiguous language. Their language is: "It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter," etc.

That language can have but one meaning. Such meaning is not changed or rendered doubtful by the subsequent covenant that the lessee shall, during that term, complete a well within a specified time or pay for subsequent periods of delay. These subsequent covenants have no bearing on the term of the grant, except in so far as failure to comply therewith may operate as an abandonment, or cause a forfeiture thereof, if the agreement should so provide. No other construction, without doing violence to the plain



meaning of the language employed, can be placed on the writing as a whole, than that the recited consideration of \$1 is for the grant for the entire term of five years, and as long thereafter as either oil or gas is produced, and also the right of termination given the lessee upon compliance with the conditions thereto attached.

We therefore conclude that the grant or so-called "lease" for the full term expressed is supported by an independent valuable consideration, and is, therefore, not void for want of mutuality,

—oil and gas  
lease—option  
to surrender—  
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and *Brown v. Wilson*, supra, holding otherwise, is on this point overruled.

With reference to the right of the lessors to terminate the lease before the expiration of the term, it will be noted that such right is not specifically reserved to the lessors, but is given to the lessee only. But it is contended that the right of the lessor to terminate arises by implication. The argument is that, notwithstanding the grant is to the lessee for a term of five years and as long thereafter as oil or gas is produced, the effect of the surrender clause is to convert the grant into one in the nature of an estate at the will of the lessee, and the statement of Coke (2 Co. Litt. 550) that, "when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor," is invoked to sustain the proposition that, since the lessee has the right to terminate, so also must the lessors. There are decisions based directly or indirectly upon the above dictum of Coke, which apparently sustain the proposition. *Knight v. Indiana Coal & I. Co.* 47 Ind. 105, 17 Am. Rep. 692; *Cowan v. Radford Iron Co.* 83 Va. 547, 3 S. E. 120, 15 Mor. Min. Rep. 453; *Eclipse Oil Co. v. South Penn Oil Co.* 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; *Reese v. Zinn* (C. C.) 103 Fed. 97; *Federal Oil Co. v. Western Oil Co.* (C. C.) 112 Fed. 373, 22 Mor. Min.

Rep. 25; *Guffey Petroleum Co. v. Oliver*, — Tex. Civ. App. —, 79 S. W. 884. However, all courts do not accept Coke's dictum literally and without question. In *Tiffany on the Modern Law of Real Property*, § 54, p. 138, English and American authorities are cited to support the statement of the author that "if a lease or grant purport to limit an estate to hold at the will of the lessee only,—that is, for so long as the lessee pleases to continue tenant,—the estate created is a freehold or estate for life, determinable at the will of the lessee, and it can be conveyed only by the formalities proper in the case of freehold estates."

In his work on *Landlord and Tenant*, § 13, p. 102, the author states the rule: "That a lease in terms creating an estate for years contains such an option [i. e., to terminate the tenancy at any time] in the lessee does not render the latter a tenant at will merely."

See also *Tiffany, Land. & T.* § 12f, p. 84. And in *Brewster v. Lanyon Zinc Co.* 72 C. C. A. 213, 140 Fed. 801, speaking of the effect of a right in the lessee to terminate, it was said:

"But that does not make the estate which it creates a mere tenancy at will within the operation of the common-law rule that an estate at the will of one party is equally at the will of the other.

"That rule is without application to a lease for a defined and permissible term, but which reserves to the lessee an option to terminate it before the expiration of the term. *Archbold, Land. & T.* 92; *Dann v. Spurrier*, 3 Bos. & P. 399, 127 Eng. Reprint, 218, 7 Revised Rep. 797, 2 Eng. Rul. Cas. 756; *Doe ex dem. Webb v. Dixon*, 9 East, 15, 103 Eng. Reprint, 478, 9 Revised Rep. 501."

*Tiffany*, in his discussion of when a tenancy at will arises (*Land. & T.* § 13, p. 101), after considering the question in the light of the authorities, states our understanding of the true meaning and proper ap-

plication of Coke's dictum as follows:

"It has in England apparently, in accordance with these views, been decided that a conveyance to one with a right in him to terminate the holding at any time creates in him a freehold estate. There the estate thus created, in the absence of the insertion of the word 'heirs,' is a life estate merely, terminable at the will of the lessee; while under the rule prevailing in most of the states in this country, that the word 'heirs' is not necessary for the creation of an estate in fee, the estate created would rather be one in fee terminable at the lessee's option, unless the terms of the conveyance show a different intention. There are several cases in this country which tend to support the view that such a conveyance creates an estate for life or in fee.

"Coke's dictum that such a lease, at the will of the lessee, creates a tenancy at will, is, it is conceived, to be regarded as applying only in the absence of livery of seisin, which was in his day necessary for the creation of an estate of freehold. That, if accompanied by livery of seisin, such a lease created an estate for life is clearly asserted by high authority prior to his time, and there is nothing in the decisions referred to by him to lead to a different conclusion. If, however, the instrument lacks any formality of execution, such as a seal, which may be in the particular jurisdiction necessary for the creation of freehold estate, it will, as at common law, when unaccompanied by livery of seisin, create merely an estate at will." Tiffany, Land. & T. pp. 103, 104.

So, if it should be held that the grant here is of a freehold interest in the land, it is valid as such, having been executed with all the formalities necessary, under our statutes, for the conveyance of a freehold estate, and the instrument therefore does not create merely an

estate at will. If, on the other hand, the view is taken that the grant is for a definite term, in the nature of an estate for years, the

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fact that it may be sooner terminated, at the option of the lessee, does not convert the grant from one in the nature of a tenancy for years into one in the nature of a tenancy at will. In either case, the above rule stated by Coke is not applicable. For these reasons we held in Northwestern Oil & Gas Co. v. Branine, — Okla. —, ante, 344, 175 Pac. 533, that the presence of the surrender clause "did not confer on the lessor the right to terminate the lease at will."

It follows that in our opinion the trial court erred in the conclusions of law, and upon the facts found the judgment below should have been for the plaintiff in error.

The judgment is accordingly reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

All the Justices concur except Turner and Brett, JJ., not participating, and Owen, J., dissenting.

Owen, J., dissenting:

I am unable to concur in this case. I cannot agree that the \$1 mentioned in the lease as part of the consideration is sufficient to support every covenant of the lease for the full term of five years. There was no bonus paid, and, as I construe the lease, the real consideration is the covenant to develop the premises and pay royalties. The language is: "For and in consideration of the sum of \$1 to them in hand paid by the said parties of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the parties of the second part to be paid, kept, and performed," etc.

Then follows in the usual form, the covenants to develop the premises for oil and gas, and to pay the stipulated royalties in the event

either oil or gas is found. If the lease did not contain a surrender clause, the conclusion reached by the majority of the court would be correct. The lessee would be bound by these terms, and this would be a sufficient consideration to support the grant. In the opinion it is stated: "The lessee is obligated thereunder to do one of three things: (1) Drill and complete a well in the fixed time, or (2) surrender all his rights and pay in addition the sum of \$1, or (3) pay during the term of five years, or until surrender, \$15 per month for each additional month the completion of the well is delayed."

In support of the proposition that the lessee is bound to do one or the other, the cases of *Cohn v. Clark*, 48 Okla. 500, L.R.A.1916B, 686, 150 Pac. 467, and *McKee v. Grimm*, — Okla. —, 157 Pac. 308, are cited. As I understand these cases, they hold the lessee was bound to pay rent until he availed himself of the surrender clause. In both cases the action was to recover rentals, there having been no drilling, and the leases had not been surrendered. In *Cohn v. Clark*, *supra*, the surrender clause was: "Second party may at any time remove all his property and reconvey the premises hereby granted, and thereupon this instrument shall be null and void."

The lessee had failed to drill, and refused to pay the rentals, and contended that this, *ipso facto*, canceled the lease, and it was not necessary to reconvey. The court held that, not having reconveyed, he was liable for the rentals due according to the terms of the lease, and that the surrender clause for the benefit of the lessee must be construed in connection with the forfeiture clause for the benefit of the lessor. In the opinion, by Commissioner Mathews, appears the following discussion: "The lessee contends that, in order to relieve himself of liability under the contract, it was unnecessary for him to avail himself of the sixth provision therein, known as the surrender clause, and execute a recon-

veyance as provided in this clause; but that he was not bound in the contract to begin operations on the lease, or to pay rentals, or to execute a reconveyance, but that upon failure on his part to either begin operations, or to pay the specified rentals as provided in the contract, *ipso facto* there was a self-executing automatic release, which relieved him of all liability. . . . If the lessee's contention be true, then we would meet the anomalous condition of a party profiting by his own breach or gaining advantage by his own wrong. Under such a contract the lessor binds his hands, and gets nothing for the lease unless the pleasure of the lessee moves him to action. Should we determine that a failure to pay the rentals stipulated, after a default in beginning operations, *ipso facto* operates to release the lessee from all liability, why encumber the lease with the sixth paragraph, known as the surrender clause? If failure to pay rentals nullifies the lease automatically, then there is no use of the surrender clause at all. It would be useless to insert a surrender clause in a lease, requiring the lessee to go to the trouble and expense of executing an actual reconveyance, when there is a provision in the lease for his advantage which is self-executing upon his failure to pay the rentals. We must construe this contract so as to give some effect and meaning to every part of the same. We are not permitted to say that the parties hereto have deliberately inserted a clause in this contract that is useless and unnecessary, when a fair and reasonable construction will give weight and effect to it; and, following this line, we conclude that if the surrender clause has been inserted in the contract for the benefit of the lessee, and affords him an easy and expeditious way of ridding himself of the contract and its liability, the forfeiture clause in paragraph 1 must have been inserted for the benefit of the lessor only. This construction will give both of the clauses the weight and effect

that were reasonably intended for them, and gives both of the parties to the contract a means of protection and a way of relieving themselves of the contract."

In *McKee v. Grimm*, *supra*, the lessee alleged that he had offered to comply with the surrender clause. The lessor, by reply, denied this allegation. The opinion holds there was a material issue of fact, with the burden of proof on the lessee, and, failing to prove this affirmative defense, he was liable for the rentals under the authority of *Cohn v. Clark*, *supra*.

The lease in question contains a surrender clause, giving the lessee, at any time, on the payment of \$1, the right to surrender the lease, after which all payments and liabilities under and by virtue of its terms shall cease and determine. The error is in holding that the lessee is bound to do one of three things, and that the \$1, paid at the time of the execution of the lease, is sufficient consideration to support the option to do either, in addition to supporting the grant for the full term of five years. I do not so understand this contract. The lessee had the option, for which he had paid nothing, to surrender this lease and avoid either drilling or paying rental. Under the express language of this clause, if at any time he decided to avoid the obligations to drill or pay rental, he could do so upon paying \$1, not "an additional \$1" to the lessor and surrendering the lease for cancelation. This negatives the premise that the \$1 originally paid was intended by the parties to pay for the valuable and substantial right to surrender and avoid the expense of development.

At one of the periods mentioned in the lease, at which time the lessee by the terms of the lease, had the option of either drilling or paying rent, or of refusing to do either, and thereby avoid liability, upon the payment of \$1, the lessor refused to accept the rental tendered and brought this action to cancel the lease. No bonus had been paid and

there had been no attempt at development. The covenants for development and payment of royalties being the real consideration for the lease, the contract, as I view it, was at that time unperformed on the part of the lessee. The \$1 mentioned as part of the consideration was merely nominal, and the lessor would not have executed this lease for such consideration.

The courts have repeatedly held that the real and moving consideration for leases of this character is not the nominal consideration paid in advance—that is, the \$1 as in this case—but the exploration and development of the land for oil and gas is the real consideration. This announcement has been made so frequently by the courts that a decision construing similar leases can scarcely be found in which such declarations are absent. In the case of *Federal Oil Co. v. Western Oil Co.* (C. C.) 112 Fed. 373, 22 Mor. Min. Rep. 25, the lease under consideration was identical with the one here, in reciting \$1 and the covenants to develop as the consideration for its execution. There it was said: "The cash payment, if actually made, was merely nominal, and it is quite apparent, from a consideration of the terms of the whole lease, that the lessors would not have executed it for any such paltry consideration. If there was no further consideration which the lessee was bound to yield to the lessors, a court of equity would be bound to refuse the enforcement of the lease. The consideration would be so trifling, compared with the value of the leasehold interest, as to shock the moral sense. . . . Oil leases stand upon quite different grounds from leases of other immovable property. The governing principle in gas and oil leases of the character in question is that the discovery and production of gas or oil is a condition precedent to the existence and continuance of any vested estate in the demised premises. Where, as in this case, the only consideration is prospective royalties to arise from

exploration and development, failure to properly explore and develop the demised premises renders the agreement nudum pactum, and works a forfeiture of the lease, for it is of the essence of such a lease that the work of exploration shall be commenced and prosecuted with promptness."

Under the terms of the lease in question there was no further consideration which the lessee was bound to advance to the lessor. The lessee was not bound to drill, nor was he bound to pay rental. It is begging the question, in my opinion, to say that he was bound to surrender the lease unless he drilled or paid rental. The surrender clause is for lessee's benefit, and is his option, for which he paid nothing, to avoid the covenants in the lease. That is equivalent to saying that binding himself to avoid liability, unless he elected to incur that liability, is sufficient to amount to performance on his part. I agree that if the lease was a performed contract, if the lessee had paid a substantial bonus, or was bound to perform something that would be of substantial benefit to the lessor, in consideration of the five-year grant of an exclusive privilege to explore the premises, then the presence of the surrender clause would not render the contract voidable. The surrender clause does not render a performed contract voidable, but it does render an unperformed contract, without a sufficient consideration, voidable at the option of the lessor where it is voidable at the option of the lessee. A contract is performed when the consideration moving from the lessee to the lessor had been paid or performed, or when the lessee is bound by its terms to pay or perform. Other cases holding prospective royalties to be the moving consideration for execution of leases of like character are: *Huggins v. Daley*, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732, 17 Mor. Min. Rep.

543; *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; *Foster v. Elk Fork Oil & Gas Co.* 32 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178; *Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co.* 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680; *Cowan v. Radford Iron Co.* 83 Va. 547, 3 S. E. 120, 15 Mor. Min. Rep. 543; *Knight v. Indiana Coal & I. Co.* 47 Ind. 110, 17 Am. Rep. 692; *Witherspoon v. Staley*, — Tex. Civ. App. —, 156 S. W. 557; *Smith v. Guffey*, 120 C. C. A. 436, 202 Fed. 109; *Owens v. Corsicana Petroleum Co.* — Tex. Civ. App. —, 169 S. W. 193; *Long v. Sun Co.* 132 La. 601, 61 So. 684; *Great Western Oil Co. v. Carpenter*, 43 Tex. Civ. App. 229, 95 S. W. 57; *Dill v. Frazee*, 169 Ind. 53, 79 N. E. 971; *Ohio Oil Co. v. Detamore*, 165 Ind. 243, 73 N. E. 907; *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.* 119 La. 793, 44 So. 601; *Murray v. Barnhart*, 117 La. 1023, 42 So. 492; *Mansfield Gas Co. v. Alexander*, 97 Ark. 167, 133 S. W. 837; *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558; *Bay Street Petroleum Co. v. Penn Lubricating Co.* 121 Ky. 637, 87 S. W. 1102; *Flanagan v. Marsh*, 32 Ky. L. Rep. 184, 105 S. W. 424.

In holding that the \$1 is sufficient to support every covenant of the lease and for the entire period of five years, it is said "the \$1 is a thing of value in the eye of the law." That rule prevails in actions at law, where any consideration of value is sufficient, and where the sufficiency of the consideration will not be inquired into. This is not such an action. This is an action of purely equitable cognizance, and a court of equity will look to the reasonableness of the moving consideration. That was held in the case of *Federal Oil Co. v. Great Western Oil Co.* supra, where it was said: "Except to the extent of \$1, the lessee has yielded no consideration for the lease; nor is it bound by any enforceable promise or covenant, for the breach of which the lessors

would have a right of action to compel the payment or yielding of any further consideration whatever. . . . The complainant is under no obligation to pay the monthly rental. . . . The lessors could maintain no action to recover the same if the complainant should refuse to continue payment. Such a lease is without consideration, and must be held nudum pactum and void. A lease so unfair, inequitable, and against good conscience no court ought to enforce."

Other cases to like effect are: Long v. Sun Co. 132 La. 601, 61 So. 684; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Berry v. Frisbie, 120 Ky. 337, 86 S. W. 558; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. 119 La. 793, 44 So. 481; Smith v. Guffey, 120 C. C. A. 436, 202 Fed. 106; Murray v. Barnhart, 117 La. 1023, 42 So. 489; Owens v. Corsicana Petroleum Co. — Tex. Civ. App. —, 169 S. W. 193.

It is suggested that the \$1 in many instances has been held to support a conveyance of land by warranty deed, and the case of Ehrig v. Adams, — Okla. —, 169 Pac. 645, is cited as authority on this proposition. That was not the question before the court in that case. In that case a restricted Indian had by warranty deed, and for a sufficient consideration, attempted to convey certain land. By reason of the restrictions on alienation that deed was void. Later, and after the restrictions had been removed by operation of law, the same Indian conveyed the same premises to the same grantee, under a deed reciting a consideration of \$1. It was contended that the principal consideration for this last deed was, in fact, the consideration received under the first deed, and, the first deed being void, therefore the last deed, based on the same consideration, was void. It was said: "There is no merit in the contention that the deed of July, 1910, was void for the reason that it was supported principally by the

consideration received under the deed of 1907. There is no allegation of fraud or want of consideration. The second deed stands as an independent transaction. The allottee being of less than one-half blood, all restrictions upon his powers of alienation of this land were removed by the Act of May 27, 1908. When he saw fit to convey this land to Bratton in 1910 for \$1, he was at liberty to do so, without regard to his void deed made prior to this act. The fact that the Indian appears to have been sufficiently honest to recognize and remember the consideration which he had received under the void deed did not impose any restrictions upon his power to alienate."

The sufficiency of the consideration was not in question. The question was whether receiving consideration under a void deed rendered the later deed void. In the instant case the question necessary for determination is whether the lessor had received a sufficient consideration to distinguish this case from the rule that contracts unperformed, without sufficient consideration, which are optional as to one, are optional as to both. It is not contended that the lessee was bound to render a sufficient consideration in the future by developing the premises or paying rentals. He was not bound to do either.

This action to cancel the lease being of purely equitable cognizance, a court of equity must inquire into the sufficiency of the consideration, and must say, as I view the lease, the covenants to develop and pay royalties were the moving consideration from the lessee to the lessor, and the lessee was not bound to perform these. That being true, and there being no development, this case falls squarely within the rule announced in Hill Oil & Gas Co. v. White, 53 Okla. 748, 157 Pac. 710, where it was said, Mr. Justice Hardy speaking for the court: "The rule in this state is that contracts unperformed, without sufficient consideration, which are op-

tional as to one, are optional as to both."

The contract here was unperformed, because no sufficient consideration had been paid, neither was the lessee bound to do anything that would amount to sufficient consideration.

Other cases in which this rule was announced are: *Frank Oil Co. v. Belleview Gas & Oil Co.* 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 138 Am. St. Rep. 942, 108 Pac. 545; *Kolachny v. Galbreath*, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902; *Brown v. Wilson*, — Okla. —, L.R.A.1917B, 1184, 160 Pac. 94.

Assuming that the \$1 mentioned as a part of the consideration was in fact paid, this payment was, in

my opinion, wholly inadequate to support the exclusive right to enter and explore for five years, and the lower court did not err in giving the lessor the right to terminate the contract, which was without sufficient consideration, unperformed and optional as to the lessee, and therefore optional as to the lessor.

It is a universal rule that courts will not grant specific performance at the instance of one of the parties to an unperformed contract, who himself is not bound to perform the contract. There is an unbroken line of decisions of this court following that rule. To deny the lessor the right to go into court and by proper action cancel such a contract is to deny him a remedy in the courts of which he might avail himself by force of arms.

## ANNOTATION.

### Validity of oil or gas lease as affected by surrender clause.

- I. Introductory, 378.
- II. General rule, 379.
- III. As affected by question whether lease imposes on lessee unavoidable obligation:
  - a. In general, 380.
  - b. Where cash consideration is nominal:
    - 1. In general, 381.
    - 2. Enforcement in equity, 383.

#### I. Introductory.

A lease of land for the production of oil and gas, which, in addition to the usual stipulation for the payment of a cash consideration and covenants for the development of the leased premises and the payment of a royalty on the product secured, or, in lieu thereof, a stated sum of money at designated times, contains a clause permitting the lessee to surrender the lease and be relieved from further liability thereunder, presents the question as to the effect of this surrender clause on the validity of the lease. The contention has frequently been made that the effect of such a clause was to invalidate the lease on the ground of want of mutuality, or at least to render the term of the lessee

one at will, terminable by either party in accordance with the rule as to such estates.

Of course, the real consideration for a lease of this character is the covenant of the lessee to develop the premises for oil and gas, although the present cash consideration and the agreement to pay stated sums in lieu of development frequently involve the payment by the lessee of substantial sums of money. In this regard it is to be noted that the obligations imposed upon the lessee are divisible and alternative, but there is nevertheless imposed upon him some obligation which cannot be avoided by him, although, being in the alternative, he may have an election as to the particular obligation which he will assume. The fact that the lease imposes upon the lessee an actual and unavoidable obligation is a matter of importance on the question of mutuality of obligation; for, in this regard, to render the obligation mutual it is not essential that each covenant or agreement by the lessor shall be supported by some specific covenant or agreement by the lessee. It is sufficient if

the contract contains mutual obligations binding upon both parties. The benefits accruing or the duties imposed need not be equal. The obligation is mutual, even though the subsidiary promises depend for their support upon the consideration of the principal agreement. If this consideration is sufficient, mutual promises are not essential.

Tested by this standard, an important feature of contracts of this character is the fact that the lessor has no property in the oil or gas in his land, until it has been drawn therefrom by wells operated in his behalf. The development of wells for this purpose requires the expenditure by the lessee of large sums of money, without any definite assurance of success. There is, therefore, no particular hardship upon the lessor in the provision entitling the lessee to be relieved from the burdens imposed by the lease, upon surrendering the same; at least, where he pays a valuable consideration therefor. This is especially true, in view of the general rule of equity that there is an implied covenant on the part of the lessee that he will use reasonable diligence to develop the leased premises, to the extent, at least, of protecting the land from the danger of having any oil or gas therein drawn through wells on adjacent lands, and in this manner lost to the lessor.

## II. General rule.

In accordance with the general principles referred to, with reference to the test to determine the validity of a contract as affected by the question of mutuality of obligation imposed thereby, by the great weight of authority a lease of land for the development and production of oil and gas is not rendered invalid on the ground of want of mutuality, by inclusion therein of a provision, in effect entitling the lessee to surrender the lease and be relieved from further liability, especially where he is required, as a condition of the surrender, to pay some designated sum of money; the consideration for the lease being otherwise sufficient, although not expressly referable to the surrender clause. And the term created by the lease is not

a tenancy at will, terminable at the pleasure of either party; but in these respects, the lease is valid and binding upon the parties, according to its terms.

**United States.**—*Brewster v. Lanyon Zinc Co.* (1905) 72 C. C. A. 213, 140 Fed. 801; *Guffey v. Smith* (1914) 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526; *Shaffer v. Marks* (1917) 241 Fed. 139; *Lindlay v. Raydure* (1917) 239 Fed. 928, affirmed in (1918) 161 C. C. A. 585, 249 Fed. 675.

**Alabama.**—*Rechard v. Cowley* (1918) — Ala. —, 80 So. 419.

**Illinois.**—*Bruner v. Hicks* (1907) 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888; *Watford Oil & Gas Co. v. Shipman* (1908) 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Poe v. Ulrey* (1908) 233 Ill. 56, 84 N. E. 46; *Ulrey v. Keith* (1908) 237 Ill. 284, 86 N. E. 696; *People ex rel. Carrell v. Bell* (1908) 237 Ill. 332, 19 L.R.A.(N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511; *Daughetee v. Ohio Oil Co.* (1914) 263 Ill. 518, 105 N. E. 308.

**Indiana.**—*Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co.* (1903) 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680; *Erie Crawford Oil Co. v. Meeks* (1907) 40 Ind. App. 156, 81 N. E. 518.

**Kansas.**—*Pittsburg Vitriified Paving & Bldg. Brick Co. v. Bailey* (1907) 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803.

**Louisiana.**—*Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate* (1905) 115 La. 107, 38 So. 932.

**Ohio.**—*Brown v. Fowler* (1901) 65 Ohio St. 507, 63 N. E. 76; *Central Ohio Natural Gas & Fuel Co. v. Eckert* (1904) 70 Ohio St. 127, 71 N. E. 281.

**Oklahoma.**—*Pucini v. Bumgarner* (1918) — Okla. —, 175 Pac. 537; *Riddle v. Keechi Oil & Gas Co.* (1918) — Okla. —, 176 Pac. 737; *Carter Oil Co. v. Tiffin* (1918) — Okla. —, 176 Pac. 912; *Eastern Oil Co. v. Beatty* (1918) — Okla. —, 177 Pac. 104; *Southwestern Oil Co. v. Bechtel* (1918) — Okla. —, 177 Pac. 108; *Ardizzone v. Archer* (1919) — Okla. —, 177 Pac. 554.

In *Rechard v. Cowley* (Ala.) *supra*, it is said that it is supposed that "this privilege, with its attendant rights of



limited entry and possession, was open to be availed of by the 'lessee' for twelve months, and for a longer period in certain circumstances defined in the writing. The 'lessee' did not engage, did not bind himself, to explore for oil and gas at any time or within any period short of one year, and that in the alternative; but this absence of obligation to explore, etc., within a period not beyond one year or alternatively, did not affect the contract with anything unfavorable or fatal to its validity. He paid an effective consideration (though nominal) for this right, this privilege, and it was his to enjoy and to avail of approximately nine months (of the twelve stipulated) after this bill was filed, within three months after the 'lease' had been executed and delivered and recorded. The 'lessee' did not oblige himself to find oil and gas, or to make the effort so to do, within the period during which the successor of the owner impleaded him in this cause. It is supposed that the insertion in the contract of the reservation of right in the 'lessee' to surrender the 'lease' and cancel the contract operated to affect, and thus avoid, the contract with a want of mutuality. This reservation vested in the 'lessee' an option to determine the contract, which, for a consideration, had clothed the 'lessee' with the privilege stated. This option in the 'lessee' to cancel was supported by the consideration that vested in him the right, the privilege, of prospecting for oil and gas on the land described in the instrument, in consequence of which it necessarily results that the contract was not wanting in mutuality. The fact that one may, at his election, surrender a right (not avoid an obligation) which he has for a consideration acquired, could not justify the conclusion that the right for which he paid never was his to surrender."

In *Central Ohio Natural Gas & Fuel Co. v. Eckert* (1904) 70 Ohio St. 127, 71 N. E. 281, it is said that such a lease does not create a mere tenancy at will. There is a good and valid consideration for the option granted by such instruments, and it is immaterial

whether they are called leases, deeds, or written agreements. The intention of the parties is to control, and it is manifest that it was not the intention of either party that the right granted by the instrument should be a mere license, and subject to be terminated by the grantor at any time.

And in *Brewster v. Lanyon Zinc Co.* (1905) 72 C. C. A. 213, 140 Fed. 801, it is said that a provision entitling the lessee to reconvey the premises at any time, and relieve himself from further obligation under the lease, does not make the estate created a mere tenancy at will within the operation of the common-law rule that an estate at will of one party is equally at the will of the other, since the rule is without application to a lease for a definite term, although it reserves to the lessee the option to terminate it before the expiration thereof.

*III. As affected by question whether lease imposes on lessee unavoidable obligation.*

*a. In general.*

The foregoing rule is based upon the assumption that the consideration to be paid or performed by the lessee is sufficient to support the contract. An important question arises as to what is a sufficient consideration within this rule. It has been held that where the consideration for a lease of this character was merely the covenant on the part of the lessee to develop the premises and produce oil or gas if the development was successful, or to pay a certain sum of money at designated times in lieu of such development, a surrender clause, entitling the lessee to be relieved from all liability under the lease by surrendering the same, was invalid on the ground of lack of mutuality, the contract being wholly executory, and the effect of the lease being merely to create a tenancy at will, terminable at the pleasure of either party. *Eclipse Oil Co. v. South Penn Oil Co.* (1899) 47 W. Va. 84, 84 S. E. 923, 20 Mor. Min. Rep. 234; *Trees v. Eclipse Oil Co.* (1899) 47 W. Va. 107, 34 S. E. 933, 20 Mor. Min. Rep. 260.

In *Eclipse Oil Co. v. South Penn*

Oil Co. (W. Va.) *supra*, it is pointed out that according to the claim of the lessee he was not bound to do anything or pay anything, until eighteen months from the date of the lease, and in the meantime he has the right to surrender it and thereby be released from any obligation whatever. The court said: "This renders it to this extent nudum pactum by which the lessor is not bound any more than the lessee, and until something is done in consummation thereof, either party may terminate it. 'If one party may terminate an estate at his will, so may the other. Right to terminate is mutual.' . . . The lessee was out nothing, at no expense, and running no risk, and yet he makes the conditions of his contract such that the lessor cannot tell for eighteen months whether the contract is to be binding on the lessee or not. In the meantime he receives nothing for his delay."

The leases involved in the foregoing cases required the payment of no present cash consideration, and imposed on the lessee no obligation to pay any sum of money whatsoever as a condition to surrendering the leases. In the majority of cases heretofore considered, as will be hereinafter more specifically pointed out, there was some present cash consideration running to the lessor for the lease, and the lessee was bound to pay a designated sum of money as a condition of availing himself of the surrender clause. It is clear that where the lease is supported by a substantial consideration, the existence of a surrender clause does not render it invalid on the ground of lack of mutuality. As, for example, where there is a present cash consideration of \$2,100. *Eastern Oil Co. v. Beatty* (1918) — Okla. —, 177 Pac. 104; or \$320, *Carter Oil Co. v. Tiffin* (1918) — Okla. —, 176 Pac. 912. And see *Owens v. Corsicana Petroleum Co.* *infra*. And the same rule also applies where the surrender clause requires the payment of a substantial sum of money as a condition to taking advantage of it. *Houssiere Latreille Oil Co. v. Jennings-Haywood Oil Syndicate* (1905) 115 La. 107, 38 So. 932 (\$100).

In Louisiana, a valuable considera-

tion is not sufficient to support a contract unless it is sufficient in amount to constitute a serious consideration. Under this rule it is held that a gas and oil lease cannot be sustained where the recited consideration is only \$1, and it contained a provision entitling the lessee to surrender the lease at any time upon the payment of a further sum of \$2. *Murray v. Barnhart* (1906) 117 La. 1023, 42 So. 489. To the same effect see *Long v. Sun Co.* (1913) 132 La. 601, 61 So. 684, where the surrender clause did not require the lessee to pay anything as a condition to availing himself thereof, and the recited consideration for the lease itself, including the option to cancel, was \$1. Such a lease, however, is valid where the lessee is required to pay \$100 as a condition of availing himself of the surrender clause. *Houssiere Latreille Oil Co. v. Jennings-Haywood Oil Syndicate* (1905) (La.) *supra*. Partial performance by the lessee, and the receipt by the lessor of substantial sums of money after the lessee has partially developed the premises, have been held to cure any defect or invalidity due to want of mutuality of the obligation. *Busch-Everett Co. v. Vivian Oil Co.* (1911) 128 La. 886, 55 So. 564; *McClendon v. Busch-Everett Co.* (1916) 188 La. 722, 70 So. 781.

*b. Where cash consideration is nominal.*

#### 1. In general.

The question as to whether or not \$1 is a sufficient consideration to support a lease of this character has been the subject of considerable contest. In the following cases \$1 has been held to be a sufficient consideration, even though the lessee was not required to pay any additional sum in order to be entitled to avail himself of the surrender clause:

*United States.*—*Brewster v. Lanyon Zinc Co.* (1905) 72 C. C. A. 213, 140 Fed. 801; *Guffey v. Smith* (1914) 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526; *Shaffer v. Marks* (1917) 241 Fed. 139; *Raydure v. Lindley* (1918) 161 C. C. A. 585, 249 Fed. 675, affirming (1917) 289 Fed. 928, writ of certiorari

denied in (1918) 247 U. S. 513, 62 L. ed. 1243, 38 Sup. Ct. Rep. 580.

**Alabama.** — *Rechard v. Cowley* (1918) — Ala. —, 80 So. 419.

**Illinois.** — *Bruner v. Hicks* (1907) 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888; *Watford Oil & Gas Co. v. Shipman* (1908) 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Poe v. Ulrey* (1908) 233 Ill. 56, 84 N. E. 46; *Ulrey v. Keith* (1908) 237 Ill. 284, 86 N. E. 696; *People ex rel. Carrell v. Bell* (1908) 237 Ill. 332, 19 L.R.A.(N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511; *Daughetee v. Ohio Oil Co.* (1914) 263 Ill. 518, 105 N. E. 308.

**Indiana.** — *Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co.* (1903) 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680; *Dill v. Frazee* (1907) 169 Ind. 53, 79 N. E. 971; *Erie Crawford Oil Co. v. Meeks* (1907) 40 Ind. App. 156, 81 N. E. 518.

**Kansas.** — *Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey* (1907) 76 Kan. 42, 12 L.R.A.(N.S.) 745, 90 Pac. 803.

**Ohio.** — *Brown v. Fowler* (1901) 65 Ohio St. 507, 63 N. E. 76; *Central Ohio Natural Gas & Fuel Co. v. Eckert* (1904) 70 Ohio St. 127, 71 N. E. 281.

In *Gillespie v. Fulton Oil & Gas Co.* (1908) 236 Ill. 188, 86 N. E. 219, the court said that it was unbelievable that the money consideration stated (\$1) was the real consideration upon which the lease rested, and that undoubtedly the real consideration was the exploitation of the mineral resources of the property to which the lease related.

And the validity of leases of this character has also been sustained where, in addition to the payment of a present cash consideration, the lessee agreed to pay merely a nominal sum as a condition to exercising the right to surrender the lease. *Shaffer v. Marks* (1917) 241 Fed. 139; *Raydure v. Lindley* (1918) 161 C. C. A. 585, 249 Fed. 675, affirming (1917) 239 Fed. 928.

In the foregoing cases the present cash consideration was also \$1. To the same effect are *RICH v. DONAGHEY* (reported herewith), ante, 352, and *NORTHWESTERN OIL & GAS CO. v. BRANINE* (reported herewith), ante, 344;

*Eastern Oil Co. v. Beatty* (1918) — Okla. —, 177 Pac. 104; *Southwestern Oil Co. v. Bechtel* (1918) — Okla. —, 177 Pac. 108.

In *Shaffer v. Marks* (Fed.) supra, it is held that as to a lease entered into prior to the decision of the Oklahoma court, in *Brown v. Wilson* (1916) — Okla. —, L.R.A.1917B, 1184, 160 Pac. 94, the existence of the surrender clause in an oil and gas lease, giving the lessee the right to surrender the lease and be relieved from further liability thereunder upon the payment of \$1, did not invalidate the lease. In this connection attention is called to *Ardizzone v. Archer* (1919) — Okla. —, 177 Pac. 554, holding that the assignee from the lessee of an oil and gas lease was liable for the amount required to be paid monthly in lieu of development, although the lease contained a surrender clause, since such clause did not render the lease invalid for want of mutuality. The court said that the case of *Brown v. Wilson* was overruled on this point. See reference to *Brown v. Wilson* (Okla.) infra. On the other hand, it has been held that neither the sum of \$2 (*J. M. Guffey Petroleum Co. v. Oliver* (1904) — Tex. Civ. App. —, 79 S. W. 884), nor \$5 (*Owens v. Corsicana Petroleum Co.* (1914) — Tex. Civ. App. —, 169 S. W. 192) was a sufficient consideration to support the surrender clause, since either sum was merely nominal. And in *Owens v. Corsicana Petroleum Co.* (Tex.) supra, the present cash consideration was \$28.28. The court said that this sum merely represented the consideration for the right to develop the premises for the first period, and the other similar sums provided for were merely a consideration for delay in development for a sufficient term. The court said that there was no obligation on the part of the lessee to pay the delay money, and no abiding obligation to pay any other sum than the \$5 to be paid on surrendering the lease; hence, the lessor was not bound to accept the delay money when tendered at the beginning of any quarterly period, unless in the meantime the lessee had in good faith begun to explore and develop the land. Compare

with *Eastern Oil Co. v. Beatty and Carter Oil Co. v. Tiffin*, supra.

In *Pierce Fordyce Oil Asso. v. Woodrum* (1916) — *Tex. Civ. App.* —, 188 S. W. 245, it is said that the supreme court of Texas granted a writ of error in the *Owens Case*, with the notation that it was of the opinion that the holding in that case that the leased contract was void, because unilateral, was erroneous, and the opinion was expressed that "it appears to have been supported by a valuable consideration paid, though it be regarded as a contract for an option and as unilateral in character. A contract to give an option is valid if supported by an independent consideration. We think it questionable, however, whether a contract by which the opposite party agrees to do a definite thing within a limited period, or in lieu of it to pay a specified amount, can be regarded as unilateral."

And in *Roberts v. McFadden* (1903) 32 *Tex. Civ. App.* 47, 74 S. W. 105, it was held that whether the \$1 consideration paid in the lease was not in fact paid, and the only consideration for the lease was the agreement to develop the premises and deliver a portion of the product secured thereby to the lessor and the lessee therein, the right to surrender the lease at any time upon the payment of \$1, the sum to be full compensation for interest sustained, the lease was unilateral and void. And in *Great Western Oil Co. v. Carpenter* (1906) 43 *Tex. Civ. App.* 229, 95 S. W. 57, the court said that, even if the \$1 consideration in an oil and gas lease was actually paid, it was merely nominal and would not of itself support the contract.

In *Brown v. Wilson* (1916) — *Okla.* —, L.R.A.1917B, 1184, 160 *Pac.* 94, it is held that where the present consid-

eration for a lease is \$1 it supports only the original grant, and does not extend to and support an agreement by which the lessee is authorized to surrender the lease upon the payment of \$1, and be relieved from further liability thereunder. This case on this point, however, is overruled by *RICH v. DONAGHEY* (reported herewith), ante, 352, and *NORTHWESTERN OIL & GAS Co. v. BRANINE* (reported herewith), ante, 344.

## 2. *Enforcement in equity.*

While \$1 may be a sufficient consideration to support a contract that depends for its validity only upon its being based upon a valuable consideration, \$1 consideration, however, has been held not to be sufficient to entitle the lessee to specifically enforce a lease in equity against the lessor, where the lessee has the option to surrender the lease and be relieved from all liability thereunder. *Watford Oil & Gas Co. v. Shipman* (1908) 233 *Ill.* 9, 122 *Am. St. Rep.* 144, 84 *N. E.* 53; *Ulrey v. Keith* (1908) 237 *Ill.* 284, 86 *N. E.* 696; *Dill v. Frazee* (1907) 169 *Ind.* 53, 79 *N. E.* 971. The Supreme Court of the United States, however, has held that where a lease of this character creates an interest in the lessor's land, as it does in Illinois, the lessee is entitled to invoke the aid of equity to protect his interest in the land, although the effect of such protection is to enforce the lease. *Guffey v. Smith* (1914) 237 *U. S.* 101, 59 *L. ed.* 856, 35 *Sup. Ct. Rep.* 526. In this regard the court refused to be bound by the Illinois decisions, pointing out the distinction, that the relief given in form is to protect the lessee's interest in the estate granted, and not specifically to enforce the contract.

A. G. S.

**MONTGOMERY LIGHT & TRACTION COMPANY, Appt.,**  
v.  
**J. P. AVANT.**

*Alabama Supreme Court — November 28, 1918.*

(— Ala. —, 80 So. 497.)

**Carriers — free transportation of policemen — evidence of right — badge as uniform.**

1. The badge of a plain-clothes member of a city police force, although worn concealed, is a uniform within the meaning of a municipal ordinance requiring street car companies to transport free, members of the police force when in uniform.

[See note on this question beginning on page 387.]

**Courts — jurisdiction — de minimis non curat lex.**

2. Where the construction of a municipal ordinance under which a city policeman claims a right to ride free on the street cars is in issue, the fact that the action is to recover only a few fares does not deprive the court of jurisdiction under the maxim, "De minimis non curat lex."

**Statutes — construction — last antecedent.**

3. The rule that in construing statutes and ordinances qualifying words, phrases, and clauses are to be applied to the words, phrases, and clauses immediately preceding, and are not to be extended to or include other words, phrases, and clauses more remote, is not applicable, if such extension or inclusion is clearly required by the intent and meaning of the context or disclosed by the entire act or ordinance.

**— position of words in sentence.**

4. In construing statutes and ordinances, where general words occur at the end of a sentence, they refer to and qualify the whole, while if they are in the middle of a sentence, and apply to a particular branch of it, they are not to be extended to that which follows.

**— contemporaneous construction — effect.**

5. Contemporaneous construction does not control when the intention of the statute or ordinance is plain, unambiguous, and not susceptible to different or contrary reasonable constructions.

**Municipal corporation — ordinance — free transportation — construction.**

6. Officers of the police force must be in uniform to receive free transportation, under an ordinance requiring such transportation for "officers and patrolmen of the police force and all members of the fire department when in uniform."

**— ordinance — contemporaneous construction — acting under ordinance.**

7. Long recognition by a street car company and city officers of the badge of a plain-clothes man as a uniform, entitling him to free transportation on the street cars under a city ordinance is an aid to the interpretation of the ordinance as contemporaneous construction.

**— binding effect of practical construction.**

8. A street car company may be bound by the construction which it places upon a municipal ordinance requiring it to transport police officers free of charge, by acting under it for a long period of time.

**Constitutional law — impairment of contract — construction of ordinance.**

9. Construing a municipal ordinance requiring free transportation by a street car company of policemen when in uniform, to include plain-clothes men wearing a badge, does not unconstitutionally interfere with the contract rights of the street car company.

[See 6 R. C. L. 328 et seq.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Montgomery County in favor of defendant in an action brought to recover street car fares. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Rushton, Williams, & Crenshaw for appellant.

Mr. G. F. Mertins for appellee.

Thomas, J., delivered the opinion of the court:

The appeal is from a judgment for defendant in an action for street car fare.

The testimony showed that on the dates named in the complaint defendant had ridden on the cars of the plaintiff without paying the customary fare for each passage required of passengers on plaintiff's cars.

The testimony for defendant tended to show he was a detective or "plain-clothes man" on the police force of the city of Montgomery, and as such had not been required to pay for his passage on said cars until a short time before the suit was brought, when the manager of plaintiff company refused to issue a book of passes to him. There was testimony to the effect that, about the time plaintiff's company refused to issue further passes to defendant, a controversy had arisen between the officials of that company and defendant, growing out of a discontinuance by defendant at his home of the lighting service of plaintiff. Defendant, as a "plain-clothes man" or detective for the city, wore civilian clothes, and not a suit or uniform, but a metal badge. The only uniform prescribed by the board of public safety for "plain-clothes men" was a metal badge, which may be worn concealed. It was also in evidence that some of the conductors of plaintiff company had permitted defendant to ride upon displaying his said badge.

Defendant introduced an ordinance of the city of Montgomery, relating to plaintiff company or its predecessors in right or title (approved April 3, 1906), providing, in the event of consolidation of certain street car companies of the city of Montgomery, that certain privileges

be granted to certain officials of the city. Section 12 thereof is as follows: "That said consolidated company, its successors and assigns, shall furnish free of charge, tickets or passes to the mayor and aldermen of the city and to all other executive officers, upon application from the mayor, and transport officers and patrolmen of the police force, and all members of the fire department, free, when in uniform."

The construction of said section of the ordinance is the question for decision. The maxim, "De minimis non curat lex," does not apply. *Courts—jurisdiction—de minimis non curat lex.* *Grunzfelder v. Interborough Rapid Transit Co.* 164 App. Div. 928, 149 N. Y. Supp. 437; *Rothschild v. Interborough Rapid Transit Co.* 162 App. Div. 532, 147 N. Y. Supp. 1040.

The doctrine of the "last antecedent" clause, that relative and qualifying words, phrases, or clauses are to be applied to the words, phrases, or clauses immediately preceding, and as not extending to or including other words, phrases, or clauses more remote, is subject to the important qualification that such extension or inclusion must be clearly required by the intent and meaning of the context or disclosed by a consideration of the entire act or ordinance. *State ex rel. Crow v. St. Louis*, 174 Mo. 125, 61 L.R.A. 593, 73 S. W. 623; *Warner v. King*, 267 Ill. 82, 86, 107 N. E. 837; *Citizens' Bank v. Parker*, 192 U. S. 73, 86, 48 L. ed. 346, 356, 24 Sup. Ct. Rep. 181; *State v. Western U. Teleg. Co.* 196 Ala. 570, 72 So. 99; 36 Cyc. 1123, and authorities.

Mr. Sutherland said on the subject: "A relative word will not be read as representing the last antecedent exclusively, where the sense of the context and the clear intention of the lawmaker require it to represent several or one more remote.

Fisher v. Connard, 100 Pa. 63, 69; Gyger's Estate, 65 Pa. 311; State v. Jernigan, 7 N. C. (3 Murph.) 18; Simpson v. Robert, 35 Ga. 180. The grammatical rule, which is also the legal rule, in construing statutes, was held to be that, where general words occur at the end of a sentence, they refer to and qualify the whole; while, if they are in the middle of a sentence, and sensibly apply to a particular branch of it, they are not to be extended to that which follows." 2 Lewis's Sutherland, Stat. Constr. § 409; Rex v. Shipton, 8 Barn & C. 94, 108 Eng. Reprint, 977.

To the same effect is the announcement of this exception in Endlich on Statutes: "The strict rule of grammar would seem to require, as a general thing, a limiting clause, or phrase, following several expressions to which it might be applicable, to be restrained to the last antecedent. . . . But this technical grammatical rule is liable to be displaced wherever the subject-matter requires a different construction, in obedience to the principle elsewhere discussed, that rules of that character are subordinated to a common-sense reading of an enactment. . . . Indeed, in most cases it will be found, on some ground of this sort, that where several words are followed by a general qualifying expression which is as much applicable to the first as to the last, that expression is not limited to the last, but applies to all. Great Western R. Co. v. Swindon & C. R. Co. L. R. 9 App. Cas. 787, 53 L. J. Ch. N. S. 1075, 32 Week. Rep. 957. . . . Similarly, where words occur at the end of a section, it is said that they are presumed to refer to and to qualify the whole." Coxson v. Doland, 2 Daly, 66; Hart v. Kennedy, 14 Abb. Pr. 432; Endlich, Interpretation of Statutes, § 414, pp. 581-584.

See also *id.* §§ 81 and 82, pp. 110-112; Black, Constr. & Interpretation of Laws, pp. 70 et seq., 106, 121, 150, §§ 49, 56, 65.

The doctrine of contemporaneous construction of the ordinance and of § 12 thereof, as embracing all firemen and all officers and patrolmen of the police force, when not in uniform, has no application. Such rule of construction cannot govern when the intention of the statute or ordinance is plain, unambiguous, and not susceptible to different or contrary reasonable constructions. Twin Tree Lumber Co. v. Ensign, 193 Ala. 113, 119, 69 So. 525; Gadsden & A. U. R. Co. v. Gadsden Land & Improv. Co. 128 Ala. 510, 29 So. 549; Ex parte Stollenwerck, — Ala. —, 78 So. 454; First Nat. Bank v. McAleer, — Ala. —, 81 So. —.

The requirements of this section of the ordinance of the traction company are: (1) To furnish free of charge tickets and passes to the mayor and aldermen, and all other executive officers of the city, upon application from the mayor; (2) to transport free of officers and patrolmen of the police force "when in uniform;" (3) and to transport free all members of the fire department "when in uniform."

Was the defendant in uniform when the demand was made on him for "fare" for his transportation and when he was so transported by plaintiff? It is in answer to this inquiry that the rule of contemporaneous construction has a field of operation under § 12 of the ordinance. The uniforms of firemen and officers thereof, and of the officers and the several classes of patrolmen, were prescribed by appropriate municipal authority. The witness said that the uniform of a "plain-clothes man" or of a city detective was and is the badge worn by defendant and exhibited to the traction company's conductor when he was transported by it, and for which the charge was demanded and refused, and for which collection is

—position of words in sentence.

—contemporaneous construction—effect.

Municipal corporation—ordinance—free transportation—construction.

Carriers—free transportation of policemen—evidence of right—badge as uniform.

(— Ala. —, 80 So. 497.)

sought by the instant suit. The "badge" of a detective or "plain-clothes man" was the only uniform or insignia of authority prescribed by the governing authority of the city having control of such official, required to be worn and exhibited by that official on demand. Such badge had been long recognized by the traction company and the city officers as his "uniform" and as entitling such official to free transportation by defendant company and its predecessors in title of the street car company. Such contemporaneous

**Municipal corporation—ordinance—contemporaneous construction—acting under ordinance.**

construction is an aid in determining the meaning of, and defining the effect of, the words of the ordinance, "when in

uniform." Black, Constr. & Interpretation of Laws, p. 31, § 20; Endlich, Interpretation of Stat. §§ 357 et seq.; 2 Lewis's Sutherland, Stat. Constr. 2d ed. §§ 472 et seq. This construction is of binding effect on the defendant traction company, and also is in harmony with the general plan and purpose of the ordinance to secure efficient service to the city and its citizens in the protection of their personal and property rights, and necessary to the good order of the municipal government.

It is not reasonable to insist that the municipality and the traction company or companies, when procuring and granting the ordinance and its provision in question, did not intend and consent to embrace and extend to all of the class of officials for which free transportation was contracted and deemed necessary to an efficient fire and police protection. This provision of the ordinance does

not authorize the exercise of arbitrary power on the part of the mayor in making his requests for tickets and passes for officers falling within the first class, nor on the part of the traction company in acceding to a request so made by the mayor under this ordinance provision. So, also, there is no justification for a discriminatory or arbitrary exercise of this right of free transportation to which officers, patrolmen, and members of the police force or of the fire department are entitled while in the uniform prescribed for them by the duly constituted city authority. This free transportation is provided for and guaranteed to them as officials in the due discharge of duty by the unambiguous provisions of § 12 of the ordinance. This

**Constitutional law—impairment of contract—construction of ordinance.**

construction of the ordinance abrogates no contract right secured by the state (Ala. Const. §§ 222, 228; Weller v. Gadsden, 141 Ala. 642, 37 So. 682, 3 Ann. Cas. 981; Mitchell v. Gadsden, 145 Ala. 132, 40 So. 350; Bessemer v. Bessemer City Waterworks, 152 Ala. 391, 44 So. 663; New Decatur v. American Teleph. & Teleg. Co. 176 Ala. 492, 58 So. 613, Ann. Cas. 1915A, 875), or the Federal Constitution (Puget Sound Traction, Light & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325, P.U.R. 1917F, 57, 37 Sup. Ct. Rep. 705; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; U. S. Const. art. 1, § 10) as applied to such official as defendant.

The judgment is affirmed.

Anderson, Ch. J., and Sayre and Gardner, JJ., concur.

## ANNOTATION.

### Evidence of right to free transportation on public conveyance.

- I. Scope of note, 387.
- II. General rule, 388.
- III. Application of rule:
  - a. Private individual, 389.
  - b. Public official or employee, 391.

#### I. Scope of note.

This note is confined to a discussion of the evidence necessary to be submitted by a passenger to the conductor



or other proper servant of the carrier, to establish the passenger's right to free transportation. While passes are included, although they may be based on some consideration, commutation and reduced-fare tickets are not within the scope of the note.

## II. General rule.

It may be stated as a broad general rule that, regardless of a person's right to free transportation by law, contract, or otherwise, since a conductor, by the very nature of his duties to the public and the carrier, has no time to become a trier of fact, and cannot stop to investigate the rights which a passenger may have aside from the evidence of such right then presented by him to the conductor, a person entitled to free transportation must present to the conductor or other proper servant of the carrier sufficient evidence of his right, such as a pass, whenever he attempts to exercise such a right.

**Alabama.**—See the reported case (*MONTGOMERY LIGHT & TRACTION CO. v. AVANT*, ante, 384). See also *Broyles v. Central of Georgia R. Co.* (1910) 166 Ala. 616, 139 Am. St. Rep. 50, 52 So. 81.

**Georgia.**—See *Elliott v. Western & A. R. Co.* (1877) 58 Ga. 454.

**Illinois.**—*Chicago R. I. & P. R. Co. v. Herring* (1870) 57 Ill. 59.

**Kentucky.**—*Chesapeake & O. R. Co. v. Collinsworth* (1913) 152 Ky. 197, 153 S. W. 241.

**Maryland.**—*Western Maryland R. Co. v. Lynch* (1896) 82 Md. 233, 34 Atl. 40.

**Missouri.**—*Brown v. Missouri, K. & T. R. Co.* (1877) 64 Mo. 536; *Graham v. Pacific R. Co.* (1877) 66 Mo. 536.

**North Carolina.**—See *McNeill v. Durham & C. R. Co.* (1904) 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765.

**Pennsylvania.**—*Erie & P. R. Co. v. Douthet* (1878) 88 Pa. 243, 32 Am. Rep. 451.

**Virginia.**—*Knopf v. Richmond, F. & P. R. Co.* (1889) 85 Va. 769, 8 S. E. 787.

In *Gulf, C. & S. F. R. Co. v. Copeland* (1897) 17 Tex. Civ. App. 55, 42 S. W. 239, an action for damages for wrong-

ful removal from a passenger train, it appeared that there was a contract between the parties for the shipment of certain cattle, which provided that the shipper should have free transportation and should sign the contract in designated places. The plaintiff had failed to sign in that place which evidenced his right to travel over the route he was traveling when ejected, and the conductor refused to accept his contract as evidence of his right to travel, in the absence of the required signature, and caused him to leave the train on his refusal to pay a fare. It was held that a ticket or pass does not, in all instances, furnish the exclusive right to the passenger to transportation, but that under certain circumstances the contract between the passenger and the agent of the carrier may be looked to in order to ascertain the rights of the passenger, the court saying: "The carrier rests under the duty to the passenger to furnish him with a ticket correctly stating the terms of the contract, and the passenger can, in the absence of actual notice to the contrary, assume that this duty has been observed; and in such a case he will not be charged with the duty of inspecting the ticket in order to see that the carrier has performed its duty. This is essentially a fair rule, for the passenger has little, if any, authority in prescribing the form of the ticket and what it shall state in substance. The carrier reserves to itself the right to furnish the ticket and what it shall state, and when the carrier retains this right without granting an equal privilege to the passenger to participate in furnishing the evidence of his right of transportation, it is nothing but fair that the passenger should not be made to suffer for any mistake or failure of duty upon the part of the carrier in furnishing him with a ticket embracing the true terms of the contract. The general rule that one shall be governed by the terms of the written contract which he is a party to, and is presumed, in becoming a party to it, to understand and assent to all of its terms, does not always apply in cases of this character; for in truth, what-

ever may be the theory to the contrary, the passenger and the carrier do not always stand upon an equal footing. A ticket which seeks to contravene or limit the rights of the passenger, as agreed upon in the contract actually made, is an unreasonable imposition, which should receive no more recognition in law than any other unreasonable regulation or contract of the carrier; and those of the latter class are never permitted to go unchallenged or condemned by the courts."

### III. *Application of rule.*

#### a. *Private individual.*

In *Knopf v. Richmond, F. & P. R. Co.* (1889) 85 Va. 769, 8 S. E. 787, an action of trespass on the case for wrongful ejection from one of the defendant railroad's passenger trains, on which the plaintiff claimed the right to be transported by virtue of a contract between the railroad and the firm of which he was a member, which contract provided that for and in consideration of \$1, and for the further consideration of a "ticket," entitling either of the firm, but only one on any train, to occupy one seat and travel on the defendant's passenger trains between two designated stations without charge, the railroad was to have certain rights in the firm's land. Although the railroad had issued an annual pass to the firm, and, upon application, a renewal "ticket" was issued, at the time of plaintiff's ejection the renewal ticket had expired and no further application had been made to the company, so that the plaintiff offered no ticket to the conductor or evidence of any kind of his right to ride. It was held that the right of the firm to free transportation was not only restricted to one member of the firm at a time, but the evidence of that right was to be a "ticket," to be presented to the conductor of every train upon which any one of the firm should take passage during the continuance of the contract, the question whether it was the duty of the railroad to issue renewals without application therefor being left to the jury on the evidence, and the finding was for the defendant.

In *Erie & P. R. Co. v. Douthet* (1878) 88 Pa. 243, 32 Am. Rep. 451, the action was to recover damages for breach of an agreement to furnish the plaintiff for life, with a pass for himself and family in part consideration for a right of way over plaintiff's land. The court in its discussion remarked that a mere contract to ride free of charge would subject both parties to inconvenience, and that the company would be liable to suits through the mistakes or ignorance of their servants, or the plaintiff, without the evidence of his right, might be refused often when his business might be most urgent.

In *Chicago, R. I. & P. R. Co. v. Herring* (1870) 57 Ill. 59, an action for injuries received by the alleged use of unnecessary force in ejecting the plaintiff from the defendant railroad's train, it appeared that the plaintiff, when asked by the conductor for a ticket, offered him a piece of paper with some writing thereon, which, she testified, had been given to her by some person as a pass, whereupon the conductor told her that the paper was not a pass and was worthless, and, after her refusal to pay a fare, ejected her from the train. It was held that as the plaintiff had no pass, on being informed of that fact by the conductor, she should have either paid her fare or left the train at the first station, if required to do so, and if she refused to comply with his request the conductor had the right to compel her to leave, and use the force necessary for that purpose.

In *Elliott v. Western & A. R. Co.* (1877) 58 Ga. 454, it appeared that by the terms of a pass used by the plaintiff it was nontransferable, and that the bearer, upon accepting the privileges of the "ticket," assumed all risk of accidents, and expressly agreed that the company would not be liable, under any circumstances, for any injury to the person, or for any loss or injury to the property, of the passenger using the ticket. The plaintiff refused to sign the agreement on the back, when required to do so by the conductor, and was ejected on his refusal to pay fare. It was held that the action of

the trial court, setting aside a verdict for the plaintiff and granting a new trial, would not be interfered with.

In *Western Maryland R. Co. v. Lynch* (1896) 82 Md. 233, 34 Atl. 40, wherein it appeared that one, attempting to ride free over a portion of defendant's railroad over which the company had refused to grant him a right to ride free, produced a copy of his contract with the company for free passage over certain other lines as the evidence of his right to travel. The defendant railroad contended that the conductor was justified in ejecting the plaintiff, because he was attempting to travel without any evidence of his right to transportation, and that if, under his contract, he was entitled to free transportation on the road in question it was a breach of contract to deny him a pass on that road, and his remedy was an action on the contract. The court, however, did not pass on this contention, but held that the contract did not give him such right.

In *Broyles v. Central of Georgia R. Co.* (1910) 166 Ala. 616, 139 Am. St. Rep. 50, 52 So. 81, an action against a railroad for personal injuries sustained by a person riding on a pass belonging to another, the conductor who allowed the plaintiff to ride on the pass without question was asked as a witness at the trial: "What must a passenger have to entitle him to ride on the train?" The court held that it was not error to receive the conductor's answer: "You have to have a ticket, cash fare, or pass, or something the conductor can turn into headquarters, showing that passenger was entitled on that train."

In *Graham v. Pacific R. Co.* (1877) 66 Mo. 536, it appeared that the plaintiff while traveling on a stock pass was ejected because of an honest misunderstanding by the conductor as to his orders. It also appeared that the plaintiff did not intend to use the pass to the destination named therein, but expected to leave the train at an intermediate station, although he was actually on his return trip. It was held that an instruction that if the pass was in full force and the con-

ductor refused to honor it, and the plaintiff left in obedience to the conductor's command, there was in law an ejection and no excuse for the expulsion, was not improper.

In *Brown v. Missouri, K. & T. R. Co.* (1877) 64 Mo. 536, it appeared that the plaintiff had a contract with the defendant railroad which authorized the owner of stock to be shipped and one or two employees to ride on the train, and it was shown that the agents of the company were authorized to issue passes to the owner and employees for their return. By the terms of the contract in question, it was provided that no person except the owner or persons in charge should be entitled to a return pass, the intent being declared to be to enable the owner or his men in charge, as expressed in the contract, and no other person, to return on the pass. The plaintiff procured a pass for his wife on this contract, by virtue of his false statement that his wife was a part owner of the stock. The conductor on the return trip refused to recognize the validity of the pass of the wife, and ejected her on her refusal to pay a fare. It was held that the claim for damages arising out of this transaction was totally without merit, as the pass was procured knowingly by fraud, the court saying: "The bare statement of the facts would appear sufficient to show the want of all merit in the plaintiff's claim. It is based on a successful attempt to procure from the agent of the railroad company, passes to which, as the applicant and agent both knew, the applicant was not entitled. The printed contract and regulations attached to it were clear that, under these special stock contracts, females were not entitled to passes. When, therefore, Brown represented his wife to be part owner, with a view to furnish the agent with a plausible excuse for his breach of authority, he admitted that upon his own construction and knowledge of the transportation contract he could not pass his wife as an employee. The agent had no authority to issue passes to a lady on a stock contract, and Mrs. Brown and her child could not and did not pretend

to exercise any supervision over the stock at the commencement or during the continuance of the trip; and the plaintiff admitted that his statement in regard to her interest in the stock was false, and she had no other interest than such as she had in all his personal property. There is no difficulty in distinguishing this case from cases where an agent exceeds his authority, which is a general one, and its limitations are unknown to the party dealing with him. The contract itself and the regulations printed on it, and the form of the pass issued, could not be misunderstood. A party dealing with the agent in this case was a party to the fraud committed on the principal. In regard to the place where the conductor handed the lady off the train, the inconvenience might undoubtedly justify damages in a case where there was a real expulsion; but the train stopped at Paris, where the conductor proposed that Mrs. Brown should get off, and where she only refused to get off at the suggestion of her husband, who was bent on getting up a case for damages, and therefore insisted she should stay on the cars until she was put off. The testimony of Mrs. Brown acquits the conductor of any incivility whatever, and states, too, in her own language, that he acted 'very gently.' And it was obviously Mr. Brown's intention to pay the fare as soon as he was satisfied that his wife could not proceed on the train without doing so, and he could get the conductor to put her off, we are unable to perceive any grounds upon which punitive damages were inflicted. According to the statement of the conductor, who seemed reluctant to remove Mrs. Brown from the train, it was suggested that if she would pay the fare, the conductor would telegraph his superintendent, and if it was ascertained that he misunderstood his duties, the money would be returned. This proposal was declined, under the impression, no doubt, that this stock pass to Mrs. Brown, however procured, and under whatever circumstances issued, would, if violated, furnish a cause of action against the company."

In *Chesapeake & O. R. Co. v. Collinsworth* (1913) 152 Ky. 197, 153 S. W. 241, the plaintiff claimed the right to ride free on a freight train because he had a shipment of stock thereon, basing his claim on a custom which was his personal conclusion. It was shown to be a custom to allow the owner under some shipping contracts to accompany his stock, but plaintiff's bill of lading did not show that he had such right, and he was ejected from the train. It was held that there was no law giving a person the right to a pass on a freight train, and that in the absence of a custom, or provision in his contract, being alleged, a demurrer to his petition should have been sustained.

In *Wallace v. Ann Arbor & Y. Electric R. Co.* (1899) 121 Mich. 588, 80 N. W. 572, a suit to enforce an agreement for passes, it appeared that the defendant electric railway company had purchased two separate lines, over one of which plaintiff had a pass which the defendant did honor. It was held that the fact that the second line had for years, previous to the consolidation, honored plaintiff's pass, did not bind the defendant to do so.

*b. Public official or employee.*

In the reported case (*MONTGOMERY LIGHT & TRACTION Co. v. AVANT*, ante, 384) it was held that under a municipal ordinance requiring the free transportation of certain city employees and officials, including police officers when in uniform, that the badge of a city detective was his uniform as prescribed by the governing authority, and entitled him to free transportation.

Although the case was dismissed for want of jurisdiction by the United States Supreme Court, facts similar to those in the reported case are found in *Public Utility Comrs. v. Manila Electric R. & Light Co.* (U. S. Adv. Ops. 1918-19, 341) — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 272, wherein it appeared that a franchise ordinance provided that members of the police and fire departments of the city of Manila shall be entitled to ride free upon the cars of the grantee of the

franchise. The Board of Public Utility Commissioners deemed that members of the detective force not publicly wearing their badges were entitled to ride free under the provisions of the ordinance, and, after notice and hearing to the railroad on the subject, issued an order directing that members of the detective force be allowed to ride free under such circumstances. The railroad, challenging the validity

of the order, refused to obey it, and, availing itself of the remedy provided by the local law, invoked the jurisdiction of the supreme court of the Philippine Islands, which decided that under the text of the ordinance the duty to furnish such transportation did not exist. The commissioners brought the case to the United States Supreme Court, which dismissed for want of jurisdiction. R. H. H.

## STATE OF IOWA, Appt.,

v.

C. F. CLAIBORNE.

*Iowa Supreme Court — January 20, 1919.*

(— Iowa, —, 170 N. W. 417.)

**Statute — insertion of words — power of court.**

1. The word "not" cannot be read into a statute intended to provide for safety in the use of automobile lights on the highway, but which reads that no automobile shall be operated with a light, "unless the same shall be so designed that the directly reflected and undiffused beams, when measured 75 feet or more ahead of the light, shall rise above 42 inches from the level surface," but there will be held to be a failure of legislation.

[See note on this question beginning on page 404.]

— construction — what may be considered.

2. In the construction of a statute it is proper to take into consideration the object which the legislature sought to obtain and the evil which it endeavored to remedy, and the surrounding circumstances and the ends intended to be accomplished, as well as the context.

— intent.

3. Statutes should be so construed as to give effect to the legislative intent.

— regulation of automobile lights.

4. In construing a statute regulating the use of lights on automobiles,

the court may take into consideration the fact that automobiles are in common use, and that certain lights used on them oftentimes blind the driver of a vehicle approaching in the opposite direction, and that the purpose of the legislature was to correct this condition.

**Evidence — opinions — emendation of statute.**

5. Testimony or opinions of witnesses cannot be taken into consideration for the purpose of supplying words alleged to have been omitted from a statute.

[See 10 R. C. L. 1028.]

**APPEAL** by the state from a judgment of the District Court for Polk County acquitting defendant of the charge of operating a motor vehicle without proper lights. *Affirmed.*

Statement by Preston, J.:

Defendant was informed against and accused of the crime of operating a motor vehicle without proper

lights. He appealed to the district court. The trial court found defendant not guilty, and the state appeals.

Messrs. H. M. Havner, Attorney General, and Ward C. Henry for the State.

Messrs. Stipp, Perry, Bannister, & Starzinger, for appellee:

A statute should be interpreted so as to give it a reasonable meaning.

McBride v. McBride, 142 Iowa, 169, 120 N. W. 709; Cherokee v. Illinois C. R. Co. 157 Iowa, 73, 137 N. W. 1053; Engvall v. Des Moines City R. Co. 145 Iowa, 560, 121 N. W. 12; Flam v. Lee, 116 Iowa, 289, 93 Am. St. Rep. 242, 90 N. W. 70.

In the construction of statutes, the intention of the lawmakers is to be ascertained from a view of the whole and every part of the statute taken together and compared.

Cooper v. Metzger, 74 Ind. 544; Cleaveland v. Norton, 6 Cush. 380; Lincoln v. Janesch, 63 Neb. 707, 56 L.R.A. 762, 93 Am. St. Rep. 478, 89 N. W. 280.

The object which the legislature sought to attain by a statute, and the evil which it endeavored to remedy, may always be considered to ascertain its intent and interpret its act.

United States v. 99 Diamonds, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 139 Fed. 961; Com. v. Trent, 117 Ky. 34, 77 S. W. 390, 4 Ann. Cas. 209.

Statutes must be so construed as to give effect to the evident legislative intent, though the result seems contrary to rules of construction and the strict letter of the statute.

Re Matthews, 109 Fed. 603; State ex rel. Hamilton v. Forkner, 70 Ind. 241.

The surrounding circumstances and ends intended to be accomplished should be considered.

Prowell v. State, 142 Ala. 80, 39 So. 164; Connecticut Mut. L. Ins. Co. v. Talbot, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 586.

Statutes, the principle of which is to protect the lives and limbs of men, are so construed as to prevent the mischief and advance the remedy so far as the words fairly permit.

Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522.

The context should be considered in interpreting a statute.

2 Lewis's Sutherland, Stat. Constr. 2d ed. p. 803; People ex rel. Escott v. Hoffman, 97 Ill. 234; Donohue v. Ladd, 31 Minn. 244, 17 N. W. 381.

It is a rule of statutory construc-

tion that where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied.

White v. Rio Grande Western R. Co. 25 Utah, 346, 71 Pac. 593; 2 Lewis's Sutherland, Stat. Constr. § 260; 17 Am. & Eng. Enc. Law, 19, 20; Comfort v. Kittle, 81 Iowa, 179, 46 N. W. 988; Lancaster County v. Frey, 128 Pa. 593, 18 Atl. 478; Graham v. Charlotte & S. C. R. Co. 64 N. C. 631; Moody v. Stephenson, 1 Minn. 401, Gil. 289; Palms v. Schawano County, 61 Wis. 211, 21 N. W. 77; Frazier v. Gibson, 7 Mo. 271; Hutchings v. Commercial Bank, 91 Va. 68, 20 S. E. 950; Ashby v. State, 124 Tenn. 684, 139 S. W. 872; State v. Louisville & N. R. Co. 97 Miss. 58, 51 So. 918, 53 So. 455, Ann. Cas. 1912C, 1150.

Preston, J., delivered the opinion of the court:

The information charges, substantially, that defendant operated upon the streets of Des Moines, at a time more than one hour after sunset, a motor vehicle, with a lighting device thereon of over 4 candle power, equipped with a reflector so arranged that the directly reflected and undiffused beam of light therefrom, when measured 75 feet ahead of the light, did not rise above 42 inches from the level surface on which the vehicle was standing and being operated, under all conditions of load.

The defendant made the following admission of record:

Mr. Bannister: This cause coming on for trial, the defendant admits that on the date and at the time and place in question he was operating an automobile in the city of Des Moines, Iowa, with the headlight lighted and so adjusted and arranged that the direct and undiffused beam or ray of light therefrom, when measured 75 feet ahead of the machine, was less than 42 inches above the ground on the level on which the machine was standing and being operated, and that the said headlight was of more than 4 candle power.

And upon said admission the state rested. The defendant introduced witnesses, who testified, substantially, to large experience in driving motor cars and in using headlights of different cars; that most headlights have been equipped with reflectors, so as to concentrate the light in one beam, so it will light up one spot, the light being in front of, or in, a concave reflector; where there is a plain glass in front of the light, the ray that comes from the light is called undiffused, or a direct beam; that, if the light is so arranged that it shoots up more than 42 inches from the ground, it will in nearly every case blind one who is approaching on the road, so he cannot see the road ahead; if this direct beam of light is down below 42 inches, it would not have as bad an effect on the driver approaching; if it is directed down, it strikes the ground and does not reflect in one's eyes; the centers of headlights on automobiles run 30 to 36 inches from the ground; there are prism lights made, which tend to diffuse the beams from a headlight; the larger portion of them, when properly installed, diffuse the light, so it is possible to drive against them without bothering one meeting them to any great extent; this is called a light that has a diffused ray, or a diffused beam. There are corrugated lights in a number of different forms, some colored and frosted, and a glass prism crosses the rays of light, or breaks them up, as some of the witnesses put it, and, as they cover a large area, rather than a direct beam in front of you, they will not extend or penetrate so far ahead, but do not reach one and blind him in meeting it. There are some lenses on the market made so that, when a light is deflected down so that it is only 42 inches from the ground 75 feet ahead of the machine, it will throw as far a light down the road as an undeflected beam. Quite a number of cars are equipped with dimmers; that is, two lights in the reflector, a small light and a large one. A headlight 16 to 40 candle

power, with an ordinary reflector and globe, so arranged as to strike the road a long way ahead, if more than 42 inches above the ground, will practically blind a driver approaching. It is very annoying, and might be very dangerous.

One of the experts was asked:

Q. Now, what would you say, as a man of experience in the operating and handling of automobiles, of the effect of a statute which apparently required all automobile drivers to shoot a direct ray of light up above 42 inches from the ground?

A. I would think it would be very dangerous.

Q. In your opinion, would anyone who was drafting a statute for the purpose of benefiting the road laws, or making a proper adjustment and operation of automobile lights at night, make or enact such a provision into the law that the lights and direct rays of light should be shot up above 42 inches; would there be any object and reason for passing such a rule?

A. No, sir.

Q. State whether or not that is the very evil which is complained of.

A. It is.

Q. State whether or not that is the very evil which any remedial statute would be calculated to remedy.

A. I think so. More than 42 inches is calculated to strike the eyes of a driver approaching in a car; that is about the average height of a driver's eyes—3 feet, 6 inches.

Defendant introduced the original House File No. 131, as follows:

House File 131. A Bill for an Act to Amend Section Fifteen Hundred Seventy-one—m—Seventeen, Supplement to the Code 1913.

Section 1. That section fifteen hundred seventy-one—m—seventeen, Supplement to the Code 1913, be and the same is hereby amended by striking out the period at the end of said section, and substituting therefor the following:

"Provided, however, that it shall be unlawful for any person operat-

ing a motor vehicle upon the public highway in this state to use any lighting device of over four candle power, equipped with a reflector, unless the same shall be so designed, deflected or arranged that (no part of the beam of the reflected) light, when measured seventy-five (75) feet or more ahead of the light shall rise above forty-two (42) inches from the level surface on which the vehicle stands under all conditions of load."

Also the senate amendment thereto, as follows: "I move to amend H. F. No. 131, by striking out all after the word 'that' in line eleven, down to and including the word 'reflected' in said line of section one, and inserting the words 'the directly reflected and undiffused beam of such.'"

The statute as it stands, and for a violation of which the defendant is accused, reads:

"That section fifteen hundred seventy-one—m—seventeen, Supplement to the Code 1913, be and the same is hereby amended by striking out the period (.) at the end of said section, and substituting therefor the following:

"Provided, however, that it shall be unlawful for any person operating a motor vehicle upon the public highway in this state to use any lighting device of over four candle power, equipped with a reflector, unless the same shall be so designed, deflected or arranged that the directly reflected and undiffused beam of such light, when measured seventy-five feet or more ahead of the light shall rise above forty-two inches from the level surface on which the vehicle stands under all conditions of load. Spot lights shall not be used so as to throw direct rays in the face of an approaching vehicle.'" Acts 37th Gen. Assem. chap. 148.

The trial court construed this statute so as to read into it the word "not," so as to read "the light shall not rise above forty-two inches," etc.

It is contended by the state that it is not admissible to speculate on

what a statute might mean beyond the import of the words used, citing *Gardner v. Collins*, 2 Pet. 58, 92, 7 L. ed. 347, 359, from which they quote this: "What the legislative intention was can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words. The spirit of the act must be extracted from the words of the act, and not from conjectures aliunde."

They say, too, that the justice and policy of statutes enacted by the legislative department of the government are not matters for the consideration of the courts of the state. *Burlington C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 344, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 107, from which they quote as follows: "Much is said in argument attacking the justice and policy of the statutes. With these things we have nothing to do. They are for the consideration of the legislative department of the government alone."

Also *Atlantic Coast Line R. Co. v. Finn*, 117 C. C. A. 1, 4, 195 Fed. 685, 688, from which they quote: "It is not for the court to inquire or determine whether a state of facts existed calling for the enactment of the legislation in question. That is for the exclusive consideration of the legislature. If, under any possible state of facts, the act would be constitutional and valid, the court is bound to presume that such condition existed."

The state says that the literal construction of a statute may defeat the objects of the act, and quotes from another case that it is better to abide by this consequence than to put upon it a construction not warranted by the words of an act, in order to give effect to what we suppose to have been the intention of the legislature. The argument is that the language of the statute is perfectly plain; that it declares certain acts to be a public offense and as criminal in character; that the rule is that such statutes should be strictly construed, and not to change



the wording by adding to or taking from. They say, too, that in construing a statute the rule is that it is necessary to consider the context or setting, and the presumption is that the words should be given their usual and ordinary meaning and significance. They concede that the object of all interpretation and construction of a statute is to ascertain and carry out the intention of the legislature, and that it is only when the act is of doubtful or ambiguous meaning that the province of a construction or interpretation begins, because it is a maxim of interpretation that it is not permitted to interpret what has no need of interpretation.

These rules are not disputed by appellee, but they rely on other principles as well. It is argued by appellee that the legislature intended to correct the abuse in the use of blinding headlights on automobiles on the public highway, and that defendant was using a proper light, and was complying with the spirit and intent of the statute, and further that there is a clerical error in the statute which the court can correct. Numerous cases are cited, but we shall not discuss them all, but state their propositions. They cite *McBride v. McBride*, 142 Iowa, 169, 179, 120 N. W. 709; *Cherokee v. Illinois C. R. Co.* 157 Iowa, 73, 137 N. W. 1053; *Engvall v. Des Moines City R. Co.* 145 Iowa, 560, 121 N. W. 12; and *Flam v. Lee*, 116 Iowa, 289, 93 Am. St. Rep. 242, 90 N. W. 70, to the point that, in construing instructions to juries, where they are manifestly wrong and state the opposite of that intended, but the error could mislead no one as to what was intended, they are not held to be erroneous. They cite *United States v. 99 Diamonds*, 2 L.R.A. (N.S.) 185, 72 C. C. A. 9, 139 Fed. 961, and *Com. v. Trent*, 117 Ky. 34, 77 S. W. 390, 4 Ann. Cas. 209, to the proposition that the object which the legislature sought to obtain by a statute, and the evil which it endeavored to remedy, may always be considered to ascertain its intent

and interpret its act. Other cases are cited to the proposition that statutes must be so construed as to give effect to the evident legislative intent, though the result seems contrary to rules of construction and the strict letter of the statute, and that surrounding circumstances and the ends intended to be accomplished should be considered. *Voelker v. Chicago, M. & St. P. R. Co.* (C. C.) 116 Fed. 867; *Chicago, M. & St. P. R. Co. v. Voelker*, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522, is cited to sustain the proposition that statutes, the principle of which is to protect the lives and limbs of men, are so construed as to prevent the mischief and advance the remedy, so far as the words fairly permit. They concede that the context should be considered in interpreting a statute.

*White v. Rio Grande Western R. Co.* 25 Utah, 346, 71 Pac. 593, 2 Lewis's Sutherland, Stat. Constr. § 260; 17 Am. & Eng. Enc. Law, 19, 20; and *Comfort v. Kittle*, 81 Iowa, 179, 46 N. W. 988, are cited on the proposition that it is a rule of statutory construction that where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. In the case of *Lancaster County v. Frey*, 128 Pa. 593, 18 Atl. 478, the word "county" was inserted in a statute for "city." In *Graham v. Charlotte & S. C. R. Co.* 64 N. C. 631, the word "venire," in a statute relating to actions against railroads, was construed to mean "venue." In *Moody v. Stephenson*, 1 Minn. 401, Gil. 289, all "penal" judgments were construed to mean all "final" judgments. In *Palms v. Shawano County*, 61 Wis. 211, 21 N. W. 77, the word "north" was read into a description in a statute instead of "south." In *Frazier v. Gibson*, 7 Mo. 271, where a statute provided that an obligor or maker of a note should be allowed every just set-off and discount against the assignee or assignor before "judgment," it was held that

the word "judgment" was evidently inserted by mistake. See *Hutchings v. Commercial Bank*, 91 Va. 68, 20 S. E. 950; *Ashby v. State*, 124 Tenn. 684, 139 S. W. 872. In *State v. Louisville & N. R. Co.* 97 Miss. 35, 51 So. 918, 53 So. 455, Ann. Cas. 1912C, 1150, where it appeared that a statute would fail to effectuate the purpose intended, or any purpose, and that it had been omitted by mistake, the word "not" was construed into the statute.

Appellant does not contradict these propositions, except in so far as the cases heretofore cited by them do so. The trial court, in an opinion filed, conceded that courts could not amend a statute, as they have no power to do so, but that reading into the statute the word "not" carries out and gives it an application intended by the legislature, and conceded, too, that great caution should be exercised by the courts in construing statutes, not to add to or take anything from the language used. The decision of the trial court was based on the citation from *Lewis's Sutherland*, Stat. Constr.; *Frazier v. Gibson*; *Lancaster County v. Frey*; and *Hutchings v. Commercial Bank*,—*supra*. But these cases, and some of the others cited, perhaps all of them, proceed upon the idea that, where the context of the statute affords the means of correction, it may be done.

Under the authorities, it is proper for us to take into consideration the object which the legislature sought to obtain and the evil which it endeavored to remedy, and the surrounding circumstances and the ends intended to be accomplished, as well as the context, and that statutes should be so construed as to give effect to the evident legislative intent. We may take into consideration the fact that automobiles are in common use, and that certain lights used on automobiles oftentimes blind the driver of a

vehicle approaching in the opposite direction, and that the purpose of the legislature in passing the act in question was to correct this condition.

We are satisfied, from all these circumstances and the record, that it was not the intention of the legislature to pass the act as it reads. Conceding this to be so, the question is: May we, under the circumstances and record, read into the statute a word which gives it exactly the opposite effect. We are not disposed to go that far. It seems to us, to do so we would be compelled to take into consideration matters not proper for us to consider, such as the evidence or opinions of witnesses testifying in this case, and the like.

Evidence—  
opinions—  
commendation of  
statute.

We could construe it as written, but, as said, we are satisfied such was not the intention. In this case the word "not" was read into the statute in order to work the acquittal of the accused. Nevertheless, it is a criminal statute. Might this be done in order to secure a conviction, if it were necessary to do so?

We reach the conclusion that, rather than to construe the statute as written, or to read into it the word "not" as was done by the trial court, we ought to and do hold that as to this particular point there was a failure of legislation, and that the defendant was properly discharged on that ground; there being no statute under which he could be convicted of the charge against him. The legislature is about to meet, and if the matter is brought to their attention they can readily make the matter plain.

Statute—  
insertion of  
words—power  
of court.

For the reason given, the judgment of the District Court is affirmed.

Ladd, Ch. J., and Stevens and Evans, JJ., concur.

#### NOTE.

The subject of supplying omitted

Statute—  
construction—  
what may be  
considered.

—regulation of  
automobile  
lights.

—intent.

words in a statute or ordinance is treated in the annotation following *CONTINENTAL OIL CO. v. SANTA FE*, post, 404. Other instances in which the court, as in the reported case

(*State v. Claiborne*), refused either to apply the statute as written or to read into the same the word claimed to have been omitted therefrom are cited at page 410 of that note.

## CONTINENTAL OIL COMPANY, Appt.,

v.

## CITY OF SANTA FE.

*New Mexico Supreme Court—December 30, 1918.*

(— N. M. —, 177 Pac. 742.)

### Statute — construction — supplying words.

1. Where it appears from the context of an act or ordinance that words have been omitted therefrom, the same may be supplied by judicial construction, to complete the sense and express the legislative will. If no judicial certainty, however, can be settled upon as to its meaning, after resorting to every authorized means of construction, the court will not complete or make certain an act or ordinance otherwise incomplete and uncertain.

[See note on this question beginning on page 404.]

### — purpose of preamble.

2. A preamble is a prefatory statement or explanation or a finding of facts by the power making it, purporting to state the purpose, reason, or occasion for making the law to which it is prefixed. Although not an essential part of an act or ordinance, reference thereto may be had in aid

of the interpretation of the act or ordinance of which it is a part.

### Municipal corporation — ordinance — construction.

3. Municipal ordinances are construed by the same rules as statutes of the legislature.

[See 19 R. C. L. 811.]

Headnotes by PARKER, J.

**APPEAL** by plaintiff from a judgment of the District Court for Santa Fe County dismissing the complaint in a suit to enjoin the enforcement or attempted enforcement of a certain ordinance, under which the defendant city claimed the right to compel plaintiff to discontinue the storage of petroleum and its products in said city. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Frank J. Lavan and Catron & Catron, for appellant:

The court erred in sustaining defendant's demurrer to that portion of plaintiff's complaint which set up a contract based upon the franchise of September 5, 1904.

Freund, Pol. Power, § 561, p. 588; Davenport v. Richmond, 81 Va. 636, 59 Am. Rep. 694; Cambridge v. Trellegan, 181 Mass. 565, 64 N. E. 204; State, Trenton Horse R. Co., Prosecutor, v. Trenton, 53 N. J. L. 132, 11 L.R.A. 410, 20 Atl. 1076; Union Oil Co.

v. Portland, 198 Fed. 441; Portland v. Cook, 48 Or. 550, 9 L.R.A. (N.S.) 733, 87 Pac. 772; Portland v. Meyer, 32 Or. 368, 67 Am. St. Rep. 538, 52 Pac. 21; Puget Sound Traction, Light, & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705; Wood v. Hinton, 47 W. Va. 645, 35 S. E. 824; State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076; Mann v. Wiley, 51 App. Div. 169, 64 N. Y. Supp. 589; Morton v. New York, 140 N. Y. 207, 22 L.R.A. 241, 35 N. E. 490; Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242;

East Hartford v. Hartford Bridge Co. 10 How. 511, 13 L. ed. 518; Brick Presby. Church v. New York, 5 Cow. 538; New York v. Second Ave. R. Co. 32 N. Y. 261; Winter v. Montgomery, 83 Ala. 589, 3 So. 235; Augusta v. Burum, 93 Ga. 68, 26 L.R.A. 340, 19 S. E. 820; Lake Roland Elev. Co. v. Baltimore, 77 Md. 352, 20 L.R.A. 126, 26 Atl. 510; Missouri ex rel. Laclede Gaslight Co. v. Murphy, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. Rep. 505, 130 Mo. 10, 31 L.R.A. 798, 31 S. W. 594; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; Coates v. New York, 7 Cow. 585; Texarkana Gas & E. Co. v. Texarkana, 58 Tex. Civ. App. 109, 123 S. W. 218.

The business of plaintiff—the storing and handling of gasoline, kerosene, oils, etc.—is not a nuisance per se.

Joyce, Nuisances, § 388, p. 563; Harper v. Standard Oil Co. 78 Mo. App. 338; Gavigan v. Atlantic Ref. Co. 186 Pa. 604, 40 Atl. 834; 3 McQuillin, Mun. Corp. § 952; 2 Dill. Mun. Corp. 5th ed. chap. 16; 2 Wood, Nuisances, 3d ed. p. 1131; Tiedeman, Pol. Power, p. 207; Freund, Pol. Power, § 176; O'Hara v. Nelson, 71 N. J. Eq. 161, 63 Atl. 836; Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 37 L.R.A. 381, 62 Am. St. Rep. 532, 47 N. E. 2, 18 Mor. Min. Rep. 674; Hundley v. Harrison, 123 Ala. 292, 26 So. 294; Cosulich v. Standard Oil Co. 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259; Walker v. Chicago, R. I. & P. R. Co. 71 Iowa, 658, 33 N. W. 224; Kinney v. Koopmann, 116 Ala. 310, 37 L.R.A. 497, 67 Am. St. Rep. 119, 22 So. 593; Louisville & N. Terminal Co. v. Jacobs, 109 Tenn. 727, 61 L.R.A. 188, 72 S. W. 954; Louisville & N. Terminal Co. v. Lellyett, 114 Tenn. 368, 1 L.R.A. (N.S.) 53, 85 S. W. 881; Richmond v. Dudley, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; Whittemore v. Baxter Laundry Co. 181 Mich. 564, 52 L.R.A. (N.S.) 930, 148 N. W. 437, Ann. Cas. 1916C, 818; Henderson v. Sullivan, 16 L.R.A. (N.S.) 691, 86 C. C. A. 236, 159 Fed. 46, 14 Ann. Cas. 590; Hardin v. Olympic Portland Cement Co. 89 Wash. 320, 154 Pac. 450; Powell v. Bentley & G. Furniture Co. 34 W. Va. 804, 12 L.R.A. 53, 12 S. E. 1085.

The business of plaintiff not being a nuisance per se, the city council of the city of Santa Fe did not have the

right arbitrarily and summarily to declare it so.

Lonoke v. Chicago, R. I. & P. R. Co. 92 Ark. 546, 135 Am. St. Rep. 200, 123 S. W. 395; Swaim v. Morris, 93 Ark. 362, 125 S. W. 432, 20 Ann. Cas. 930; Chicago v. Weber, 246 Ill. 304, 34 L.R.A. (N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359; San Antonio v. Salvation Army, — Tex. Civ. App. —, 127 S. W. 860; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 33 L.R.A. (N.S.) 494, 130 N. W. 545, Ann. Cas. 1912B, 1030; Barger v. Smith, 156 N. C. 323, 72 S. E. 376, 160 N. C. 205, 75 S. E. 1098; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Cuba v. Mississippi Cotton Oil Co. 150 Ala. 259, 10 L.R.A. (N.S.) 310, 43 So. 706; Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Ison v. Manley, 76 Ga. 804; Western & A. R. Co. v. Atlanta, 113 Ga. 537, 54 L.R.A. 294, 38 S. E. 996; Darst v. People, 62 Ill. 306; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25; Everett v. Council Bluffs, 46 Iowa, 66; Cole v. Kegler, 64 Iowa, 59; Joyce v. Woods, 78 Ky. 386; New Windsor v. Stockdale, 95 Md. 196, 52 Atl. 596; Frostburg v. Wineland, 98 Md. 239, 64 L.R.A. 627, 103 Am. St. Rep. 399, 56 Atl. 811, 1 Ann. Cas. 783; Everett v. Marquette, 53 Mich. 450, 19 N. W. 140; St. Paul v. Gilfillan, 36 Minn. 298, 31 N. W. 49; Pieri v. Shieldsboro, 42 Miss. 493; Green v. Lake, 60 Miss. 451; Underwood v. Green, 42 N. Y. 140; McCrowell v. Bristol, 5 Lea, 685; Miller v. Burch, 32 Tex. 209, 5 Am. Rep. 242; Pye v. Peterson, 45 Tex. 312, 23 Am. Rep. 608; Joyce, Nuisances, § 332; McQuillin, Mun. Corp. § 901; Hennessy v. St. Paul, 37 Fed. 565; Harmison v. Lewistown, 153 Ill. 313, 46 Am. St. Rep. 893, 38 N. E. 628; Walker v. Jameson, 140 Ind. 591, 28 L.R.A. 679, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869; Patterson v. Vail, 43 Iowa, 142; Re Frazee, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; Ex parte O'Leary, 65 Miss. 80, 7 Am. St. Rep. 640, 3 So. 144; St. Louis v. Heitzberg Packing & Provision Co. 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; State v. Taft, 118 N. C. 1190, 32 L.R.A. 122, 54 Am. St. Rep. 768, 23 S. E. 970; Cleveland v. Malm, 7 Ohio S. & C. P. Dec. 124; Wygant v. McLaugh-

lan, 39 Or. 429, 54 L.R.A. 636, 87 Am. St. Rep. 673, 64 Pac. 867; *Bryan v. Chester*, 212 Pa. 259, 108 Am. St. Rep. 870, 61 Atl. 894; *Grossman v. Oakland*, 30 Or. 478, 36 L.R.A. 593, 60 Am. St. Rep. 832, 41 Pac. 5; 2 Wood, Nuisances, 1000.

The ordinance in question was unconscionable, oppressive, arbitrary, unreasonable, and unjust, and such an unwarranted and unfair assumption of authority as to constitute an abuse of the same, amounting to confiscation, and was void as being in violation of the 14th Amendment to the Constitution of the United States.

2 Dill. Mun. Corp. 5th ed. § 589; *Hannibal v. Missouri & K. Teleph. Co.* 31 Mo. App. 23; *State, Pennsylvania R. Co., Prosecutor, v. Jersey City*, 47 N. J. L. 286; *Cooley, Const. Lim.* 7th ed. p. 280; *Yee Gee v. San Francisco*, 235 Fed. 757; *St. Louis v. Edward Heitzberg Packing & Provision Co.* 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954; *L'Hote v. New Orleans*, 177 U. S. 587, 44 L. ed. 899, 20 Sup. Ct. Rep. 788; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Pacific States Supply Co. v. San Francisco*, 171 Fed. 727.

As a question of purely statutory construction, the ordinance is fatally defective and bad.

*United States v. Lucero*, 1 N. M. 422; *Ex parte De Vore*, 18 N. M. 246, 136 Pac. 47; *State v. Armijo*, 19 N. M. 345, 142 Pac. 1126; *Territory v. Davenport*, 17 N. M. 214, 41 L.R.A.(N.S.) 407, 124 Pac. 795; *Esquibel v. Chaves*, 12 N. M. 482, 78 Pac. 505; *United States v. Santistevan*, 1 N. M. 583; *Kennahan v. New York*, 162 App. Div. 364, 147 N. Y. Supp. 835; *Railroad Commission v. Grand Trunk Western R. Co.* 179 Ind. 255, 100 N. E. 852.

Mr. A. B. Renehan, amicus curiæ:

An arbitrary or unreasonable municipal by-law or ordinance will not stand before the courts.

*St. Louis v. St. Louis Theater Co.* 202 Mo. 690, 100 S. W. 627; *Hannibal v. Missouri & K. Teleph. Co.* 31 Mo. App. 23; *Miller v. Birmingham*, 151 Ala. 469, 125 Am. St. Rep. 31, 44 So. 388; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Com. v. Patch*, 97 Mass. 221; *Morse v. West Port*, 110 Mo. 502, 19 S. W. 831; *State, Trenton Horse R. Co., Prosecutor, v. Trenton*, 53 N. J. L. 132, 11 L.R.A. 410, 20 Atl. 1076; *State, Consolidated Traction Co., Prosecutor, v. Elizabeth*, 58 N. J.

L. 619, 32 L.R.A. 170, 34 Atl. 146; *State, Cape May, D. B. & S. R. Co., Prosecutor, v. Cape May*, 59 N. J. L. 404, 36 L.R.A. 657, 36 Atl. 678; *New York v. Dry Dock, E. B. & B. R. Co.* 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563; *Wygant v. McLaughlan*, 39 Or. 429, 54 L.R.A. 636, 87 Am. St. Rep. 673, 64 Pac. 867; *Com. use of Madisonville v. Price*, 123 Ky. 163, 94 S. W. 32, 13 Ann. Cas. 489; *Wells v. Mt. Olivet*, 126 Ky. 131, 11 L.R.A.(N.S.) 1080, 102 S. W. 1182; *Lamar v. Weidman*, 57 Mo. App. 507; *State, Pennsylvania R. Co., Prosecutor, v. Jersey City*, 47 N. J. L. 286; *State, Nicoulin, Prosecutor, v. Lowery*, 49 N. J. L. 391, 8 Atl. 518; *Ex parte Haskell*, 112 Cal. 412, 32 L.R.A. 527, 44 Pac. 725; *Re Berry*, 147 Cal. 523, 109 Am. St. Rep. 160, 82 Pac. 44; *Myers v. Chicago*, 196 Ill. 591, 63 N. E. 1037; *Austin v. Austin City Cemetery Asso.* 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *Lake View v. Tate*, 130 Ill. 247, 6 L.R.A. 268, 22 N. E. 791; *Hawes v. Chicago*, 158 Ill. 653, 30 L.R.A. 225, 42 N. E. 373; *Wice v. Chicago & N. W. R. Co.* 193 Ill. 351, 56 L.R.A. 268, 61 N. E. 1084; *Re Vandine*, 6 Pick. 187, 17 Am. Dec. 351; *Austin v. Murray*, 16 Pick. 126; *People v. Blom*, 120 Mich. 45, 78 N. W. 1015; *Grand Rapids v. Braudy*, 105 Mich. 670, 32 L.R.A. 116, 55 Am. St. Rep. 472, 64 N. W. 29; *Hudson v. Thorne*, 7 Paige, 261; *Sandys v. Williams*, 46 Or. 327, 80 Pac. 642; *Kneedler v. Norristown*, 100 Pa. 368, 45 Am. Rep. 383; *Austin v. Austin City Cemetery Asso.* 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; *Ex parte Patterson*, 42 Tex. Crim. Rep. 256, 51 L.R.A. 654, 58 S. W. 1011; *Dobbins v. Los Angeles*, 195 U. S. 235, 49 L. ed. 175, 25 Sup. Ct. Rep. 18; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Messrs. J. J. Kenney, E. P. Davies, and N. D. Meyer for appellee.

Parker, J., delivered the opinion of the court:

This is an appeal by the Continental Oil Company from a judg-

ment rendered in the district court of Santa Fe county, dismissing a complaint filed by it against the city of Santa Fe.

The suit was instituted by the appellant for the purpose of enjoining and restraining the enforcement, or attempted enforcement, of a certain ordinance of said city under which the latter claimed the right to compel the appellant and others to discontinue the storage of petroleum and its products in said city.

The appellant is now, and for many years last past has been, engaged in the business of storing, distributing, and selling petroleum and its products in said city, and in prosecuting its business in those respects it has maintained and used warehouses, tanks, and other instrumentalities within said city. In pursuance of a contract made in 1904 between the appellant and the city, the former, upon premises owned by it adjacent to a line of railway in said city, erected a warehouse constructed of brick, with stone foundation and metal roof and doors, at a cost to it of about \$2,500. There is also situate upon said property three metal tanks, of the total capacity of 18,000 gallons, which are used in the prosecution of its said business.

On January 3, 1917, the appellee ordained the following ordinance (the marginal numerals being inserted by us for convenience):

**An Ordinance Regulating the Handling, Storage, etc., of Petroleum, Gasolene, etc., in the City of Santa Fe.**

Be it ordained by the city council of the city of Santa Fe:

That whereas, the use and maintenance of storage warehouses and depots for the storage, selling, handling, and distributing of petroleum or kerosene (commonly called (1) coal oil), gasolene, and any and all kinds of oil used for fuel, power, or illuminating purposes, inside of the city limits of the city of Santa Fe, is highly dangerous to the lives and property of the citizens of the city of Santa Fe, and constitutes a nuisance:

3 A.L.R.—26.

Therefore it is hereby ordained:

That any person, firm, company, or corporation who shall so keep,

(2) use, conduct, or maintain a warehouse or warehouses, storage depot, or place inside of the city limits of the city of Santa Fe, wherein petroleum or kerosene (commonly called coal oil), gasolene, or any other kind of oil, used for or suitable for fuel, power, or illuminating purposes, in quantities of more than one barrel, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than \$25 nor more than \$50, or imprisonment for not less than ten nor more than thirty days, and for the purpose of this ordinance (each day) that said warehouses, storage depots, or places where (3) such oils, in quantities of more than one barrel, are kept, shall constitute a separate offense.

The Continental Oil Company, and any other persons, firms, companies, and corporations, so

(4) running, operating, maintaining, or conducting such warehouses, storage depots, or places where such petroleum or kerosene, gasolene, and other kinds of oil used for fuel, power, or illuminating purposes, within the city limits of said city of Santa Fe, in quantities exceeding one barrel, are hereby ordered and required to remove its or their said warehouses, storage depots, or places beyond the city limits of the city of Santa Fe within ten days from the service upon it or them of a copy of this ordinance.

Counsel for appellant, appellee, and the amicus curiæ have filed able and exhaustive briefs in this cause. Many of the propositions presented involve matters of great importance and without precedent in this jurisdiction. For instance, the following, among other propositions, are presented: That the contract of 1904 was a measure for the regulation of the business of the appellant, and did not constitute bartering away the police power of the city; that the city was without power to summari-

ly declare the business of the appellant a nuisance, and its declaration to that extent does not constitute an adjudication of the fact; that courts may review the reasonableness of ordinances of a municipality passed under the police power, and declare them void because of the nature of their provisions; and that the ordinance is not general in its nature and impartial in its operation. Not only are these specific propositions raised, but the case involves a discussion of many of the ramifications of each of these questions. We are also asked to comprehensively define, in particular respect to the parties affected, the limits beyond which a municipality may not go in the pretended exercise of the so-called police power. Each and every one of these propositions ought to be determined in this jurisdiction for the future guidance of the officers of the municipalities of this state; but a discussion of them would necessarily be premised upon the assumption that some definite and ascertained meaning may be and is attached to the ordinance involved herein, whereas, as we shall hereafter demonstrate, the ordinance is indefinite and unintelligible. So uncertain are its terms that no fixed meaning can be ascribed thereto. Consequently we cannot determine many of the propositions submitted, but are constrained to determine the appeal upon purely formal matters, viz., matters pertinent to the construction of the ordinance.

The title of the ordinance purports to advise that the ordinance was to regulate the handling, storage, etc., of petroleum, gasoline, etc. The main subject of the title is petroleum, etc., not warehouses.

(1) The matter opposite marginal numeral 1, the same being ¶ 1 of the ordinance, is introductory to, and explanatory of, the reasons for passing the ordinance, and constitutes the preamble, a wholly unnecessary part of an ordinance. *Townsend v. State*, 147 Ind. 624, 37 L.R.A. 294, 300, 62 Am.

Statute—  
purpose of  
preamble.

St. Rep. 477, 47 N. E. 19; *Fenner v. Luzerne County*, 167 Pa. 632, 31 Atl. 862; *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495; *Den ex dem. Lloyd v. Urison*, 2 N. J. L. 212; *Den ex dem. James v. Du Bois*, 16 N. J. L. 285; *Silva v. Newport*, 119 Ky. 587, 84 S. W. 741; *Hanly v. Sims*, 175 Ind. 345, 93 N. E. 228, 94 N. E. 401. In the latter case it was said that a preamble is a prefatory statement or explanation or a finding of facts by the power making it, purporting to state the purpose, reason, or occasion for making the law to which it is prefixed.

It is utilized as an aid to the interpretation of the act to which it is prefixed, for the purpose of clarifying, or to assist in clarifying, ambiguities. Its office is to expound powers conferred, not substantially to create them. 2 *Lewis's Sutherland*, Stat. Const. 2d ed. § 341. The subject is fully discussed in the last-mentioned work. The ordinance in question not being ambiguous, but so uncertain as to fail to prescribe a rule of conduct, the preamble performs no important function herein.

The matter opposite marginal numeral 2, being the second paragraph of the ordinance, is incomplete and inconclusive in expression, and fails to prescribe a rule of conduct. The expression of the thought, purpose, and object of the ordinance is omitted therein. The first part of the paragraph, omitting superfluous words, is to be read substantially as follows: Any person who shall keep a place in said city where petroleum, in quantities of more than one barrel (?), shall be fined or imprisoned.

In the words of counsel for appellant: "What? What about the petroleum, etc., in quantities of more than one barrel? Are manufactured? Are refined? Are distilled?"

Certainly the paragraph remains in an unfinished state, and, lacking a predicate, no rule of conduct is thereby prescribed, and consequently the sense of the paragraph is left wholly to speculation. The entire or-

dinance is so inconsistently phrased that we can only conjecture as to what the power ordaining it intended to accomplish thereby.

—construction—  
supplying  
words.

The matter opposite marginal numeral 3, being the latter part of ¶ 2 of the ordinance, is radically imperfect. It is not an imperfection which may be cured by judicially inserting, by construction, words plainly omitted by reference to the context, but represents an unintelligible sentence. Reference to it (quoted above) will disclose that it is to be read thus, when superfluous matter is eliminated therefrom: Each day that said places, shall constitute a separate offense.

Obviously the sentence is incomplete, and what was intended by the power ordaining it is, again, a matter of pure speculation. These are not nice and refined observations upon diction or phraseology, but substantial errors in the preparation and ordaining of the ordinance.

The matter opposite marginal numeral 4 is akin to that opposite marginal numeral 2, in that it was evidently patterned upon it, and fails to contain a predicate to the subject of the topic sentence.

(2) In the exercise of their function of interpreting and construing acts of the legislative branch of the government, courts, in the exercise of common sense and judgment, will not permit an act to be declared invalid for uncertainty or vagueness where reason demands that words be inserted therein. This rule is founded upon the premise, however, that the intent of the lawmaking power is so expressed in the act involved that from its context the meaning thereof is ascertainable. The rule is well stated in 36 Cyc. 1127, as follows: "Where it appears from the context that certain words have been inadvertently omitted from a statute, the court may supply such words as are necessary to complete the sense and to express the legislative intent. But

in the application of this rule the court should exercise great care to keep within its province of construction, and not to trespass upon that of legislation."

The rule is also referred to at page 1113 in the same volume and work, where it is said: "Where a statute is incomplete or defective, whether as a result of inadvertence or because the case in question was not foreseen or contemplated, it is beyond the province of the courts to supply the omissions, even though as a result the statute is a nullity."

In 2 Lewis's Sutherland, Stat. Constr. 2d. ed. it is said:

"Legislative enactments are not, any more than any other writings, to be defeated on account of mistakes, errors, or omissions, provided the intention of the legislature can be collected from the whole statute, and the title and preamble may be referred to for this purpose." § 410.

"To enable the court to insert in a statute omitted words or read it in different words from those found in it, the intent thus to have it read must be plainly deducible from other parts of the statute. When the descriptive words constitute the very essence of the act, unless the description is so clear and accurate as to refer to the particular subject intended, and be incapable of being applied to any other, the mistake is fatal." § 411.

In the discussion of this proposition the doctrine is also mentioned that to constitute an enforceable act the statute or ordinance must prescribe a rule of action, and unless it does do so it is void for uncertainty. A case where the court says all that may be necessary to say concerning the matter is that of State ex rel. Crow v. West Side Street R. Co. 146 Mo. 155, 47 S. W. 959, where it is said: "Recurring to the point first suggested, this question is presented: Does the act sufficiently express the legislative will to enable the courts and officers charged with its execution to ascertain and enforce



it? A statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations, will not render it nugatory. Doubts as to its proper construction will not justify us in disregarding it. It is the bounden duty of the courts to endeavor, by every rule of construction, to ascertain the meaning of, and to give full force and effect to, every enactment of the general assembly not obnoxious to constitutional prohibitions. It is equally true that a mere collection of words cannot constitute a law; otherwise, the dictionary can be transformed into a statute by the proper legislative formula. An act of the legislature, to be enforceable as a law, must prescribe a rule of action, and such rule must be intelligibly expressed. 'It is plainly the duty of the court to construe a statute ambiguous in its meaning so as to give effect to the legislative intent, if this be practicable. . . . But a statute must be capable of construction and interpretation; otherwise it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligible meaning; but if, after such effort, it is found to be impossible to solve the doubt and dissolve the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply or make one. The court may not allow "conjectural interpretation to usurp the place of judicial exposition." There must be a competent and efficient expression of the legislative will' [cit-

ing cases]. . . . It is needless to cite authorities to show that which is self-evident. It is manifest that an act of the legislative department cannot be enforced when its meaning cannot be determined by any known rules of construction. The courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers."

(3) Municipal ordinances are construed by the same rules as statutes of the legislature. 28 Cyc. 388.

The application of the foregoing rules manifestly makes it necessary to hold that the ordinance in question is so vague and uncertain that it fails to prescribe a rule of action. We may only surmise what the power ordaining the ordinance intended. The ordinance, as it stands, is wholly inoperative, and, if it is to be corrected, the power that ordained it must make the correction. We are not justified in completing the ordinance under the guise of judicial construction. For the reasons stated, the judgment of the trial court will be reversed, with instructions to enter judgment granting the relief prayed for in the complaint; and it is so ordered.

Hanna, Ch. J., and Roberts, J., concur.

## ANNOTATION.

### Supplying omitted words in statute or ordinance.

- I. General rule, 404.
- II. Application of rule, 405.
- III. Exceptions to rule, 410.

#### *I. General rule.*

Where words have been omitted from a statute or an ordinance by in-

advertence or through a clerical error, and the intent of the legislature is ascertainable from the context, the court will insert the words necessary to carry out that intent. Courts will not permit an act to be declared in-

valid for uncertainty, where reason demands the insertion of words therein.

**Colorado.**—*Morris v. People* (1893) 4 Colo. App. 136, 35 Pac. 188.

**Georgia.** — *Brinsfield v. Carter* (1847) 2 Ga. 143; *Abernathy v. Mitchell* (1901) 113 Ga. 127, 38 S. E. 303.

**Illinois.**—*Loverin v. McLaughlin* (1896) 161 Ill. 417, 44 N. E. 99; *George M. Clark & Co. v. Kent* (1899) 80 Ill. App. 128, affirmed in (1899) 181 Ill. 237, 54 N. E. 967.

**Indiana.**—*Gustavel v. State* (1899) 153 Ind. 617, 54 N. E. 123.

**Iowa.**—*STATE v. CLAIBORNE* (reported herewith) ante, 392.

**Kansas.**—*Landrum v. Flannigan* (1899) 60 Kan. 436, 56 Pac. 753; *State v. Taylor* (1913) 90 Kan. 438, 133 Pac. 861.

**Kentucky.**—*Com. v. Barney* (1903) 115 Ky. 475, 74 S. W. 181; *Com. v. Herald Pub. Co.* (1908) 128 Ky. 424, 108 S. W. 892, 16 Ann. Cas. 761; *Com. v. Stahr* (1915) 162 Ky. 388, 172 S. W. 677.

**Maryland.**—*Waters v. Laurel* (1901) 93 Md. 221, 48 Atl. 499.

**Minnesota.**—*Loper v. State* (1900) 82 Minn. 71, 84 N. W. 650.

**Mississippi.** — *Earhart v. State* (1889) 67 Miss. 325, 7 So. 347.

**Nevada.**—*State ex rel. Bartlett v. Brodigan* (1914) 37 Nev. 245, 141 Pac. 988.

**New York.**—*Jones v. Mail & Exp. Pub. Co.* (1894) 80 Hun, 368, 30 N. Y. Supp. 335.

**Pennsylvania.** — *Worth v. Peck* (1847) 7 Pa. 268; *Philadelphia v. Ridge Ave. Pass. R. Co.* (1883) 102 Pa. 190.

**Tennessee.**—*State ex rel. Dolan v. Clarksville & R. Turnp. Co.* (1854) 2 Sneed, 88; *Wright v. Cunningham* (1905) 115 Tenn. 445, 91 S. W. 293; *Ashby v. State* (1911) 124 Tenn. 684, 139 S. W. 872; *State v. Crockett* (1917) 137 Tenn. 679, 195 S. W. 583.

**Virginia.**—*Hutchings v. Commercial Bank* (1895) 91 Va. 68, 20 S. E. 950.

**Wisconsin.**—*Nichols v. Halliday* (1871) 27 Wis. 406.

“Where the real design of the legislature in passing a statute or a particular section thereof can be per-

ceived with reasonable certainty, notwithstanding the want of precision in the language used, such language must be so construed as to carry that design into effect, even though the interpolation of other words may be necessary.” *Loverin v. McLaughlin* (1896) 161 Ill. 417, 44 N. E. 99.

“Legislative enactments are not to be defeated on account of mistakes, errors, or omissions, provided the intention of the legislature can be collected from the whole statute.” *Loper v. State* (1900) 82 Minn. 71, 84 N. W. 650.

“Where, from a reading of the entire act, certain words necessary to give it complete sense have manifestly been omitted, courts, under well-established rules of construction, are permitted to read the same into the act, in order that the law may express the true legislative intent.” *State ex rel. Bartlett v. Brodigan* (1914) 37 Nev. 245, 141 Pac. 988.

## II. Application of rule.

In *Morris v. People* (1893) 4 Colo. App. 136, 35 Pac. 188, a statute was construed which penalized any person who should, by false representations, “obtain a credit thereby defraud any person.” It was held that the word “and” should be supplied before the word “thereby,” the court saying: “An insignificant alteration in the phraseology, or the omission of a word of this description in the adoption of a statute of another state, or in the revision of a statute, does not necessarily imply an intention to alter the construction of the act. It is equally settled that wherever there is an apparent mistake on the face of a statute the character of the error may often be determined by reference to other parts of the enactment, which may always be legitimately referred to in order to determine its legitimate construction.”

In *Brinsfield v. Carter* (1847) 2 Ga. 143, the act which was before the court for construction related to the granting of state lands to persons who complied with the provisions of the act. The word “grant” was omitted from the third section of the act, which read as follows: “That from

and after the said 1st day of October, 1844, any person, a citizen of this state, by paying into the treasury the sum of two thousand dollars, shall be entitled to receive from this state in his, her or their name, to any ungranted lot of land in the counties aforesaid." The fourth section provided that where two or more persons applied for the same lot at the same time, the surveyor general should place the names of the applicants in a hat, and the first name drawn should be entitled to *the grant*. It was held that the grant referred to in the fourth section of the act was the grant contemplated by the third section, and that the word "grant" in the third section had been omitted by a clerical error, and would be supplied by the court in order to give effect to the statute.

In *Abernathy v. Mitchell* (1901) 113 Ga. 127, 38 S. E. 303, there was involved an act amending a section of the Civil Code relative to affidavits in forma pauperis in the courts of ordinary. The title of the act stated its purpose to be to make certain specific changes. In addition to these the words, "or proceeding in the court of ordinary," were omitted, making the act applicable to all courts. It was held that the omission was inadvertent, and that the words quoted would be supplied by the court.

In *Loverin v. McLaughlin* (1896) 161 Ill. 417, 44 N. E. 99, a statute involving the liability of directors of a defectively or illegally organized corporation was construed. It appeared that § 4 of the act (Rev. Stat. 1874, chap. 32), directed the secretary of state to issue a certificate of the complete organization of the corporation, making a part thereof a copy of all papers in and about the organization of the corporation, authenticated under his hand and the seal of the state, and provided further as follows: "The same shall be recorded in a book for that purpose in the office of the recorder of deeds of the county where the principal office of such company is located. Upon the recording of said copy, the corporation shall be deemed fully organized, and may proceed to

business." It was held that although, from a literal reading of the statute, it would appear that only a copy of all papers filed in the office of the secretary of state was demanded, it was also the evident intention to require the recording of the certificate of the secretary of state, of which such copy was a part. The court held this to be the evident intent of the legislature from the fact that the preceding part of the section required that "the same shall be recorded," and the words, "the same," referred back to the certificate and the copy, the copy being part of the certificate; and as "a copy of all papers," etc., was made a part of the certificate, and the latter was "duly authenticated under his hand and seal," the certificate and the copy attached to it constituted one document. It was accordingly held that the words, "upon the recording of said copy," were to be understood as if the words, "certificate and," had been inserted.

In *George M. Clark & Co. v. Kent* (1899) 80 Ill. App. 128, following *Loverin v. McLaughlin* (1896) 161 Ill. 417, 44 N. E. 99, the word "or" was written into § 18 of the Corporation Act, as follows: "If any person or persons being, or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act, (or) before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation, or pretended corporation."

In *Gustavel v. State* (1899) 153 Ind. 613, 54 N. E. 123, it appeared that a statute regulating fishing in one section prohibited the taking of fish in any of the "streams" of the state, while the next section allowed fishing with a hook and line during certain months of the year in any "waters" of the state. It was held that the legislature intended to distinguish be-

tween "streams" and "waters," and therefore that the word "other" should be inserted before "waters." The court said: "The intent of the act is evident and it should be carried into effect. Criminal statutes should not be construed so strictly as to defeat their obvious interpretations. The principle of strict construction does not allow a court to make that an offense which is not such by legislative enactment, but this does not exclude the application of common sense to the terms made use of in an act, in order to avoid an absurdity which the legislature ought not to be presumed to have intended."

In *Landrum v. Flannigan* (1899) 60 Kan. 436, 56 Pac. 753, it appeared that a statute gave a right of action to certain persons injured by reason of the intoxication of another. After stating who these persons were, it enumerated them again in the same sentence, but omitted from those previously named, "employers" and "other persons." It was held that these words were omitted by mistake, and should be inserted.

In *State v. Taylor* (1913) 90 Kan. 438, 133 Pac. 861, there was involved a statute providing as follows: "Any mortgagor of personal property or any other person who shall injure, destroy or conceal any mortgaged property, or any part thereof, with intent to defraud the mortgagee, his executors, administrators, personal representatives or assigns, or shall sell or dispose of the same without the written consent of the mortgagee or his executors, administrators, personal representatives or assigns, shall be deemed guilty of larceny." "For selling, injuring, destroying, concealing or disposing of such property of the value of twenty dollars and under, on which the mortgagee has a lien, or of the value of over twenty dollars, on which the mortgagee has a lien of not more than twenty dollars, such person shall be deemed guilty of petit larceny, and on conviction shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one hundred dollars or by both such fine and imprisonment; for selling, injuring, destroying, conceal-

ing or disposing of such property of the value of twenty dollars and over, on which the mortgagee has a lien to the amount of twenty dollars, such person shall be deemed guilty of grand larceny and on conviction shall be punished by confinement and hard labor not exceeding five years (Laws 1911, chap. 226, § 1)." The statute, as it read, made the same act both a felony and a misdemeanor, and made no provision for cases in which the property involved was worth over twenty dollars, and was subjected to a lien of over twenty dollars. The statute was based on § 1 of chapter 105 of the Laws of 1901, which contained the words, "the amount of over twenty dollars;" but the word "over" was omitted by a typographical error when the act was republished in the General Statutes of 1901, and the General Statutes of 1909 followed the General Statutes of 1901, and also left the word out. In 1911, in amending the law in another particular, the new act was drafted from the compilation of 1909, but was copied from the reprint instead of the official publication, and so the word "over" was again omitted. It was held that under these circumstances there could be no doubt that the statute should be construed as though it contained the missing word.

In *Com. v. Barney* (1903) 115 Ky. 475, 74 S. W. 181, it appeared that the title of an act, making it an offense to dispose of the property of another, contained the word "fraudulently," but that this word was used nowhere else in the act. It was contended that therefore the act violated that section of the Constitution which provides that a bill or act must not contain more than one subject, which must be expressed in the title. It was held that the act must be construed in such a way as to be constitutional, if that could be done without doing violence to the manifest legislative intent. It was therefore held that the legislature intended to include in the acts prohibited only those that were intentionally fraudulent. The court thus inserted the word "fraudulently" in the statute, to carry out the legislative intent.

In *Com. v. Herald Pub. Co.* (1908) 128 Ky. 424, 108 S. W. 892, 16 Ann. Cas. 761, there was involved a statute (Ky. Stat. 1903, § 1352) providing as follows: "Any person or corporation who sells . . . any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, . . . or who writes, prints, publishes, or utters . . . any advertisement or notice of any kind, giving information . . . where, how, of whom, or by what means any, or what purports to be any, obscene, lewd, filthy, indecent or disgusting book, picture, writing, paper . . . named in this section can be purchased, obtained or had." The section did not declare the acts specified therein to be unlawful, nor did it state that a person who did the acts therein named should be guilty of any offense. It was held that as the intent of the section was clear and the purpose of its enactment plain, it would not be allowed to fail by reason of the omission of the words, "it shall be unlawful for," which should have been placed at the beginning of the section, and of the words, "shall be guilty of an offense," which should have been added to the section.

In *Com. v. Stahr* (1915) 162 Ky. 388, 172 S. W. 677, it appeared that the grand jury had indicted the fiscal court of the city of Fulton for maintaining a public nuisance, by permitting a public road, known as the State Line road, to become and remain in an impassable and dangerous condition. The defense was that the road lay within the corporate limits of the city of Fulton, and therefore was not under the jurisdiction of the fiscal court. It appeared that the boundary line between Tennessee and Kentucky was along the south curb of State street. The street was therefore wholly within the state of Kentucky, and as its condition was admitted, the only question was whether it was a city street or a public road of the county. The charter of the city of Fulton was put in evidence, defining the city boundary, and showed that the southern boundary began at the southwest corner of the Carr Institute lot and ex-

tended thence in a northwardly and northeastwardly direction until it was carried to a stake on the brow of the hill west of the bridge on said State Line road; "thence with said State Line road to the beginning." The place of beginning was described as being located "on the state line at the southwest corner of Carr Institute lot." It was claimed that the word "road" was omitted by mistake and should be inserted after the words "state line," thus making the boundary begin "on the State Line road at the southwest corner of Carr Institute lot," so as to conform to the subsequent description as above given. It was held that the word "road" should be inserted, in order to give effect to the obvious intention of the legislature.

In *Waters v. Laurel* (1901) 93 Md. 221, 48 Atl. 499, it appeared that one section of a statute, authorizing the mayor and city council of the town of Laurel to issue bonds for constructing a waterworks, omitted the words, "of Laurel," although the words were contained in the title and in the other sections of the act. It was held that these words could be inserted, as it was clear that that was the intent of the legislature, as gathered from the title and from the other parts of the act.

In *Loper v. State* (1900) 82 Minn. 71, 84 N. W. 650, wherein it appeared that a law providing a bounty for the arrest and conviction of horse thieves had been erroneously copied, and the act as it read provided a bounty for the conviction of every criminal offense, it was held that as the intent and purpose of the act could be clearly understood from its title, which contained the words, "for the arrest and conviction of horse thieves," these words must be read into the act for the purpose of giving it its true meaning, and to interpret correctly the purpose of the legislature in passing the act. The court said: "Legislative enactments are not to be defeated on account of mistakes, errors, or omissions, provided the intention of the legislature can be collected from the whole stat-

ute, and the title and its history may be referred to for that purpose."

In *Earhart v. State* (1889) 67 Miss. 325, 7 So. 347, it appeared that in amending a statute (Code 1880, § 2958) relating to the carrying of concealed weapons, the clause, "or having good and sufficient reason to apprehend an attack," was stricken out. The section as thus amended contained the meaningless phrase, "not being threatened with." It was held that as it was evident that the legislature did not intend to nullify the law, but only to amend it, the words, "an attack," should be retained so that the section as amended would read, "any person not being threatened with an attack . . . who carried concealed," etc.

In *State ex rel. Bartlett v. Brodigan* (1914) 37 Nev. 245, 141 Pac. 988, a statute relating to the redistricting of the judicial districts of the state was construed. The first section divided the state into ten judicial districts and described their boundaries. It then provided for the number of judges as follows: "For each of said districts judges shall be elected by the qualified electors thereof at the general election in 1914 and every four years thereafter, except as otherwise provided in this act as follows: For each of said districts except the second judicial district, there shall be [elected one judge. For the second judicial district there shall be] two judges elected." The words in brackets were omitted from the enrolled bill, as signed by the governor. Section 3 provided for the salaries to be paid to the judges. Section 4 provided that the second judicial district should have two judges, and made provision for their jurisdiction, giving them concurrent and co-extensive powers. There was, therefore, a conflict between § 1 and § 4 of the act. Section 1 provided that the second judicial district should have only one judge, while § 4 provided for two judges. In § 3 the judges in each district were referred to in the singular number, and their jurisdiction was not provided for specially, as was done by § 4 for the second judicial dis-

trict. It was held that the words in brackets were omitted by mistake.

In *Jones v. Mail & Exp. Pub. Co.* (1894) 80 Hun, 368, 30 N. Y. Supp. 335, the court held that a statute which provided for the filing of the certificate of the payment of the capital stock of a corporation "in the office of the secretary of state, and of the county in which the principal business office of the corporation is situated," must be construed to read so as to designate the office of the clerk of the county as one of the places where the certificate should be filed, as that was the evident intent of the legislature, there being no other place in counties throughout the state where papers can be legally recorded and filed.

In *Worth v. Peck* (1847) 7 Pa. 268, it was held that, where a statute provided a penalty of "not less than one nor more than three hundred dollars," the minimum penalty was \$100 and not \$1.

In *Philadelphia v. Ridge Ave. Pass. R. Co.* (1883) 102 Pa. 190, it was held that the word "annually" must be read into a statute which provided that a railroad company should pay 6 per cent of all dividends exceeding 6 per cent of its capital stock to the city of Philadelphia. The court said this was necessary in order to prevent the purpose of the act from being rendered of no effect; for the directors of the corporation could defeat the act by declaring a dividend as often as necessary to prevent it being large enough to be taxable.

In *State ex rel. Dolan v. Clarksville & R. Turnp. Co.* (1854) 2 Sneed (Tenn.) 88, it was held that in a statute which gave a turnpike company the right to erect a tollgate "within 2 miles of Clarksville," the words, "but not nearer," must be inserted to give effect to the intent of the legislature in granting the charter.

In *Wright v. Cunningham* (1905) 115 Tenn. 445, 91 S. W. 293, the law under consideration read as follows: "The ticket shall provide for those favoring the Small Stock Law, 'for the Small Stock Law' and those 'against said law.'" The court held that there was an omission of the word "for" be-

tween "and" and "those," and after the word "those" an omission of the expression, "opposing the Small Stock Law," so that, as corrected, the sentence read: "The ticket shall provide for those favoring the Small Stock Law, 'for the Small Stock Law,' and for those opposing the Small Stock Law, 'against the Small Stock Law.'"

In *Ashby v. State* (1911) 124 Tenn. 684, 139 S. W. 872, the statute involved read as follows: "An act to create a board of jury commissioners for counties in this state having a population of 19,100 and less than 19,000 inhabitants of the Federal census of 1900 or that may have that number of inhabitants by any subsequent Federal census, and for the election of juries; to prescribe the duties of the members of said board and of the judges, and punish violations of this act; to provide for jury lists and jury boxes to be kept in each county affected by this act; and to repeal all laws in conflict with this act." The act as it read was without sense, and the court, to carry out the legislative intent, inserted the words, "not more than," immediately before the figures "19,100" and the word "not" immediately before the word "less."

In *State v. Crockett* (1917) 137 Tenn. 679, 195 S. W. 583, it was held that in a statute relating to the obtaining of money by means of worthless checks, drafts, or orders the words, "shall be made," should be inserted to make that part of the statute read sensibly, so that it read: "Unless payment shall be made of such check, draft or order after giving seven days' written notice mailed to the drawer's last known address."

In *Hutchings v. Commercial Bank* (1895) 91 Va. 68, 20 S. E. 950, the Married Woman's Law (Acts 1877-78, p. 248) was before the court. The second paragraph of this act provided that a married woman should have the same right to devise and bequeath her property as if unmarried, and then read as follows: "And provided further, that the sole and separate estate created by any gift, grant, devise or bequest shall be held according to the terms and powers, and be subject to

the provisions and limitations thereof, and to the provisions and limitations of this act, so far as they are in conflict therewith." The act was conflicting in its terms, for in the sentence quoted it upheld and preserved separate estates, and yet in the last words quoted it would appear that they were made subject to the provisions of the act. It appeared that the word "not" was included in the Act of April 4, 1877, in the enrolled bill, so that the act read "so far as they are not in conflict therewith," but this word was omitted both in the enrolled bill and the printed acts when the act was amended and re-enacted by the Act of March 14, 1878. It was held that the word had been omitted by inadvertence, and should be inserted to give an intelligent effect to the statute, and to carry out the manifest intent of the legislature.

In *Nichols v. Halliday* (1871) 27 Wis. 406, the court construed a statute providing as follows: "The keeper of a boarding house shall have the same lien upon and right to detain the baggage and effects of any boarder for the amount which may be due for board by such boarder, to the same extent and in the same manner as innkeepers have such lien and such right of detention." It was held that the words, "with respect to the baggage and effects of their guests," must be supplied at the end of this section, as the sentence was elliptical and the words were plainly suggested by the context.

### III. Exceptions to rule.

A court will not insert words in a statute or ordinance which is so vague and uncertain as to have no definite meaning, or the meaning of which can be ascertained only by conjecture, but will declare the act to be inoperative and void. *Holmberg v. Jones* (1901) 7 Idaho, 752, 65 Pac. 563; *STATE v. CLAIBORNE* (reported herewith) ante, 392; *CONTINENTAL OIL CO. v. SANTA FE* (reported herewith) ante, 398; *Kennahan v. New York* (1914) 162 App. Div. 364, 147 N. Y. Supp. 835.

In *Holmberg v. Jones* (1901) 7 Idaho, 752, 65 Pac. 563, an act en-

titled, "An Act to Create and Organize the County of Clearwater and Define the Boundaries of Shoshone, Idaho and Nez Perces Counties," was under the consideration of the court. It appeared that the language of the act was conflicting, some sections treating the county of Clearwater as being created by the act, while in other sections the plain inference of the language used was that another act was to be passed by the legislature, creating Clearwater county. In the first section of the act was a description of territory which it evidently was the intention of the legislature should constitute the county of Clearwater, but there was no declaration anywhere in the act to carry out that intent. It was held that the act did not create a county, as there were no words in the act which expressed that intention, and the courts did not have the authority to create a county by supplying words, as to do so would be to impinge upon the power vested solely in the legislature. The court said: "While courts do, in order to carry out the will of the legislature, expressed in an imperfect way, interpolate punctuation or words evidently intended to be used, yet, when such interpolation comprises the real substance of the act—in this instance, words creating a county—the court is not authorized to make such interpolation."

In *Kennahan v. New York* (1914) 162 App. Div. 364, 147 N. Y. Supp. 835, it was held that an ordinance designating a certain newspaper to publish election notices, without repealing or referring to a prior ordinance on the same subject, and without stating what political party the newspaper represented, was void. The court said: "The case is controlled by the familiar rule of statutory construction that, if the legislature fails to insert such provisions in the law as will accomplish the result intended, their omission cannot be remedied by construction, and the law must, to that extent, be considered defective and inoperative, the court having no power to interpolate words or phrases."

A court will not insert words in a statute or ordinance which is plain

and unambiguous, and does not need the insertion of words to carry out its terms, since to do so would be an act of legislation and not an act of construction.

**Kentucky.** — *Barron v. Kaufman* (1909) 131 Ky. 642, 115 S. W. 787.

**Louisiana.**—*State v. Trapp* (1916) 140 La. 425, 73 So. 255.

**New Jersey.**—*Orvil Twp. v. Woodcliff* (1897) 61 N. J. L. 107, 38 Atl. 685.

**Ohio.**—*Slingluff v. Weaver* (1902) 66 Ohio St. 621, 64 N. E. 574.

**Oklahoma.**—*Arnold v. State* (1913) — Okla. Crim. Rep. — 132 Pac. 1123.

**South Dakota.**—*Ex parte Brown* (1907) 21 S. D. 515, 114 N. W. 303.

**Virginia.** — *Johnson v. Barham* (1901) 99 Va. 305, 38 S. E. 136.

**England.**—*Coe v. Lawrence* (1853) 1 El. & Bl. 516, 118 Eng. Reprint, 529, 22 L. J. Q. B. N. S. 140, 17 Jur. 1115, 1 Week. Rep. 146.

"Although it seems probable from an examination of the other parts of this act that the legislature intended to confer the power of approval upon the governing body of the township rather than on the township itself, we cannot say that such intent appears beyond doubt. Not to be able to do this is fatal to the claim of the plaintiffs, for the injection of the word 'committee' into the statute under such circumstances would be an act of legislation rather than of construction." *Orvil Twp. v. Woodcliff* (1897) 61 N. J. L. 107, 38 Atl. 685.

In *Barron v. Kaufman* (1909) 131 Ky. 642, 115 S. W. 787, it was held that the courts had no power to interpolate the words, "for each meeting attended," in a statute providing for the pay of members of the board of councilmen and board of aldermen. The court said: "The interpolation of words into an act by construction is allowable only when it is necessary in order to rescue the enactment from an absurdity, or to carry into effect a purpose obviously plain from other parts of the act. We have not such a situation here."

In *State v. Trapp* (1916) 140 La. 425, 73 So. 255, it was held that the court had no power to declare a person guilty of a misdemeanor, where the statute



failed to state that the act or conduct declared to be unlawful was a misdemeanor, the court saying: "Courts of justice have nothing more to do with criminal statutes than to apply them to the cases to which the legislature has declared they shall be applied. If the legislature has accidentally or inadvertently failed to express the intention that certain conduct shall constitute a crime or misdemeanor, the courts cannot correct the error or supply the omission, no matter how plainly the conduct in question is within the mischief intended to be remedied by the statute."

In *Orvil Twp. v. Woodcliff* (N. J.) *supra*, it was held that the court had no power to insert the word "committee" in a statute conferring the power of approval of the division and apportionment of the liabilities of the township, on a majority either of the township or of the mayor and council of the borough, so that the act would read: "A majority of the township committee." The court said: "Although it seems probable from an examination of the other parts of this act that the legislature intended to confer the power of approval upon the governing body of the township rather than on the township itself, we cannot say that such intent appears beyond doubt. Not to be able to do this is fatal to the claim of the plaintiffs, for the injection of the word 'committee' into the statute, under such circumstances, would be an act of legislation rather than of construction."

In *Slingluff v. Weaver* (1902) 66 Ohio St. 621, 64 N. E. 574, a statute regulating the jurisdiction of the supreme court was before the court for construction. This act read as follows: "A judgment rendered or a final order made by any circuit court or a judge thereof, court of common pleas, or a judge thereof, probate court, insolvency court, or the superior court or a judge thereof, may be reversed or modified by the supreme court on petition in error, for errors appearing on the record, in any case in quo warranto, mandamus, habeas corpus, procedendo, or in which is involved the construction of the Constitution of

the United States, or the state of Ohio, or the jurisdiction of any court of this state, or the construction or validity of a treaty or statute of or authority exercised under the United States, or in which the decision is contrary to that of any circuit court, and not in accordance with a previous decision of the supreme court; but no petition in error in such cases except as to the judgment or final order of the circuit court, or a judge thereof, or of the general term of the superior court of Cincinnati, shall be filed without leave of the supreme court, or judge thereof, and the supreme court shall not in any civil cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of evidence; and on application of any party excepting to a ruling or decision of the circuit court during the trial, or on motion for a new trial, such court shall find from the evidence and state on the record the facts upon which the alleged error arises, or which may be material in determining whether error has intervened or not." The case before the court had been appealed because the court below had sustained a demurrer to a petition for an injunction, and had dismissed the injunction. This class of cases was not included among those which the supreme court had jurisdiction to review under the above statute. The court held that the statute could not be changed by it so as to give the court jurisdiction, since it did not have the power to introduce a doubt not apparent in the language, and then introduce verbal modifications in order to remove the doubt thus created.

In *Arnold v. State* (1913) — Okla. Crim. Rep. —, 132 Pac. 1123, wherein it appeared that a statute fixed the punishment for perjury committed on the trial of an indictment for a felony at imprisonment for not less than ten nor more than twenty years, it was held that the court had no power to insert the words, "or information," after the word "indictment." The court said: "This court is in no sense of the word a forum of legislation or an arena for political debate. Where

there is an ambiguity in a statutory provision, then we must resort to construction, but we have no power to add to or take from a plain and mandatory provision of the statute."

In *Ex parte Brown* (1907) 21 S. D. 515, 114 N. W. 303, it was held that under a penal statute commonly known as the "Pure Food Law," it was not

permissible to insert the word "drug-gist," where the statute specifically referred to innkeepers, restaurant, boarding house, and hotel keepers. Such words excluded by implication all persons not of the same class as those specifically mentioned. A "casus omissus" cannot be supplied by the court. B. F. D.

JOHN F. DODGE et al.

v.

FORD MOTOR COMPANY et al., Appts.

*Michigan Supreme Court — February 7, 1919.*

(— Mich. —, 170 N. W. 668.)

**Corporations — diverting funds to humanitarian purposes — compelling payment of dividends.**

1. Minority stockholders have a right to force a declaration of dividends of a material portion of the surplus by a corporation dominated by one stockholder, which has a surplus of almost a hundred and twelve million dollars, cash on hand of nearly fifty-four million, and a business producing net profits of nearly sixty millions per year, where the declared policy of the dominating stockholder is to use the surplus for increasing the size of the plant for the semi-eleemosynary purpose of reducing the selling price of the product below what is necessary, for the benefit of the public, and the increase of output for the benefit of employees at high wages, all of which will make the business less profitable.

[See note on this question beginning on page 443.]

**Definition — capital stock.**

2. The term, "capital stock," means the funds, property, or other means contributed or agreed to be contributed by stockholders as the financial basis for the prosecution of the business of the corporation, being made directly through stock subscriptions or indirectly through declaration of stock dividends.

[See 7 R. C. L. 195.]

**Statute — interpretation — limitation of capital of corporation.**

3. The court cannot, in interpreting a statute limiting the capital of a corporation, assume that because there is a possible reason for a further limitation such further limitation must be implied.

[See 7 R. C. L. 202 et seq.]

**Corporation — statutory limitation of capital — use of profits.**

4. A statutory limitation of the capital which may be employed by a cor-

poration does not preclude the use of surplus profits in the business, although the aggregate assets are thereby made to exceed the amount fixed by the statute.

[See 7 R. C. L. 204.]

**— ultra vires — operation of smelter.**

5. The operation of a smelter to produce iron for its castings is not ultra vires of a corporation organized to manufacture automobiles.

[See 7 R. C. L. 528.]

**Monopoly — extension of corporation.**

6. The mere expansion of a business to produce and sell a commodity which the public demands, at a price which the public regards as cheap or reasonable, does not violate the Anti-trust Laws or create a monopoly, although the assets used in the business will exceed the amount of capital permitted by statute.

[See 19 R. C. L. 30 et seq.]

**Corporations — powers of directors.**

7. A business corporation is organized and carried on primarily for the profit of stockholders, and the powers and discretion of directors are to be exercised to attain that end, and do not extend to the reduction of profits or their nondistribution among stockholders in order to devote them to other purposes.

[See 7 R. C. L. 294, 437.]

**— discretion of directors — extent.**

8. The directors of a corporation have a discretion to be exercised in good faith to control the infinite details of the business, including the wages to be paid employees, the number of working hours, the conditions under which labor shall be carried on, and the price for which the product shall be offered to the public.

[See 7 R. C. L. 437, 620.]

**Estoppel — to demand dividends — consent to increase of capital.**

9. Minority stockholders of a corporation are not estopped to demand proper dividends upon the stock they own, by agreeing to permit an increase in the capital which shall be represented by a stock dividend, and which contemplates a large increase in the volume of business done.

[See 7 R. C. L. 294.]

**Corporation — amount of dividends.**

10. A corporation whose net earnings are approximately sixty million dollars a year, and which will have a surplus of thirty million after paying for all improvements contemplated, and whose output is promptly turned into cash, may be compelled by minority stockholders to distribute two thirds of the net surplus in dividends.

[See 7 R. C. L. 294.]

**APPEAL** by defendants from a decree of the Circuit Court for Wayne County, in Chancery, in favor of plaintiffs in an action brought to require defendants to declare and distribute dividends to the stockholders of the defendant company. *Affirmed in part.*

Statement by Ostrander, J.:

The Ford Motor Company is a corporation, organized and existing under Act No. 232 of the Public Acts of 1903, entitled: "An act to revise and consolidate the laws providing for the incorporation of manufacturing and mercantile companies or any union of the two, and for the incorporation of companies for carrying on any other lawful business, except such as are precluded from organization under this act by its express provisions, and to prescribe the powers and fix the duties and liabilities of such corporations."

Section 2 of the act relates, in part, to the articles of association, and what shall appear in them, and the fourth subdivision of this section reads: "Fourth. The amount of the total authorized capital stock which shall not be less than one thousand dollars, and not more than twenty-five million dollars; the amount of capital stock subscribed which shall not be less than 50 per cent of the authorized capital stock; the articles may provide for common and preferred stock subject to § 35, and in that case shall con-

tain an exact statement of the terms upon which the common and preferred stocks are created, and the amount of each subscribed, and the amount of each paid in."

In 1917 (Pub. Acts 1917, No. 254), the maximum of capital stock was fixed at \$50,000,000.

The second clause of the ninth subdivision of the same section reads, in part, as follows: "The amount of the capital stock and number of shares of every corporation organized under this act may be increased or diminished at any annual meeting of the stockholders, or at a special meeting expressly called for that purpose, by a vote of two thirds of the capital stock of the corporation."

Section 14 reads: "Every such corporation shall have power to purchase, hold and convey all such real and personal estate as the purposes of the corporation shall require, and all other real and personal estate which shall have been bona fide conveyed or mortgaged to said corporation by way of security, or in satisfaction of debts. Any corporation formed under this act may purchase

real or personal property necessary for its business, and issue its authorized capital stock to the amount of the value thereof in payment therefor, and the capital stock so issued shall be full paid stock, and not liable to any further call, neither shall the holder thereof be liable to any further payment under any of the provisions of this act, except the liability imposed by § 29; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property shall be conclusive. And in addition to the powers hereinbefore enumerated, every corporation organized under this act shall possess and exercise all such rights and powers as are necessarily incidental to the exercise of the powers expressly granted herein. It may also purchase and hold any grant of land made by the government to aid in any work of internal improvement."

To this was added by amendment in 1917: "Subject to the limitations of the laws of this state and of the United States with respect to illegal restraints of trade, every such corporation shall have power, in furtherance of the objects of its organization, to hold shares of stock of other corporations organized under the laws of this or any other state for purposes similar to those for which corporations may be organized under this act: Provided, such other corporations be formed as subsidiary thereto and for the actual carrying on of their immediate lawful business or the natural or legitimate branches or extensions thereof."

The articles of association were executed June 16, 1903, and acknowledged on that day by the parties associating. In the articles the capital stock is fixed at the sum of \$150,000, with 1,500 shares of the par value of \$100 each. It is recited therein that the amount of capital stock subscribed is \$100,000, and that said sum is actually paid in, \$49,000 in cash and \$51,000 in other property. The other property described is: Letters patent, issued

and applied for, valued at \$40,000; machinery and stock, \$10,000; contracts for supplies, \$1,000. Article II. of the articles of association reads: "The purpose or purposes of this corporation are as follows: To purchase, manufacture, and placing on the market for sale of automobiles, or the purchase, manufacture and placing on the market for sale of motors and of devices and appliances incident to their construction and operation."

The parties in the first instance associating, who signed the articles, included Henry Ford, whose subscription was for 255 shares, John F. Dodge, Horace E. Dodge, the plaintiffs, Horace H. Rackham and James Couzens, who each subscribed for fifty shares, and several other persons. The company began business in the month of June, 1903. In the year 1908, its articles were amended and the capital stock increased from \$150,000 to \$2,000,000, the number of shares being increased to 20,000; and in the certificate, made in November, 1908, evidencing the increase of capital stock, it was recited:

"The total amount of stock, including such increase actually paid in, is the sum of two million (\$2,000,000) dollars, of which one million eight hundred and fifty thousand (\$1,850,000) dollars of the increase and fifty thousand (\$50,000) dollars of the original capital stock not subscribed, has been paid in by the surrender of all the stockholders to the corporation of their respective claim and right to dividends duly declared by the board of directors of said corporation out of the surplus of said company to the amount of one million nine hundred thousand (\$1,900,000) dollars.

"The amount of capital stock subscribed is the sum of two million (\$2,000,000) dollars; the amount of said stock actually paid in at the date thereof is the sum of two million (\$2,000,000) dollars, of which one hundred thousand (\$100,000) dollars represents the capital stock originally subscribed and paid in,

and one million nine hundred thousand (\$1,900,000) dollars by surrender to the corporation by all stockholders of their claim to dividends duly declared by the board of directors payable out of surplus."

The business of the company continued to expand. The cars it manufactured met a public demand, and were profitably marketed, so that, in addition to regular quarterly dividends equal to 5 per cent monthly on the capital stock of \$2,000,000, its board of directors declared and the company paid special dividends: December 13, 1911, \$1,000,000; May 15, 1912, \$2,000,000; July 11, 1912, \$2,000,000; June 16, 1913, \$10,000,000; May 14, 1914, \$2,000,000; June 12, 1914, \$2,000,000; July 6, 1914, \$2,000,000; July 23, 1914, \$2,000,000; August 23, 1914, \$3,000,000; May 28, 1915, \$10,000,000; October 13, 1915, \$5,000,000, a total of \$41,000,000 in special dividends. Sales and profits for several years were: Year ending September 30, 1910, 18,664 cars, \$4,521,509.51. Year ending September 30, 1911, 34,466 cars, \$6,275,031.07. Year ending September 30, 1912, 68,544 cars, \$13,057,312.24. Year ending September 30, 1913, 168,304 cars, \$25,046,767.43. Year ending September 30, 1914, 248,307 cars, \$30,338,454.63. Ten months ending July 31, 1915, 264,351 cars, \$24,641,423.17. Year ending July 31, 1916, 472,350 cars, \$59,994,918.01.

The surplus above capital stock was, September 30, 1912, \$14,745,095.67, and was increased year by year to \$28,124,173.68, \$48,827,032.07, \$59,135,770.66. July 31, 1916, it was \$111,960,907.53. Originally, the car made by the Ford Motor Company sold for more than \$900. From time to time, the selling price was lowered and the car itself improved until in the year ending July 31, 1916, it sold for \$440. Up to July 31, 1916, it had sold 1,272,986 cars at a profit of \$173,895,416.06. As the cars in use multiplied, sales of parts and of repairs increased, so that, in the year ending July 31, 1916, the gross profit from repairs and parts was \$3,915,778.94; sales

being more than \$600,000 for each of the months of May, June, and July. For the year beginning August 1, 1916, the price of the car was reduced \$80 to \$360.

The following is admitted to be a substantially correct statement of the financial affairs of the company on July 31, 1916:

| Assets.                     |                  |
|-----------------------------|------------------|
| Working—                    |                  |
| Cash on hand and in bank    | \$52,550,771.92  |
| Michigan municipal bonds    | 1,259,029.01     |
| Accounts receivable.....    | 8,292,778.41     |
| Merchandise and supplies    | 31,895,434.69    |
| Investments—outside ....    | 9,200.00         |
| Expense inventories.....    | 434,055.19       |
| Plant—                      |                  |
| Land .....                  | 5,232,156.10     |
| Buildings and fixtures....  | 17,293,293.40    |
| Machinery and power plant   | 8,896,342.31     |
| Factory equipment.....      | 3,868,261.02     |
| Tools .....                 | 1,690,688.54     |
| Patterns .....              | 170,619.77       |
| Patents .....               | 64,339.85        |
| Office equipment.....       | 431,249.37       |
| Total assets .....          | \$132,088,219.58 |
| Liabilities.                |                  |
| Working—                    |                  |
| Accounts payable .....      | \$7,680,866.17   |
| Contract deposits .....     | 1,519,296.40     |
| Accrued pay rolls.....      | 847,953.68       |
| Accrued salaries.....       | 338,268.86       |
| Accrued expenses.....       | 1,175,070.72     |
| Contract rebates.....       | 2,199,988.00     |
| Buyers' P. S. rebate .....  | 48,099.00        |
| Reserves—                   |                  |
| For fire insurance .....    | 57,493.89        |
| For depreciation of plant . | 4,260,275.33     |
| Total liabilities .....     | \$18,127,312.05  |
| Surplus .....               | 111,960,907.53   |
| Capital stock .....         | 2,000,000.00     |
| Total .....                 | \$132,088,219.58 |

The following statement gives details of the business of the Ford Motor Company for the fiscal year July 31, 1915, to July 31, 1916:

|  |                  |
|--|------------------|
| Number of cars made in year.....   | 508,000          |
| Total business done.....   | \$206,867,347.46 |
| Profit for the year.....   | 59,994,118.01    |
| Cash on hand and in banks  | 52,550,771.92    |
| Materials on hand.....   | 31,895,434.69    |
| Cars in transit and at branch assembling plants (about 2½ weeks' output) ..... | 35,650           |
| Cars sold during year .....  | 472,350          |
| Employed at home plant.....  | 34,489           |
| Employed at home offices.....  | 1,028            |
| Total employees in Detroit plant getting \$5 a day or more.....                | 27,002           |
| Employed at 84 branch plants....   | 14,355           |
| Total employees (all plants).....  | 49,872           |
| Total employees getting \$5 a day or more.....                                 | 36,626           |

From a mere assembling plant, the plant of the Ford Motor Company came to be a manufacturing plant, in which it made many of the parts of the car which in the beginning it had purchased from others. At no time has it been able to meet the demand for its cars or in a large way to enter upon the manufacture of motor trucks.

No special dividend having been paid after October, 1915 (a special dividend of \$2,000,000 was declared in November, 1916, before the filing of the answers), the plaintiffs, who together own 2,000 shares, or one tenth of the entire capital stock of the Ford Motor Company, on the 2d of November, 1916, filed in the circuit court for the county of Wayne, in chancery, their bill of complaint, which bill was later, upon leave granted, on April 26, 1917, amended, in which bill they charge that since 1914 they have not been represented on the board of directors of the Ford Motor Company, and that since that time the policy of the board of directors has been dominated and controlled absolutely by Henry Ford, the president of the company, who owns and for several years has owned 58 per cent of the entire capital stock of the company; that the directors of the company are Henry Ford, David H. Gray, Horace H. Rackham, F. L. Klingensmith, and James Couzens, and the executive officers Henry Ford, president, F. L. Klingensmith, treasurer, and Edsel B. Ford, son of Henry Ford, secretary; that after the filing of the original, and before the filing of the amended, bill, at the annual meeting of the stockholders, David H. Gray retired from the board of directors, and Edsel B. Ford was elected and is acting as a director. Setting up that on the 31st of July, 1916, the end of its last fiscal year, the said Henry Ford gave out for publication a statement of the financial condition of the company (the same as hereinabove set out), that for a number of years a regular dividend, payable quarterly, equal to 5 per cent monthly upon the author-

ized capital stock, and the special dividends hereinbefore referred to, had been paid, it is charged that notwithstanding the earnings for the fiscal year ending July 31, 1916, the Ford Motor Company has not, since that date, declared any special dividends: "And the said Henry Ford, president of the company, has declared it to be the settled policy of the company not to pay in the future any special dividends, but to put back into the business for the future all of the earnings of the company, other than the regular dividend of five per cent (5 %) monthly upon the authorized capital stock of the company—two million dollars (\$2,000,000)."

This declaration of the future policy, it is charged in the bill, was published in the public press in the city of Detroit and throughout the United States in substantially the following language: "'My ambition,' declared Mr. Ford, 'is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them to build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.'"

It is charged further that the said Henry Ford stated to plaintiffs personally, in substance, that as all the stockholders had received back in dividends more than they had invested they were not entitled to receive anything additional to the regular dividend of 5 per cent a month, and that it was not his policy to have larger dividends declared in the future, and that the profits and earnings of the company would be put back into the business for the purpose of extending its operations and increasing the number of its employees, and that, inasmuch as the profits were to be represented by investment in plants and capital investment, the stockholders would have no right to complain. It is charged (paragraph 16) that the said Henry Ford, "dominating and controlling the policy of said company, has declared it to be his pur-

pose—and he has actually engaged in negotiations looking to carrying such purposes into effect—to invest millions of dollars of the company's money in the purchase of iron ore mines in the Northern peninsula of Michigan or state of Minnesota; to acquire by purchase or have built ships for the purpose of transporting such ore to smelters to be erected on the River Rouge, adjacent to Detroit, in the county of Wayne and state of Michigan; and to construct and install steel manufacturing plants to produce steel products to be used in the manufacture of cars at the factory of said company; and by this means to deprive the stockholders of the company of the fair and reasonable returns upon their investment by way of dividends to be declared upon their stockholding interest in said company."

Setting up that the present invested assets of the company, exclusive of cash on hand, as of July 31, 1916, represented more than thirty times the present authorized capital of the company, and 2½ times the maximum limit (\$25,000,000) fixed by the laws of the state of Michigan for capitalization of such companies (now \$50,000,000), it is charged that the present investment in capital and assets constitutes an unlawful investment of the earnings, and that the continued investment of earnings would be a continuation of such unlawful policy. Setting up unsuccessful efforts to secure a conference with Mr. Ford for the purpose of discussing the question, and asking that there be a distribution of a part of the accumulations, it is charged: That on September 28, 1916, plaintiffs addressed to him, and had delivered to him by registered letter, the following communication:

"We have for some time, as you know, been endeavoring to make an appointment to see you, for the purpose—as you assumed and informed one of your associates—of discussing the affairs of the Ford Motor Company from the standpoint of our interest as stockholders, and

with a view to securing action by the board of directors looking to a very substantial distribution from its cash surplus as dividends.

"Not having been able to make an appointment to discuss the matter with you personally, as we very much desired to do, we write you this letter upon the subject.

"The condition shown by your recent financial statement—showing approximately \$60,000,000 of net profits for the past year and cash surplus in bank exceeding \$50,000,000—it seems to us would suggest, without the action being requested, the propriety of the board taking prompt action to distribute a large part of the accumulated cash surplus as dividends to the stockholders to whom it belongs.

"While we would be sorry to have any controversy over the matter, we feel that your attitude toward the stockholders of the company is entirely unwarranted.

"The statements that you have made—that the stockholders are and have been receiving as dividends all they are entitled to—shows a most extraordinary state of mind, if it represents your real feelings.

"While a dividend of 5 per cent per month, 60 per cent per annum, on the capital stock of the company, \$2,000,000, on its face would seem to be a large dividend—the fact is, however, that the assets of the company representing its surplus is as much the property of the stockholders as the assets representing the capital stock, and the stockholders are as much entitled to a dividend that will give them returns on their surplus investment as their capital stock.

"Looking at the situation in this way, the dividend being paid the stockholders is only a little above 1 per cent on their capital employed in the business, and entirely out of proportion to what the stockholders are entitled to.

"In view of the existing circumstances, we ask that you promptly call a meeting of the board of directors to consider the situation and lay

before them our views as stockholders, as outlined in this letter, and we desire to say in this connection that we conceive it to be the duty of the board of directors to distribute as a minimum a special dividend of not less than 50 per cent of the accumulated cash surplus of the company.

"Another matter that we desire brought to the attention of the board is our contention, as stockholders, that the company has no right to use the company's earnings in the continued extension of the plants and property of the company; indeed, from our point of view, they have already exceeded their authority in this direction.

"We would be pleased to have your acknowledgment of the receipt of this letter, and advise that you have called a meeting of the board of directors for the purpose of considering and acting upon the matters referred to in it."

And that they sent on the same day copies to each of the members of the board of directors of the Ford Motor Company, and one to Edsel B. Ford, secretary. That, although the said Henry Ford and each of the directors were in the city of Detroit at the time of the receipt of such communication, no attention was paid to it and no acknowledgment made by said Henry Ford personally, but in his behalf his son, Edsel, under date October 10, 1916, replied:

"I beg to acknowledge due receipt of your letter of September 23, 1916, and to say that it would have been answered before this but for my absence from town for a considerable length of time, and pressure of other matters.

"It seems to me, in view of all the conditions of business and our extensions, which have been determined upon for so long a time past and to which we have been working, that it would not be wise to increase the dividends at the present time; but, nevertheless, I will lay your letter before the board of directors, and we will give your views regarding the increase of dividends and

extensions full consideration at our next meeting."

Plaintiffs addressed another letter to Mr. Ford, dated October 11th, acknowledging the receipt of the communication of October 10th, and containing, among other things, the following:

"Rumors are current to the effect that the company has very ambitious plans for the expansion of the operations of the company under consideration, and negotiations looking to carrying them into effect that would involve the disbursement of a large part of the cash assets of the company.

"We would thank you very much to advise us by early mail as to whether there is any foundation for the rumors referred to, and that plans for the extension or expansion of the operations of business of the company that would absorb any considerable part of the company's present resources are under consideration, and the status of any negotiations relating thereto. In short, as stockholders, we would ask to be advised promptly as to what plans for the enlargement of the plants, property, or operations are under way, or under consideration.

"Of course, it would be idle to have the board of directors consider the question of disbursing the cash assets of the company in dividends, if, before the board has considered our request, the same have been appropriated in the directions referred to.

"We would respectfully urge that we be given a prompt and full reply to this letter."

And it is charged that up to the date of filing the bill no reply had been received or acknowledgment of said communication.

Paragraphs 25, 26, 27, and 28 of the bill read:

"(25) That during the year ending July 31, 1916, the output of the said Ford Company's product amounted to approximately five hundred thousand (500,000) automobiles, yielding to the company, as stated, a net profit of sixty million



dollars (\$60,000,000). That although there was no reason to conclude that said company could not repeat its production of 500,000 cars during the succeeding year and sell the same readily at the price at which they had been sold in the previous year, and although labor and material costs were increasing, the said Henry Ford forced upon the board of directors his policy of reducing the price of such cars by eighty dollars (\$80) per car, making a difference in the net sales price of the product of said company for the year ending July 31, 1917, of forty million dollars (\$40,000,000). That such policy was adopted only for the purpose of enabling him to continue to carry out the policy he had decided upon to extend the operations and increase the said company's output of manufactured automobiles and a production schedule for the year July 31, 1916, to July 31, 1917, for eight hundred thousand (800,000) cars was adopted. That in order to prepare for such increased production the company is now, in carrying out such policy of said Henry Ford, engaged in practically duplicating the enormous plant of the company at Highland Park in the county of Wayne and state of Michigan, and in making other large expenditures and preparing to make other expenditures involving millions of dollars in carrying out such plan of the expansion of the business plants and property of the company.

"(26) That unless restrained by the injunction of this honorable court, the said Henry Ford will cause the cash assets that would otherwise be available for dividends, to be disbursed and invested in fixed capital assets.

"(27) In the face of the increased labor and material cost and the uncertain conditions that will prevail in the business world at the termination of the present World War, the policy of said Henry Ford, in continuing the expansion of the business of said corporation, is reckless in the extreme, and seriously jeopardizes the interest of your orators as stockholders in said corporation.

ardizes the interest of your orators as stockholders in said corporation.

"(28) That there are many other corporations engaged in the business of manufacturing cars in competition with the only car manufactured by the Ford Motor Company, to wit, the class recognized in the trade as 'low-priced cars.' That the annual production of such other companies of such class of cars runs into the hundreds of thousands of cars per annum. That if the said Henry Ford is permitted to continue the policy that he has inaugurated and announced he is determined to carry out, of increasing production, reducing the price of cars, and increasing the capital investments in the conduct of such business by withholding the dividends from stockholders to which they are entitled, the necessary result will be the destruction of competition on the sale of the class of cars manufactured by such corporation and the creation of a complete monopoly in the manufacture and sale of such cars, in violation of the state, Federal, and common law."

Paragraphs 30 and 31 read:

"(30) That by reason of the declared policy of said Henry Ford not to pay dividends and to continue the expansion of the business of said company, including the risks involved in various enterprises proposed to be carried on by said company, your orators' interest in said Ford Motor Company, which is worth not less than \$50,000,000, is practically limited to a valuation fixed by the dividends so regularly to be declared, which, as stated, amount to little more than 1 per cent upon the actual capital investment of the stockholders of the company in the business of said corporation and renders the disposition of your orators' stockholding interest in said corporation, except at a sacrifice, impossible.

"(31) That the operations of said corporation should, by the injunction of this honorable court, be limited at least to the conduct of the company's business within the lim-

its of its present capital investment, not including its cash accumulations, and your orators' interests as such stockholders should not be put in jeopardy by the reckless ventures proposed to be entered upon in connection with the carrying out of the policy of expansion of the said Henry Ford as above herein outlined."

Plaintiffs ask for an injunction to restrain the carrying out of the alleged declared policy of Mr. Ford and the company, for a decree requiring the distribution to stockholders of at least 75 per cent of the accumulated cash surplus, and for the future that they be required to distribute all of the earnings of the company except such as may be reasonably required for emergency purposes in the conduct of the business.

The answer of the Ford Motor Company, which was filed November 28, 1916, admits most of the allegations in the plaintiffs' bill of complaint, denying, upon information and belief, those in paragraph 16 of the bill, and declining to answer those charges personal to Mr. Henry Ford. It sets out meetings of the board of directors of the 31st of October, 2d of November, and 8th of November, 1916. It denies that Henry Ford forced upon the board of directors his policy of reducing the price of cars by \$80, and says that the action of the board in that behalf was unanimous and made after careful consideration. It admits that it has decided to increase the output of the company and is engaged in practically duplicating its plant at Highland Park; that plans therefor have been under consideration and practically agreed upon for a year, and the lands necessary for the expansion acquired a year before this suit was begun, and their acquisition laid before the board on the 28th of January, 1916, and ratified; that these plans were made public as early as December, 1915; and, upon information and belief, it is alleged that the plaintiffs knew all about it and never

made any complaint until they filed their bill in this cause, unless the letter set forth in the bill of complaint can be called a complaint; that it has been the policy of the company, and its practice for eight or ten years, to cut the price of cars and increase the output, a plan which has been productive of great prosperity, and that what was done the 1st of August, 1916, was strictly in accordance with this policy; that it was not carried out by cutting the price of cars August 1, 1915, because after full discussion it was determined that the proposed expansions of business were necessary to secure the continued success of the company, and that a considerable additional sum ought to be accumulated for the purpose of extensions and making the improvements complained of; that this policy for the year ending July 31, 1916, was understood by all the directors and the management and, it is believed, by all of the stockholders, including the plaintiffs; that the expansion is well under way; building operations are being carried on; that there is a great demand for Ford trucks which could not be supplied without such expansion; that only such extensions and expansions are contemplated as are shown in the estimates found in the minutes of the directors' meeting. It is denied that the proposed expansions jeopardize the interests of the plaintiffs, and asserted that they are in accordance with the best interests of the company and in pursuance of their past policy. It is denied that the policy continued would destroy competition, and any idea of creating a monopoly is denied. The allegations in regard to mining, shipping, and transporting iron ore are denied, or that anything is being done or contemplated which will result in disaster. Any plan or purpose or thought to injure or impair the value of plaintiffs' capital stock is denied, while it is asserted that their interests will be improved. The minutes attached to this answer showing action of the board of di-

rectors at meetings held in October and November, 1916, are voluminous. They show, among other things, approval of a purchase of property in the city of New York, costing \$560,052.40. They show discussion of plans regarding a building to be erected on such property, and deferred action. They show that various purchases of property made during the year 1916, from May to August, in Chicago, Detroit, Kansas City, New Jersey, Cleveland, Ohio, Iowa, costing upwards of \$900,000, were ratified, and an assembly plant ordered to be constructed at Des Moines, Iowa, at approximately the cost of \$420,000. The minutes of the meeting of the board of directors, held November 2, 1916, after providing for the purchase of certain lands adjacent to the plant of the defendant company, contain the following:

Whereas, the officers have proceeded with the preparations for the increase of the plant and have started the erection of some of the buildings to that end, and having incurred expenditures in connection therewith, the details of which have been laid before the board and duly considered, together with approximate estimates of the total cost of such extensions with explanations by the officers and engineers of this company, and which approximate estimates so submitted by the officers and engineers are as follows:

|  |                |
|--|----------------|
| Manufacturing building, 4-story, 800x600 .....             | \$3,000,000.00 |
| Manufacturing building equipment (jigs and fixtures) ..... | 3,000,000.00   |
| Building "A" extension ....                                | 300,000.00     |
| Building "A" tools and fixtures .....                      | 700,000.00     |
| Power plant extension and equipment .....                  | 1,000,000.00   |
| Addition to office building ..                             | 220,000.00     |
| Body plant building .....                                  | 800,000.00     |
| Dry kilns, etc. ....                                       | 125,000.00     |
| Body plant equipment .....                                 | 500,000.00     |
| Oakland avenue viaduct (300,000) F. M. Co.'s share ..      | 150,000.00     |
| John R street viaduct (200,000) F. M. Co.'s share ...      | 100,000.00     |
| Total .....  | \$9,895,000.00 |

Now, therefore, resolved that the proceedings and action heretofore taken and the expenditures made in the works aforesaid be hereby ratified and confirmed; and further resolved, that the officers are authorized to proceed with such plans for building extensions, purchase of equipment, tools, and fixtures as in their judgment most advantageous and economical for this company, as follows, viz.:

|   |                |
|---|----------------|
| Equipment, jigs and fixtures  | \$3,000,000.00 |
| Completion of building "A" extension .....  | 300,000.00     |
| Building "A" tools and fixtures .....   | 700,000.00     |
| Power plant extension and equipment .....   | 1,000,000.00   |
| And the officers are empowered to co-operate in the construction of the Oakland avenue viaduct on the most advantageous terms practicable for this company—estimated .... | \$150,000.00   |

With respect to the manufacturing building, four-story, 800x600, the body plant building, dry kilns, body plant equipment, the addition to office building and the John R street viaduct, resolved that consideration thereof be deferred until a later date.

And, with respect to certain new operations, contain the following:

The adoption of the following resolution was moved by Mr. Couzens and supported by Mr. Rackham:

Whereas this company has for some time past been making preparations looking to the manufacture of its own iron and the erection of a manufacturing plant on lands to be acquired from Mr. Henry Ford at the River Rouge, Wayne county, Michigan, for that purpose, and whereas approximate estimates have been submitted by the company's engineers for such work as follows:

|  |                 |
|--|-----------------|
| Two (2) 500-ton blast furnaces, stoves, blowing engines, ore and stock bins and ore handling equipment ..... | \$4,500,000.00  |
| Ore dock and river dock front .....  | 1,000,000.00    |
| Turning basin, canal dredging, etc. ....   | 250,000.00      |
| 1,000-ton by-product coke oven plant, with necessary benzol plant .....                                      | 2,000,000.00    |
| Power plant .....  | 1,500,000.00    |
| Foundry buildings .....  | 550,000.00      |
| Foundry equipment .....  | 250,000.00      |
| Malleable foundry .....  | 500,000.00      |
| Malleable foundry equipment .....  | 150,000.00      |
| Office building .....  | 150,000.00      |
| Office building equipment .....  | 25,000.00       |
| Track and transportation equipment .....   | 250,000.00      |
| Miscellaneous buildings ....   | 200,000.00      |
| Total .....  | \$11,325,000.00 |

And whereas, certain steps have been taken by the management preliminary to such work, including the hiring of an engineer, preparation of plans, etc.

Now, therefore, resolved that the undertaking aforesaid be proceeded with, that the action heretofore taken in that behalf be ratified and confirmed, and the officers and management are authorized to go forward with said works as in their judgment may be most advantageous and economical to this company and they are authorized to execute and carry out necessary contracts in connection with such work and make all payments required in the course thereof.

And resolved, that this company purchase of Henry Ford for the purposes aforesaid the following described lands, viz.:—Lands in Springwells township, Wayne county, Michigan, described as follows: Bounded on the north by the Michigan Central Railroad, bounded on the east by the Pere Marquette Railroad, on the south by Dix avenue and River Rouge, and on the west by a line approximately 50 feet west of the east line of P. C. 29 extended to the River Rouge—at the cost thereof to Mr. Ford with interest at the rate of 6 per cent per annum, approximately \$700,000, and the officers are instructed to

accept conveyances from Mr. Ford and to pay the price stated upon transfer being completed, and

Resolved further, that the expense of turning basin and dredging of the canal, as shown upon the plans of the engineers, half of such canal being upon the lands of Mr. Ford and half upon the lands of this company, be borne equally by this company and by Mr. Ford, and that the management be authorized to proceed with such work and make the necessary arrangements to divide the expense.

Carried unanimously.

A further resolution was offered to build a building on property owned by the company in New York city for offices and salesroom, and to lease the balance of the building for hotel purposes; the building to cost approximately \$740,000. At the directors' meeting held November 8, 1916, a dividend of 100 per cent on the capital stock was ordered paid, and the resolution with respect to the hotel building in New York city carried. At a meeting of directors held November 13, 1916, the following resolution was unanimously adopted: "It was moved, supported and unanimously carried that in view of written reports of Engineers Mayo and Kennedy (hereto attached) and the oral report of the president of the company, that, all things considered, it seems more desirable to locate the proposed blast furnaces, steel plant, and other extensions on the location on River Rouge, rather than on the Detroit river, and that the officers of the company are authorized and are hereby authorized to proceed with the preparations for such extensions and acquiring of the land as originally passed at the directors' meeting of November 2, 1916, but that no new contracts be entered into until the injunction against the directors has been disposed of."

The answer of Henry Ford is a repetition in many respects of the matter contained in the answer of the Ford Motor Company. He de-

nies that he has declared it to be the settled policy of the company not to pay any special dividends, but to put back into the business for the future all the earnings of the company other than the regular dividends of 5 per cent monthly. He denies that he made a declaration as to his future policy as controlling stockholder in fixing the policy for the management of the corporation. He admits that he used the language substantially set out in the 13th paragraph of the bill, hereinbefore set out, and he does not deny, but admits, that his ambition is as therein stated, but that his action as a director will be controlled by future conditions, and with due respect to the interests of all concerned. He declares that he has been and always is open to argument and conviction as to what is best and what is right in the conduct of the affairs of the Ford Motor Company. He denies that he stated personally to plaintiffs in substance that as all of the stockholders had received back in dividends more than they had invested they were not entitled to receive anything additional to the regular dividend of 5 per cent per month, and that it was not his policy to have larger dividends declared in the future, and that the proceeds and earnings of the company would be put back into the business, etc. He denies the allegations of the 16th subdivision of the bill, and specifically, "defendant denies that he has declared it to be his purpose to invest millions of dollars of the company's money in the purchase of iron ore mines anywhere, or to acquire by purchase or have built ships for the purpose of transporting ore. He admits that he caused an investigation to be made relative to obtaining the necessary ore for the proposed blast furnaces herein-after referred to, but upon having such investigation made several months ago he found that there was abundant competition in the iron ore market, and that it was wholly unnecessary and undesirable to acquire ore in any other way than by

purchase, and therefore all thought in that direction was abandoned. The same is true with respect to the acquisition of ships for the transportation of ore. This defendant says that the Ford Motor Company has for more than a year past been laying plans publicly and openly for the building of blast furnaces, stoves, blowing engines, coke ovens, foundry buildings and equipment, malleable foundries and equipment and the necessary accompaniments therefor, for the purpose of producing the iron used in the construction of the cars of the Ford Motor Company. That some contracts have been entered into by the company to that end, and some substantial amounts paid out upon the preliminary work. He shows that such blast furnaces and the works above described will be for the great benefit and advantage of the company, not only in the direct saving of cost of iron parts, but in the improvement of the quality thereof. He further shows that the present plans do not contemplate the manufacture of steel, but that in the future it is hoped to be able to produce at comparatively small increased expense the steel required by the Ford Motor Company in the manufacture of its cars. This defendant denies absolutely the allegation of the 16th subdivision that by the means stated in said subdivision 16, or in any other way, that this defendant proposed to deprive the stockholders of the company of the fair and reasonable return upon their investments."

He answers the charges in the bill respecting attempts on the part of plaintiffs to have an interview with him, explaining why a desired interview did not take place, says he supposed that the proposed interview related to a desire on the part of plaintiffs to sell their stock in the Ford Motor Company to him, as they had previously attempted to do. He admits the receipt of letters referred to in the bill of complaint. He admits that the letter of October 11th, written by the plaintiffs, was

not answered until on or about November 3d, but he denies that in the meantime he continued to carry out plans to disburse the cash of the company so that there would not be funds available for declaring dividends.

The 25th paragraph of the answer is as follows: "(25) This defendant denies that he forced upon the board of directors his policy of reducing the price of such cars by \$80 per car, and says that the action of the board was unanimous thereon after careful consideration. This defendant admits that it was decided to increase the output of the company, and admits that the company is engaged in practically duplicating the plant at Highland Park. He shows that the plans therefor have been under discussion and have been adopted for practically a year past, and that the entire organization has been working to that end. He shows that most of the lands necessary for such expansion for the Highland Park plant were acquired nearly a year ago. That the plans had been made public as early as last December, and upon information and belief he shows that the plaintiffs knew all about it, and that they never made any complaint with respect to it until the time of filing the bill herein, unless the letters referred to in the bill, written by the plaintiffs, could be said to be such complaint. This defendant shows that it has been the practice of the Ford Motor Company, for the past eight or ten years, to cut the price of the car annually and to increase the output. That such policy has been productive of great prosperity to the company and to its stockholders. That what was done in that regard on the 1st of August, 1916, was strictly in pursuance of the regular policy of the company. That this policy of cutting the price was not carried out on the 1st of August, 1915, because in the counsels of the company, among its active managers, it was, after full discussion, decided that the proposed expansion and buildings were

necessary to the continued success of the company, and that it would be wiser and better not to cut the price during the fiscal year ending July 31, 1916, in order that a considerable additional fund might be accumulated for the very purpose of building the extensions and making the improvements that are now being complained of by the plaintiffs. This policy so adopted for the fiscal year ending July 31, 1916, was thoroughly understood by all the directors and active members of the management, and, as this defendant is informed and believes, by all of the stockholders, including the plaintiffs. Original price of the touring car which is now sold at \$360 was upwards of \$900, being substantially the same car, although it has been greatly improved in many respects since the time when it was sold at \$900 and upwards. The cuts in the price have been made substantially every year, except for the fiscal year ending July 31, 1916. This defendant has every reason to believe that the action of the board of directors in reducing the price for the current year was very wise, and this defendant denies that it was adopted for any reason except the permanent good of the company. This defendant admits that construction is now under way and has been for months past in increasing and practically duplicating the size of the plant at Highland Park. Much of the machinery for such expansion has heretofore been ordered, the exact particulars of which will be furnished to the court. This defendant was not present at the meeting of the board of November 2d. He is informed that the reason why the appropriation for the large building referred to in the estimate was not passed was that construction could not commence until the opening of spring. Building A extension is now approaching completion. The Ford Motor Company is now far behind its orders. The expansion is absolutely essential for the continued prosperity and success of the corporation. There is a great demand

for Ford trucks, but the manufacturing department of the company has been unable to supply the demand, and is now utterly unable to meet the demand. It is estimated by the manufacturing department that it cannot turn out to exceed ten thousand trucks this year, whereas it is the estimate of the sales department that one hundred thousand could be sold if they could be turned out."

Paragraph 27 of the answer reads: "(27) This defendant denies that proposed expansion is reckless or that it threatens to jeopardize the interest of the plaintiff, but shows that the same is strictly in accordance with the best interests of the company and its stockholders, and strictly in pursuance of the past policy of the company. That the proposed expansion and extension are practical, feasible, and have only been decided upon after the most careful investigation and advice of experts of the highest obtainable capacity."

Paragraph 36 reads: "(36) Further answering, this defendant shows that personally he has always been in favor of maintaining very large cash balances; that he has always been opposed to borrowing money, and that he has urged the policy of paying cash for extensions and expansions and other expenses; that he has often in the past yielded his better judgment in the extent of dividends to be paid after discussion with other members of the board; that some of the large dividends paid have been against this defendant's better judgment, but after discussing it he has yielded his judgment to the other members of the board, who at the present time are practically the same as during all the past successful years of the corporation, although Mr. John F. Dodge, who was a member for a number of years; retired on or about the 18th day of August, 1913. This defendant shows that he has no fixed and unalterable views on the subject of dividends, but is always ready and willing to discuss with

other members of the board what seems to be right under the circumstances. Inasmuch as the company was contemplating the entering upon large enterprises of expansion involving large amounts of cash, this defendant has insisted upon great caution in the matter of dividends, particularly in view of the conditions of business throughout the world. This defendant shows that the expenditures of the Ford Motor Company from day to day are very great, and its requirements of cash are enormous. He shows that if, by any chance, there should be a sudden falling off of business or collapse of business, that it would require great sums of money to carry on the business of the company, and his idea is to be well fortified against emergencies. This defendant is opposed to any policy which would necessitate the discharge of large number of employees in case there should be a sudden depression of business, if there be any way to avoid it, and this defendant believes that the latter methods and policies ultimately redound to the best financial interests of the company and its stockholders. This defendant is not in favor of paying out in dividends the surplus of the company to the danger point, or any point where it could be regarded as risky in the least degree. This defendant further shows that he is not in favor of keeping up the price of the car to the highest possible point that the public will apparently stand for the time being, but he is in favor of the policy of reducing the price of the car from time to time, as the safety and welfare of the company and stockholders will dictate, since he believes such to be a better permanent policy for the company. Such always has been the policy adopted in the past, and he believes that such has been one of the causes of the unexampled success of the company."

Defendants Klingensmith and Rackham also answered the bill, their answers being generally in ac-

cord with those of the Ford Motor Company and Mr. Ford.

All of the answers had been filed on November 28th, and were used in a showing, in opposition to plaintiffs' application for an injunction, an order to show cause and a restraining order having been made November 2d. The motion for injunction came on to be heard November 29th, in the circuit court for the county of Wayne, in chancery, three circuit judges sitting. An opinion upon the application for a temporary injunction was filed December 9, 1916. The conclusions of two of said judges are expressed in the following excerpt from the opinion:

"We are of the opinion that the expansion of the business, by way of the establishment of a smelting plant at the River Rouge, should be restrained, pending an early hearing upon the question of whether the diverting of accumulated cash profits to that end is an abuse of discretion on the part of the directors. This involves a mixed question of fact and law, and we feel that the allegations of the bill, and the showing in support thereof, make this a question to be decided only on a hearing upon the merits, and therefore matters should stand as they are, pending such hearing."

"Considering the importance of the questions involved, we feel there should be a hearing on the merits within sixty days. Let an injunction issue, restraining defendants from using accumulated cash profits on hand for the establishment of a smelting plant."

The third judge concurred in granting the injunction, but refused to concur in the conclusion that the defendant corporation could lawfully engage in the smelting business. An order having been entered in the circuit court in accordance with the opinion, application was made to the supreme court for a writ of mandamus to vacate and set aside said order. Upon that application, it appearing that considerable contracts had been made, that loss

would attend an interruption of the carrying out of plans, and that Mr. Ford and others had offered to indemnify the company and plaintiffs, an alternative order was issued, whereupon the order for temporary injunction was modified in such way as to permit the use of the accumulated cash profits of the Ford Motor Company, not exceeding \$10,000,000, for the establishment of a smelting plant during the pendency of this suit and until the further order of the court, upon condition that a bond in the sum of \$10,000,000, conditioned to refund to the Ford Motor Company all money so used, be given, and also conditioned that such obligation may be enforced against such defendants by the final decree herein, or by supplemental proceedings in this cause. Thereupon Messrs. Ford, Rackham, and Klingensmith made their writing obligatory in accordance with said order, and the bond was approved January 6, 1917.

The cause came on for hearing in open court on the 21st of May, 1917. A large volume of testimony was taken, with the result that a decree was entered December 5, 1917, in and by which it is decreed that within thirty days from the entry thereof the directors of the Ford Motor Company declare a dividend upon all of the shares of stock in an amount equivalent to one half of, and payable out of, the accumulated cash surplus of said Ford Motor Company, on hand at the close of the fiscal year ending July 31, 1916, less the aggregate amount of the special dividends declared and paid after the filing of the bill and during the year ending July 31, 1917; the amount to be declared being \$19,275,385.96. It was further decreed:

"Third. The owning, holding, or operating by the defendant Ford Motor Company of, and the using or appropriating or incurring obligations which might require or necessitate the using or appropriating of any funds or other property of said defendant Ford Motor Company for, a smelting plant or blast fur-



nace or furnaces of the kind or character which the proofs adduced herein show to be contemplated and now in course of construction on or near the River Rouge, and of any lands, buildings, machinery, or equipment therefor, and other incident thereof, is without authority of law, and is permanently and absolutely restrained and enjoined.

"Fourth. The increase of the fixed capital assets of the defendant Ford Motor Company, beyond those at the date of the entry hereof owned and held by the said corporation, is without authority of law, and is permanently and absolutely restrained and enjoined. The date of the entry hereof is taken, instead of the date of the objections raised by plaintiffs to any such increase, at the suggestion of plaintiffs, so that said corporation shall not be in any wise embarrassed through the wrongful acts of the individual defendants. The said fixed capital assets so owned and held at the date of the entry hereof shall be deemed to include such further investment as may be necessary to complete or to complement the same so as to be properly usable in the conduct of the regular business of the said corporation. The said fixed capital assets shall be deemed to be exclusive of those of the kind or character contemplated in the next preceding paragraph hereof.

"The holding of liquid assets (including accumulations of and from the earnings and profits of regular business operations from time to time) by the defendant Ford Motor Company, in excess of such as may be reasonably required in the proper conduct and carrying on of the business and operations of said corporation in connection with, and by the use of, the fixed capital assets, limited as aforesaid, is likewise without authority of law, and is permanently and absolutely restrained and enjoined, and said defendant corporation and its board of directors, the individual defendants herein and their respective successors in office, are directed and com-

manded to declare and distribute, as dividends to the stockholders, any such excess which may now exist or may accrue from time to time hereafter. The term, 'liquid assets,' as used herein, shall be deemed to include all assets other than fixed capital assets within the meaning generally understood in business of said last-mentioned term.

"The intent and purpose of this subdivision 'fourth' of this decree is to fix a maximum limit for the aggregate assets of the defendant Ford Motor Company, and, if it be practicable to increase either class (fixed or liquid) of assets out of the other without affecting the aggregate, such increase shall be proper—the limit in this subdivision stated for each class having been adopted as the most convenient manner of stating the limit of the aggregate."

The defendants Ford, Rackham, and Klingensmith are ordered to account for any and all sums used since the filing of the bill in and about the establishment of a smelting plant, and within thirty days after the accounting is completed to pay to the Ford Motor Company, in pursuance of the obligation of the undertaking executed by them, the amount by such accounting found and determined to have been in fact paid out in and about the work aforesaid, and to discharge all liabilities incurred in that behalf, taking from the Ford Motor Company conveyance and transfer of any and all property purchased and acquired in the establishment of said plant. Dates are fixed for the payment of the special dividend ordered to be made, and plaintiffs are awarded their costs.

It should be stated that as to the defendants, James Couzens and David Gray, the bill of complaint was taken as confessed.

The limited dividend ordered is fixed with reference to the written demand of plaintiffs for the distribution of 50 per cent of the cash.

Defendants have appealed, plaintiffs have not appealed, from the decree. In the briefs, appellants

state and discuss the following propositions:

"(1) The claim of plaintiffs' counsel that a manufacturing corporation in Michigan may not have more than \$25,000,000 (now \$50,000,000) of capital assets, is without merit.

"(2) Monopoly. There is nothing in the Anti-trust Laws which affects this case. Mere bigness of a corporation is not unlawful.

"(3) It is lawful for the Ford Motor Company to build blast furnaces at the Rouge.

"(a) No claim in this regard is made by plaintiffs in the bill of complaint.

"(b) The plaintiffs are estopped by their conduct to raise the question.

"(c) The work is not ultra vires the corporation.

"(4) The management of the corporation and its affairs rests in the board of directors, and no court will interfere or substitute its judgment so long as the proposed actions are not ultra vires or fraudulent. They may be ill advised, in the opinion of the court, but this is no ground for exercise of jurisdiction.

"(5) The board has full power over the matter of investing the surplus and as to dividends, so long as they act in good faith.

"(6) Such rights of management and control over investments and dividends are not only rules of law, they are rights fixed by the contract between the parties in the formation of the corporation.

"(7) These things are so, although the majority of the stock is held by one man.

"It is the right and the duty of the majority to control. This duty must be exercised, and the responsibility cannot be shifted or evaded.

"(8) Motives of the board members are not material and will not be inquired into by the court, so long as the acts are within their lawful powers.

"(9) Motives of a humanitarian character will not invalidate or form the basis of any relief so long as the acts are within the lawful

powers of the board, if believed to be for the permanent welfare of the company.

"(10) The court will not entertain a bill to enforce unconscionable demands, no matter what the legal rights of plaintiffs may be."

In the brief for plaintiffs, the grounds for relief are stated as follows:

"(1) The proposed scheme of expansion is not for the financial advantage of the corporation, either mediate or immediate, and is not to be prosecuted with that intent, but for the purpose of increasing the number of employees and of the cars produced, to the end of giving employment and low-priced cars to a greater number of people.

"(These are ends worthy in themselves but not within the scope of an ordinary business corporation—ends which, if prosecuted, should be by individuals associated for such purposes).

"(2) If the proposed scheme of expansion were for the proper and legitimate uses and needs of the corporation, and a cash surplus equivalent to that accumulated and now on hand were necessary for the business of the corporation, nevertheless, a proper dividend ought to be required to be declared and paid out of such accumulated cash surplus, because the only reason there would not be ample cash on hand for all purposes, including proper dividends, is that the price of the cars, and of the parts therefor, has been arbitrarily fixed at a figure which it is intended shall not produce a net profit sufficient to fulfil all those requirements, including the payment of proper dividends, and the requiring of the payment of dividends will force, and it is the only way by which can be forced, the fixing of prices which will produce the requisite amount of net profits.

"(The whole scheme is to bring about such a relation of wages, revenue, and cash requirements of the business as to preclude dividends of a reasonable return upon the fair value of the capital stock.)

"(3) The relation, irrespective of any limitation imposed by statute, between the authorized capital stock of the Ford Motor Company, \$2,000,000, and the accumulated surplus (outside of cash on hand and municipal bonds in which some of the same has been temporarily invested), \$58,000,000, is such as in and of itself requires the prevention of the further conversion of accumulated cash surplus from current earnings into capital investment against the objection of any stockholder.

"(4) A smelting plant for the manufacture from the ore of iron for use in the manufacture of automobiles is not within the power of a corporation organized under Act 232 of the Public Acts of 1903.

"(5) The capital stock of a corporation organized under Act 232 of the Public Acts of 1903 is limited to \$25,000,000, and as defendant corporation has now, as shown by the financial statement, an actual capital investment (outside of cash on hand and municipal bonds in which some of the same has been temporarily invested) of \$60,000,000, the conversion of the accumulated cash surplus from current earnings into capital investment by the enlargement of the plant and facilities for the manufacture and sale of automobiles is within the inhibition of the statutory limitation."

Messrs. Lucking, Helfman, Lucking, & Hanlon, Alexis C. Angell, L. B. Robertson, H. H. Rackham, and Hubert B. Hartman, for appellants:

A limitation upon the amount of capital stock is in no sense a limitation upon the amount of property.

1 Cook, Corp. § 8; Wells v. Green Bay & M. Canal Co. 90 Wis. 452, 64 N. W. 69; Wells's Estate, 156 Wis. 304, 144 N. W. 174; Barry v. Merchants Exch. Co. 1 Sandf. Ch. 280; Person & R. Co. v. Lipps, 219 Pa. 99, 67 Atl. 1081; Clark & M. Priv. Corp. p. 114, § 202; 2 Beach, Priv. Corp. §§ 446, 466; 7 Am. & Eng. Enc. Law, 719; Farrington v. Tennessee, 95 U. S. 679, 686, 24 L. ed. 558, 560; 10 Cyc. 365; State, Canfield, Prosecutor, v. Morristown Fire Asso. 23 N. J. L. 195; Wetherbee

v. Baker, 35 N. J. Eq. 505; People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 437, 12 L.R.A. 762, 27 N. E. 818; Burrall v. Bushwick R. Co. 75 N. Y. 211; Williams v. Western U. Teleg. Co. 93 N. Y. 188; Tradesman Pub. Co. v. Car Wheel Co. 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097; Markle v. Burgess, 176 Ind. 25, 95 N. E. 308.

The mere size of a business, if brought about by legitimate growth, is not against public policy.

United States v. Eastman Kodak Co. 226 Fed. 80; United States v. International Harvester Co. 214 Fed. 1000; United States v. Keystone Watch Case Co. 218 Fed. 510.

Plaintiffs could not stand by and see the corporation spend money and undertake the work in question, and thereafter, when it suited their purpose, file a bill for injunction.

McKee v. Grand Rapids, 137 Mich. 212, 100 N. W. 580; Stock v. Hillsdale, 155 Mich. 375, 119 N. W. 435; Hill v. Atlantic & N. C. R. Co. 143 N. C. 539, 9 L.R.A.(N.S.) 606, 55 S. E. 854.

A corporation has implied power to do those things necessary and helpful to the conduct of its authorized business."

Timm v. Grand Rapids Brewing Co. 160 Mich. 371, 27 L.R.A.(N.S.) 186, 125 N. W. 357; Eureka Iron & Steel Works v. Bresahan, 60 Mich. 332, 27 N. W. 524; Lyde v. Eastern Bengal R. Co. 36 Beav. 10, 55 Eng. Reprint, 1059; Brown v. Winnisimmet Co. 11 Allen, 326; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; Louisville Property Co. v. Com. 146 Ky. 827, 38 L.R.A.(N.S.) 830, 143 S. W. 412; Perkins v. Coffin, 84 Conn. 275, 79 Atl. 1070, Ann. Cas. 1912C, 1188; Ft. Worth City Co. v. Smith Bridge Co. 151 U. S. 294, 301, 38 L. ed. 167, 14 Sup. Ct. Rep. 339; Malone v. Lancaster Gaslight & Fuel Co. 182 Pa. 309, 37 Atl. 932; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; Central Trust Co. v. Columbus, H. Valley & T. R. Co. 87 Fed. 815; S. O. & C. Co. v. Ansonia Water Co. 83 Conn. 611, 78 Atl. 432; Bridgeport v. Housatonic R. Co. 15 Conn. 502; Meredith v. New Jersey Zinc & I. Co. 59 N. J. Eq. 271, 44 Atl. 55; Joy v. Jackson & M. Pl. Road Co. 11 Mich. 170; Malone v. Lancaster Gaslight & Fuel Co. 182 Pa. 309, 37 Atl. 932; State ex rel. Hadley v. Mis-

(— Mich. —, 170 N. W. 668.)

souri P. R. Co. 287 Mo. 338, 141 S. W. 643; Joseph Bancroft & Sons Co. v. Bloede, 52 L.R.A. 734, 45 C. C. A. 354, 106 Fed. 896; Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co. 78 C. C. A. 293, 148 Fed. 168; Heinz v. National Bank, 150 C. C. A. 592, 237 Fed. 950; McAdow v. Kansas City Western R. Co. 96 Kan. 423, L.R.A. 1917B, 1158, 151 Pac. 1113; United States v. Winslow, 227 U. S. 218, 57 L. ed. 485, 33 Sup. Ct. Rep. 253.

The management of the corporation and its affairs rests in the board of directors, and no court will interfere or substitute its judgment so long as the proposed actions are not ultra vires or fraudulent.

Cook, Corp. § 684; 10 Cyc. 987; Joy v. Jackson & M. Pl. Road Co. 11 Mich. 170; People ex rel. La Grange Twp. v. State Treasurer, 24 Mich. 471; Republican Mountain Silver Mines v. Brown, 24 L.R.A. 776, 7 C. C. A. 412, 19 U. S. App. 203, 58 Fed. 644; Perkins v. Coffin, 84 Conn. 275, 79 Atl. 1070, Ann. Cas. 1912C, 1188; Converse v. Hood, 149 Mass. 471, 4 L.R.A. 521, 21 N. E. 878; North American Land & Timber Co. v. Watkins, 48 C. C. A. 254, 109 Fed. 105; Ranger v. Champion Cotton-Press Co. 52 Fed. 609; Worth Mfg. Co. v. Bingham, 54 C. C. A. 119, 116 Fed. 785; Cowell v. McMillin, 100 C. C. A. 443, 177 Fed. 42; Wilson v. American Ice Co. 206 Fed. 741; Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L.R.A. 630, 25 N. E. 201.

The board of directors has full power over the matter of investing the surplus and as to dividends, so long as they act in good faith.

Gibbons v. Mahon, 136 U. S. 549, 558, 34 L. ed. 525, 527, 10 Sup. Ct. Rep. 1057; 2 Cook, Corp. § 545; Hunter v. Roberts, T. & Co. 83 Mich. 68, 47 N. W. 131; Knapp v. S. Jarvis Adams Co. 70 C. C. A. 536, 135 Fed. 1008; Marks v. American Brewing Co. 126 La. 666, 52 So. 983; Burden v. Burden, 159 N. Y. 287, 54 N. E. 17; Knight v. Alamo Mfg. Co. 190 Mich. 223, 157 N. W. 24; Trimble v. American Sugar Ref. Co. 61 N. J. Eq. 340, 48 Atl. 912; 1 Morawetz, Priv. Corp. 447; Schell v. Alston Mfg. Co. 149 Fed. 439; Blanchard v. Prudential Ins. Co. 78 N. J. Eq. 471, 79 Atl. 583, 80 N. J. Eq. 209, 83 Atl. 220; Nickals v. New York, L. E. & W. R. Co. 21 Blatchf. 177, 15 Fed. 575, 119 U. S. 296, 30 L. ed. 363, 7 Sup. Ct. Rep. 209.

Such rights of management and control over investments and dividends are not only rules of law, but are rights fixed by the contract between the parties in the formation of the corporation.

Joy v. Jackson & M. Pl. Road Co. 11 Mich. 170; Clearwater v. Meredith (Ferguson v. Meredith) 1 Wall. 25, 17 L. ed. 604; Spencer v. Seaboard Air Line R. Co. 137 N. C. 107, 1 L.R.A. (N.S.) 619, 49 S. E. 96; Perkins v. Coffin, 84 Conn. 275, 79 Atl. 1070, Ann. Cas. 1912C, 1188; Atty. Gen. ex rel. Dusenberry v. Looker, 111 Mich. 501, 58 L.R.A. 947, 69 N. W. 929; New York, L. E. & W. R. Co. v. Nickals, 119 U. S. 304, 30 L. ed. 367, 7 Sup. Ct. Rep. 209.

It is the right and duty of the majority to decide and to control. This is a responsibility which cannot be abrogated or evaded.

Cowell v. McMillin, 100 C. C. A. 443, 177 Fed. 42; Wilson v. American Ice Co. 206 Fed. 743.

Motives of the board members are not material and will not be inquired into by the court, so long as the acts are within the authority of the directors and justified by the objects for which the company was incorporated.

Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186; Republican Mountain Silver Mines v. Brown, 24 L.R.A. 776, 7 C. C. A. 412, 19 U. S. App. 203, 58 Fed. 644; American Alkali Co. v. Campbell, 113 Fed. 398.

Motives of a humanitarian character will not invalidate or form the basis of any relief, so long as the acts are within the lawful powers of the board, if believed to be for the permanent welfare of the company.

Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Taunton v. Royal Ins. Co. 2 Hem. & M. 135, 71 Eng. Reprint, 413, 33 L. J. Ch. N. S. 406, 10 Jur. N. S. 291, 10 L. T. N. S. 156, 12 Week. Rep. 549; Henderson v. Bank of Australia, L. R. 40 Ch. Div. 170, 58 L. J. Ch. N. S. 197, 59 L. T. N. S. 856, 37 Week. Rep. 382; Heinz v. National Bank, 150 C. C. A. 592, 237 Fed. 942; Steinway v. Steinway & Sons, 17 Misc. 43, 40 N. Y. Supp. 718; People ex rel. Metropolitan L. Ins. Co. v. Hotchkiss, 186 App. Div. 150, 120 N. Y. Supp. 649.

The court will not entertain a bill to enforce unconscionable demands, no matter what the strict legal rights may be.

*Interstate Sav. & L. Asso. v. Badgley*, 115 Fed. 390; *Post v. Beacon Vacuum Pump & Electrical Co.* 28 C. C. A. 431, 50 U. S. App. 271, 84 Fed. 371; *Van Nordsall v. Smith*, 141 Mich. 355, 104 N. W. 660.

*Messrs. Stevenson, Carpenter, Butzel, & Backus*, and *Thomas G. Long*, for appellees:

A court of equity may require the declaration and payment of dividends at the suit of the stockholders of a corporation.

10 Cyc. 548; 7 R. C. L. § 269; *Cook, Corp.* 7th ed. § 545; *Clark & M. Priv. Corp.* § 517f; *Thomp. Corp.* § 4509; *Morawetz, Priv. Corp.* 2d ed. § 276; *Hunter v. Roberts, T. & Co.* 83 Mich. 63, 47 N. W. 131; *Miner v. Belle Isle Ice Co.* 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218; *Pratt v. Pratt*, 33 Conn. 446; *Hiscock v. Lacy*, 9 Misc. 578, 80 N. Y. Supp. 860; *Wilson v. American Ice Co.* 206 Fed. 736; *Storow v. Texas Consol. Compress & Mfg. Asso.* 31 C. C. A. 139, 59 U. S. App. 120, 87 Fed. 612; *Re Brantman*, 156 C. C. A. 529, 244 Fed. 101.

The relation between the authorized capital stock of the Ford Motor Company and the actual fixed capital investment of the company is such that further conversion of current earnings into fixed capital may not be made against the objection of any stockholder.

*Morawetz, Priv. Corp.* 2d ed. § 447; *Pratt v. Pratt*, 33 Conn. 446; *Wilson v. American Ice Co.* 206 Fed. 736.

A stockholder has the right to complain, assuming the corporation is exceeding its powers.

*Clark & M. Priv. Corp.* § 300; 3 *Thomp. Corp.* § 2846; *Victor v. Louise Cotton Mills*, 148 N. C. 107, 16 L.R.A. (N.S.) 1020, 61 S. E. 648, 16 Ann. Cas. 291; *Mills v. Central R. Co.* 41 N. J. Eq. 1, 2 Atl. 453; *Byrne v. Schuyler Electric Mfg. Co.* 65 Conn. 336, 28 L.R.A. 304, 31 Atl. 833; *Day v. Spiral Springs Buggy Co.* 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; *C. H. Little Co. v. Woodward Ave. Cemetery Asso.* 135 Mich. 248, 97 N. W. 682; *Pere Marquette R. Co. v. Graham*, 136 Mich. 445, 99 N. W. 408.

Corporations created under general laws providing for articles of association have powers "simply such as the statute confers, and the enumeration of them implies exclusion of all others."

*Thomas v. West Jersey R. Co.* 101

U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis, A. & T. R. Co.* 118 U. S. 290, 30 L. ed. 888, 6 Sup. Ct. Rep. 1094; *People v. Gansley*, 191 Mich. 357, 158 N. W. 195, Ann. Cas. 1918E, 165; *American Teleph. & Tel. Co. v. Secretary of State*, 159 Mich. 196, 123 N. W. 568; *American Automobile Ins. Co. v. Insurance Comrs.* 174 Mich. 295, 140 N. W. 557.

The defendant corporation had no implied powers.

*Atty. Gen. v. Oakland County Bank, Walk. Ch. (Mich.)* 90; *Michigan Bank v. Niles*, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575; *People ex rel. Atty. Gen. v. River Raisin & L. E. R. Co.* 12 Mich. 390, 86 Am. Dec. 64; *Thomp. Corp.* § 2770; *Day v. Spiral Springs Buggy Co.* 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; *Teele v. Rockport Granite Co.* 224 Mass. 20, 112 N. E. 497; *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 166, 38 N. E. 990; *Gause v. Commonwealth Trust Co.* 196 N. Y. 134, 24 L.R.A. (N.S.) 967, 89 N. E. 476; *Nicollet Nat. Bank v. Frisk-Turner Co.* 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160; *Fifth Ave. Coach Co. v. New York*, 58 Misc. 401, 111 N. Y. Supp. 759; *National Car Advertising Co. v. Louisville & N. R. Co.* 110 Va. 413, 24 L.R.A. (N.S.) 1010, 66 S. E. 88; *Hartford & N. H. R. Co. v. Crosswell*, 5 Hill, 383, 40 Am. Dec. 354; *Marietta & C. R. Co. v. Elliott*, 10 Ohio St. 57; *Pearce v. Madison & I. R. Co.* 21 How. 441, 16 L. ed. 184; *People ex rel. Moloney v. Pullman's Palace Car Co.* 175 Ill. 125, 64 L.R.A. 366, 51 N. E. 664; *People ex rel. Healy v. Illinois C. R. Co.* 233 Ill. 378, 16 L.R.A. (N.S.) 604, 122 Am. St. Rep. 181, 84 N. E. 368, 18 Ann. Cas. 285; *Calumet & C. Canal & Dock Co. v. Conkling*, 273 Ill. 318, L.R.A. 1917B, 814, 112 N. E. 982; *Consumers' Gas Trust Co. v. Quinby*, 70 C. C. A. 220, 137 Fed. 882; *Downing v. Mt. Washington Road Co.* 40 N. H. 230; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221; *Western Maryland R. Co. v. Blue Ridge Hotel Co.* 102 Md. 307, 2 L.R.A. (N.S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351; *Northside R. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055; *Zurn v. Mitchell*, — Tex. Civ. App. —, 196 S. W. 544; *Byrne v. Schuyler Electric Mfg. Co.* 65 Conn. 336, 28 L.R.A. 304, 31 Atl. 833; *Central R. Co. v. Collins*, 40 Ga. 582; *Central Life Securities Co. v. Smith*, 149 C. C. A. 360, 236 Fed. 170.

The statutory limitation upon capital stock is a limitation upon the amount of property the corporation may have.

Machen, Corp. § 497; Stamford Trust Co. v. Yale & T. Mfg. Co. 83 Conn. 43, 75 Atl. 90; Markle v. Burgess, 176 Ind. 25, 95 N. E. 308; New Haven v. City Bank, 31 Conn. 109; People ex rel. Bank of Commonwealth v. Tax & A. Comrs. 23 N. Y. 192; Indianapolis & St. L. R. Co. v. Vance, 96 U. S. 450, 455, 24 L. ed. 752, 755; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Wilmington Underwriters Ins. Co. v. Stedman, 130 N. C. 221, 41 S. E. 279; Judy v. Beckwith, 137 Iowa, 24, 15 L.R.A.(N.S.) 142, 114 N. W. 565, 15 Ann. Cas. 890; Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 N. E. 205; Com. v. New York, P. & O. R. Co. 188 Pa. 169, 41 Atl. 594; Smith v. Dana, 77 Conn. 543, 69 L.R.A. 76, 107 Am. St. Rep. 51, 60 Atl. 117.

The results of monopoly are the same, whether it be a monopoly in contemplation of law only, or a virtual or purely economic monopoly.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 784; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; United States v. Eastman Kodak Co. 226 Fed. 62; Patterson v. United States, 138 C. C. A. 123, 222 Fed. 599; Richardson v. Buhl, 77 Mich. 632, 6 L.R.A. 457, 48 N. W. 1102.

Ostrander, Ch. J., delivered the opinion of the court:

The authorized capital stock of the defendant company is \$2,000,000. Its capital, in July, 1916, invested in some form of property, including accounts receivable, was \$78,278,418.65, and, less liabilities other than capital stock, was more than \$60,000,000. Besides this, it had and was using as capital nearly \$54,000,000 in cash or the equivalent of cash. It is contended by plaintiffs that because the statute has prescribed that the total authorized capital stock shall be not less than \$1,000, and not more than \$25,000,000 (now \$50,000,000), the capital of any corporation organized under the act may not lawfully ex-

ceed \$25,000,000 (now \$50,000,000). In the argument presented by them the term "capital" is used as meaning "the aggregate of the sums subscribed and paid in or secured to be paid in by the shareholders, with the addition of all gains or profits realized in the use and investment of those sums; or, if losses have been incurred, then it is the residue after deducting such losses."

Pointing out that the shares of stock are at all times representative of the capital, whatever it may be, it is said that the learned trial judge decided that "it was the legislative intent to prohibit a corporation having a capital in excess of the maximum limitation, whether that excess was acquired by contributions from stockholders or from profits on those contributions."

And, in the judgment of counsel for plaintiffs, the essence of the reasoning employed by the trial judge may be and is stated by them in this language: "Looking at the statute, the history of the times, and the constitutional provision respecting corporations, it appears that the limitation in question was put in the statute because it was believed that mischief would result unless a restriction was placed upon corporate capital; that it was the intent of the statute to prevent this mischief; that to permit corporations to increase their capital, at pleasure, from undivided profits, would frustrate that intent and give to old corporations powers, rights, and privileges which were not given to new corporations, and thus make corporations unequal before the law, contrary to the intent of the provision in our Constitution respecting corporations, to place them all on a basis of equality."

It was the opinion of the three judges to whom was presented the application for a temporary restraining order that the statute, in the language referred to, does not limit the amount of capital—that portion of the assets of a corporation, regardless of their source, utilized for the conduct of the corpo-

rate business for the purpose of deriving gains and profits—which a corporation organized under the act may lawfully possess.

The term, "capital stock," in its primary sense, means the fund, property, or other

**Definition—  
capital stock.**

means contributed or agreed to be contributed by shareholders as the financial basis for the prosecution of the business of the corporation, being made directly through stock subscriptions or indirectly through the declaration of stock dividends. The capital stock of a corporation is always representative of the net assets of the corporation, whatever they may be, and so a share of stock may be worth more or less than its par value, because it is representative of an aliquot part of the net assets of the corporation. The section of the statute with which we are dealing relates to the organization of corporations, and, plainly, it is the legislative intent that no more than \$50,000,000 of capital shall be, in the first instance, aggregated and embarked in business under this law. It has been the policy of the state, unlike that of most of the states, to limit the aggregate of capital which, in the first instance, may be employed in corporate enterprises; but the history of legislation is not evidence of a continuing state policy which limits the capital assets of corporations. Act No. 41, Public Acts of 1853, authorized the formation of manufacturing corporations. It contained the provision: "The amount of the capital stock in every such corporation shall be fixed and limited by the stockholders in their articles of association, and shall, in no case, be less than ten thousand dollars, nor more than five hundred thousand dollars, and shall be divided into shares of twenty-five dollars each. The capital stock may be increased, and the number of shares, at any meeting of the stockholders called for that purpose: Provided, that the amount so increased shall not, with the existing capital, exceed five hundred thousand dollars."

In 1875, Act No. 89, this law was amended. As to corporations engaged in mining or manufacturing iron, steel, silver, lumber, or copper, the maximum limit of capital stock was fixed at \$2,500,000, as to any other manufacturing corporation the limit was \$500,000, and it was expressly subject to these limitations that the capital stock was permitted to be increased. At the same session, Act No. 187 was passed for the incorporation of manufacturing companies. The minimum limit of capital stock was fixed at \$10,000, which might be increased by stockholders; the maximum limit being \$2,500,000. In 1881, Act No. 257, the maximum was increased to \$5,000,000. Act No. 232 of the Public Acts of 1885 was a revision of laws for incorporating manufacturing companies. By its terms the articles of incorporation were required to state the amount of capital stock, not less than \$5,000 or more than \$5,000,000, except that corporations for manufacturing cheese or other products of milk might have not less than \$1,000 capital stock. The express terms are that, subject to these limitations, the capital stock may be increased or diminished, etc. In argument, significance is attached to the language employed in the Act of 1853, authorizing an increase of capital stock, but providing that the amount of the increase, "with the existing capital," shall not exceed the maximum of \$500,000. Significance is also attached to the language in the amending acts, which permit an increase of capital stock subject to the limitations as to minimum and maximum of capital stock.

Assuming that the legislature, in passing the Law of 1853, had in view the distinction between capital stock and capital, or capital assets, and intended a maximum limitation of the amount of capital, the assumption must, of course, rest upon the language employed in the law. When the legislature in the later act omitted the words upon which the assumption is based, no reason is

apparent for the conclusion that the limitation of capital was still intended. If the Act of 1853 contains evidence of a policy limiting capital assets, the Act of 1903 contains no such evidence.

There is no apparent reason for entering upon the task of interpreting or construing language which is self-interpreting, which has a clear, reasonable meaning. The same general implications are to be drawn from the phrase, "not more than," as from the phrase, "not less than." We are not called upon to find a reason for the policy of limiting the capital stock, or for the failure to also limit the value of the assets which may at any time be employed in the corporate business.

Statute—  
interpretation—  
limitation of  
capital of  
corporation.

We may assume a legislative reason, but may not assume that, because a possible reason may be

given for a further limitation, such further limitation must be implied.

The reasons given for a different interpretation of the language, reasons which introduce matter not in the statute, are inconclusive. If the claimed statute limitation exists, it is imperative. It is manifestly impracticable, if not impossible, to limit the use in its business by a corporation of any size, of its profits, to require that, when organized with the maximum amount of capital stock, all profits shall be set aside. It is conceded in argument that there must be some variation, some leeway. But, if any, how much? It may be supposed that the legislature looked with disfavor upon an initial aggregation of capital exceeding a certain amount. It cannot be supposed that it looked with disfavor upon a profitable corporate existence.

Subscriptions to capital stock may be paid for in property valued by those associating. It may be that a patent is contributed which, until exploited, has only an estimated potential value—no selling value—but, after exploitation, would sell for more than the maximum limit fixed

for capital stock. No one would contend that a \$50,000,000 manufacturing corporation could not borrow money for the purposes of its business. Of course, if it borrowed, it would owe for the money, and, as matter of bookkeeping, would not by borrowing expand its capital assets. But, in fact, at the expense of a small rate of interest, it might add \$50,000,000 to the capital actually employed in business.

Experience would not lead to the belief that any manufacturing corporation of any size would continue to embark in the enterprise such profits as competition permitted, and stockholders were willing to forego, to the public detriment. It happens that the Ford Motor Company has had an unusual, a phenomenal, experience; but this affords no reason for finding the meaning in the statute which plaintiffs insist shall be given to it. That no limit is, in terms, placed upon the value of assets—capital—which may be employed, is a circumstance supporting the conclusion that none was intended.

Corporation—  
statutory limita-  
tion of capital—  
use of profits.

Any aggregation of capital, from \$1,000 to \$50,000,000, is now permitted, invited, to be embarked in business under this statute, the corporations formed to compete among themselves, and with foreign corporations admitted to do business in this state. The purpose of any organization under the law is earnings, profit. Undistributed profits belong to the corporation, and, so far as any limitation can be found in this act, may be lawfully employed as capital. If the meaning of the law were more doubtful, it would be prudent, if not imperative, that the legislature be left to make plain what is supposed to be obscure.

There is little, if anything, in the bill of complaint which suggests the contention that the smelting of iron ore as a part of the process of manufacturing motors is, or will be, an activity ultra vires the defendant corporation. On the contrary, the



bill charges that the erection of smelters and such other buildings, machinery, and appliances as are intended to go along with the business of smelting ore, is part of a general plan of expansion of the business of defendant corporation which is in itself unwise, and which is put into operation for the purpose of absorbing profits which ought to be distributed to shareholders. Restraint is asked, not because the smelting business is ultra vires the corporation, but because the whole plan of expansion is inimical to shareholders' rights, and was formulated and will be carried out in defiance of those rights.

The gray iron parts of a Ford car weigh, in the rough, 268.90 pounds, and when finished 215.71 pounds. This iron, as now made by defendants, costs per car, at the prices of iron when the cause was tried, \$11.184. The malleable iron parts weigh, finished, per car, 69.63 pounds, and would cost \$6.757. The total cost per car of gray and malleable iron parts is less than \$18.

The smelter proposition involves, of course, much more than the initial expenditure for a plant. It involves the use of a large amount of capital to secure the finished product for the cars. Quantities of iron ore must be purchased and carried in stock; coal for the coke ovens must be purchased; the plant must be maintained. If the plant produces the necessary iron, and 800,000 cars are made in a year, something more than 270,000,000 pounds of iron ore will be produced, and if, as is claimed by Mr. Ford, the cost is reduced to the company by one half, and better iron made, a saving of \$9 or \$10 on the cost of each car will be the result. Presumably, this saving will also be reflected in the profits made from sales of parts. Ultimately, the result will be, either a considerable additional profit upon each car sold, or it will permit a reduction in the selling price of cars and parts. The process proposed to

be used has not been used commercially.

The contention that the project is ultra vires the defendant corporation appears to have been made upon the application for a preliminary restraining order, and at the hearing on the merits, as a reason for denying the right to invest instead of distributing the money which the proposed plant will cost, with no claim of surprise upon the part of defendants.

Strictly, upon the pleadings, the question of ultra vires is not for decision, and this is not seriously denied. Assuming, however, in view of the course taken at the hearing, it is proper to express an opinion upon the point, it must be said that to make castings from iron ore, rather than to make them from pig iron, as defendant is now doing, eliminating one usual process, is not beyond the power of the corporation. In its relation to the <sup>—ultra vires—  
operation of  
smelter.</sup> finished product, iron ore, an article of commerce, is not very different from lumber. It is admitted that the defendant company may not undertake to smelt ore except for its own uses. Defendant corporation is organized to manufacture motors and automobiles and their parts. To manufacture implies the use of means of manufacturing as well as the material. No good reason is perceived for saying that, as matter of power, it may not manufacture all of an automobile. In doing so, it need not rely upon the statute grant of incidental powers. Extreme cases may be put; as, for example, if it may make castings from iron ore, may it invest in mines which produce the ore, and in means for transporting the ore from mine to factory? Or, if it may make the rubber tires for cars, may it own and exploit a rubber plantation in Brazil, or elsewhere? No such case is presented, and, until presented, need not be considered.

As we regard the testimony as failing to prove any violation of

**Anti-trust Laws, or that the alleged**  
**Monopoly—** policy of the com-  
**extension of** pany, if success-  
**corporation.** fully carried out,  
 will involve a monopoly other than  
 such as accrues to a concern which  
 makes what the public demands, and  
 sells it at a price which the public  
 regards as cheap or reasonable, the  
 case for plaintiffs must rest upon  
 the claim, and the proof in support  
 of it, that the proposed expansion of  
 the business of the corporation, in-  
 volving the further use of profits as  
 capital, ought to be enjoined because  
 inimical to the best interests of the  
 company and its shareholders, and  
 upon the further claim that in any  
 event the withholding of the special  
 dividend asked for by plaintiffs is  
 arbitrary action of the directors, re-  
 quiring judicial interference.

The rule which will govern courts  
 in deciding these questions is not in  
 dispute. It is, of course, differently  
 phrased by judges and by authors,  
 and, as the phrasing in a particular  
 instance may seem to lean for or  
 against the exercise of the right of  
 judicial interference with the ac-  
 tions of corporate directors, the  
 context, or the facts before the  
 court, must be considered. This  
 court, in *Hunter v. Roberts*, T. &  
 Co. 83 Mich. 63, 71, 47 N. W. 184,  
 recognized the rule in the following  
 language: "It is a well-recognized  
 principle of law that the directors of  
 a corporation, and they alone, have  
 the power to declare a dividend of  
 the earnings of the corporation, and  
 to determine its amount. 5 Am. &  
 Eng. Enc. Law, 725. Courts of  
 equity will not interfere in the man-  
 agement of the directors, unless it is  
 clearly made to appear that they are  
 guilty of fraud or misappropriation  
 of the corporate funds, or refuse to  
 declare a dividend when the corpo-  
 ration has a surplus of net profits  
 which it can, without detriment to  
 its business, divide among its stock-  
 holders, and when a refusal to do so  
 would amount to such an abuse of  
 discretion as would constitute a  
 fraud, or breach of that good faith

which they are bound to exercise  
 towards the stockholders."

In 2 Cook on Corporations, 7th  
 ed. § 545, it is expressed as follows:

"The board of directors declare  
 the dividends, and it is for the di-  
 rectors, and not the stockholders, to  
 determine whether or not a divi-  
 dend shall be declared.

"When, therefore, the directors  
 have exercised this discretion and  
 refused to declare a dividend, there  
 will be no interference by the courts  
 with their decision, unless they are  
 guilty of a wilful abuse of their  
 discretionary powers, or of bad  
 faith, or of a neglect of duty. It re-  
 quires a very strong case to induce  
 a court of equity to order the di-  
 rectors to declare a dividend, in as  
 much as equity has no jurisdiction  
 unless fraud or a breach of trust is  
 involved. There have been many  
 attempts to sustain such a suit, yet,  
 although the courts do not disclaim  
 jurisdiction, they have quite uni-  
 formly refused to interfere. The  
 discretion of the directors will not  
 be interfered with by the courts,  
 unless there has been bad faith, wil-  
 ful neglect, or abuse of discretion.

"Accordingly, the directors may,  
 in the fair exercise of their discre-  
 tion, invest profits to extend and de-  
 velop the business, and a reasonable  
 use of the profits to provide addi-  
 tional facilities for the business can-  
 not be objected to or enjoined by the  
 stockholders."

In 1 Morawetz on Corporations,  
 2d ed. § 447, it is stated:

"Profits earned by a corporation  
 may be divided among its share-  
 holders, but it is not a violation of  
 the charter if they are allowed to  
 accumulate and remain invested in  
 the company's business. The man-  
 aging agents of a corporation are  
 impliedly invested with a discretion-  
 ary power with regard to the time  
 and manner of distributing its prof-  
 its. They may apply profits in pay-  
 ment of floating or funded debts, or  
 in development of the company's  
 business; and so long as they do not  
 abuse their discretionary powers, or

violate the company's charter, the courts cannot interfere.

"But it is clear that the agents of a corporation, and even the majority, cannot arbitrarily withhold profits earned by the company, or apply them to any use which is not authorized by the company's charter. The nominal capital of a company does not necessarily limit the scope of its operations; a corporation may borrow money for the purpose of enlarging its business, and in many instances it may use profits for the same purpose. But the amount of the capital contributed by the shareholders is an important element in determining the limit beyond which the company's business cannot be extended by the investment of profits. If a corporation is formed with a capital of \$100,000 in order to carry on a certain business, no one would hesitate to say that it would be a departure from the intention of the founders to withhold the profits, in order to develop the company's business, until the sum of \$500,000 had been amassed, unless the company was formed mainly for the purpose of accumulating the profits from year to year. The question in each case depends upon the use to which the capital is put, and the meaning of the company's charter. If a majority of the shareholders or the directors of a corporation wrongfully refuse to declare a dividend and distribute profits earned by the company, any shareholder feeling aggrieved may obtain relief in a court of equity.

"It may often be reasonable to withhold part of the earnings of a corporation in order to increase its surplus fund, when it would not be reasonable to withhold all the earnings for that purpose. The shareholders forming an ordinary business corporation expect to obtain the profits of their investment in the form of regular dividends. To withhold the entire profits merely to enlarge the capacity of the company's business would defeat their just expectations. After the business of a corporation has been brought to a

prosperous condition, and necessary provision has been made for future prosperity, a reasonable share of the profits should be applied in the payment of regular dividends, though a part may be reserved to increase the surplus and enlarge the business itself."

One other statement may be given from *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162 (45 N. J. Eq. 244, 19 Atl. 621): "In cases where the power of the directors of a corporation is without limitation, and free from restraint, they are at liberty to exercise a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. Their power over them is absolute, so long as they act in the exercise of their honest judgment. They may reserve of them whatever their judgment approves as necessary or judicious for repairs and improvements, and to meet contingencies, both present and prospective. And their determination in respect of these matters, if made in good faith and for honest ends, though the result may show that it was injudicious, is final, and not subject to judicial revision."

It is not necessary to multiply statements of the rule.

To develop the points now discussed, and to a considerable extent they may be developed together as a single point, it is necessary to refer with some particularity to the facts.

When plaintiffs made their complaint and demand for further dividends, the Ford Motor Company had concluded its most prosperous year of business. The demand for its cars at the price of the preceding year continued. It could make and could market in the year beginning August 1, 1916, more than 500,000 cars. Sales of parts and repairs would necessarily increase. The cost of materials was likely to advance, and perhaps the price of labor; but it reasonably might have expected a profit for the year of upwards of \$60,000,000. It had assets

of more than \$132,000,000, a surplus of almost \$112,000,000, and its cash on hand and municipal bonds were nearly \$54,000,000. Its total liabilities, including capital stock, was a little over \$20,000,000. It had declared no special dividend during the business year except the October, 1915, dividend. It had been the practice, under similar circumstances, to declare larger dividends. Considering only these facts, a refusal to declare and pay further dividends appears to be not an exercise of discretion on the part of the directors, but an arbitrary refusal to do what the circumstances required to be done. These facts and others call upon the directors to justify their action, or failure or refusal to act. In justification, the defendants have offered testimony tending to prove, and which does prove, the following facts: It had been the policy of the corporation for a considerable time to annually reduce the selling price of cars, while keeping up, or improving, their quality. As early as in June, 1915, a general plan for the expansion of the productive capacity of the concern by a practical duplication of its plant had been talked over by the executive officers and directors, and agreed upon; not all of the details having been settled, and no formal action of directors having been taken. The erection of a smelter was considered, and engineering and other data in connection therewith secured. In consequence, it was determined not to reduce the selling price of cars for the year beginning August 1, 1915, but to maintain the price, and to accumulate a large surplus to pay for the proposed expansion of plant and equipment, and perhaps to build a plant for smelting ore. It is hoped by Mr. Ford that eventually 1,000,000 cars will be annually produced. The contemplated changes will permit the increased output.

The plan, as affecting the profits of the business for the year beginning August 1, 1916, and thereafter, calls for a reduction in the selling

price of the cars. It is true that this price might be at any time increased, but the plan called for the reduction in price of \$80 a car. The capacity of the plant, without the additions thereto voted to be made (without a part of them, at least), would produce more than 600,000 cars annually. This number, and more, could have been sold for \$440 instead of \$360, a difference in the return for capital, labor, and materials employed of at least \$48,000,000. In short, the plan does not call for and is not intended to produce immediately a more profitable business, but a less profitable one; not only less profitable than formerly, but less profitable than it is admitted it might be made. The apparent immediate effect will be to diminish the value of shares and the returns to shareholders.

It is the contention of plaintiffs that the apparent effect of the plan is intended to be the continued and continuing effect of it, and that it is deliberately proposed, not of record and not by official corporate declaration, but nevertheless proposed, to continue the corporation henceforth as a semi-eleemosynary institution, and not as a business institution. In support of this contention, they point to the attitude and to the expressions of Mr. Henry Ford.

Mr. Henry Ford is the dominant force in the business of the Ford Motor Company. No plan of operations could be adopted unless he consented, and no board of directors can be elected whom he does not favor. One of the directors of the company has no stock. One share was assigned to him to qualify him for the position, but it is not claimed that he owns it. A business, one of the largest in the world, and one of the most profitable, has been built up. It employs many men, at good pay.

"My ambition," said Mr. Ford, "is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their

lives and their homes. To do this we are putting the greatest share of our profits back in the business."

"With regard to dividends, the company paid 60 per cent on its capitalization of \$2,000,000, or \$1,200,000, leaving \$58,000,000 to reinvest for the growth of the company. This is Mr. Ford's policy at present, and it is understood that the other stockholders cheerfully accede to this plan."

He had made up his mind in the summer of 1916 that no dividends other than the regular dividends should be paid, "for the present."

Q. For how long? Had you fixed in your mind any time in the future, when you were going to pay—

A. No.

Q. That was indefinite in the future?

A. That was indefinite; yes, sir.

The record, and especially the testimony of Mr. Ford, convinces that he has to some extent the attitude towards shareholders of one who has dispensed and distributed to them large gains, and that they should be content to take what he chooses to give. His testimony creates the impression also, that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken. We have no doubt that certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company—the policy which has been herein referred to.

It is said by his counsel that "although a manufacturing corporation cannot engage in humanitarian works as its principal business, the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation."

And again: "As the expenditures complained of are being made in an expansion of the business which the company is organized to carry on, and for purposes within the powers of the corporation as hereinbefore shown, the question is as to whether such expenditures are rendered illegal because influenced to some extent by humanitarian motives and purposes on the part of the members of the board of directors."

In discussing this proposition, counsel have referred to decisions such as *Hawes v. Oakland* (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; *Taunton v. Royal Ins. Co.* 2 Hem. & M. 135, 71 Eng. Reprint, 413, 33 L. J. Ch. N. S. 406, 10 Jur. N. S. 291, 10 L. T. N. S. 156, 12 Week. Rep. 549; *Henderson v. Bank of Australia*, L. R. 40 Ch. Div. 170, 58 L. J. Ch. N. S. 197, 59 L. T. N. S. 856, 37 Week. Rep. 332; *Steinway v. Steinway & Sons*, 17 Misc. 43, 40 N. Y. Supp. 718; *People ex rel. Metropolitan L. Ins. Co. v. Hotchkiss*, 136 App. Div. 150, 120 N. Y. Supp. 649. These cases, after all, like all others in which the subject is treated, turn finally upon the point, the question, whether it appears that the directors were not acting for the best interests of the corporation. We do not draw in question, nor do counsel for the plaintiffs do so, the validity of the general proposition stated by counsel, nor the soundness of the opinions delivered in the cases cited. The case presented here is not like any of them. The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employees, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious. There should

be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general pub-

Corporation—diverting funds to humanitarian purposes—compelling payment of dividends.

lic, and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

There is committed to the discretion of directors, a discretion to be exercised in good faith, the infinite details of business, including the wages which shall be paid to employees, the number of hours they shall work, the conditions under which labor shall be carried on, and the price for which products shall be offered to the public.

It is said by appellants that the motives of the board members are not material, and will not be inquired into by the court so long as their acts are within their lawful powers. As we have pointed out, and the proposition does not require argument to sustain it, it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders, and for the primary purpose of benefiting others, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.

We are not, however, persuaded that we should interfere with the proposed expansion of the business of the Ford Motor Company. In view of the fact that the selling price of products may be increased at any time, the ultimate results of the larger business cannot be certainly estimated. The judges are

not business experts. It is recognized that plans must often be made for a long future, for expected competition, for a continuing as well as an immediately profitable venture. The experience of the Ford Motor Company is evidence of capable management of its affairs. It may be noticed, incidentally, that it took from the public the money required for the execution of its plan, and that the very considerable salaries paid to Mr. Ford and to certain executive officers and employees were not diminished. We are not satisfied that the alleged motives of the directors, in so far as they are reflected in the conduct of the business, menace the interests of shareholders. It is enough to say, perhaps, that the court of equity is at all times open to complaining shareholders having a just grievance.

Assuming the general plan and policy of expansion and the details of it to have been sufficiently formally approved at the October and November, 1917, meetings of directors, and assuming further that the plan and policy and the details agreed upon were for the best ultimate interest of the company and therefore of its shareholders, what does it amount to in justification of a refusal to declare and pay a special dividend or dividends? The Ford Motor Company was able to estimate with nicety its income and profit. It could sell more cars than it could make. Having ascertained what it would cost to produce a car and to sell it, the profit upon each car depended upon the selling price. That being fixed, the yearly income and profit were determinable, and, within slight variations, were certain.

There was appropriated—voted—for the smelter \$11,325,000. As to the remainder voted, there is no available way for determining how much had been paid before the action of directors was taken, and how much was paid thereafter; but assuming that the plans required an expenditure, sooner or later, of \$9,-

895,000 for duplication of the plant, and for land and other expenditures \$3,000,000, the total is \$24,220,000. The company was continuing business at a profit—a cash business. If the total cost of proposed expenditures had been immediately withdrawn in cash from the cash surplus (money and bonds) on hand August 1, 1916, there would have remained nearly \$30,000,000.

Defendants say, and it is true, that a considerable cash balance must be at all times carried by such a concern. But, as has been stated, there was a large daily, weekly, monthly, receipt of cash. The output was practically continuous, and was continuously, and within a few days, turned into cash. Moreover, the contemplated expenditures were not to be immediately made. The large sum appropriated for the smelter plant was payable over a considerable period of time. So that, without going further, it would appear that, accepting and approving the plan of the directors, it was their duty to distribute on or near the 1st of August, 1916, a very large sum of money to stockholders.

In reaching this conclusion, we do not ignore, but recognize, the validity of the proposition that plaintiffs have from the beginning profited by, if they have not lately officially participated in, the general policy of expansion pursued by this corporation. We do not lose sight of the fact that it had been, upon an occasion, agreeable to the plaintiffs to increase the capital stock to \$100,000,000 by a stock dividend of \$98,000,000. These things go only to answer other contentions now made

**Estoppel—to demand dividends—consent to increase of capital.**

by plaintiffs, and do not and cannot operate to estop them to demand proper dividends upon the stock they own. It is obvious that

an annual dividend of 60 per cent upon \$2,000,000, or \$1,200,000, is the equivalent of a very small dividend upon \$100,000,000, or more.

The decree of the court below, fixing and determining the specific amount to be distributed to stockholders, is affirmed. In other respects, except as to the allowance of cee is reversed. **Corporation—amount of dividends.** costs, the said de- Plaintiffs will recover interest at 5 per cent per annum upon their proportional share of said dividend from the date of the decree of the lower court. Appellants will tax the costs of their appeal, and two thirds of the amount thereof will be paid by plaintiffs. No other costs are allowed.

Steere, Fellows, Stone, and Brooke, JJ., concur with Ostrander, J.

Moore, J.:

I agree with what is said by Justice Ostrander upon the subject of capitalization. I agree with what he says as to the smelting enterprise on the River Rouge. I do not agree with all that is said by him in his discussion of the question of dividends. I do agree with him in his conclusion that the accumulation of so large a surplus establishes the fact that there has been an arbitrary refusal to distribute funds that ought to have been distributed to the stockholders as dividends. I, therefore, agree with the conclusion reached by him upon that phase of the case.

Bird, Ch. J., and Kuhn, J., concur with Moore, J.

Petition for rehearing denied.

## ANNOTATION.

**Right of business corporation to use its funds or property for humanitarian purposes.**

The reported case (*DODGE v. FORD MOTOR Co.*) ante, 413, is of interest not only because of the element of the picturesque supplied by the history of the defendant company and the altruistic character of its moving spirit, but also because it brings into clear relief the principle, which earlier decisions had previously recognized, that the fundamental purpose of a business corporation is to earn as large a profit as trade conditions and the business sagacity of its management will permit, and that its property is but a trust fund, to be employed by its managers for that purpose. Their policies must be such as are conducive to such purpose; and if they wish to be generous they must employ their own funds, and not the funds of the corporation. "A business corporation," says the court in the reported case, "is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes."

"The directors [of a national bank] can use the funds and property of the bank only for proper banking purposes, and for the strict furtherance of the business objects and financial prosperity of the corporation. They cannot use any portion of the money for objects of usefulness, or charity, or the like, however worthy of encouragement or aid. They cannot make gifts from the corporate fund. All their transactions must be strictly matter of business." *Morse, Banks & Bkg.* § 127, cited with approval in *McCrary v. Chambers* (1892) 48 Ill. App. 445.

It is, however, within the powers of the officers or directors of a corporation to expend its funds for purposes

which, although immediately charitable or humanitarian, have a tendency directly to promote the welfare of the corporation. The benefit reaped must, however, be an individual and personal benefit, and not a general benefit shared by the whole community.

As is said by Bowen, L. J., in *Hutton v. West Cork R. Co.* L. R. 23 Ch. Div. (Eng.) 654: "Charity has no business to sit at boards of directors qua charity." There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent, and in that garb (I admit not a very philanthropic garb), charity may sit at the board, but for no other purpose."

"If that act," said Beekman, J., in *Steinway v. Steinway & Sons* (1896) 17 Misc. 43, 404 N. Y. Supp. 718, "is one which is lawful in itself, and not otherwise prohibited, is done for the purpose of serving corporate ends, and is reasonably tributary to the promotion of those ends, in a substantial and not in a remote and fanciful sense, it may fairly be considered within charter powers. The field of corporate action in respect to the exercise of incidental powers is thus, I think, an expanding one. As industrial conditions change, business methods must change with them, and acts become permissible which, at an earlier period, would not have been considered to be within corporate power."

It is not beyond the corporate powers of a town site company to donate some of its lots to a university, to aid in the erection of a college building in the vicinity of the town site, if the effect of the construction of such building is to enhance the value of its remaining property. *Whetstone v. Ottawa University* (1874) 13 Kan. 320.

But it is not within the powers of the president of a corporation engaged in the manufacture of pumps and hydraulic machinery, to equip a laboratory of hydraulic engineering in a university, at the expense of the com-



pany; and it may be doubted whether the corporation itself would have power to do so. *Worthington v. Worthington* (1905) 100 App. Div. 332, 91 N. Y. Supp. 443.

The courts will not, at the instance of a stockholder, enjoin a water company, operating under a franchise granted by a municipal corporation, from furnishing water to such corporation for municipal purposes, free of charge, beyond what it was required to do, where it does not appear that in so doing the board of directors exceeded its discretion. *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) (1882) 104 U. S. 450, 26 L. ed. 827.

An insurance company will not be restrained, at the instance of a stockholder, from paying losses for which it is not legally liable, where it appears that it is the custom, among insurance companies generally, to pay losses of a similar character, the making of such payments being, under the circumstances, conducive to the well-being of the company. *Taunton v. Royal Ins. Co.* (1864) 2 Hen. & M. 135, 71 Eng. Reprint, 413, 33 L. J. Ch. N. S. 406, 10 L. T. N. S. 156, 12 Week. Rep. 549.

A street railway company may make a valid contract to furnish or pay for medical aid and attention to one injured upon its cars or tracks. *Youngstown Park & F. Street R. Co. v. Kessler* (1911) 84 Ohio St. 74, 36 L.R.A. (N.S.) 50, 95 N. E. 509, Ann. Cas. 1912B, 933.

It is within the powers of a manufacturing corporation which has removed its plant to a sparsely settled locality, to purchase land in excess of its own needs, to make expenditures for streets and sewers, and a water supply therefor, to erect houses to be sold or rented to its employees, and to make contributions toward the establishment of a church, school, free library, and free baths, such a policy on its part reasonably tending to insure the continued and faithful services of a skilled and contented body of operatives. *Steinway v. Steinway & Sons* (1896) 17 Misc. 43, 40 N. Y. Supp. 718.

In *People ex rel. Metropolitan L. Ins.*

*Co. v. Hotchkiss* (1909) 136 App. Div. 150, 120 N. Y. Supp. 649, it was held that a life insurance corporation, empowered by law to acquire and own such real estate "as shall be requisite for a convenient accommodation in the transaction of its business," may purchase land on which to erect a hospital for the care and treatment of its employees afflicted with tuberculosis. The court said: "The duties of the employer to the employee have been enlarged in recent years, and are not merely that of the purchaser of the employee's time and service for money. The enlightened spirit of the age, based upon the experience of the past, has thrown upon the employer other duties, which involve a proper regard for the comfort, health, safety, and well-being of the employee. A corporation may not only pay to its employee the actual wage agreed upon, but may extend to him the same humane and rational treatment which individuals practise under like circumstances. It must do this in order to get competent and effective service. We see corporations pensioning old and infirm employees, establishing benefits for the sick and disabled, permitting regular vacations with continuing pay, aiding in sickness, and doing many humane and praiseworthy acts which formerly might have been questioned as not fairly within the powers or duties of the corporation. These acts are not to be defended upon the ground of gratuity or charity, but they enter into the relation of the employer and employee, become, as it were, a part of the inducement for the employee to enter the employment and serve faithfully for the wage agreed upon, and become a part of the terms of employment. The considerate employer who treats his employees well is thus able to secure better service, and upon more satisfactory terms, than the unwilling, illiberal employer. A corporation with 13,280 employees is called upon to exercise great care in selecting and managing them, so as to receive the best service. Upon their loyalty and efficiency much of its success must depend. The employment, training, disciplining, and managing of such a

force, and obtaining from it the best results, is an important part of the relator's business. It is well within the corporate power to assume, as it has done, the care and treatment of such of its employees as are afflicted with tuberculosis. And unless it is shown to be wasteful of the company's money and unproductive of beneficial results, the practice may stand as well within the scope of its business. The reasonable care of its employees, according to the enlightened sentiment of the age and community, is a duty resting upon it, and the proper discharge of that duty is merely transacting the business of the corporation. If it preserves the health, the efficiency, and safety of the other employees to segregate such as have tuberculosis, or are suspected of being so afflicted, the relator has the power so to do; it would seem unnecessary to discharge a trusted employee because he is so afflicted, when the company, by proper treatment, may again obtain the value of his services; by taking him from its offices at once it not only benefits the employee and makes his speedy recovery and return to work more probable, but protects its other employees. If we assume that the company has the legal right to care for and assume the treatment of its employees so afflicted, it must follow that it has the right to do this in the most economical and most effective manner. It would seem that to put the patient in a hospital where intelligent treatment and manner of living is prescribed by the experience of those familiar with the disease, would tend to shorten the time of his sickness, lessen the expense thereof to the company, and insure his more speedy return to duty. I think the company has the right to care for and treat its employees so afflicted, and may do this in the manner which promises the best result to the patient, and consequently to the company itself."

A coal company may contract for services of a physician in the treatment of its employees for injuries received while working in its mines.

*Gibson v. O'Gara Coal Co.* (1909) 151 Ill. App. 424.

It is within the powers of a sawmill corporation to employ a physician on a contract for a fixed salary, to attend its employees in case of sickness or accident. *Jackson Lumber Co. v. Trammell* (1917) — Ala. —, 74 So. 469. In the course of its opinion the court said: "Without laborers the corporation would be powerless to carry out the purposes of its creation. It is, therefore, necessarily interested in the welfare of its employees. Much depends upon their health and their contentment in the service, and to conserve their physical comfort tends to their efficiency, and the greater their efficiency the greater the profits to the defendant company. It could hardly be denied that a private corporation engaged in the manufacture of lumber could, if it saw fit, erect houses for the use of its employees, and surround them with such sanitary conditions as would tend to promote their general and physical welfare, even though its charter might contain no such provisions. These are matters which relate to what might be termed the 'internal management' of the corporation, with which, in the absence of fraud or unfair dealing, the courts as a rule do not interfere."

A railroad corporation may defray the expense of caring for an injured employee. *Toledo, W. & W. R. Co. v. Rodrigues* (1868) 47 Ill. 188, 95 Am. Dec. 484; *Indianapolis & St. L. R. Co. v. Morris* (1873) 67 Ill. 295; *Cairo & St. L. R. Co. v. Mahoney* (1876) 82 Ill. 73, 25 Am. Rep. 299; *Bedford Belt R. Co. v. McDonald* (1896) 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022.

A number of cases have expressly held that it is within the powers of a railway company to contribute to a fund for the payment of benefits to sick or injured employees. *Harrison v. Alabama Midland R. Co.* (1906) 144 Ala. 246, 40 So. 394, 6 Ann. Cas. 804; *Bedford Belt R. Co. v. McDonald* (1896) 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022; *Maine v. Chicago, B. & Q. R. Co.* (1899) 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315,

2 Am. Neg. Rep. 15; *Chicago, B. & Q. R. Co. v. Bell* (1895) 44 Neb. 44, 62 N. W. 314, 16 Am. Neg. Cas. 581; *Beck v. Pennsylvania R. Co.* (1899) 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908, 6 Am. Neg. Rep. 601; *State ex rel. Sheets v. Pittsburg, C. C. & St. L. R. Co.* (1903) 68 Ohio St. 9, 64 L.R.A. 405, 96 Am. St. Rep. 635, 67 N. E. 93. The right of a railroad company so to do is also impliedly recognized in a number of cases which it is needless to cite.

A railroad corporation has incidental power to contract with its own employees to pay them half wages during disability resulting from service accidents. *McAdow v. Kansas City Western R. Co.* (1915) 96 Kan. 423, L.R.A. 1917B, 1158, 151 Pac. 1113.

A corporation may properly defray the funeral expenses of an employee killed in its factory. *Noll v. Archer-Pancoast Co.* (1901) 60 App. Div. 414, 69 N. Y. Supp. 1007.

A manufacturing corporation may, against the protest of a stockholder, give gratuities to its workmen after an especially prosperous year. *Hampson v. Price's Patent Candle Co.* (1876) 45 L. J. Ch. N. S. (Eng.) 437, 34 L. T. N. S. 711, 24 Week. Rep. 754.

It has been held that an insurance company cannot vote a retiring officer a pension, in consideration of services previously rendered. *Beers v. New York L. Ins. Co.* (1892) 66 Hun, 75, 20 N. Y. Supp. 788. In this case, however, it did not appear that there was a custom among insurance companies to grant such pensions, and it did appear that the pension was wholly undeserved.

But in *Henderson v. Bank of Australasia* (1888) L. R. 40 Ch. Div. (Eng.) 170, 58 L. J. Ch. N. S. 197, 59 L. T. N. S. 856, 37 Week. Rep. 332, it was held to be within the powers of a banking corporation to pay a pension to the family of a deceased officer, it appearing that it was the custom of other banks to grant such gratuities to the widows and families of their officers dying in their service, so that a failure to conform to such practice would tend to weaken the efficiency of

the staff, and would, therefore, be injurious to the shareholders' interests.

The general authority confided to the directors to manage the concerns of a gas company will authorize the grant of a pension to an officer wishing to retire on account of ill health, and agreeing to abstain from transferring his services to any other company. *Clarke v. Imperial Gaslight & Coke Co.* (1842) 4 Barn. & Ad. 315, 110 Eng. Reprint, 473, 1 Nev. & M. 206, 2 L. J. K. B. N. S. 30.

In *Normandy v. Ind. C. & Co.* [1908] 1 Ch. (Eng.) 84, it was said by Kekewich, J.: "I entertain no doubt that it is within the powers of the executive of a trading company, unless expressly prohibited, to grant a pension to a retiring officer or servant, and to do that with or without any reasonable terms which may be bargained for or imposed."

The stockholders of a national bank may create a pension fund to be shared by officers and employees, the establishment of such a fund having a direct and reasonably necessary bearing upon the successful carrying out of the business of the corporation, upon the class of employees likely to be obtained, upon the character of the service likely to be rendered, and upon the length of such service and the loyalty of the employees. *Heinz v. National Bank* (1916) 150 C. C. A. 592, 237 Fed. 942.

But while a company carrying on business has power to expend a portion of its funds in gratuities to servants and directors, provided such grants are made for the purpose of advancing the interests of the company, it cannot do so where it has transferred its undertaking to another company and ceased to be a going concern. *Hutton v. West Cork R. Co.* (1883) L. R. 23 Ch. Div. (Eng.) 654, 52 L. J. N. S. 689, 49 L. T. N. S. 420, 31 Week. Rep. 827.

It may be of interest to the reader, in connection with the reported case, to know that it has been held that, while the managers of a corporation may not reduce the price of its product for the purpose of benefiting the

public, they may do so, even to the extent of selling below cost, where there is a reasonable expectation that such course will result in ultimate profit.

Thus, the directors of a corporation will not be enjoined, at the instance of a minority stockholder, from selling its products at a loss, where it does not appear that such course is not calculated in the end to make money. *Trimble v. American Sugar*

*Ref. Co.* (1901) 61 N. J. Eq. 340, 48 Atl. 912.

And the courts will not aid a stockholder of a corporation in an attempt to prevent it from selling its products for less than cost, where it appears that the reduction in price was necessary, in order to enable it to meet competition. *Re Pierson* (1899) 44 App. Div. 215, 60 N. Y. Supp. 671, affirming (1899) 28 Misc. 726, 59 N. Y. Supp. 1003. E. S. O.

**PEOPLE OF THE STATE OF ILLINOIS EX REL. CHARLES A. LAF-  
FERTY et al.**

v.

**LESLIE J. OWEN et al., Appts.**

*Illinois Supreme Court — February 20, 1910.*

(286 Ill. 638, 122 N. E. 132.)

**Constitutional law — validating act declared void by court.**

1. The legislature cannot validate the organization of a high school district after it has been declared void by final judgment of a court of competent jurisdiction.

[See note on this question beginning on page 450.]

**Judgment — quashing school district — effect.**

2. After a judgment quashing a high school district, proceedings to organize the district are a nullity, and the judgment as effectually destroys the right of persons asserting the title to office as a board of education as if they had been ousted by a quo warranto proceeding.

[See 15 R. C. L. 1029.]

**Certiorari — to test organization of school district.**

3. Certiorari is the proper remedy

to test the organization of a high school district where appeal does not lie and no officers exist against whom quo warranto might be maintained.

[See 5 R. C. L. 258 et seq.]

**Office — necessity of establishing right.**

4. Persons called upon by a quo warranto proceeding to show their authority for assuming to act as public officers must show a right de jure to such offices.

[See 22 R. C. L. 661-664.]

**APPEAL** by defendants from a judgment of the Circuit Court for McLean County overruling their motion in arrest of judgment and entering judgment of ouster in a proceeding in the nature of quo warranto to require defendants to show by what right they claimed to hold the offices of president and members of the board of education of a certain high school district. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. De Mange, Gillespie, & De Mange, for appellants:

In an information in the nature of quo warranto, if it is made to appear that the filing of the information has been inadvertently allowed under a

misapprehension of the law, or the facts, the court, at the term in which leave to file the information is granted, may at any time vacate the order granting the leave.

People ex rel. Outman v. Wanmer,

276 Ill. 463, 114 N. E. 1015; *People v. Chicago*, 270 Ill. 188, 110 N. E. 366; *People ex rel. Cleland v. Barnes*, 170 Ill. App. 539.

The judgment in *Lafferty v. Moore*, 275 Ill. 580, 114 N. E. 336, based upon the decision in *People ex rel. Kane v. Weis*, 275 Ill. 581, 114 N. E. 331, was not a final judgment.

*People ex rel. Fitzgerald v. Stitt*, 280 Ill. 565, 117 N. E. 784.

The authority of a corporation to exist can be inquired into only by quo warranto proceedings in the name of the people. The organization of the present high school for district 333, by virtue of the Act of 1917, violated no vested right inhering in one or more of the relators herein by virtue of such judgment.

*Ferry v. Campbell*, 110 Iowa, 290, 50 L.R.A. 92, 81 N. W. 604; *People ex rel. Fitzgerald v. Stitt*, 280 Ill. 553, 117 N. E. 784; *Lincoln v. Harts*, 266 Ill. 405, 107 N. E. 725; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 27 L. ed. 986, 3 Sup. Ct. Rep. 211.

The Act of 1917 does not attempt to validate the Act of 1911.

*People ex rel. Patterson v. Woodruff*, 280 Ill. 472, 117 N. E. 791.

The common-law writ of certiorari did not stay appellants' election, which was collateral to the record before the court and which had begun to be executed at the time of the filing of the petition.

*Highway Commissioners v. People*, 99 Ill. 587; *Com. ex rel. Fisher v. Kistler*, 149 Pa. 345, 24 Atl. 216; *Ewing v. Thompson*, 43 Pa. 372; *Citizens' Gaslight Co. v. State*, 44 N. J. L. 648; *Gaertner v. Fond du Lac*, 84 Wis. 497; 4 Enc. Pl. & Pr. 208.

Messrs. Miles K. Young and Sterling, Livingston, & Whitmore, for appellees:

The validating Act of June 4, 1917, does not validate and revive school boards and school districts in cases where such school districts had been adjudged illegal by a court of competent jurisdiction, and where judgment was affirmed by the supreme court before the enactment of the act.

*People ex rel. Robinson v. New York C. R. Co.* 283 Ill. 334, 119 N. E. 299; *People ex rel. Shriver v. Cowen*, 283 Ill. 308, 119 N. E. 335; *People ex rel. Holmes v. Illinois C. R. Co.* 282 Ill. 23, 118 N. E. 494; *People ex rel. Colford*

*v. New York C. R. Co.* 282 Ill. 458, 118 N. E. 723; *Chicago & E. I. R. Co. v. People*, 219 Ill. 408, 76 N. E. 571; *Dobbins v. First Nat. Bank*, 112 Ill. 553; *Cooley, Const. Lim.* 7th ed. 136-139.

If the legislature had extended the validating Act of June 14, 1917, to include such school districts which had previously been adjudged illegal by final judgment, then the act would have been unconstitutional. The legislature may not under any pretext annul, set aside, or impair the final judgments previously rendered by the courts of competent jurisdiction.

*Memphis v. United States*, 97 U. S. 293, 24 L. ed. 920; *Humphrey v. Gerard*, 83 Conn. 346, 77 Atl. 65; *Miller v. Jackson Twp.* 178 Ind. 503, 99 N. E. 102; *Livingston v. Livingston*, 173 N. Y. 377, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123; *Strafford v. Sharon*, 61 Vt. 126, 4 L.R.A. 499, 17 Atl. 793, 18 Atl. 308; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *Lancaster v. Barr*, 25 Wis. 560.

Certiorari operates as a stay of proceedings.

*Highway Comrs. v. People*, 99 Ill. 587.

Duncan, Ch. J., delivered the opinion of the court:

On December 21, 1917, upon leave granted the people, upon the relation of Charles A. Lafferty and a number of others, filed an information in the nature of quo warranto in the circuit court of McLean county against appellants, Leslie J. Owen and others, requiring them to show by what right they claimed to hold the offices of president and members of the board of education of a certain pretended high school district No. 333, situated in McLean county. To the information appellants filed a plea sufficient to show that the necessary steps had been taken to organize said territory into a high school district under the Act of June 5, 1911 (*Laws 1911*, p. 505), and that the election for the organization of said district occurred February 15, 1916, and that at an election under said act duly called and advertised they were duly elected as president and members of said board of education March 4, 1916. They further averred in their plea that by virtue of the validating Act of June

14, 1917 (Laws 1917, p. 744), they had levied and collected taxes, employed and paid teachers and janitors, rented a schoolhouse, and had caused to be conducted a high school in said district continuously since their election. Appellees replied to the plea, in substance, that this court on October 24, 1916, prior to the passage of the validating Act of 1917, upon appeal had affirmed a judgment of the circuit court of McLean county quashing the record of high school district No. 333 in a proceeding by common-law writ of certiorari, in which the relators herein, as taxpayers and owners of land in said school district, were petitioners, and Benjamin C. Moore, county superintendent, and others, were defendants; that the judgment in the certiorari proceeding constitutes a bar to the operation of the validating Act of 1917 upon district No. 333, and that the pendency of the certiorari proceeding in the circuit court, and the judgment therein, so invalidated appellants' election that the Act of 1917 would not operate to validate it. Appellants filed a rejoinder, setting forth the judgments of the circuit court and of this court in the certiorari case, and also the opinions of the circuit judge and of the supreme court in that case, and the opinion of the supreme court in the case of *People ex rel. Kane v. Weis*, 275 Ill. 581, 114 N. E. 331, alleged that the judgments of the circuit court and of this court in the certiorari case (*Lafferty v. Moore*, 275 Ill. 580, 114 N. E. 336) were based on the sole ground that the Act of June 5, 1911, was unconstitutional, and further alleged that those judgments were not final judgments or binding on appellants because they were not parties to the judgments, and that those judgments did not prevent the validating Act of 1917 from validating their election. Appellees demurred to appellants' rejoinder. Appellants moved to carry the demurrer back to appellees' replication. The trial court sustained appellees' demurrer to the rejoinder and overruled ap-

pellants' motion to carry the demurrer back. Appellants stood by their motion to carry back the demurrer and by their rejoinder, and moved the court in arrest of judgment. The trial court overruled appellants' motion in arrest of judgment and entered judgment of ouster, from which appellants have appealed.

The judgments of the circuit court and of this court in the certiorari proceedings are final judgments, which quashed the record of the high school district and held the proceedings absolutely void and of no effect. From and after the rendering of those judgments the pretended record showing the organization of said high school district was an absolute nullity, and they were just

Judgment—  
quashing  
school district  
—effect.

as effectual to destroy the right or pretension of the appellants to assert and hold their officers as a board of education as if they had been ousted in a quo warranto proceeding and the district declared void. At the time the certiorari proceedings were instituted there was no board or pretended board of education in existence to be ousted by a proceeding in the nature of quo warranto. The common-law writ of certiorari was the only remedy, at the time it was sued out, to test the validity of the district, as there was no remedy by appeal or otherwise, and quo warranto

Certiorari—  
to test organiza-  
tion of school  
district.

would not lie, as there were no officers or pretended officers at that time in the district against whom information could be filed. The board of education of district No. 333 elected after the certiorari proceeding had been begun were bound by the proceeding. When called on by the information in this case to show their authority for assuming to be such officers, it was incumbent upon them to show a right de jure to such officers. The showing in this record is that they were

Office—neces-  
sity of establish-  
ing right.

elected under the provisions of a void act as a board of education of a high school district pretended to be organized by the same void act, and which had, by courts of competent jurisdiction, been declared as having no legal existence, and the pretended record thereof null and void.

The legislature has no right or power to annul, set aside, or impair the final judgments previously rendered by courts of competent jurisdiction.

**Constitutional law—validating act declared void by court.**

The legislature had no power to validate any proceeding to organize a high school district under the Act of June 5, 1911, after final judgment had been rendered by this court, before the Act of 1917 was passed, holding the organization of the district invalid, and it does not matter whether such final judgment was rendered in a proceeding by common-law writ of certiorari or in a proceeding in which an information is filed in the nature of a quo warranto. *People ex rel. Robinson v. New York C. R. Co.* 283 Ill. 334, 119 N. E. 299; *People ex rel. Shriver v. Cowen*, 283 Ill. 308, 119 N. E. 335. We have heretofore frequently held that the validating act did apply to all high school districts organized under said act, even where proceed-

ings were pending in a lower court of competent jurisdiction to oust the high school board and to declare the organization of the district void, or where such cases were pending, on appeal or otherwise, in this court and final judgment had not been rendered. *People ex rel. Fitzgerald v. Stitt*, 280 Ill. 553, 117 N. E. 784; *People ex rel. Vautrin v. Madison*, 280 Ill. 96, 117 N. E. 493; *People ex rel. Cofoid v. New York C. R. Co.* 282 Ill. 458, 118 N. E. 723.

As the judgment of this court in the certiorari proceeding aforesaid was a final judgment declaring the organization or pretended organization of district No. 333 void, the judgment of ouster in this case was the only proper and legal judgment that could have been rendered. It follows, as a matter of course, that the trial court did not err in refusing to allow appellants' motion to set aside its order granting leave to file the information and to dismiss this suit, as the court had before it the petition for certiorari and the judgments of the trial court and of this court in said certiorari proceeding in *Lafferty v. Moore*, supra, in addition to the allegations in the petition for leave to file the information, supported by affidavits.

The judgment of the lower court is therefore affirmed.

## ANNOTATION.

### Power of legislature to set aside or impair judgment.

- I. Introductory, 450.
- II. General rule, 450.
- III. Illustrations:
  - a. Civil judgment generally, 453.
  - b. Judgment relating to taxes, 456.
  - c. Criminal judgment, 457.

#### I. Introductory.

It is the purpose of this note to treat those cases only in which it appears that the legislature has attempted to annul, modify, or impair a judgment rendered by a court of competent jurisdiction, and in which the decision is based on the distinction between the powers and duties of the legislative and judicial departments

of the government. Cases involving remedial legislation, the grant by the legislature of the right to new trials or appeals, and the power to validate faulty judicial proceedings, are excluded.

#### II. General rule.

It is well settled that the legislature is without power to invade the province of the judiciary by setting aside, modifying, or impairing a final judgment rendered by a court of competent jurisdiction.

*United States.—McCullough v. Virginia* (1898) 172 U. S. 102, 43 L. ed.

382, 19 Sup. Ct. Rep. 134; *United States v. Peters* (1809) 5 Cranch, 115, 3 L. ed. 53; *Mason v. Haile* (1827) 12 Wheat. 370, 6 L. ed. 660; *United States v. Klein* (1871) 13 Wall. 128, 20 L. ed. 519; *Central of Georgia R. Co. v. Railroad Commission* (1908) 161 Fed. 925, reversed on other grounds in (1909) 95 C. C. A. 117, 170 Fed. 225.

**California.**—*Lincoln v. Alexander* (1877) 52 Cal. 482, 28 Am. Rep. 639.

**Connecticut.**—*State v. New York, N. H. & H. R. Co.* (1898) 71 Conn. 43, 40 Atl. 925.

**Illinois.**—*Chicago & E. I. R. Co. v. People* (1906) 219 Ill. 408, 76 N. E. 571; *Geneva v. People* (1901) 98 Ill. App. 315.

**Indiana.**—*Searcy v. Patriot & B. Turnp. Co.* (1881) 79 Ind. 274.

**Louisiana.**—*Lanier v. Gallatas* (1858) 13 La. Ann. 175.

**Maryland.**—*Berrett v. Oliver* (1835) 7 Gill & J. 191; *Baltimore v. Horn* (1867) 26 Md. 194.

**Massachusetts.**—*Denny v. Mattoon* (1861) 2 Allen, 361, 79 Am. Dec. 784.

**Michigan.**—*People ex rel. Butler v. Saginaw County* (1872) 26 Mich. 22; *Moser v. White* (1874) 29 Mich. 59; *People v. Cummings* (1891) 88 Mich. 249, 14 L.R.A. 285, 50 N. W. 310.

**Missouri.**—*McNichol v. United States Mercantile Reporting Agency* (1881) 74 Mo. 457.

**Nevada.**—*Ex parte Darling* (1881) 16 Nev. 98, 40 Am. Rep. 495; *Ex parte Woodburn* (1909) 32 Nev. 136, 104 Pac. 245; *State ex rel. Howell v. Wildes* (1911) 34 Nev. 94, 116 Pac. 595.

**New Hampshire.**—*Merrill v. Sherburne* (1818) 1 N. H. 199, 8 Am. Dec. 52.

**New York.**—*Roberts v. State* (1898) 30 App. Div. 106, 51 N. Y. Supp. 691, affirmed in (1899) 160 N. Y. 217, 54 N. E. 678, 15 Am. Crim. Rep. 561; *People v. Keenan* (1905) 110 App. Div. 537, 97 N. Y. Supp. 77, affirmed in (1906) 185 N. Y. 600, 78 N. E. 1108.

**Pennsylvania.**—*Lambertson v. Hogan* (1845) 2 Pa. St. 22; *Greenough v. Greenough* (1849) 11 Pa. 489, 51 Am. Dec. 567; *De Chastellux v. Fairchild* (1850) 15 Pa. 18, 53 Am. Dec.

570; *McCabe v. Emerson* (1851) 18 Pa. 111; *Menges v. Dentler* (1859) 33 Pa. 495, 75 Am. Dec. 616, overruling *Menges v. Wertman* (1845) 1 Pa. St. 218; *Com. ex rel. Johnson v. Halloway* (1862) 42 Pa. 446, 82 Am. Dec. 526.

**Rhode Island.**—*Re Dorr* (1854) 3 R. I. 299; *Taylor v. Place* (1856) 4 R. I. 324; *Re Nichols* (1864) 8 R. I. 50.

**South Dakota.**—*Skinner v. Holt* (1896) 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595.

**Texas.**—*Milam County v. Bateman* (1880) 54 Tex. 153.

**Vermont.**—*Ward v. Barnard* (1825) 1 Aik. 121; *Bates v. Kimball* (1824) 2 D. Chip. 77; *Keith v. Ware* (1829) 2 Vt. 174; *Lyman v. Mower* (1830) 2 Vt. 517; *Kendall v. Dodge* (1830) 3 Vt. 360.

**Virginia.**—*Griffin v. Cunningham* (1870) 20 Gratt. 31; *Martin v. South Salem Land Co.* (1896) 94 Va. 28, 26 S. E. 591.

**West Virginia.**—*Arnold v. Kelley* (1872) 5 W. Va. 446; *Ex parte Low* (1884) 24 W. Va. 620.

As was said in *Gilman v. Tucker* (1891) 128 N. Y. 190, 13 L.R.A. 804, 26 Am. St. Rep. 464, 28 N. E. 1040: "A judgment has here been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication the fruits of the judgment become rights of property. These rights became vested by the action of the court, and were thereby placed beyond the reach of legislative power to affect."

The rule is based on the well-established principle of public law that the three great powers of government, the legislative, the executive, and the judicial, should be preserved as distinct from and independent of each other. Thus, in *Denny v. Mattoon* (1861) 2 Allen (Mass.) 361, 79 Am. Dec. 784, wherein it appeared that the legislature had passed an act which in effect annulled the decree of a court in insolvency proceedings, the court, holding the statute to be ineffective in so far as a final judgment was concerned, stated the rule as follows: "It is the exclusive province of courts of justice to apply established prin-



ciples to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or take cases out of the settled course of judicial proceeding. It is on this principle that it has been held that the legislature have no power to grant a new trial or direct a rehearing of a cause which has been once judicially settled. The right to a review, or to try anew facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action. *Taylor v. Place* (1856) 4 R. I. 337; *Lewis v. Webb* (1825) 3 Me. 326; *De Chastellux v. Fairchild* (1850) 15 Pa. 18, 53 Am. Dec. 570. A fortiori, an action of the legislature cannot set aside or annul final judgments or decrees. This is the highest exercise of judicial authority. Lord Coke calls judgment and execution the 'fruit of the law.' To vest in the legislature the power to take them away, or to impair their effect on the rights of parties, would be to deprive the judiciary of its most essential prerogative. It could then no longer finally adjudicate and determine the rights of litigants. The will of the legislature would be substituted in the place of fixed rules and established principles, by which alone judicial tribunals can be governed. The power to correct errors and to revise and reverse judgments, which in the strictest sense of the word has always been deemed essentially judicial, would be transferred to the legislative branch of the government, even to the extent of controlling the final decrees of the tribunal of last resort. It is obvious that such an exercise of authority would lead to the entire destruction of the order and harmony of our system of government, and to a manifest infraction of one of its fundamental

principles. Indeed it is difficult to see how the legislature could more palpably invade the judicial department and effectually usurp its functions, than to pass statutes which should operate to set aside or annul judgments of courts in their nature final, and which would otherwise be conclusive on the rights of parties. Upon this ground we are of the opinion that the Statute of 1860, chap. 78, cannot be held to extend to a case like the present, in which a judicial decree declaring the proceedings void had been entered at the time of the enactment of the law. If such was the intent of the legislature in passing the act, it cannot be carried into effect, because it would operate to annul or reverse a final judgment of this court, which had conclusively settled the rights of persons who are parties and privies to the present proceeding."

But it has been held that a judgment granting a certificate of naturalization, though in form a judgment, is not so in substance, and, where obtained in ex parte proceedings, will not bar Congress from passing an act providing for its cancellation on proof that it was obtained by fraud. *Johannessen v. United States* (1912) 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613, wherein the court, in answering the contention that the Act of June 29, 1906 (6 Fed. Stat. Anno. 2d ed. p. 987), authorized the impeachment of a pre-existing judgment of a co-ordinate court for fraud, consisting of the introduction of relevant perjured testimony, and was therefore unconstitutional as an exercise of judicial power by the legislature, said: "Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured ex parte in the ordinary way, any conclusive effect as against the public. Such a certificate, including the 'judgment' upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land

(Rev. Stat. § 2289, etc., Comp. Stat. 1916, § 4530, 8 Fed. Stat. Anno. 2d ed. p. 543), or of the exclusive right to make, use, and vend a new and useful invention (Rev. Stat. § 4883, etc., Comp. Stat. 1916, § 9427, 7 Fed. Stat. Anno. 2d ed. p. 11). . . . The contention that the Act of June 29, 1906, in authorizing the impeachment of certificates of naturalization theretofore issued for fraud, consisting of the introduction of perjured testimony, is unconstitutional as an exercise of judicial power by the legislative department, is in effect disposed of by what has been said. The act does not purport to deprive a litigant of the fruits of a successful controversy in the courts; for, as already shown, the proceedings for naturalization are not in any proper sense adversary proceedings, but are *ex parte* and conducted by the applicant for his own benefit. The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard. Retrospective acts of this character have often been held not to be an assumption by the legislative department of judicial powers."

A decision of the supreme court, quashing an order of removal made by a lower court in proceedings for the transfer of a pauper from one township to another, has been held not to be such a judgment as the legislature may not modify, but, like a reversal on a writ of error, leaves the parties where they began and, therefore, an act of the legislature providing for a retrial of the case is not unconstitutional. *West Buffalo v. Walker Twp.* (1848) 8 Pa. 177.

### III. Illustrations.

#### a. *Civil judgment generally.*

Where a court by its judgment declared that the proceeds of a life insurance policy were subject to the payment of the debts of the insured, a statute subsequently enacted, providing that the proceeds of life in-

surance policies should inure to the separate use of the widow, husband, or minor children independently of the rights of the creditors of the insured, was held to be unconstitutional in so far as it applied to judgments rendered prior to its passage, in *Skinner v. Holt* (1896) 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595.

Likewise it has been held that, where a court has decided that certain public lands were the property of the counties in which they lay, an act of the legislature authorizing the issuance of patents to persons who settled on the land is unconstitutional. *Milam County v. Bateman* (1880) 54 Tex. 153.

In *Taylor v. Place* (1856) 4 R. L. 324, it was held that a vote of the legislature opening judgments and setting aside a verdict so that certain garnishees could amend their affidavits, on the ground that they had been erroneously made through mistake, was unconstitutional.

It has been held that, where a proceeding for the sale of land on execution was declared null and void by a court of competent jurisdiction, the legislature was without power to enact a statute providing that in such a case the plaintiff must pay within a certain time to the grantee or his assignee, the money paid on the sale, including cost and expenses of the defendant in defending the action. *Gilman v. Tucker* (1891) 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040, wherein it was said: "The sole aim of the statute thus seems to be to effect a change of title, and wrest from one person the property which has been finally adjudged to be his, and vest it in another by mere force of the legislative will. No obligation to make the payments referred to existed at law and none was created by the act, but it simply declared that unless they are made, the defaulting party shall forfeit his property and it shall be transferred to another who has neither legal nor equitable claim to it. In effect it reverses the judgment and gives to one that which the court has deliberately adjudged to another."

Similarly, where a court has declared a bank to be insolvent and appointed a receiver to take charge of and wind up its affairs, the legislature has no power to compel by statute such a receiver to turn over the property and control of the bank to a bank examiner, as such a statute amounts to a legislative modification of a judgment. *State ex rel. Howell v. Wildes* (1911) 34 Nev. 94, 116 Pac. 595.

Where a guardian has been duly appointed by lawful order of court with power of sale under further order of court, it has been held that the legislature is without authority to invest the mother of the wards with power to sell their estate, as such an act would be a modification or annulment of the judgment of a court. *Lincoln v. Alexander* (1877) 52 Cal. 482, 28 Am. Rep. 639.

In *Geneva v. People* (1901) 98 Ill. App. 315, it was held that an act of the legislature, amending an act under which a judgment had been rendered ordering a mandamus to issue, compelling a city to pass an ordinance disconnecting territory, by making the action discretionary with the city council, could not affect the judgment, as the legislature was without power to modify a judgment lawfully rendered.

In *United States v. Peters* (1809) 5 Cranch (U. S.) 115, 3 L. ed. 53, it appeared that a decree in a United States court in admiralty proceedings awarded certain moneys to the libellants. Subsequently the state legislature passed an act requiring the governor of the state to demand the money so awarded for the use of the state, the motive for the passage of the act being that the Federal court was without jurisdiction in the case. Holding that the legislature was without power to annul or modify the judgment of a Federal court, Chief Justice Marshall said: "If the legislature of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of en-

forcing its laws by the instrumentality of its own tribunals."

Likewise, where a court has declared that a will was not legally executed, the legislature is powerless to enact a law providing that wills executed in the manner of the one adjudged to be invalid by the court should be deemed to be validly executed. *Greenough v. Greenough* (1849) 11 Pa. 489, 51 Am. Dec. 567; *Snyder v. Bull* (1851) 17 Pa. 54.

So, it has been held that after a decree of a court construing certain deeds made by a married woman, the legislature is without power to pass an act vacating and annulling the deeds and the decree construing them. *Berrett v. Oliver* (1835) 7 Gill & J. (Md.) 191.

In *Central of Georgia R. Co. v. Railroad Commission* (1908) 161 Fed. 925, reversed on other grounds in (1909) 95 C. C. A. 117, 170 Fed. 225, it was held that the legislature had no power to enact a statute providing that the fact that an injunction had been issued restraining the collection of certain rates should be no defense to an action by a shipper to recover a penalty provided for by the statute, when the prohibited rate was exacted, as this in effect was nullifying a judgment of the court, which the legislature was powerless to do.

It has been held that, where a court had entered a decree in a creditors' suit against certain stockholders for their unpaid subscriptions, the legislature was without power to require that all actions for unpaid stock subscriptions should be brought in the courts of law, in so far as it was sought to make the act apply to suits in equity brought before the passage of the act. And it was further held that the fact that the cause was pending on appeal did not change the nature of the decree as a final judgment. *Martin v. South Salem Land Co.* (1896) 94 Va. 28, 26 S. E. 591.

In *Arnold v. Kelley* (1872) 5 W. Va. 446, it appeared that a judgment had been obtained for the conversion of property of another during the Civil War. Subsequently to the rendition of the judgment the legislature passed

an act prohibiting the collection of any debt or judgment against any person who had done or committed any acts on either side in the late war, in accordance with the rules of civilized warfare. In holding the act to be unconstitutional the court said: "The legislature has no power to set aside a judgment, or to empower a court to set aside a judgment, rendered before the passage of the act, no matter how erroneous the judgment may be."

In *Griffin v. Cunningham* (1870) 20 Gratt. (Va.) 31, it was held that an act empowering the supreme court to review and set aside or affirm the judgments of a former court composed of judges holding office under military appointment was unconstitutional.

In *McCullough v. Virginia* (1898) 172 U. S. 102, 44 L. ed. 382, 19 Sup. Ct. Rep. 134, the court, holding that the repeal of an act providing a remedy by which holders of coupons cut from certain state bonds might force their acceptance in payment of taxes did not affect the validity of a judgment obtained under the act repealed, said: "It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases. So, properly, the court of appeals, in considering the question of the validity of this judgment, took no notice of the subsequent repeal of the act under which the judgment was obtained, and the inquiry in this court is not what effect the repealing Act of 1894 had upon proceedings initiated thereafter, or pending at the time, but whether such a repeal devastated a plaintiff in a judgment of the rights acquired by that judgment. And in that respect we have no doubt that the rights acquired by the judgment under the Act of 1882 were not disturbed by a subsequent repeal of the statute."

It has been held that the legislature has no power to validate the or-

ganization of a high school district after a judgment by the supreme court holding its organization to be invalid. *People ex rel. Robinson v. New York C. R. Co.* (1918) 283 Ill. 334, 119 N. E. 299. To the same effect, see the reported case (*PEOPLE EX REL. LAFFERTY v. OWEN*, ante, 447). But where the judgment declaring the organization invalid has not been passed on by the supreme court though it was pending in that court on appeal, the legislature may enact a law declaring the organization to be valid. *People ex rel. Vautrin v. Madison* (1917) 280 Ill. 96, 117 N. E. 493; *People ex rel. Fitzgerald v. Stitt* (1917) 280 Ill. 553, 117 N. E. 784. However, where no appeal is pending from such a judgment, the legislature has no power to pass a statute declaring a high school district to be valid. *People ex rel. Shriver v. Cowen* (1918) 288 Ill. 308, 119 N. E. 335.

In *People v. Keenan* (1905) 110 App. Div. 537, 97 N. Y. Supp. 77, affirmed in (1906) 185 N. Y. 600, 78 N. E. 1108, it was insisted that an act of the legislature, requiring the chamberlain of the city of New York to pay over to the state treasurer all moneys paid into court and remaining unclaimed for a period of twenty years, was unconstitutional in that it attempted to modify or annul a judgment of the court. Holding the act to be valid, the court said: "The order or decree applies with the same force to the successor in office or other custodian of the fund as it did to the person who held the office when the order was granted and the deposit made. If a change in the occupant of the office worked a change in the order or decree under which the money was held, it would follow that the present chamberlain has no authority over the moneys which have come to him from the treasurers of the counties of Kings, Queens, and Richmond, or even from his predecessors in office, as the orders and decrees under which he now holds the moneys which are in controversy were made long prior to his incumbency. Each depositary takes the fund subject to the order or decree directing its

deposit, and he becomes bound to execute the trust thereby committed to his care, in conformity with the terms of the order under which he holds it and under which it was originally deposited. The act in question does not seek to change the order or decree under which the deposit was made. The treasurer of the state of New York becomes bound by the very terms of the act to pay it out only under an order of the court to be hereafter made. The legislature by various enactments has changed the depository of court funds, and so far as we are aware, it has never before been urged that such a change tended to divest the property rights of the beneficiaries, or to nullify or interfere with the prior orders of the court."

In *Schneck v. Jeffersonville* (1898) 152 Ind. 204, 52 N. E. 212, it was held that a statute validating the bonds of a city which had theretofore been declared invalid by the courts was not unconstitutional with respect to an action involving the validity of such bonds, brought after the passage of the statute.

*b. Judgment relating to taxes.*

Where a court of competent jurisdiction has declared the levy of a special assessment to be void, and enjoined its collection, the legislature is without power to enact a law validating the assessment and in effect dissolving the injunction. *Searcy v. Patriot & B. Turnp. Co.* (1881) 79 Ind. 274; *Baltimore v. Horn* (1867) 26 Md. 194. In the case last cited it was said: "The most prominent objection to this law, taken in the argument by the counsel of the appellees, was that the legislature, in passing it, exercised judicial power, which, by the Declaration of Rights and numerous decisions in this state and other states of the Union, which separate the judicial from the legislative and executive powers of government, it could not assume and exercise. And this position, we think, is well taken. When this law was passed, the rights of the parties under the laws of 1856, chap. 164, had been judicially determined by this court. In the case of *Balti-*

*more v. Porter* (1861) 18 Md. 284, 79 Am. Dec. 686, this court had adjudged that the parties assessed in certain proceedings under that law were not liable for the assessments, and had perpetually enjoined the city authorities from proceeding to collect them; and yet the Laws of 1864, chap. 344, passed after that decision, expressly authorized those authorities to proceed and collect them. It adjudged those parties to pay that which this court, in a regular proceeding, determined they were not bound to pay. It in effect, and that most plainly, reversed the judgment of this court. That which this court said was illegally done, or done without authority of law, or in contravention of law, and that the parties could not be assessed for, this act of assembly clearly declares shall be paid for by the parties, although they were relieved from that payment by the final determination of this court. There certainly could not be a more plain assumption of judicial power by the legislature than was exercised by the enactment of the Laws of 1864, chap. 344, and, as such, this law must be pronounced inoperative and void."

Likewise it has been held that where the supreme court had declared a tax levy to be invalid, its judgment could not be set aside by the legislature's passing an act declaring the levy valid. *Chicago & E. I. R. Co. v. People* (1906) 219 Ill. 408, 76 N. E. 571. And it was further held in that case that the fact that the act was passed before the judgment of the supreme court reversing and remanding the case had reached the lower court could not render it effectual as against the judgment.

Similarly, it has been held that where the courts had enjoined the levy of a drainage assessment the legislature had no authority to pass an act directing the county supervisors to reassess the tax and proceed to collect it, as this virtually amounted to the legislature setting aside a judgment of the court. *People ex rel. Butler v. Saginaw County* (1872) 26 Mich. 22.

In *Moser v. White* (1874) 29 Mich. 59, the court, in holding that the legis-

lature could not, by legalizing an invalid tax roll, set aside or impair a judgment against the collectors for trespass in attempting to collect the tax, said: "That act does, in terms, purport to heal all the defects which have been pointed out. But plaintiff's judgment was obtained before the justice before this act was passed. If regular when obtained, it could not be reversed. The legislature have no authority to reverse judgments, directly or indirectly. The effect of the act must be so limited as not to interfere with an existing judgment, or it would be necessary to declare it void on principles which are too elementary to be discussed. The case had been already tried, and there was to be no further trial to determine the merits. The judgment had fixed the questions of fact, and the only matter open in the circuit was whether, in so doing, any legal error had been committed. To allow such a judgment to be vacated when there had been no error committed would be a plain invasion of private right, and a usurpation of judicial power which cannot be justified."

In *Ex parte Low* (1884) 24 W. Va. 620, it was held that an act authorizing and directing the assessors and clerks, in making out the land books for taxation, to disregard all changes made by the county court in the value of any tract of land under certain circumstances, was void as being an encroachment on the judiciary.

In *Lambertson v. Hogan* (1845) 2 Pa. St. 22, it was held that where a court of competent jurisdiction had decided that a purchaser of land at a tax sale, who had notice by ancient improvements that the land was seated, was not entitled to recover for improvements made by himself, the judgment could not be affected by an act of the legislature allowing compensation for improvements made bona fide under a tax title.

But in *Re Lockett* (1908) 58 Misc. 5, 110 N. Y. Supp. 32, the court, holding that an order of the court apportioning a tax assessment for street improvements was not such a judgment as the legislature could not modify,

said: "It is true that the final order in the proceedings referred to has all the force and effect of a judgment, and that, ordinarily, the legislature cannot undo a judgment or deprive the successful party of its fruits. But the final order herein is of dual nature. So far as it divests the title to real estate by virtue of the right of eminent domain and fixes the compensation of the owner, the court acts judicially as in a controversy between private parties; but, so far as it apportions and imposes an assessment, it acts as but a legislative agency in the exercise of the taxing power. A tax levy made by public officers, if regular in form and within their jurisdiction, has as much the power and force of a judgment as if made by the confirmatory order of a court. The inviolability of these assessments depends in no way upon the form of the machinery by which the legislature had directed their levy originally. The whole question of taxation, within defined limits, is with the legislature. What it can take, it may remit, under many circumstances. What it has prescribed, it may change."

#### *c. Criminal judgment.*

The legislature has no power to pass an act reducing for good behavior the sentences of prisoners convicted before the passage of the act. *Ex parte Darling* (1881) 16 Nev. 98, 40 Am. Rep. 495; *Ex parte Woodburn* (1909) 32 Nev. 136, 104 Pac. 245; *Com. ex rel. Johnson v. Halloway* (1862) 42 Pa. 446, 82 Am. Dec. 526. In the case last cited, it was said: "The whole judicial power of the commonwealth is vested in courts. Not a fragment of it belongs to the legislature. The trial, conviction, and sentencing of criminals are judicial duties, and the duration or period of the sentence is an essential part of a judicial judgment in a criminal record. Can it be reversed or modified by a board of prison inspectors, acting under legislative authority? If it can, what judicial decree is not exposed to legislative modifications? From what judicial sentence may not the legislature direct 'deductions' to be made,

if this act be constitutional? . What they may do indirectly they may do directly. If they may authorize boards of inspectors to disregard judicial sentences, why may they not repeal them as fast as they are pronounced, and thus assume the highest judicial functions?"

In *People v. Cummings* (1891) 88 Mich. 249, 14 L.R.A. 285, 50 N. W. 310, it was held that an act empowering prison commissioners to release prisoners on parole was an impairment of a judgment of court, and was therefore unconstitutional.

It has been held that an act of the legislature discharging a debtor from imprisonment on execution is unconstitutional, as invading the province of the judiciary. *Ward v. Barnard* (1825) 1 Aik. (Vt.) 121; *Keith v. Ware* (1829) 2 Vt. 174; *Lyman v. Mower* (1830) 2 Vt. 517; *Kendall v. Dodge* (1830) 3 Vt. 360.

But in the case of *Re Nichols* (1864) 8 R. I. 50, it was held that a special act of the legislature, permitting a person imprisoned for debt to take the poor debtor's oath and thereby relieve himself from liability, was not an unlawful invasion of the judicial power.

In *Mason v. Haile* (1827) 12 Wheat. (U. S.) 370, 6 L. ed. 660, it was held that a special act reviving an act for the relief of insolvent debtors for the benefit of a person imprisoned for debt was not unconstitutional.

In *United States v. Klein* (1872) 13 Wall. (U. S.) 128, 20 L. ed. 519, it was held that Congress had no power to pass an act denying to pardons granted by the President, the effect which the court of claims and the supreme court had adjudged them to have.

Similarly, it has been held that if a statute authorizing a pardoned criminal to maintain an action for damages in the court of claims should be construed as an enactment that the person convicted was innocent, and that his conviction was improper, it was unconstitutional as an invasion by the legislature of the judicial department of the government. *Roberts v. State* (1899) 30 App. Div. 106, 51 N. Y. Supp. 691, affirmed (1899) 160 N. Y. 217, 54 N. E. 678, 15 Am. Crim. Rep. 561, where it was said: "If the act under consideration can be sustained, we see no reason to doubt that in any case where a criminal has been convicted of a crime and imprisoned, the legislature, on his being pardoned, or on the expiration of his term of imprisonment, may retry the question of his guilt or innocence, or authorize a tribunal of its own selection to do so, and may thereupon sanction an allowance of a claim for damages against the state. The effect of holding that the legislature possesses this power would be deplorable. Judgments in criminal cases would only be final, effectual, and valid at the will of the legislature. We are satisfied that the legislature possesses no power to annul the final judgment of a court of competent jurisdiction, or to retry the questions necessarily passed upon in the rendition of such judgment, or to authorize any board or tribunal created by it to exercise such powers."

An act to reverse and annul the judgment of a supreme court for treason is unconstitutional. *Re Dorr* (1854) 3 R. I. 299. M. B.

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HAROLD A. ANDREWS, Appt.,

v.

ALBERT HAAS et al., Respts.

*New York Court of Appeals — February 25, 1916.*

(214 N. Y. 255, 108 N. E. 423.)

**Damages — for discontinuing suit conducted for contingent fee.**

1. The value of the services rendered, and not the amount which would have been secured had the suit been pressed, is the measure of damages in

case a client discontinues a suit for the conduct of which he has employed an attorney on a contingent fee.

[See note on this question beginning on page 472.]

Contract — implied — illegal.

2. The law will not imply an agree-

ment which would be illegal, if it were express.

[See 6 R. C. L. 588.]

**APPEAL** by plaintiff from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Nassau County, dismissing a complaint filed to recover damages for alleged breach of a contract of employment. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Harold A. Andrewes, in propria persona:

Performance is pronounced when performance has been prevented by the other party, and the measure of damages is the sum agreed to be paid in the event of complete success.

9 Cyc. 701, note 6; Mains v. Haight, 14 Barb. 76; Smith v. Gugerty, 4 Barb. 614; Taylor v. Bullen, 6 Cow. 624; United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; Griggs v. Day, 168 N. Y. 1, 52 N. E. 692; Masterson v. Brooklyn, 7 Hill, 61, 42 Am. Dec. 38; Gifford v. Waters, 67 N. Y. 80; Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291; Ware Bros. Co. v. Cortland Cart & Carriage Co. 192 N. Y. 439, 22 L.R.A.(N.S.) 272, 127 Am. St. Rep. 914, 85 N. E. 666; Marsh v. Holbrook, 3 Abb. App. Dec. 176; Mt. Vernon v. Patton, 94 Ill. 65.

An attorney has the same contract rights as other professional men.

Re Fitzsimons, 174 N. Y. 15, 66 N. E. 554; Ransom v. Ransom, 70 Misc. 34, 127 N. Y. Supp. 1027; Peri v. New York C. & H. R. R. Co. 152 N. Y. 521, 46 N. E. 849; Fischer-Hansen v. Brooklyn Heights R. Co. 178 N. Y. 492, 66 N. E. 895, 13 Am. Neg. Rep. 396; Morehouse v. Brooklyn Heights R. Co. 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377; Marsh v. Holbrook, 3 Abb. App. Dec. 176; Lawson v. Bachman, 81 N. Y. 616; Re Robbins, 189 N. Y. 422, 82 N. E. 501; Carlisle v. Barnes, 102 App. Div. 573, 92 N. Y. Supp. 917; Re Albers Realty Co. 140 App. Div. 278, 125 N. Y. Supp. 179; Carey v. Gnant, 59 Barb. 574; Graut v. Langley, 34 Misc. 776, 68 N. Y. Supp. 820; Werner v. Knowlton, 107 App. Div. 158, 94 N. Y. Supp. 1054; Mt. Vernon v. Patton, 94 Ill. 65; Millard v. Richland County, 13 Ill. App. 533; French v. Cunningham, 149 Ind. 632, 49 N. E. 797; Western U. Teleg. Co. v. Semmes, 73 Md.

9, 20 Atl. 127; Kersey v. Garton, 77 Mo. 645; Reynolds v. Clark County, 162 Mo. 680, 63 S. W. 382; Webb v. Treacy, 76 Cal. 621, 18 Pac. 796; Baldwin v. Bennett, 4 Cal. 392; Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060; Matheny v. Farley, 66 W. Va. 680, 66 S. E. 1060; Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613; Myers v. Crockett, 14 Tex. 257; Watson v. Columbia Min. Co. 118 Ga. 603, 45 S. E. 460; Villhauer v. Toledo, 5 Ohio S. & C. P. Dec. 8; McElhinney v. Kline, 6 Mo. App. 94.

Messrs. Eppstein & Rosenberg, for respondents:

An allegation that a certain sum is due and owing is a mere conclusion of law, and is not an allegation either that damage had been sustained by plaintiff in that amount, or that services alleged to have been rendered by the plaintiff were reasonably worth that amount.

Sampson v. Grand Rapids School Furniture Co. 55 App. Div. 163, 66 N. Y. Supp. 815; Sparks v. Ducas, 123 App. Div. 507, 108 N. Y. Supp. 546; Mitchell v. Dunmore Realty Co. 60 Misc. 563, 112 N. Y. Supp. 659; Tate v. American Woolen Co. 114 App. Div. 106, 99 N. Y. Supp. 678; Poland v. Hollander, 62 Misc. 523, 115 N. Y. Supp. 1044; American Exch. Nat. Bank v. Goubert, 135 App. Div. 374, 120 N. Y. Supp. 397.

A client has the right at any time, arbitrarily and without cause, to discharge his attorney, but of course if he exercises this right, he must do so upon terms that are just to the attorney.

Lusk v. Hasting, 1 Hill, 656; Bathgate v. Haskin, 59 N. Y. 533; Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263; De Angelis v. Bank for Savings, 74 Misc. 394, 132 N. Y. Supp. 295; Roake v. Palmer, 119 App. Div. 64, 103



N. Y. Supp. 862; *Anglo-Continental Chemical Works v. Dillon*, 111 App. Div. 418, 97 N. Y. Supp. 1081; *Re Robbins*, 61 Misc. 114, 112 N. Y. Supp. 1032; *Badger v. Celler*, 41 App. Div. 599, 58 N. Y. Supp. 653; *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. Supp. 1059; *Re Prospect Ave. 85 Hun*, 257, 32 N. Y. Supp. 1013; *Vincent v. Nassau County*, 45 Misc. 247, 92 N. Y. Supp. 32; *O'Sullivan v. Metropolitan Street R. Co.* 39 Misc. 268, 79 N. Y. Supp. 481; *Re Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536.

Public policy prohibits an attorney from acquiring such an interest in his client's cause of action as will prevent the client from, in good faith, settling the litigation or abandoning it.

*Re Snyder*, 190 N. Y. 69, 14 L.R.A. (N.S.) 1101, 123 Am. St. Rep. 533, 82 N. E. 742, 13 Ann. Cas. 441.

Cardozo, J., delivered the opinion of the court:

The plaintiff is a member of the bar. He complains that the defendants refused to prosecute an action in which they had retained him as their lawyer. The agreement was, he says, that they would sue for \$180,000, and pay him 25 per cent of the amount recovered. He drafted a complaint for them, but there the action stopped. The defendants refused to go on with it. They were advised and became convinced, as they now allege in their answer, that the action was without merit. Because of their refusal to proceed with it the plaintiff says that they owe him \$45,000. In opening his case he declined to prove the value of his services up to the time when the case was halted; he took his stand upon the ground that he was entitled to the profits that would have come to him if his clients had pressed the case to a successful conclusion. At the close of his opening the complaint was dismissed.

The employment of a lawyer to serve for a contingent fee does not make it the client's duty to continue the lawsuit, and thus increase the lawyer's profit. The lawsuit is his own. He may drop it when he will.

Even an express agreement to pay damages for dropping it without his lawyer's consent would be against public policy and void. *Re Snyder*, 190 N. Y. 66, 69, 14 L.R.A. (N.S.) 1101, 123 Am. St. Rep. 533, 82 N. E. 742, 13 Ann. Cas. 441. The law will not imply an agreement which would be illegal, if it were express. It will not, Contract—implied—illegal.

under the coercion of damages, constrain an unwilling suitor to keep a litigation alive for the profit of its officers. *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Re Dunn*, 205 N. Y. 398, 402, 98 N. E. 914, Ann. Cas. 1913E, 536; *Nutt v. Knut*, 200 U. S. 12, 21, 50 L. ed. 348, 353, 26 Sup. Ct. Rep. 216; *Mesa County Nat. Bank v. Berry*, 24 Colo. App. 487, 135 Pac. 129. The notion that such a thing is possible betrays a strange misconception of the function of the legal profession, and of its duty to society. When the defendants abandoned the action, they became liable to the plaintiff for the value of the services then rendered. Damages—for discontinuing suit conducted for contingent fee.

That is the measure of their liability and of his right.

We have been referred to cases where clients, after retaining a lawyer for a contingent fee, have continued the litigation through another lawyer, and have been held answerable in damages. *Martin v. Camp*, 161 App. Div. 610, 146 N. Y. Supp. 1041; *Carlisle v. Barnes*, 102 App. Div. 573, 92 N. Y. Supp. 917. We are not required at this time either to approve or to condemn those rulings. They have not passed unchallenged. *Martin v. Camp*, supra; *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. Supp. 1059. In those cases, and in others like them, the clients went on with the lawsuit. Here they abandoned it. We refuse to hold that they were bound to pay their lawyer as if they had gone on with it and won it.

The plaintiff's claim is without

merit. The judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., and Hisecock, Chase, Cuddeback, Miller, and Seabury, JJ., concur.

**NOTE.**

The question as to the amount or

basis of recovery by an attorney who takes a case on a contingent fee, where the client discontinues, settles, or compromises, is discussed in the note following *SOUTHWORTH v. ROSENDAHL*, post, 472. For cases dealing with a discontinuance or dismissal of the case by the client, see subdivisions II. b, and III. of that note.

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B. F. PROCTER, Appt.,  
v.  
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

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A. T. MCCORMACK, Appt.,  
v.  
SAME.

*Kentucky Court of Appeals — December 16, 1913.*

(156 Ky. 465, 161 S. W. 518.)

**Attorneys — contingent fee — basis of computation.**

1. The amount which an attorney, having a contract for a contingent fee on the percentage basis, may recover, under a statute giving attorneys a lien upon all claims put into their hands for the amount of their agreed fees, from one who has entered into a compromise agreement to pay his client a certain sum and the legally taxable costs of the litigation, is to be computed as though the amount paid by way of compromise constituted the entire recovery.

[See note on this question beginning on page 472.]

**Appeal — conflicting evidence — review.**

2. A finding by the trial court, upon conflicting evidence, as to the value of the services of an expert witness, will not be disturbed on appeal.

[See 2 R. C. L. 202.]

**Attorneys — fees — compromise by client.**

3. The rule that, where a judgment has been recovered, a client cannot, by compromising, deprive the attorney of

his fee according to the contract between them, does not apply where the judgment has been reversed.

[See 2 R. C. L. 1080.]

**Estoppel — stare decisis.**

4. The principle of stare decisis will not preclude the court from re-examining a question which has been passed upon on a single occasion only, and has not become established as a rule of property.

[See 7 R. C. L. 1000.]

(Turner and Nunn, JJ., dissent.)

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**APPEALS** by plaintiffs from judgments of the Circuit Court for Warren County in their favor for less than the amounts demanded, in consolidated actions brought to recover fees for services rendered by them in a personal injury action against the defendant railroad company. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. B. F. Procter, Grider & Harlin, O'Rear & Williams, and Wright & McElroy for appellants.

Messrs. Sims & Rodas and B. D. Warfield, for appellee:

Plaintiffs have recovered and have been paid all the fees to which they are entitled under their contracts.

Schmitz v. South Covington & C. Street R. Co. 131 Ky. 207, 22 L.R.A. (N.S.) 776, 114 S. W. 1197, 18 Ann. Cas. 1114; Newport Rolling Mill Co. v. Hall, 147 Ky. 598, 144 S. W. 760; Louisville R. Co. v. Burke, 149 Ky. 437, 149 S. W. 865.

Miller, J., delivered the opinion of the court:

These appeals involve only the fees for services rendered by Dr. A. T. McCormack as a physician, and by B. F. Procter as an attorney, in the action of R. E. Lynch against the Louisville & Nashville Railroad Company for personal injuries.

Having been injured in a collision upon appellee's road at Rockland, Tennessee, Lynch and his brother-in-law, Niemeyer, made the following contract of employment with Procter:

This obligation witnesseth, that I have employed B. F. Procter to adjust by suit or compromise a claim for myself and for E. B. Niemeyer for an injury done to us at Rockland, Tennessee, March 13, 1907, in a collision; he is also to represent a claim for malpractice in treatment of said Niemeyer. It is agreed that we will give all assistance in case of the prosecution of said claim, and for his services we and each of us will pay to said Procter a sum equal to one fourth ( $\frac{1}{4}$ ) received for said injury if compromised before trial, but if a trial is gone into then said Procter is to prosecute said claim in all courts in which it is pending, and for his services he is to receive a sum equal to one third ( $\frac{1}{3}$ ) received for said injuries. If nothing is received he is to receive nothing for his services.

This November 26th, 1907.

R. E. Lynch,  
E. B. Niemeyer,  
Per R. E. Lynch.

Acting for Lynch, appellant Procter instituted a suit against the appellee in the Warren circuit court, and recovered a judgment for \$25,000, which was reversed by this court in *Louisville & N. R. Co. v. Lynch*, 137 Ky. 696, 126 S. W. 362. After the case had been remanded to the lower court for a new trial, and before another trial was had, Lynch, acting alone, compromised his case for \$10,000, as is shown by the following receipt given by him: "Received of the Louisville & Nashville Railroad Company ten thousand (\$10,000) dollars in full compromise, settlement and adjustment of all claims and demands of every character whatsoever, which I have against said company, its officers, agents, or employees on account of injuries received by me on or about the 13th day of March, 1907, at or near Rockland, Tennessee, and on every other account whatsoever. I hereby agree to dismiss settled my action now pending against said company in the Warren circuit court to recover damages on account of said injuries; the Louisville & Nashville Railroad Company to pay the legally taxable costs of the litigation which it has not heretofore paid. Witness my hand at Louisville, Kentucky, this May 21, 1910."

The company paid Lynch the \$10,000 called for by the settlement, whereupon McCormack and Procter intervened in this action, claiming their fees and a lien therefor. Recognizing its liability under § 107 of the Kentucky Statutes, which gives attorneys a lien upon all claims or demands, including all claims for unliquidated damages put into their hands for suit or collection, for the amount of any fee which may have been agreed upon by the parties, the company offered to pay Procter \$2,500, that sum being one fourth of the amount which the company had paid Lynch. Procter, however, claimed that he was entitled to \$5,000, since the settlement had been made after trial, in which event he was, by the

terms of his contract, entitled to one third of the recovery; that in paying Lynch \$10,000, the company had paid Lynch only that part of the recovery which was due him; and that the remaining one third, or \$5,000, was due Procter under the contract. The circuit court having held that Procter was entitled to a fee of \$3,333.33, the company paid him that sum. Procter appeals, claiming that he was entitled to \$5,000, and that there is yet due him \$1,666.67.

Before the trial of the action in the circuit court, Dr. A. T. McCormack and another physician were appointed by the court to make a physical examination of Lynch for the purpose of preparing themselves to testify concerning his injuries. Dr. McCormack made the examination, and testified; and for his services he claimed \$250. The circuit court allowed him a fee of \$50, which was taxed as costs, and paid by the company; and from so much of the judgment as denied him a recovery of the remaining \$200, Dr. McCormack appeals.

Disposing of Dr. McCormack's appeal first, it is sufficient to say that, while several witnesses testified that \$250 was a reasonable fee for the services he rendered, at least two physicians testified that \$50 was a reasonable fee. This question of fact having been tried by the circuit judge, who knew the witnesses and heard them testify, we are not inclined to disturb his finding. Where the proof is contradictory, and the mind is left in

Appeal—  
conflicting  
evidence—  
review.

doubt upon a question of fact, this court will not disturb the finding of

fact by the chancellor. Byassee v. Evans, 143 Ky. 415, 136 S. W. 857; Kirkpatrick v. E. Rehkoph Saddlery Co. 144 Ky. 134, 137 S. W. 862; Wathen v. Wathen, 149 Ky. 505, 149 S. W. 902; Bond v. Bond, 150 Ky. 389, 150 S. W. 363. The judgment is therefore affirmed upon Dr. McCormack's appeal.

Turning to Procter's appeal, we

find he relies upon Louisville & N. R. Co. v. Procter, 21 Ky. L. Rep. 447, 51 S. W. 591; Procter Coal Co. v. Tye, 123 Ky. 381, 96 S. W. 512, and Elk Valley Coal Min. Co. v. Willis, 149 Ky. 449, 149 S. W. 894, for a reversal of the judgment which passed upon his claim. A careful reading of the opinions in those cases will show, however, that none of them comes up to the position contended for by appellant. A brief examination of those opinions will show that fact.

In the first case, in 21 Ky. L. Rep. 447, the plaintiff had recovered a judgment for \$1,000 against the railroad company, and subsequently compromised it for \$300. In that case Procter, the plaintiff's attorney, had a contract for a fee of one half of the amount recovered; and the effect of the opinion was, that where a client had compromised a claim, which had already been reduced to judgment, by accepting less than the judgment in satisfaction thereof, his act in so settling his judgment did not deprive the attorney of his fee according to his contract, when applied to the existing judgment. In that case the judgment was in force, and it was therefore a correct measure of the company's liability. In the case at bar, however, Lynch had no judgment at the time he made the settlement; and the fact that he had previously received a judgment which had been reversed cannot affect the question. When the case went back to the circuit court for trial, so far as Lynch and his attorney were concerned, it stood as though he had never recovered a judgment, and as though his suit had just been brought and was awaiting trial for the first time.

Attorneys—  
fees—compromise by client.

Attorneys—fees—compromise by client.

In Procter Coal Co. v. Tye, supra, the case was compromised by the plaintiff Chandler before trial; and, the attorneys having no express contract as to the amount of their fee, they were allowed to recover upon a quantum meruit. It appeared, however, that although the plain-

tiff had received but a small sum of money, he obtained a contract by which he was to be given employment by the defendant company as long as it remained in existence. The court held that the attorneys were entitled, in fixing their fee upon a quantum meruit basis, to show the value of the contract between the company and Chandler for future employment. And, in speaking of the effect of the statute giving attorneys a lien for their fees, the court said: "This statute was not intended to deny to parties to an action the right to settle their differences independent of their attorneys, and without notice to them; but if they do so settle, and money or other thing of value is paid by the defendant to plaintiff as a consideration for the settlement, the attorney for plaintiff may recover from the defendant a reasonable fee for his services. Nor was it designed to prevent the compromise or settlement of lawsuits out of court by the parties. The only purpose of it is to provide a means whereby attorneys who have been instrumental in bringing the settlement about, by reason of the claim being placed in their hands for collection, shall receive a reasonable compensation for the services they have rendered."

Again, in *Elk Valley Coal Min. Co. v. Willis, Alexander*, the plaintiff, settled his claim for \$250 in money, a house and lot, and permanent employment in the service of the company. For a fee the attorneys had a contract for a sum equivalent to 50 per cent of the amount recovered by suit or otherwise. It will be seen that in this case, as in the *Tye Case*, it became necessary to determine what the recovery was, by ascertaining the value of the contract for future service and the house and lot, and that the attorneys were entitled to one half of that sum. It will thus be seen that neither of these cases bears directly upon the case at bar.

The question presented by this

appeal has, however, been squarely decided by this court in *Schmitz v. South Covington & C. Street R. Co.* 131 Ky. 207, 22 L.R.A. (N.S.) 776, 114 S. W. 1197, 18 Ann. Cas. 1114. In that case, Mrs. Linns, the plaintiff, employed Schmitz, an attorney, to prosecute a damage suit for her against the company under a contract to pay the attorney, as a fee, a sum equivalent to one half of any sum that might be collected or recovered by suit, compromise, or otherwise. After the suit had been instituted, and before trial, Mrs. Linns settled her case for \$1,500, the company further agreeing, as a part of the settlement, to pay Schmitz, her attorney, the fee agreed upon between him and Mrs. Linns. It will be observed that this is precisely the agreement the appellee in the case at bar made with Lynch as to paying Procter's fee. In the *Schmitz Case*, the company offered to pay Schmitz \$750, that sum being one half of the amount it had paid Mrs. Linns. Schmitz, however, contended that he was entitled to \$1,500, under his contract for one half of the recovery, just as Procter is claiming \$5,000 in the case at bar, under his contract for one third of the recovery. In the *Schmitz Case*, however, this court affirmed the judgment of the circuit court, which allowed Schmitz \$750 instead of \$1,500.

—contingent  
fee—basis of  
computation.

We are now asked to re-examine the question and to overrule the *Schmitz Case*. The question in that case was, however, carefully considered and thoroughly argued, as fully appears from the opinion. The gist of the opinion and the reasons for the conclusion reached are found in the following extract taken from page 211 of 131 Ky., of that opinion: "The attorney, independent of his client, had no cause of action whatever against the company. His claim against it resulted entirely from his employment. If his client had no claim against the company, neither did the at-

torney. If the client did not recover anything, neither could the attorney. The amount of the attorney's recovery depended entirely upon the amount recovered by his client. He was to get a share or interest in whatever amount his client received, and hence, in determining what the attorney was entitled to, we must of necessity ascertain what the client secured, as the attorney is only entitled to one half of that amount. The venture of the attorney and the client as between themselves may be treated as a partnership in the sense that the attorney was to receive an amount equal to one half of the sum recovered by the client, but this partnership did not increase the liability of the company. Its obligation was to pay to the attorney the fee the client would have to pay—no more and no less—and it is clear that the client could only be required to pay one half of the amount recovered. If the case had gone to trial, and a judgment had been rendered for \$1,500, the client and attorney under the agreement would share equally in the recovery, solely because the attorney was to get one half of the recovery, and in this state of case the client would only receive \$750; but, if a third party had come in and assumed to pay the attorney his fee, then the client would receive \$1,500, and the attorneys \$750. It does not follow from the fact that, because the client received \$1,500, the attorney is entitled to a like amount. The amount the attorney is entitled to receive is absolutely fixed by the amount paid to the client. If the attorney receives one half the amount his client receives, it does not concern him whether he is paid that amount by his client or by some other person." And, as pointed out in that opinion, if the company had been insolvent, and the attorney could not for that reason have recovered any part of his fee from the company, clearly he could not have recovered more than \$750 from his client. And, as

his claim against the company arises only from his employment by his client, it is difficult to understand how his claim can be any greater against the company than it could have been against his client.

In Cooley's Constitutional Limitations, it is said that, when a rule has been once deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very urgent reasons, and upon a clear manifestation of error; and that, if the practice were otherwise, it would be leaving us in a perplexed uncertainty as to the law. 7th ed. p. 84.

Upon the principle of stare decisis, the decisions which have been rendered by a court will be adhered to by such court in subsequent cases, unless there is something manifestly erroneous therein, or the rule or principle of law established by such decisions has been changed by legislative enactment. 11 Cyc. 746. And, while we are not unmindful of the salutary tendency of the rule stare decisis, we are, at the same time, not averse to re-examining a question which has been passed upon on a single occasion only, and has not established a rule of property. *Montgomery County Fiscal Ct. v. Trimble*, 104 Ky. 639, 42 L.R.A. 738, 47 S. W. 773.

**Estoppel—  
stare decisis.**

We have, therefore, carefully re-examined the question decided in the *Schmitz Case*, and, being of opinion that the rule there announced is sound in every particular, it is approved and followed.

Judgment affirmed in each appeal.

**Turner, J., dissenting:**

I must respectfully dissent from so much of the opinion of the court as holds the appellant Procter is only entitled to recover from appellee \$3,333.33.

There is no disputed fact in the record, and, in my view, no question of law presented, but really only a question of calculation. The

uncontradicted facts are that Procter and Lynch entered into the contract quoted in the opinion of the court; that the suit was instituted by Procter and diligently prosecuted; that there was a verdict for \$25,000 which, upon appeal to this court, was reversed; that upon the return of the case to the lower court, and before another trial was had, negotiations looking to a settlement were pending between the attorneys for the parties; that at the very time Lynch made the settlement, appellee had pending a proposition by it to settle the case for \$15,000; that, while that proposition was pending, Lynch went to Louisville and settled with the appellee's attorney for \$10,000 net to him (*Lynch*), with the agreement at the time that the company would pay Procter under the terms of Lynch's contract with him, which contract was before the attorney for the appellee at the time the settlement with Lynch was made.

In order that the circumstances may be fully understood, I quote as follows from the uncontradicted testimony of Lynch as to this settlement. In answer to a question from Procter, he said: "I went to Warfield's office in Louisville on my own free will and accord to make a settlement of this case. When I went, after talking over the matter some time, Mr. Warfield asked me as to the conditions of the contract between you and I. I told him about the contract. He asked me if I had it with me. I told him I did, and he asked me if I had any objections to him reading it. I told him none whatever, and I showed him the contract, and after reading the contract, he offered to compromise for \$10,000 net to me. He agreed to pay all legal taxable court costs, your part of the contract, and whatever the contract was with Wright & McElroy, and Dr. Hagan's bill. I told him, after looking over the contract that he drew up, that your name was not on there. He said your part would be paid according to the contract, and with

his assurance that it would, I agreed to accept it."

We have then a corporation admitting a liability, in full possession of the fact that one third of that liability is going to and payable to one party, and deliberately, with its eyes open and in full possession of all the facts, settling with another party two thirds of that liability for \$10,000, and agreeing to settle the remaining part of it with the other party; thereby, by its own act, fixing its liability to the third party at \$5,000. Suppose the liability had grown out of a contract instead of a tort, and suppose the contractual liability was payable, two thirds to one man and one third to another, could it, by paying in full the one to whom was due the two thirds, have reduced its liability to the other? In my mind there can be no difference in principle; if there had been a disputed contractual liability, and it had fixed the amount of ultimate liability by settling with one who was only entitled to a part of the recovery, it would not thereafter be heard to say that it was not proportionately liable to the other party.

But it is argued that it is against the policy of the law not to permit a party to compromise or settle out of court his litigation, even without the consent of his attorney, and that is true; but it is sufficient to say in this case that the client did not undertake to settle the whole liability of the defendant, but only to settle that part which was coming to Lynch, which, under the terms of the contract, was two thirds. The company expressly agreed, with the contract before it, that it would settle with Procter; by the very terms of its settlement with Lynch it fixed the amount which it must pay to Procter. It may be very readily admitted that it was within the power of Lynch to have made a settlement of the whole liability at \$10,000 without the consent of Procter, and if he had done so it would have absolutely fixed Procter's fee at one

third of that amount; *but this he did not undertake to do.* On the contrary, he settled only what was coming to him under the contract; that is, he was paid \$10,000 net, with the agreement that the company, having the contract between him and Procter before it at the time, would settle with Procter; that is to say, the company, at the time, agreed to pay Procter one half as much as it had paid Lynch, because it knew from the very terms of the contract that Procter was entitled to that much.

The company admits its liability to Procter for a fee under the terms of this contract, and a majority of the court have determined that \$3,333.33 is what it must pay, and that amount has been, as shown by the record, paid Procter. Let us see by a simple calculation whether that is a compliance with the terms of the contract. The company has paid Lynch \$10,000; it has paid Procter \$3,333.33; the aggregate of those sums is \$13,333.33. Has Procter received one third of that liability which the company now admits? Certainly not; he has only received one fourth of it, and the terms of his contract have been violated over his protest.

In my view of this case the only question is, Of what sum is \$10,000 two thirds? I am of the opinion that appellant Procter is entitled to his \$5,000 fee, and that the case of Schmitz v. South Covington & C. Street R. Co. 131 Ky. 207, 22 L.R.A. (N.S.) 776, 114 S. W. 1197, 18 Ann. Cas. 1114, should be overruled. As long as the rule therein laid down obtains, an easy opportunity is offered agents of corporations to procure from ignorant, dishonest, or improvident persons having claims against them, settlements which will defraud attorneys out of part

of their just compensation, to say nothing of their contract rights.

While it is not the policy of the law to discourage settlements between litigants, or to prevent a party from settling without the consent of his attorney, we all know, as a matter of common experience, that settlements made with a litigant in the absence of his attorney (the attorney of the other party being present) is not conducive, as a general rule, to fair or equitable adjustments.

The reference in the opinion to the doctrine of stare decisis can be viewed in no other light than as an apology for the opinion in the Schmitz Case. If that opinion was and is still right, what necessity is there for invoking the doctrine of stare decisis to continue in force the unfortunate doctrine announced therein?

Nunn, J., concurs in this dissent.

#### NOTE.

In this case the stipulation in the settlement agreement, that the defendant was to pay the "legally taxable costs of the litigation," is apparently treated in both opinions as raising the same question involved in Schmitz v. South Covington & C. Street R. Co. (1908) 131 Ky. 207, 22 L.R.A. (N.S.) 776, 114 S. W. 1197, 18 Ann. Cas. 1114, in which the defendant, in settling with the plaintiff, agreed as a part of the settlement to pay plaintiff's attorney the fee agreed upon between him and plaintiff. This question is discussed in the note following SOUTHWORTH v. ROSENDAHL, post, 472, on "Amount or basis of recovery by attorney who takes case on contingent fee, where client discontinues, settles, or compromises," under the subhead, "Effect of agreement by defendant to pay attorney."



WALTER N. SOUTHWORTH et al., Appts.,  
v.  
OLE ROSENDAHL, Respt.

*Minnesota Supreme Court—July 7, 1916.*

(133 Minn. 447; 158 N. W. 717.)

**Attorney — contingent fee — settlement — compensation.**

1. Where the client exercises his legal right to settle with his adversary, in good faith and without purpose to defraud the attorney out of his compensation, the latter may recover only the reasonable value of the services rendered by him down to the time of the settlement.

[See note on this question beginning on page 472.]

**—right of client to compromise suit.**

2. The relation of attorney and client does not preclude the latter from settling and compromising the matters in litigation in his own way, and without the knowledge or consent of the attorney, and by so doing he does not subject himself to the payment to the attorney of a contingent fee agreed upon in case of the successful outcome of the case.

[See 2 R. C. L. 1000 et seq.]

**—effect of agreement not to compromise.**

3. A client may, without the consent of his attorney, settle and compromise

with his adversary all matters in litigation in such manner and upon such terms as he may deem necessary for his own interest, even though he has expressly agreed with his attorney that he will not settle or compromise without his consent or approval.

[See 2 R. C. L. 1001.]

**Contract — right to terminate performance.**

4. In executory contracts, either party has the power to arrest performance by specific direction to that effect, thereby subjecting himself to damages as for breach of contract.

[See 6 R. C. L. 1029.]

Headnotes 1 and 2 by BROWN, Ch. J.

APPEAL by plaintiffs from an order of the District Court for Scott County denying a new trial of an action brought to recover the amount of an alleged agreed compensation for services rendered by plaintiffs to defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. W. N. Southworth and F. J. Leonard, in propriis personis:

The verdict is not supported by the evidence.

Bradley v. Burk, 81 Minn. 368, 84 N. W. 123; Rosenberg v. Burnstein, 60 Minn. 18, 61 N. W. 684; Douglas v. First Nat. Bank, 17 Minn. 35, Gil. 18; Martin v. Courtney, 75 Minn. 255, 77 N. W. 813; Farmers' Union Elevator Co. v. Syndicate Ins. Co. 40 Minn. 152, 41 N. W. 547; Getchell v. Hill, 21 Minn. 464; Kohn v. Fandel, 29 Minn. 470, 13 N. W. 904; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362, 50 N. W. 77; Peterson v. Western U. Teleg. Co. 65 Minn. 18, 33 L.R.A. 302, 67 N. W. 646; Messenger v. St. Paul City R. Co. 77 Minn. 34, 79 N. W. 583; Rheiner v.

Stillwater Street R. & Transfer Co. 29 Minn. 147, 12 N. W. 449; Busse v. State, 129 Wis. 171, 108 N. W. 64; Poels v. Wilson, 77 Neb. 73, 108 N. W. 153; Meyer v. Home Ins. Co. 127 Wis. 293, 106 N. W. 1087; Hoyt v. Graham, — Iowa, —, 105 N. W. 456; Armstrong v. State, 30 Fla. 170, 17 L.R.A. 484, 11 So. 618; Bannon v. Insurance Co. of N. A. 115 Wis. 250, 91 N. W. 666; Beyer v. St. Paul F. & M. Ins. Co. 112 Wis. 138, 88 N. W. 57; Wunderlich v. Palatine F. Ins. Co. 104 Wis. 395, 80 N. W. 471.

Plaintiffs were entitled to compensation.

Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060; 13 Cyc. 159; Steinberg v. Gebhardt, 41 Mo. 520; Severance v.

Bizallion, 67 Misc. 108, 121 N. Y. Supp. 627; Hurr v. Metropolitan Street R. Co. 141 Mo. App. 217, 124 S. W. 1057; Coker v. Oliver, 4 Ga. App. 728, 62 S. E. 483; Scheinesohn v. Lemonek, Ann. Cas. 1912C, 741, note; Carlisle v. Barnes, 102 App. Div. 573, 92 N. Y. Supp. 917; Larned v. Dubuque, 86 Iowa, 166, 53 N. W. 105; Sullivan v. McCann, 124 App. Div. 126, 108 N. Y. Supp. 909; Sargent v. McLeod, 155 App. Div. 21, 139 N. Y. Supp. 666; Brodie v. Watkins, 33 Ark. 545, 34 Am. Rep. 49; Webb v. Trescony, 76 Cal. 621, 18 Pac. 796; Carter v. Baldwin, 95 Cal. 475, 31 Pac. 595; Mt. Vernon v. Patton, 94 Ill. 65; Kersey v. Garton, 77 Mo. 645; McElhinney v. Kline, 6 Mo. App. 94; Myers v. Crockett, 14 Tex. 257; Collier v. Hecht-Brittingham Co. 7 Ga. App. 178, 66 S. E. 400; Union Security & Guaranty Co. v. Tenney, 200 Ill. 349, 65 N. E. 688; Miedreich v. Rank, 40 Ind. App. 393, 82 N. E. 117; Philbrook v. Moxey, 191 Mass. 33, 77 N. E. 520; Genrow v. Flynn, 166 Mich. 564, 35 L.R.A.(N.S.) 960, 131 N. W. 1115, Ann. Cas. 1912D, 638; Riehl v. Levy, 45 Misc. 425, 90 N. Y. Supp. 441; Crye v. O'Neal, — Tex. Civ. App. —, 135 S. W. 253; Sessions v. Warwick, 46 Wash. 165, 89 Pac. 482; Eastman v. Blackledge, 171 Ill. App. 404; Whittle v. Tompkins, 94 S. C. 237, 77 S. E. 929; MacKie v. Howland, 3 App. D. C. 461; Bright v. Hewes, 18 La. Ann. 666; Morel v. New Orleans, 12 La. Ann. 485; Craddock v. O'Brien, 104 Cal. 217, 87 Pac. 896; Majors v. Hickman, 2 Bibb. 217; Bright v. Taylor, 4 Sneed, 159; Weil v. Fineran, 78 Ark. 87, 93 S. W. 568; Bowser v. Patrick, 23 Ky. L. Rep. 1578, 65 S. W. 824; Cheshire v. Des Moines City R. Co. 158 Iowa, 88, 183 N. W. 324; Andrews v. Haas, 160 App. Div. 421, 144 N. Y. Supp. 1060; Martin v. Camp, 161 App. Div. 610, 146 N. Y. Supp. 1041; Parish v. McGowan, 39 App. D. C. 184; Jacks v. Thweatt, 39 Ark. 340; Bogert v. Adams, 8 Colo. App. 185, 45 Pac. 235; Hill v. Cunningham, 25 Tex. 25; Millard v. Jordan, 76 Mich. 131, 42 N. W. 1085; De Briar v. Minturn, 1 Cal. 450; Reynolds v. Clark County, 162 Mo. 680, 63 S. W. 382; 2 Thornton, Attys. No. 450; Baldwin v. Bennett, 4 Cal. 392; Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 748; State

ex rel. Marshall v. Butler County, 164 Mo. 214, 64 S. W. 176.

Messrs. J. J. Moriarty and W. H. Leeman for respondent.

Brown, Ch. J., delivered the opinion of the court:

The facts in this case, though in some respects disputed or left in doubt by the evidence, may, for the purposes of the decision, be conceded to be substantially as follows: Defendant was the owner of certain real property the title to which was somewhat involved, the particulars with respect to which are immaterial, and certain litigation was pending in the courts concerning the same, in which he was plaintiff. Plaintiffs in this action, attorneys at law, were retained by him to take charge of and conduct the litigation in his behalf, and to institute such other or further actions or proceedings as the attorneys should deem necessary to the protection of his rights in and to the property. Plaintiffs claim that at the time of such retainer it was expressly agreed that, if successful in the litigation, they should receive and defendant would pay them as and for their compensation the sum of \$10,000; but if they failed in their efforts to clear up defendant's title, they should receive no compensation at all. The property involved was valued at about \$100,000. There is no controversy in the evidence as to the employment of plaintiffs to conduct the litigation, though defendant denied that he agreed to pay them \$10,000 if they were successful in the suit. But for the purposes of the case we assume that he did so agree. Subsequent to the retainer plaintiffs rendered certain services in the pending action, the nature and extent of which do not fully appear and are not important. Thereafter, and without notice to plaintiffs or either of them, defendant amicably settled and compromised the matter in litigation with the adverse party, and the litigation was thus brought to an end, dispensing with the further services of plaintiffs. Plain-

tiffs then brought this action to recover the amount of the agreed compensation, namely, \$10,000. A verdict was returned for defendant, and plaintiffs appealed from an order denying a new trial.

The assignments of error challenge certain rulings of the court in the admission and exclusion of evidence and certain parts of the charge to the jury, but, as our conclusion upon the main question involved is adverse to the right of plaintiffs to recover, and completely disposes of the case on the merits, it becomes unnecessary to consider them. We therefore limit our consideration of the case to the question whether plaintiffs, under the facts stated, are entitled to recover upon the express contract, or whether their remedy is in quantum meruit, for the reasonable value of their services.

It is well settled that a client may, without the consent of his attorney, settle and compromise with his adversary all matters in litigation, in such manner and upon such terms as he may deem necessary for the protection of his interests. *Boogren v. St. Paul City R. Co.* 97 Minn. 51, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691, 106 N. W. 104; *Paulson v. Lyson*, 12 N. D. 354, 97 N. W. 533, 1 Ann. Cas. 245; 2 R. C. L. p. 1000, and page 1080, § 171.

No vested right of the attorney is violated or impaired, and the rule applies notwithstanding an express agreement with the attorney that he will not settle a compromise without his consent or approval. 6 C. J. § 318, p. 743; *Huber v. Johnson*, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806. The late Justice Mitchell tersely stated the rule in the case just cited as follows: "The law favors the compromise of disputes without litigation, and it is difficult to conceive of any stipulation more against public policy than one which prohibits a party from settling his own dispute, or at least prevents it, except by his subject-

ing himself to the payment of an arbitrary penalty for doing so; and this is the stipulation which plaintiff is seeking to enforce in this action. We think it is void as against public policy."

Plaintiffs do not question the rule, nor its application, and the case involves no controversy respecting the legal right of a client to settle his dispute with his adversary in his own way in all cases, and we have only to consider whether plaintiffs are entitled to the agreed compensation.

The authorities are not in harmony upon the question. It has been held by some of the courts that, where an attorney is employed for a particular litigated controversy with an agreement for a fixed compensation in the event of a successful termination of the case, and thereafter the client, without cause or justifiable reason, discharges the attorney and employs another, who proceeds with the matter to a successful end, the attorney is entitled to the agreed compensation. *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49; *Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796; *Kersey v. Garton*, 77 Mo. 646; 2 Thornton, Attys. § 450. This doctrine finds support in, and in fact is founded upon, the general principle of liability where one party to an executory contract wrongfully prevents the other from performing the same. But the rule can have no application to the case at bar; for there

—right of client to compromise suit.

was no wrong as against plaintiffs in the act of defendant in compromising the matters in dispute with the adverse party. Plaintiffs' contract of employment was subject to an exercise of that right by defendant. The *Cantieny Case*, *supra*, upon which plaintiffs to some extent rely, is not controlling; for there the attorney was discharged by the client, and the case was thus brought within the general rule of liability just referred to. There

Attorney—  
effect of agree-  
ment not to  
compromise.

are, however, authorities which directly support the contention that the attorney is entitled to the agreed compensation in the case of a settlement by the client as well as in the case of a wrongful discharge of the attorney. *Cheshire v. Des Moines City R. Co.* 153 Iowa, 88, 133 N. W. 324, and authorities cited in 2 Thornton, Attys. § 456. The theory supporting the decisions so holding is that by the settlement the client waives full performance by the attorney, entitling him to the agreed compensation. But that theory of the law is not supported by the weight of authority. 2 Thornton, Attys. § 457; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Western Union Teleg. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Harris v. Root*, 28 Mont. 159, 72 Pac. 429; *Duke v. Harper*, 8 Mo. App. 296; *Re Snyder*, 190 N. Y. 66, 14 L.R.A.(N.S.) 1101, 123 Am. St. Rep. 533, 82 N. E. 742, 13 Ann. Cas. 441. It is not in harmony with the trend of our own decisions upon the subject. In *Gammans v. Johnson*, 69 Minn. 488, 72 N. W. 563, a case involving a settlement by the client without the consent of the attorney, it was held that the attorney was entitled to recover the reasonable value of his services, but could not recover the agreed compensation. The contract there before the court was held void, as champertous, but that fact does not change the rule made the basis of the decision. We have also held that, where the settlement is made in good faith and without purpose to defraud the attorney, the amount of the settlement may be taken as the basis for the computation of the attorney's agreed per cent of the recovery. *Davis v. Great Northern R. Co.* 128 Minn. 356, 151 N. W. 128. The rule is otherwise where the settlement was fraudulent, and with a purpose of cheating the attorney out of his fees. *Desaman v. Butler Bros.* 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1918E, 642. It is a rule of general application applied by this court, that in execu-

tory contracts either party has the power to arrest performance by specific directions to that effect, thereby subjecting himself to damages as for a breach of contract. *Gibbons v. Bente*, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756; 3 Notes to Minn. Rep. 875. The contract involved in that case was one between laymen, but that is not a differentiating fact, for the general principles of the law of contracts apply to transactions between attorney and client, as well as between other persons. Logically considered, these various decisions are on principle opposed to plaintiffs' contention, though they do not reach the precise point of the case. But we think that the precise point was reached, and the foundation of the rule limiting the attorney to the reasonable value of his services disclosed, in the reasons given for the decision in *Huber v. Johnson*, supra. The contract in that case contained a stipulation prohibiting a settlement by the party in interest, and a further stipulation imposed upon him, in the event he did settle the matter, an arbitrary amount, to be paid the other party without regard to the value of services rendered by him. The court held the contract void as against public policy, that the attorney could not recover the agreed compensation, and the ruling is supported by practically all the authorities upon facts similar to those there presented. If a contract of that kind be void as against public policy because it subjects the party to a penalty for exercising a legal right the exercise of which the law approves and encourages, there would seem slight basis for a rule of law which would subject the party to the same penalty for exercising the same right in the case where there was no stipulation prohibiting its exercise. A decision that would award the penalty in such case would be not only inconsistent, but flatly contradictory of the rule applied in the *Huber*

Contract—right  
to terminate  
performance.

Case,—a rule which finds general support in the books. 6 C. J. 745; *Ibert v. Aetna L. Ins. Co.* (D. C.) 213 Fed. 996; *Pratt v. Kerns*, 123 Ill. App. 86; *Ellwood v. Wilson*, 21 Iowa, 523; *Henry v. Vance*, 111 Ky. 72, 63 S. W. 273; *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797. The fact that in actions for the recovery of money the amount of the settlement is made the basis of measuring the agreed per centum fee of the attorney in no way conflicts with the theory that his compensation in a case of this kind should be measured by the reasonable value of the services rendered. This is not a percentage agreement, but one for a fixed amount in an action involving rights and interests in real property, and the rule

of quantum meruit is appropriately applicable. *Western U. Teleg. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Duke v. Harper*, 8 Mo. App. 296. Nor does the further fact appearing in the case at bar, that the parties agreed that the property involved in the litigation was worth the sum of \$100,000, in any proper view change the rule. This covers the case on the merits. Plaintiffs cannot recover the agreed compensation. They are limited to the reasonable value of their services, which cannot be recovered in this action, for the complaint is not so framed. Yet the judgment to be rendered herein will not defeat a subsequent action therefor. *Leonard v. Schall*, 132 Minn. 446, 157 N. W. 723.

Attorney—  
contingent fee—  
settlement—  
compensation.

Order affirmed.

## ANNOTATION.

**Amount or basis of recovery by attorney who takes case on contingent fee where client discontinues, settles, or compromises.**

### I. Introductory, 472.

#### II. Contingent fees consisting of a percentage of the recovery or amount involved:

##### a. Compromise or settlement:

1. General rule, 473.
2. Applications of rule, 475.
3. Where client receives or retains property as result of compromise, 477.
4. Items of settlement, 480.
5. Conclusiveness of recited consideration for compromise, 480.
6. Effect of fraud, 480.

### I. Introductory.

The scope of this note is clearly indicated by the title, and it is only necessary to say here that the note does not include questions as to the measure of recovery where a contract for a contingent fee is for any reason held invalid, or where the attorney is discharged and other attorneys substituted, even though a compromise is involved, if it is the invalidity of the contract or the discharge of the attorney that raises the question as to

### II. a—continued.

7. Effect of opponent's agreement to pay attorney, 481.
8. Settlement after judgment, 484.
9. Effect of provisions of contract as to compromise, 486.
10. The rule in Oklahoma and Texas, 487.

#### b. Discontinuance or dismissal, 489.

### III. Definite fees contingent upon success, 491.

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the measure of recovery. It should, however, be borne in mind that clients sometimes discharge their attorneys as a preliminary step in making a compromise, and there are doubtless some cases included in which there was a formal discharge of this kind. And as some courts treat the questions under annotation as branches of the law governing the discharge of attorneys, it may be said that the rule seems to be that when an attorney employed on a contingent fee is discharged by the

client, the measure of recovery is not the contingent fee, but the reasonable value of the services rendered. 2 R. C. L. pp. 1048, 1049. Some cases, however, apparently recognize the attorney's right to recover damages for the breach of contract in lieu of, or in addition to, compensation for the services rendered.

Some other related matters which are excluded from this note will be mentioned under particular headings.

*II. Contingent fees consisting of a percentage of the recovery or amount involved.*

*a. Compromise or settlement.*

*1. General rule.*

Cases merely assuming without controversy that the measure of recovery is the stipulated percentage of the amount for which the case was compromised, and cases dealing with the right of the attorney to continue the client's action, notwithstanding the settlement, have not been included unless they expressly discuss the measure of recovery. Some of the cases of the latter class may, however, proceed upon the assumption that the amount of the settlement does not fix the attorney's rights. See *Texas C. R. Co. v. Andrews* (1902) 28 Tex. Civ. App. 477, 67 S. W. 923; *Potter v. Ajax Min. Co.* (1899) 19 Utah, 421, 57 Pac. 270, on second appeal (1900) 22 Utah, 276, 61 Pac. 999.

By the weight of authority where an attorney is employed on a contingent fee consisting of a percentage of the amount recovered, and the client compromises the case, the amount for which the case is settled is the basis on which the attorney's percentage is to be computed.

**United States.**—*Barcus v. Gates* (1904) 180 Fed. 364, affirmed in (1905) 69 C. C. A. 200, 136 Fed. 184.

**Arkansas.**—*Jacks v. Thweatt* (1882) 39 Ark. 340; *St. Louis, I. M. & S. R. Co. v. Kirtley* (1915) 120 Ark. 389, 179 S. W. 648; *Bogle v. Walker* (1918) 183 Ark. 294, 202 S. W. 478; *Sanders v. Cotton* (1918) — Ark. —, 206 S. W. 313.

**Colorado.**—*Bogert v. Adams* (1896) 8 Colo. App. 185, 45 Pac. 235; *Nichols*

*v. Orr* (1917) — Colo. —, 2 A.L.R. 449, 166 Pac. 561.

**Illinois.**—*Sutton v. Chicago R. Co.* (1913) 258 Ill. 551, 101 N. E. 940; *Czeczotka v. Hammond Glue Co.* (1914) 185 Ill. App. 559; *Case v. Emerson-Brantingham Co.* (1915) 269 Ill. 94, 109 N. E. 671, affirming (1914) 195 Ill. App. 209; *Malmquist v. Belden Mfg. Co.* (1916) 202 Ill. App. 319.

**Iowa.**—*Larned v. Dubuque* (1892) 86 Iowa, 166, 53 N. W. 105; *Rickel v. Chicago, R. I. & P. R. Co.* (1900) 112 Iowa, 148, 83 N. W. 957; *Cheshire v. Des Moines City R. Co.* (1911) 153 Iowa, 88, 133 N. W. 324; *Crosby v. Hatch* (1912) 155 Iowa, 312, 135 N. W. 1079.

**Kentucky.**—*Louisville & N. R. Co. v. Givens* (1891) 13 Ky. L. Rep. 491; *Schmitz v. South Covington & C. Street R. Co.* (1909) 131 Ky. 207, 22 L.R.A. (N.S.) 776, 114 S. W. 1197, 18 Ann. Cas. 1114; *Newport Rolling Mill Co. v. Hall* (1912) 147 Ky. 598, 144 S. W. 760; *Louisville R. Co. v. Burke* (1912) 149 Ky. 437, 149 S. W. 865; *Elk Valley Coal Min. Co. v. Willis* (1912) 149 Ky. 449, 149 S. W. 894; *PROCTER v. LOUISVILLE & N. R. Co.* (reported herewith) ante, 461; *Wood-Heck v. Roll* (1919) 183 Ky. 128, 208 S. W. 768.

**Michigan.**—*Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge* (1910) 161 Mich. 181, 137 Am. St. Rep. 495, 126 N. W. 56.

**Minnesota.**—*Johnson v. Great Northern R. Co.* (1915) 128 Minn. 365, L.R.A.1917B, 1140, 151 N. W. 125; *Davis v. Great Northern R. Co.* (1915) 128 Minn. 354, 151 N. W. 128.

**Missouri.**—*Curtis v. Metropolitan Street R. Co.* (1906) 118 Mo. App. 341, 94 S. W. 762, s. c. on second appeal (1907) 125 Mo. App. 369, 102 S. W. 62; *Wait v. Atchison, T. & S. F. R. Co.* (1907) 204 Mo. 491, 103 S. W. 60; *Boyle v. Metropolitan Street R. Co.* (1908) 134 Mo. App. 71, 114 S. W. 558; *Boyd v. G. W. Chase & Son Mercantile Co.* (1909) 135 Mo. App. 115, 115 S. W. 1052; *Whitwell v. Aurora* (1909) 139 Mo. App. 597, 123 S. W. 1045; *Hurr v. Metropolitan Street R. Co.* (1910) 141 Mo. App. 217, 124 S. W. 1057; *United R. Co. v. O'Connor*

(1910) 153 Mo. App. 128, 132 S. W. 262; *Stephens v. Metropolitan Street R. Co.* (1911) 157 Mo. App. 656, 138 S. W. 904; *Belch v. Schott* (1913) 171 Mo. App. 357, 157 S. W. 658; *White-cotton v. St. Louis & H. R. Co.* (1913) 250 Mo. 624, 157 S. W. 776; *McCall v. Atchley* (1914) 256 Mo. 39, 164 S. W. 593; *Gillespie v. American Car & Foundry Co.* (1917) — Mo. App. —, 194 S. W. 1064; *Mytton v. New York, C. & St. L. R. Co.* (1917) — Mo. App. —, 198 S. W. 189.

**Montana.**—*Myers v. Bender* (1913) 46 Mont. 497, 129 Pac. 330, Ann. Cas. 1916E, 245.

**New York.**—*Pilkington v. Brooklyn Heights R. Co.* (1900) 49 App. Div. 22, 30 N. Y. Civ. Proc. Rep. 276, 63 N. Y. Supp. 211; *Neu v. Brooklyn Heights Street R. Co.* (1906) 118 App. Div. 446, 99 N. Y. Supp. 290; *Murray v. Waring Hat Mfg. Co.* (1911) 142 App. Div. 514, 127 N. Y. Supp. 78; *Re Winkler* (1913) 154 App. Div. 532, 139 N. Y. Supp. 755; *Farago v. New York R. Co.* (1914) 163 App. Div. 878, 147 N. Y. Supp. 303; *Levy v. Hirschberg* (1914) 85 Misc. 249, 148 N. Y. Supp. 422; *Davis v. New York C. & H. R. R. Co.* (1917) 181 App. Div. 228, 167 N. Y. Supp. 868.

The attorney is not limited to the reasonable value of his services if less than the specified percentage of the amount of the settlement, or entitled to recover such reasonable value if greater than such specified percentage. *St. Louis, I. M. & S. R. Co. v. Kirtley* (1915) 120 Ark. 389, 179 S. W. 648; *Cheshire v. Des Moines City R. Co.* (1911) 153 Iowa, 88, 133 N. W. 324; *Crosby v. Hatch* (1912) 155 Iowa, 312, 135 N. W. 1079; *Louisville & N. R. Co. v. Givens* (1891) 13 Ky. L. Rep. 491; *Wood-Heck v. Roll* (1919) 183 Ky. 128, 208 S. W. 768; *Murray v. Waring Hat Mfg. Co.* (1911) 142 App. Div. 514, 127 N. Y. Supp. 78; *Re Winkler* (1913) 154 App. Div. 532, 139 N. Y. Supp. 755.

In *Louisville & N. R. Co. v. Givens* (1891) 13 Ky. L. Rep. 491, the court said: "In this case, then, has Carnes a lien upon any amount except the amount received by his client? We think not. His services were, of

course, worth more than that, and it is a hardship upon him to thus limit his fee, but it is a hardship brought about by the law and his contract. He agreed to accept a sum equal to one half the amount recovered by his client. If the action had been prosecuted to a judgment which awarded Givens \$26, it could not be contended that Carnes would have been entitled to more than a sum equal to one half of it. His client agreed, as he had the unquestioned right to do, to accept \$26 in full payment of his claim. There is no charge of fraud or collusion in the settlement between Givens and the appellant. Then by what process of reasoning can the appellant be made responsible to Carnes for a larger fee than that agreed on between himself and his client when he was employed to institute the suit?" It was held that the court erred in admitting proof as to what would be a reasonable fee.

In *Murray v. Waring Hat Mfg. Co.* (1911) 142 App. Div. 514, 127 N. Y. Supp. 78, an attorney brought an action for death under a contract entitling him to 40 per cent of any recovery or settlement. It was held that as the contract was made in good faith, and as its terms were not unconscionable when made, the attorney's compensation could not be cut down to a sum which the court believed to be reasonable compensation, on the ground that 40 per cent of the settlement would be excessive compensation for the services which the attorney had rendered. The court said: "If the compensation seemed large when finally determined by the resistance of the defendant to the claim, it must be remembered that the compensation was contingent, and therefore properly larger than if absolute . . . and that, when entered into, the extent of the services required could not be forecast."

In Oklahoma, the measure of recovery is regulated by statute, and the general rule as above stated is not applied. In Texas it was decided in an early case that the attorney was entitled to the full amount of the fee as if the contingency had transpired upon which the payment of the fee

was made to depend. *Hill v. Cunningham* (1860) 25 Tex. 25. Though the fee involved in that case was not a percentage of the recovery, the decision was apparently regarded as applying to such fees, and is apparently still regarded as stating the general rule. For convenience the cases from these two states will be considered below in separate subdivisions.

In Arkansas, the statute at one time provided that where a suit in which attorneys were employed on a contingent fee was compromised by the parties, the attorneys should have a right of action against them for a "reasonable fee," to be fixed by the court or jury. *Bush v. Prescott & N. W. R. Co.* (1907) 83 Ark. 210, 103 S. W. 176; *St. Louis, I. M. & S. R. Co. v. Kirtley* (1915) 120 Ark. 389, 179 S. W. 648. The statute was, however, impliedly repealed by the Attorneys' Lien Statute, and the general rule, as above stated, now applies. *St. Louis, I. M. & S. R. Co. v. Kirtley* (Ark.) *supra*.

It is also possible that some of the other cases cited below are in conflict with the general rule. See particularly *Kersey v. Garton* (1888) 77 Mo. 645, and *Duke v. Harper* (1880) 8 Mo. App. 296.

### 2. *Applications of rule.*

The general rule stated in the preceding subdivision proceeds on the theory that the client may settle his cause of action for any sum which he chooses to accept, and that when the parties have in good faith agreed on a certain sum, the sum agreed on is conclusive on the attorney so far as the amount of his compensation is concerned. It follows that if the parties in good faith agree to settle for a specified sum, and the opposite party thereupon pays the whole of such sum to the client, the fact that an attorney's lien statute compels him to pay an additional sum to the attorney does not entitle the attorney to have his percentage computed on the whole amount that the opposite party will ultimately be required to pay, as this is not the amount for which the client agreed to settle. Under such circum-

stances, therefore, an attorney who was to receive 50 per cent of the recovery is only entitled to 50 per cent of the amount paid the client, and not an amount equal to that paid the client. *Czecziotka v. Hammond Glue Co.* (1914) 185 Ill. App. 559; *Case v. Emerson-Brantingham Co.* (1915) 269 Ill. 94, 109 N. E. 671, affirming (1914) 195 Ill. App. 209; *Whitcotton v. St. Louis & H. R. Co.* (1913) 250 Mo. 624, 157 S. W. 776. This application of the rule is open to some criticism, and will again be considered in another subdivision in connection with the question arising where the defendant agrees with the client to pay the attorney in addition to the payment made to the client.

Where the client agreed not to compromise the claim without the attorney's consent, and to pay the attorney a fee of \$250 if he compromised for less than \$500, the attorney was only entitled to the agreed percentage of the amount paid on a settlement, though less than \$500. The right to claim the fee of \$250 was dependent solely on the provision denying the client the right to settle or adjust his claim without the attorney's consent, and that being void and unenforceable, the claim to such fee fell with it. *Louisville R. Co. v. Burke* (1912) 149 Ky. 437, 149 S. W. 865. But see *Riou v. Fraser* (1909) Rap. Jud. Quebec 37 C. S. 1, cited *infra*, III.

And where the contract provided that in case of a settlement the attorneys' compensation should not be limited to the agreed percentage in case a reasonable compensation for their services should exceed that sum, the recovery was limited to the agreed percentage in the absence of evidence of the value of their services. *Rickel v. Chicago, R. I. & P. R. Co.* (1900) 112 Iowa, 148, 83 N. W. 957.

Where an attorney was employed to collect municipal bonds for one fourth of the amount collected, provided the whole amount of the principal and interest was collected, and if he failed to collect the whole amount, he was to receive no fee, and after the recovery of judgment, and while litigation to compel its payment by munic-



ipal officers was pending, the client compromised for less than the amount due, the attorney was entitled to one fourth of the amount received by the client. *Larned v. Dubuque* (1892) 86 Iowa, 166, 53 N. W. 105.

An attorney agreeing to bring and prosecute an action for one half of whatever might be received as damages was entitled to one half of the amount paid by the defendant to the client in settlement of the controversy, and was not limited to reasonable compensation, since if he failed to "prosecute" the action, within the meaning of the contract, it was owing to the settlement. Nor does the fact that the payment was for the purpose of getting rid of the controversy, and not as an admission that there was anything due "as damages," defeat the attorney's right to one half of such sum. *Cheshire v. Des Moines City R. Co.* (1911) 153 Iowa, 88, 133 N. W. 324.

Where attorneys are employed to bring a suit to establish a will in favor of a person who would take a part of the estate if the will were not established, under an agreement that they shall receive 15 per cent of the value of the estate realized as the result of the suit or litigation or by compromise, and the client compromises the case, they are only entitled to the agreed percentage of the amount by which the settlement exceeds the amount which the client would have taken in any event. The contract is open to this construction and should be so construed under the rule that an ambiguous contract should be construed against the party who selected its language. *Belch v. Schott* (1913) 171 Mo. App. 357, 157 S. W. 658.

And where an attorney was to be paid 10 per cent of the amount by which he might succeed in getting a decree reduced, and, on appeal, the court struck out certain items and granted a new trial, but, before the new trial, the attorney died, and the client thereafter settled with the adverse party for less than the amount of the decree as reduced by the court, the attorney was held entitled only to 10 per cent of the reduction by the

court. *Nickels v. Kane* (1886) 82 Va. 309.

Where an attorney was employed to bring an action by an executor for the death of his testator for one third of the amount received in case of a settlement before trial, and 50 per cent in case of trial, whether compromised thereafter or not, in addition to taxable costs, and before trial the defendant settled with the widow and sole beneficiary of the deceased for \$400, it was held that this amount was the amount received within the meaning of the contract, and that the attorney's right to compensation was limited to not more than 50 per cent of \$400 and the taxable costs, and that, there being no claim of fraud, it was error to submit the case to the jury for the purpose of permitting the attorney to recover one half of the verdict. *Davis v. New York C. & H. R. Co.* (1917) 181 App. Div. 228, 167 N. Y. Supp. 868. Why the attorney's recovery was not limited to one third instead of one half of the \$400 is not clear.

In *Kersey v. Garton* (1883) 77 Mo. 645, the court approved a declaration of law that attorneys were entitled to recover as if their contract had been fully performed, but what was actually decided is far from clear. The attorneys were employed to "bring suit for certain land, contingent upon success;" but it does not appear whether it was a percentage fee, though it probably was. The statement says that the client refused to permit the attorneys to proceed, and dismissed the suit, but the opinion intimates that he compromised for \$300. How much the attorneys recovered does not appear, but the court says that there was evidence that the client compromised for a sum which was the full value of the land, and that, if so, the recovery of the attorneys was not as much as it should have been.

As to the measure of recovery under a contract providing for a contingent fee of 50 per cent if settled with the attorney's approval, and otherwise—a reasonable fee of not less than the agreed percentage, see *Lindskog v.*

Conrad Seipp Brewing Co. (1914) 187 Ill. App. 180.

As to the basis of recovery where the compromise was of cross demands and the attorney was to have one half of any amount recovered against the defendant or saved to the plaintiff in the litigation, see *Bogle v. Walker* (1918) 133 Ark. 294, 202 S. W. 478. The facts in this case are rather complicated and do not seem to have sufficient general interest to justify setting them out.

Some other applications of the rule and exceptions thereto are treated below in separate subdivisions.

*3. Where client receives or retains property as result of compromise.*

Where attorneys were employed to defend an action to contest a will for one fourth of the property willed to the client if the will was sustained, or one fourth of whatever was recovered by the client by compromise or otherwise, and the parties made a compromise under which plaintiff conveyed to the client a part of the land devised to her, and the client permitted judgment to go against her, setting aside the will, the attorneys were entitled to one fourth of the value of the land conveyed to the client. There was no merit in the contention that the land was not recovered in such action because the judgment did not provide for such recovery. *McCall v. Atchley* (1914) 256 Mo. 39, 164 S. W. 593.

It is said in *Barcus v. Gates* (1904) 130 Fed. 364, affirmed in (1905) 69 C. C. A. 200, 136 Fed. 184, that where property is taken by the clients in order to effect a settlement with their debtors, an attorney employed on a contingent fee should receive a percentage of the fair valuation of the property as distinguished from the price at which it is actually taken. There does not seem to have been any compromise in that case, however, but a decree in favor of the clients fixed a lien in their favor on land which they apparently purchased at a sale to satisfy the lien, and the court held that the attorney's compensation should be computed on the actual

value of the land, and not on the price at which it was taken.

And where a client settled with his debtor by taking the latter's notes for an amount less than the amount of his claim, an attorney employed to collect the claim for 25 per cent of all amounts collected by him and a like percentage in case of a settlement or compromise by the client was not entitled to the agreed percentage of the amount of the notes until it was ascertained whether the notes were collectable. The attorney's contract provided for a smaller percentage in case the claim was uncollectable, and it was held that if anything could be recovered prior to the collection of the notes, the attorney could recover only this smaller percentage. *Mills v. Fox* (1855) 4 E. D. Smith (N. Y.) 220.

But where an attorney was employed to bring an action for conversion of personal property against a defendant who claimed a lien on such property, and the client settled by paying the defendant an amount less than the value of the property, and receiving the property, the court, in *Re Winkler* (1918) 154 App. Div. 532, 139 N. Y. Supp. 755, seems to have computed the attorney's percentage on the value of the chattels, without deducting the amount paid by the client. The attorney was, however, claiming the right to disregard the contract entirely, and recover on a quantum meruit.

Where a claim against a county was adjusted in part by the delivery of county warrants, and the client transferred the balance of the claim, an allowance to the attorneys of their agreed percentage of the currency value of the warrants, without any allowance based on the portion of the claim transferred, was held not unfair to the client, in *Jacks v. Thweatt* (1882) 39 Ark. 340. Whether it was fair to the attorneys was not decided, as they had not moved for a new trial.

Where an attorney was employed by a settler to bring an action to establish his title to land within the limits of a railroad land grant, for 12½ per cent of the value of any land or money recovered, and a compromise was

made whereby the railroad company conveyed a part of the land to the settler and quitclaimed another part to the government to enable it to issue a patent to the settler, it was held that the land quitclaimed to the government was a part of the recovery upon which the attorney's percentage was to be computed. *Myers v. Bender* (1913) 46 Mont. 497, 129 Pac. 330, Ann. Cas. 1916E, 245. It was also held in this case that as the attorney was to have no interest in the land recovered, but was only to be paid the agreed percentage of the value, he was entitled to receive his compensation when the compromise agreement was made, though the formal conveyances were not made until later, and that his compensation was therefore measured by the value of the land at that time, and evidence of its value subsequently was not admissible.

Where an action for injuries is settled by the defendant paying the client a small sum of money and agreeing to give the client employment as long as it remains in existence, attorneys employed on a contingent fee are entitled to recover a reasonable fee from the defendant (made liable by an attorneys' lien statute), as the amount received by the client is not definite, and it would not be practicable for the attorneys to recover from the defendant the sum they might have required the client to pay. *Proctor Coal Co. v. Tye* (1906) 123 Ky. 381, 96 S. W. 512.

But where the action was compromised for \$250 in money, a house and lot, worth from \$200 to \$250, and an agreement by the defendant to give the client permanent employment, the rule just stated did not apply, as the amount of money and property paid was not so small as to be inconsequential, and to render the amount recovered uncertain in value. Therefore the attorneys could not recover on quantum meruit, but were entitled to a fee equal to \$125, plus one half the value of the house and lot, and also to a sum equal to one half of the value of the contract for permanent employment. *Elk Valley Coal Min. Co. v. Willis* (1912) 149 Ky. 449, 149 S. W.

894. The court did not attempt to state how the value of the contract for permanent employment was to be determined.

Where a contract under which an attorney was employed to defend an ejectment action provided that he should receive one half of the land, or so much of it as might be held by the client, but also showed that the parties had agreed upon \$300 as the money value of the services in case the client refused to deed one half of the land, the attorney was limited to that sum, and could not recover one half of the difference between the value of the land and the amount which the client paid the plaintiff in settlement of the action. *Millard v. Jordan* (1889) 76 Mich. 131, 42 N. W. 1085. The contract in this case provided that the attorney should receive an undivided half of the land, or, in lieu thereof, \$300, and also authorized a compromise by the attorney, and provided that he should have one half of whatever was realized from the compromise or from the plaintiff in the action for a release, the parties to share equally in the land or such part of it as might be held by the client by the determination in the suit or by agreement or compromise with the plaintiff, and in any sum that might be recovered, received, or awarded to the client.

Where an attorney was employed to defend an action to set aside a will and annul a deed, and to bring a third action, under an agreement that he was to be paid \$500 if successful, otherwise 10 per cent of the value of the estate involved in litigation, and judgments were entered in favor of his client in each of the suits, but it appeared that such judgments were the result of a compromise under which the client paid \$5,000 in one suit and the costs in another, but this compromise was made over the attorney's objection, the court said that the compromise did not affect the contract with the attorney, and that defendant was still liable to him for 10 per cent of the value of the "property." *Cosgrove v. Burton* (1903) 104 Mo. App. 698, 78 S. W. 667. The attorney,

however, had sued on quantum meruit for less than such 10 per cent, and a judgment in his favor on quantum meruit was affirmed.

An attorney employed on a contingent fee to bring an action for breach of promise of marriage was not entitled to any share of property received by the client by operation of law as a result of her subsequent marriage to the defendant, nor to any part of the value of such marriage. *Crow v. Mitchell* (1917) 269 Mo. 697, L.R.A. 1917D, 912, 192 S. W. 417.

It is held in *Topeka Water-Supply Co. v. Root* (1895) 56 Kan. 187, 42 Pac. 715, that where attorneys were employed to bring an action to set aside deeds to land for an undivided half of the land, and, pending the action, the client settled by conveying the land to the defendant in the action, for which they were paid a sum of money and given a life lease of the land, the attorneys were entitled to specific performance by the defendant, of the client's agreement to convey them one half of the land. The court said that having contracted to pay them in land, the defendant could not, at its election, require the attorneys to resort to an action for the value in money of the services performed, and take their chance of being able to collect it. The attorneys were, however, required to repay one half of the amount originally paid for the deeds sought to be set aside, and the opinion discusses the merits of the client's action, apparently taking the view that the attorneys' right to recover depended on the client's right to have the deeds set aside.

In *Western U. Teleg. Co. v. Semmes* (1890) 73 Md. 9, 20 Atl. 127, a telegraph company brought a suit against a railroad company to establish its title to telegraph lines and to recover money received by the railroad company for messages transmitted over such lines. Another telegraph company owning a majority of the stock of the complainant company employed attorneys and agreed to pay them one fifth of the amount which should be recovered for it, as a stockholder. There was a dismissal, and, pending

an appeal, the last-mentioned company purchased from the railroad company the property in dispute, thus settling the litigation. It was held that the attorneys were only entitled to reasonable compensation for the work and labor done by them, and were not entitled to "the contingent compensation," and that the question whether the suit could have been brought to a successful issue could not be gone into. It is not quite clear whether the attorneys sought to recover the compensation which they would have recovered if successful, or the agreed percentage of what the telegraph company received as a result of the compromise, or why the court denied the latter, unless it was because of the nature of the compromise, which probably would have prevented any estimate of what the company had received by virtue of the compromise without determining whether it would have been successful in the suit. The court said: "Nor have we the means of ascertaining whether the plaintiffs would have brought the suit to a successful issue if it had not been settled. That could be shown with legal certainty only by the judgment of the tribunal charged with the decision of the case. It is nothing to the purpose that the record is in this court; the question must be decided on principles which would apply to any case. The plaintiffs could not maintain their position in this regard, without showing to the satisfaction of the jury that they would have prevailed in the suit in question. Now can anything be more inconsistent with the settled principles of practice than to submit such a question to the finding of a jury. By what possible means could they be informed what would have been the final decision in the suit? Was it within the competency of the court below to examine the questions in the cause, and to instruct the jury authoritatively as to its result? Most certainly no tribunal had the authority to decide this question, except this court where it was pending; and here, it would have been decided in the orderly and becoming course of justice, after argument by

counsel, and patient study and conference on the part of the judges. We cannot consent to introduce into trials at the bar the embarrassment and confusion which would arise from injecting into the bosom of another suit the questions which the law requires to be settled with such careful and cautious deliberation."

See also *Coker v. Oliver* (1908) 4 Ga. App. 728, 62 S. E. 483, cited *infra*, II. a, 8.

#### 4. *Items of settlement.*

Where an action for personal injury is settled by the payment of \$275, of which \$25 is for medical services, and \$50 for the client's expenses in going to the office of the defendant's claim agent, the entire sum must be divided, and the \$50 cannot be considered apart from the cause of action which was being settled, there being no claim that it was intended as a gift. *Sanders v. Cotton* (1918) — Ark. —, 206 S. W. 313.

Where attorneys are employed to bring an action for injuries for one half of the recovery, and the parties settle for \$75, the attorneys can recover only one half of that amount from the defendant, who was made liable by an attorneys' lien statute. But where the contract provided that the attorneys should be reimbursed for moneys advanced by them, before a division of the recovery, the defendant was bound by the contract in that respect, and the attorneys were entitled to reimbursement for any legitimate expenses incurred by them. *Davis v. Great Northern R. Co.* (1915) 128 Minn. 354, 151 N. W. 128. The court, however, refrained from deciding whether the recovery for such disbursements could exceed the amount of the settlement.

The costs of the action, whether paid by the client or by the defendant in the action, could not be deducted from the amount paid the client before computing the attorney's percentage thereof. *Whitcotton v. St. Louis & H. R. Co.* (1913) 250 Mo. 624, 157 S. W. 776.

#### 5. *Conclusiveness of recited consideration for compromise.*

If the true consideration for a settlement is not stated in the release executed by the client, the attorneys are entitled to the agreed percentage of the true consideration, and are not bound by that recited in the release. *Whitwell v. Aurora* (1909) 139 Mo. App. 597, 123 S. W. 1045. And see *Mytton v. New York, C. & St. L. R. Co.* (1917) — Mo. App. —, 198 S. W. 189, holding that where, for the purpose of defrauding the attorney, an agreement by the defendant to pay the attorney's fee is not included in the written compromise agreement, the attorney may show the real agreement. But see *Hurr v. Metropolitan Street R. Co.* (1910) 141 Mo. App. 217, 124 S. W. 1057, holding that if the release contains an agreement that the consideration therein stated is the sole consideration of the release, and that the consideration is contractual, and not a mere recital, the attorney cannot show by oral testimony that the defendant agreed with the client to pay the attorney.

#### 6. *Effect of fraud.*

It is held in *Rodriguez v. Cuelli* (1903) 1 Porto Rico Fed. Rep. 272, that if a suit is collusively settled for the purpose of defrauding the attorney, who was to be paid a percentage of the recovery, he is entitled to recover at least a reasonable fee for his services. The court does not distinctly hold that he might not recover a specified percentage of the amount of the settlement. There are many cases which recognize that the attorney's compensation might not be limited to the agreed percentage of the amount of the settlement, if the settlement was fraudulent and for the purpose of defrauding the attorney. Of course, the mere making of the settlement without the attorney's knowledge or consent is not such fraud as will have this effect. Substantially all of the cases cited in this note involve settlements that were made without the attorney's consent.

Conceding, without deciding, that if a client settles before verdict, the lien

of the attorney is measured by the amount determined upon and actually settled for, and that even after verdict the parties may in good faith settle for less than the verdict, the court held in *Desaman v. Butler Bros.* (1912) 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642, that where a verdict had fixed the amount of plaintiff's cause of action, a secret and collusive compromise between the parties, the facts of which showed fraud as against plaintiff's attorney, did not affect the amount of the attorney's lien. Accordingly, as the attorney had a contract with plaintiff for one half of the amount that might be obtained, and after the recovery of a verdict for \$3,000, the client settled for \$700, it was held that the attorney could recover from the defendant, \$1,500.

As to effect of fact that compromise was tainted with such fraud and undue influence as would have entitled the client to have it set aside, see *Stephens v. Metropolitan Street R. Co.* (1911) 157 Mo. App. 656, 138 S. W. 904, cited *infra*, II. a, 8.

**7. Effect of opponent's agreement to pay attorney.**

Where the defendant settles the case by paying the client a sum of money and agreeing with the client that he will also pay his attorney, a question arises which, while apparently simple, has created considerable conflict of opinion. All of the cases doubtless recognize the rule that the amount for which the parties have in good faith agreed to settle is binding on the attorney, but they disagree as to what this amount is. The view that the amount paid the client is the amount on which the attorney's percentage is to be computed has been adopted and reaffirmed after full consideration in Kentucky, and is also apparently accepted in Iowa, New York, and Texas, and is supported to some extent by a Tennessee case dealing with an analogous question. *Rickel v. Chicago, R. I. & P. R. Co.* (1900) 112 Iowa, 148, 83 N. W. 957; *Schmitz v. South Covington & C. Street R. Co.* (1909) 131 Ky. 207, 22 L.R.A.(N.S.) 3 A.L.R.—31.

776, 114 S. W. 1197, 18 Ann. Cas. 1114; *PROCTER v. LOUISVILLE & N. R. Co.* (reported herewith) ante, 461; *Pilkington v. Brooklyn Heights R. Co.* (1900) 49 App. Div. 22, 63 N. Y. Supp. 211, 30 N. Y. Civ. Proc. Rep. 276; *Neu v. Brooklyn Heights R. Co.* (1906) 118 App. Div. 446, 99 N. Y. Supp. 290 (citing *Pilkington Case*); *Sargent v. McLeod* (1913) 155 App. Div. 21, 139 N. Y. Supp. 666, reversed on another ground in (1913) 209 N. Y. 360, 52 L.R.A.(N.S.) 380, 103 N. E. 164; *Sidoway v. Jones* (1912) 125 Tenn. 322, 143 S. W. 893; *Texas & N. O. R. Co. v. Marshall* (1916) — Tex. Civ. App. —, 184 S. W. 643.

The view prevailing in Illinois, Minnesota, and Missouri is that the agreement to pay the attorney is a part of the settlement, that the amount paid the client is not the whole of the settlement, but only the client's share thereof, and that the whole amount of the settlement on which the attorney's percentage is to be computed is an amount bearing such a proportion to the amount paid to the client as the whole bears to the fraction representing the client's share. *Sutton v. Chicago R. Co.* (1913) 258 Ill. 551, 101 N. E. 940, reversing (1912) 174 Ill. App. 316; *Malmquist v. Belden Mfg. Co.* (1915) 202 Ill. App. 319; *Johnson v. Great Northern R. Co.* (1915) 128 Minn. 365, L.R.A.1917B, 1140, 151 N. W. 125; *Curtis v. Metropolitan Street R. Co.* (1906) 118 Mo. App. 341, 94 S. W. 762, s. c. on subsequent appeal (1907) 125 Mo. App. 369, 102 S. W. 82; *Boyd v. G. W. Chase & Son Mercantile Co.* (1909) 135 Mo. App. 115, 115 S. W. 1052; *Mytton v. New York, C. & St. L. R. Co.* (1917) — Mo. App. —, 198 S. W. 189. And see 2 Thornton, Attys. § 457.

In *Sutton v. Chicago R. Co.* (1913) 258 Ill. 551, 101 N. E. 940, reversing (1912) 174 Ill. App. 316, supra, the supreme court of Illinois said: "In case of a settlement, the only right that an attorney with such a contract has is to insist that his lien attach to the amount agreed to be paid his client in the settlement. . . . The agreement on the part of appellee to pay the fee of appellant was just as much

a part of the consideration for the release by Speicher of his claim against appellee as the cash which was paid him, and that, together with the cash paid, represented the full amount of the settlement. The lien of appellant attached to the whole amount represented by this settlement agreement, and under his contract he was entitled to one half of the same."

In *Curtis v. Metropolitan Street R. Co.* (1907) 125 Mo. App. 369, 102 S. W. 62, the Kansas City court of appeals said: "As long as the parties acted in good faith, the defendant, at the risk of having to pay the attorneys' fee twice, because of the lien which attached to the judgment, could agree with plaintiff to pay her the entire proceeds of the settlement, and depend on her to pay her lawyers their fee. And, had it been the understanding that the payment of \$200, made to plaintiff, was to include the amount due them, we would have no hesitation in saying that her failure to pay the fee would give to the attorneys no other lien, under the statute, than one for the security of a fee of \$100. In such case, the payment to plaintiff would include the entire proceeds of the settlement, and would fix the standard by which the fee should be measured. But that was not the settlement made in this case. Defendant, knowing that the attorneys had a lien on the judgment obtained by their client, made the settlement on the distinct understanding that the sum of \$200 which they paid plaintiff did not include the fee of her attorneys or any part thereof, and agreed with her, in addition to the amount paid her, to discharge the lien of the attorneys. In other words, as part of the settlement, they agreed to pay her attorneys the amount the latter were entitled to receive under the contract of employment. And, under this agreement, the proceeds of the settlement received by plaintiff were composed of the sum of \$200 in cash paid to her, and the promise of defendant to pay her lawyers. Defendant thereby assumed the burden of discharging plaintiff's obligation as fixed by the terms of the contract of employment, and the ex-

tent thereof is not affected by the erroneous assumption of the parties that the fee of the attorneys was limited to one half of the cash payment made to plaintiff. The contract required that the fee should equal the amount of plaintiff's share of the proceeds of any settlement, and should we say that defendant could pay plaintiff \$200 as her share of the proceeds and discharge the attorneys' lien on the payment of \$100 to the attorneys, we would arbitrarily, and without any legal justification, change the terms of the contract by giving to the attorneys, not one half of the proceeds, but only one third thereof."

The arguments in support of the opposite view must be sought in the Kentucky cases, as none of the other cases discussed the question at length. These arguments are apparently two. First, it is said (*Schmitz v. South Covington & C. Street R. Co.* (1909) 131 Ky. 207, 22 L.R.A.(N.S.) 776, 114 S. W. 1197, 18 Ann. Cas. 1114, *supra*) that "the amount of the attorney's recovery depended entirely upon the amount recovered by his client. He was to get a share or interest in whatever amount his client received, and hence, in determining what the attorney was entitled to, we must of necessity ascertain what the client secured, as the attorney is only entitled to one half of that amount." The obvious answer to this is that the Kentucky rule gives the attorney only one half of the cash received, but the client has received in addition to this a discharge of his indebtedness to his attorney. If the client, instead of receiving any cash, had contracted with the defendant to pay other debts owing by the client, would it be argued that the client had received nothing? The second argument is more difficult. It is that the obligation of the defendant was to pay to the attorney the fees the client would have to pay, no more and no less; and the court adds: "Suppose the company had been insolvent and the attorney could not recover from it any part of his fee, how much could he have recovered from his client?" In the *Curtis Case* (Mo.) *supra*, this same question was put to

the court by counsel, but the court's answer is hardly satisfactory. The court said: "The clandestine agreement of plaintiff and defendant to settle their controversy did not absolve plaintiff from her obligation to her attorneys under the contract of employment, and if she chose to accept the promise of an insolvent for a part of the proceeds of that settlement, she assumed the risk of the failure of her promisor to pay. She could no more require her lawyers to share in that risk than she could compel them to accept the whole of it in consideration of their demand against her. In the case supposed, as in the one actually before us, the proceeds of the settlement would consist of the sum of the amount of the cash payment and the amount covered by the promise, and the attorneys would be entitled to recover from their client one half of the total sum."

If the court means that the attorney could recover from the client the entire amount paid to the client, leaving the client to take the entire risk of collecting the balance of the settlement, it is difficult to believe that such holding would meet with general approval. The court also appears to overlook the fact that the attorney already was sharing in the risk of the client's inability to collect anything from the defendant, and that such risk was not increased by the settlement. It is, however, unnecessary to go to this length to meet the objection made by the Kentucky court. Whether the defendant was solvent or insolvent, if the attorney sued the client, it would appear proper to limit his recovery to the agreed percentage of the amount paid the client, not because his fee would be measured by the cash payment, but because he should not be permitted to collect the balance of the fee until the client collected the balance of the settlement. But no such reason exists for so limiting the recovery in an action against the defendant, as the very object of the action is to collect the balance of the settlement.

One objection to which the Missouri rule is open is that it results in computing the attorney's percentage on a

sum larger than the amount which the parties had in mind when making the settlement; but, as said in *Curtis v. Metropolitan Street R. Co.* (1907) 125 Mo. App. 369, 102 S. W. 62, this merely results from the fact that the parties put a wrong legal construction on the contract of employment. If, however, the defendant, instead of agreeing to discharge the attorney's lien, had paid the client \$200, and agreed to pay \$100 on account of her attorney's fee, the net proceeds of the settlement would have been \$300, and the amount of the attorney's lien would have been one half of that sum. This would be for the reason that the client could, in good faith, settle the entire cause of action for any amount he chose to accept. *Ibid.* But see *Boyd v. G. W. Chase & Son Mercantile Co.* (1909) 135 Mo. App. 115, 115 S. W. 1052 (discussed below), where this suggestion appears to have been repudiated by the same court.

The rule also seems open to the criticism that, in refusing to extend it to cases in which the defendant pays the entire amount of the settlement to the client, knowing that the law will compel him to pay an additional sum to the attorneys, and doubtless intending, though not promising, to do so, the court is making a distinction where there is no real difference (*Czecziotka v. Hammond Glue Co.* (1914) 185 Ill. App. 559; *Case v. Emerson-Brantingham Co.* (1915) 269 Ill. 94, 109 N. E. 671, affirming (1915) 195 Ill. App. 209; *Whitcotton v. St. Louis & H. R. Co.* (1913) 250 Mo. 624, 157 S. W. 776). Thus, in *Case v. Emerson-Brantingham Co.* (1915) 269 Ill. 94, 109 N. E. 671, affirming (1915) 195 Ill. App. 209, *supra*, the defendant, after paying the whole amount of the settlement to the client, apparently made a prompt and voluntary offer to pay an amount equal to one half thereof to the attorney. As a matter of law, it is doubtless true, as stated by the court, that defendant's failure to withhold one half of the proceeds of the settlement was not controlling in determining the amount of the attorney's fee, but merely made the defendant liable to pay such one half



over again; but the failure to withhold any part of the proceeds of the settlement, in connection with the other facts stated, would seem to make a question of fact as to whether the actual agreement between the parties did not contemplate that the attorney would be paid by the defendant.

It seems that if a client's release of the defendant contains an agreement that the consideration therein stated is the sole consideration of the release, and that the consideration is contractual, and not a mere recital, the attorney is limited to one half of the amount recited in the release, and cannot show by oral testimony that the defendant agreed with the client to pay his attorney. *Hurr v. Metropolitan Street R. Co.* (1910) 141 Mo. App. 217, 124 S. W. 1057.

But where the agreement to pay the attorney's fee was excluded from the written compromise agreement for the purpose of defrauding the attorney, he might show the real agreement, and recover his fee under such agreement, and the evidence was not excluded by the parol-evidence rule. *Mytton v. New York, C. & St. L. R. Co.* (1917) — Mo. App. —, 198 S. W. 189.

Where the attorney was to receive 35 per cent of the cause of action, and the client settled for \$2,000, the defendant also agreeing to pay any sum that she might be compelled to pay to her attorney, it was error to add to the \$2,000, 35 per cent of that amount, making an aggregate of \$2,700, and then compute the attorney's percentage on that amount. The court should have ascertained the amount of which \$2,000 constituted 65 per cent, and awarded the attorney 35 per cent of that amount. *Boyd v. G. W. Chase & Son Mercantile Co.* (1909) 135 Mo. App. 115, 115 S. W. 1052. This seems to be a proper application of the Missouri rule, but this case involved the settlement of two actions, and in the second action (in which the attorney was to receive 40 per cent) the defendant paid the client \$1,800, and agreed to pay her any amount that she should be required to pay to her attorney, "not to exceed 40 per cent of the amount paid to her, to wit, the sum of

\$720." The court, however, applied the same rule to this settlement, saying that the attempt to limit the attorney's fee was not binding on the attorney. It did not, of course, limit the attorney's fee to \$720, but it would seem as if it did limit it to 40 per cent of \$2,520, as the parties agreed to settle for an amount not to exceed this sum.

Where an attorney was employed to recover and clear the title to land, for which he was to receive a sum equal to one third of what he might recover or clear the title to, the land being estimated to be of the value of \$1.50 an acre, and the defendants settled with the client for \$500, and assumed and agreed to settle the attorney's fee, it was held in *Bowser v. Patrick* (1901) 23 Ky. L. Rep. 1578, 65 S. W. 824, that the same rule should apply as in case of the attorney's discharge, and that the attorney was entitled to reasonable compensation for the services actually rendered up to the time of the compromise, to be allowed at the contract price, abated by such sum as was reasonably represented by the unperformed part of the labor; that the amount paid the client was not material to the question, since, when defendants agreed to pay the attorney, and obtained a conveyance of the land, the measure of their liability was the reasonable fee of the attorney, and not the amount paid the client. A recovery of \$900 was therefore upheld, it appearing that 1,800 acres were involved in the controversy, and that the attorneys, by their vigilance, had, through an injunction, saved to the client timber worth \$3,000.

#### *8. Settlement after judgment.*

Where the settlement is made after judgment, the cases are not entirely harmonious, but they support the rule that if the judgment is final, the amount of the judgment, and not the amount of the settlement, controls, at least, where the defendant is solvent. *Flint v. Hubbard* (1901) 16 Colo. App. 464, 66 Pac. 446; *Coker v. Oliver* (1908) 4 Ga. App. 728, 62 S. E. 483; *Chreste v. Louisville R. Co.* (1915) 167 Ky. 75, L.R.A.1917B, 1123, 180 S. W.

49, Ann. Cas. 1917C, 867; Waite v. Atchison, T. & S. F. R. Co. (1907) 204 Mo. 491, 103 S. W. 60; Stephens v. Metropolitan Street R. Co. (1911) 157 Mo. App. 656, 138 S. W. 904; Serwer v. Serwer (1904) 91 App. Div. 538, 86 N. Y. Supp. 838.

And in *Serwer v. Serwer* (1904) 91 App. Div. 538, 86 N. Y. Supp. 838, *supra*, it was held that the court had no power to reduce the amount of the attorney's fee, though the defendant was financially irresponsible, and the client was in needy circumstances and anxious to accept an offer of settlement made by the defendant's brothers, but which was conditional upon the discharge of the attorney's lien.

So, in *Coker v. Oliver* (1908) 4 Ga. App. 728, 62 S. E. 483, where the client accepted corporate stock in full settlement of the judgment, it was held that he was liable to the attorney for the full amount of the attorney's fee (apparently meaning the agreed percentage of the face of the judgment, with interest), and that evidence of the real value of the property taken in payment of the judgment was immaterial. The court said that a client who made a settlement without the consent of the attorney would be presumed to have collected the claim in full, and to have received such a settlement as was as satisfactory to him as payment in full. The court, however, does not seem to attach much importance to the fact that there had been a judgment. It should be noted, however, that the action was one on notes, and not one for unliquidated damages.

In *Flint v. Hubbard* (1901) 16 Colo. App. 464, 66 Pac. 446, the court lays stress on the fact that the settlement was collusive and fraudulent.

But where the judgment has not become final, as where an appeal or a motion for a new trial is pending, the amount of the settlement, and not the amount of the judgment, controls as a general rule. *Nichols v. Orr* (1917) — Colo. —, 2 A.L.R. 449, 166 Pac. 561; *Wait v. Atchison, T. & S. F. R. Co.* (1907) 204 Mo. 491, 103 S. W. 60; *Boyle v. Metropolitan Street R. Co.* (1908) 134 Mo. App. 71, 114 S. W. 558;

*Stephens v. Metropolitan Street R. Co.* (1911) 157 Mo. App. 656, 138 S. W. 904; *Corcoran v. George Kellogg Structural Co.* (1917) 179 App. Div. 396, 166 N. Y. Supp. 269.

And this is true, though the defendant was guilty of such fraud and undue influence in procuring the settlement as would entitle the client to have it set aside, where he has not sought to have it set aside, but by his inaction has ratified the settlement. *Stephens v. Metropolitan Street R. Co.* (1911) 157 Mo. App. 656, 138 S. W. 904.

In *Corcoran v. George Kellogg Structural Co.* (1917) 179 App. Div. 396, 166 N. Y. Supp. 269, *supra*, the client, apparently as a mere step in making the settlement, discharged the attorneys, and there are some remarks in the opinion which seem to indicate that the court thought that the attorneys were only entitled to recover the value of their services, and not the contingent fee; but as the defendant had retained the attorneys' share of the settlement, and did not deny their right to recover that amount, such remarks were apparently obiter.

But where there was no pretense that the defendant in the action was irresponsible, or that there was any likelihood that the judgment recovered against him would have been reversed on appeal, it was held that the amount of the judgment controlled, though the settlement was made while an appeal was pending. *Baxter v. Connor* (1907) 119 App. Div. 450, 39 N. Y. Civ. Proc. Rep. 363, 104 N. Y. Supp. 327. The court said: "If, after a judgment has been duly recovered for a substantial amount, to be equally divided between attorney and client by lawful agreement, the party in whose favor it has been obtained is at liberty to negotiate with the judgment debtor and to cancel the judgment for a nominal consideration, limiting his attorney to a fractional part of the nominal sum by way of compensation, it is difficult to see any beneficial object accomplished by the statute [the Attorneys' Lien Statute]. The freedom of a plaintiff to compromise his claim and to settle with

his adversary, notwithstanding the existence of an attorney's lien, has often been judicially declared, and many cases are cited by the learned counsel for the appellant. They have little or no application here because none of them relates to a case of settlement, privately effected after judgment."

And in *Louisville & N. R. Co. v. Proctor* (1899) 21 Ky. L. Rep. 447, 51 S. W. 591, the amount of the judgment was held to control, though the court said that the case was prepared for appeal before the settlement was made. The judgment in that case provided that the attorney should have a lien thereon for a reasonable attorney's fee, but it is difficult to see how this could have any greater force than a statutory provision to the same effect.

*9. Effect of provisions of contract as to compromise.*

In many cases, the contract between the attorney and client provides that the attorney shall receive a specified percentage of the amount recovered, by judgment, compromise, or otherwise; or some other words are used which are broad enough to include a compromise. It should be noted, however, that such a contract undoubtedly contemplates a compromise made by mutual consent of the attorney and client, and not a compromise made by the client without the attorney's knowledge or consent. Most of the cases appear to attach no importance to the presence or absence of such language, and it was expressly held in *Gillespie v. American Car & Foundry Co.* (1917) — Mo. App. —, 194 S. W. 1064, that, though the contract did not, in terms, make any provision for a compromise by the client, the attorneys were entitled to receive the specified percentage of the amount for which the client compromised the claim. The contract in that case provided that the attorneys should have 50 per cent of the entire amount sued for, in case they were able to compromise and collect the claim before judgment, and that in case the claim was not compromised or settled, but was prosecuted to judgment, they

should have 50 per cent of the full amount of the judgment.

In two other cases, however, the courts have refused to measure the attorney's compensation by the amount of the settlement, because the contract did not contemplate a settlement by the client. *Duke v. Harper* (1880) 8 Mo. App. 296; *Levy v. Public Service R. Co.* (1918) 91 N. J. L. 183, 103 Atl. 171, affirming (1916) — N. J. L. —, 98 Atl. 847. In the *New Jersey* case, the contract authorized the attorney to retain 50 per cent of all moneys received by him by way of settlement, but said nothing about a settlement by the client; and the court held that the percentage contract was not involved in a proceeding to enforce the attorney's lien against the adverse party, after a settlement with the client. The court's remarks on this point are rather meager, but it apparently holds that the agreement does not control in such case, in determining the amount due the attorney. It, however, held that the amount of the lien was limited to the amount of the settlement, not because the attorney's fee was so limited, but because there could not be a lien on a claim for more than the amount of the claim, as liquidated by a settlement.

In *Duke v. Harper* (Mo.) *supra*, attorneys were employed to recover real and personal property, under an agreement that they should have one fourth of the clients' shares of the property recovered, whether by suit, or compromise, or otherwise, and that they should be the exclusive judges of what suits or proceedings were necessary or proper. The clients subsequently settled by conveying their interests to the defendant for a money consideration. It was held that the attorneys were entitled to the reasonable value of their services, and not limited, on the one hand, to the agreed percentage of the amount paid on the settlement, or entitled, on the other hand, to the agreed percentage of the amount which would have been recovered. The holding that they were not limited to the agreed percentage of the settlement was based on two grounds. The first was, that the attorneys, having

taken the risk of failure, could not be also compelled to take the risk arising from the clients' voluntary act. The second was, that the compromise contemplated by the contract was one made by the attorneys, or with their consent, and that a compromise without their consent was a *casus omissus*, not contemplated by the contract, and not governed thereby. Neither of these reasons appears entirely consistent with the later decisions in the same jurisdiction. In support of its other conclusion, that the amount which might have been recovered did not govern, the court said: "It is true that the plaintiffs might have recovered nothing. But the happening of that contingency is out of the question, since the defendants have chosen to interfere with the contract as made, and have prevented the occurrence of the contingencies which were in the minds of the parties. Thus, as we cannot proceed upon the basis that nothing might have been recovered, so we cannot proceed upon the basis that all might have been recovered. We must simply leave the contract, since success under it was not attained; and since, from its provisions, it furnishes no test by which to determine the damages. Ordinarily, the basis on which the law proceeds is of restoring, through the medium of money damages, the aggrieved person to the position in which he would have been had the other party performed his contract. . . . But the contingencies of this contract afford no measure. . . . The plaintiffs must prove loss actually sustained, and cannot ignore uncertainties which are a part of their bargain. The law will presume they would have performed their contract, as they did, so far as allowed; but will not enter the region of conjecture and assume how much would have been recovered."

#### 10. *The rule in Oklahoma and Texas.*

In Oklahoma, the statute authorizes attorneys to contract for a percentage of the proceeds of the cause of action, not exceeding 50 per cent of the amount of such judgment as may be recovered, or such compromise as may

be made with the consent of the attorney, and provides that no compromise or settlement without the attorney's consent shall affect or abrogate the lien. It also provides that, when the contract is for a contingent fee and specifies the amount for which the action is to be filed, then the lien and the cause of action by the attorney against the adverse party shall be for the agreed percentage "of the amount to be sued for, as mentioned in the contract." Thereunder, it is held that the attorney's recovery against the adverse party is not limited to the specified percentage of the amount paid the client, and that the attorney may recover the specified percentage of the amount which the client would have recovered had the action proceeded to final judgment, and that, to fix this amount, the attorney may establish the merits of the client's cause of action. *Herman Constr. Co. v. Wood* (1912) 35 Okla. 103, 128 Pac. 309; *Gulf, C. & S. F. R. Co. v. Williams* (1913) 49 Okla. 126, 152 Pac. 395; *Allen v. Shepherd* (1918) — Okla. —, 169 Pac. 1115. In *Herman Constr. Co. v. Wood* (Okla.) supra, it was apparently contended by counsel that the attorney was entitled to recover the specified percentage of the amount for which the suit was brought, regardless of the merits of the suit. The court, however, pointed out that the statute did not authorize a contract for a percentage of the amount to be sued for, but only for a percentage "of the net amount of such judgment as may be recovered, or such compromise as may be made with the consent of the attorney;" and held that the statute meant that the attorney might sue the adverse party for an amount not to exceed the specified percentage of the amount sued for, and recover to the extent that he might show his client was entitled to recover.

An early Texas case laid down the general rule that, where an attorney contracts with a client for a definite fee contingent upon the result of the suit, and the client compromises the suit without the knowledge of the attorney, the attorney is entitled to re-

cover the whole amount of the fee in like manner as if the contingency had transpired upon which the payment of the fee was made to depend. *Hill v. Cunningham* (1860) 25 Tex. 25.

While the contract in the *Hill* Case was not one for a percentage, the rule seems to have been regarded as applying to such fees. It was, however, held in *Merchants' Nat. Bank v. Eustis* (1894) 8 Tex. Civ. App. 350, 28 S. W. 227, that the rule stated only applies, where the evidence fails to show what would have been the result of the litigation, had there been no compromise; and where such rule does not apply, the amount recoverable is apparently governed by the amount which would have been recovered had the suit been prosecuted to final judgment. *Ibid.*; *Lynch v. Munson* (1900) — Tex. Civ. App. —, 59 S. W. 603, on rehearing (1901) — Tex. Civ. App. —, 61 S. W. 140; *St. Louis, S. F. & T. R. Co. v. Thomas* (1914) — Tex. Civ. App. —, 167 S. W. 784.

Thus, in *Merchants' Nat. Bank v. Eustis* (Tex.) *supra*, it was apparently held that the attorney could not recover, where it appeared that the case would have been decided against the client if prosecuted to final judgment.

And where the client employed the attorney to bring an action on a guardian's bond, and for his services assigned him one half of the amount to be realized, and thereafter dismissed the suit in consideration of the payment of a nominal sum, it was held that the attorney was not entitled to recover one half of the amount sued for on behalf of the client, but only one half of the amount which would have been realized, and that it was necessary for him to show the client's right of recovery and the solvency of the defendant. *Lynch v. Munson* (1900) — Tex. Civ. App. —, 59 S. W. 603, on rehearing. (1901) — Tex. Civ. App. —, 61 S. W. 140. The court, however, places this holding, to a considerable extent, on the ground that there was no personal liability of the client under the contract, and that his liability arose only from his destruction of the attorney's right

to prosecute the claim to the extent of his interest.

And where the client employed attorneys to bring an action for damages, and for their services assigned to them a one-half interest in the cause of action, it was held that a settlement by the client, to which the attorneys were not parties, affected only the client's one-half interest; and that the attorneys could, notwithstanding the settlement, prosecute the suit to a conclusion for the one-half interest assigned to them, and were not limited to, or compelled to accept, one half of the amount for which the client settled. *St. Louis, S. F. & T. R. Co. v. Thomas* (1914) — Tex. Civ. App. —, 167 S. W. 784.

But in *Galveston, H. & S. A. R. Co. v. Ginther* (1903) 96 Tex. 295, 72 S. W. 166, affirming (1902) 30 Tex. Civ. App. 161, 70 S. W. 96, it was held that a contract between attorney and client, whereby the client agreed to give and assign to the attorney one third of whatever might be recovered in a contemplated suit, or by way of compromise, was not merely an agreement for a contingent fee, but an assignment of an interest in the fund, when recovered. Accordingly, where the client compromised, pending the suit, for \$2,500, and the attorneys intervened and sought and obtained judgment for one third of the amount paid to the client, the judgment in their favor was affirmed. This case is distinguished in *St. Louis, S. F. & T. R. Co. v. Thomas* (Tex.) *supra*, on the ground that the assignment was of one third of whatever might be recovered in the suit, or by way of compromise.

And where the client assigned to the attorney a one-half interest in the case, and, pending the action, the defendant fraudulently settled with the client and transported him outside the state, and concealed his whereabouts from the attorney, the attorney, though entitled to prosecute the client's suit to judgment in his own interest, and to the extent of his interest, was not restricted to that remedy, but might recover from the defendant one half of the amount paid

the client in settlement of the client's claim. The transfer of part of the cause of action entitled the assignee to that proportion of the fruits or proceeds of the cause of action, without so specifying. Defendant not only deprived the attorney of evidence which was indispensable to him in prosecuting the cause of action, but also destroyed his ability to arrive at the amount of damages which would have been fixed upon a successful result of the suit, and the only measure of damages left open was that fixed by the defendant by his own settlement. *Powell v. Galveston, H. & S. A. R. Co.* (1904) — Tex. Civ. App. —, 78 S. W. 975.

*b. Discontinuance or dismissal.*

Cases in which the client, after dismissing the suit, brings a new action by another attorney, in which there is a recovery, in which the displaced attorney claims a right to participate, have not been included.

This subdivision includes only cases in which there was a percentage contract. For other cases, involving a discontinuance or dismissal of the action by the client, see the following subdivision.

As a general rule, an attorney employed on a percentage contract is entitled to recover the reasonable value of his services, where the action is voluntarily discontinued or dismissed by the client without his consent. *Simrall v. Morton* (1890) 12 Ky. L. Rep. 31, 12 S. W. 185; *Carbajal's Succession* (1916) 139 La. 481, 71 So. 774; *Badger v. Mayer* (1894) 8 Misc. 533, 59 N. Y. S. R. 398, 28 N. Y. Supp. 765; *Yuells v. Hyman* (1903) 84 N. Y. Supp. 460; *Clark v. Nichols* (1908) 127 App. Div. 219, 111 N. Y. Supp. 66; *ANDREWES v. HAAS* (reported herewith) ante, 458, affirming (1913) 160 App. Div. 421, 144 N. Y. Supp. 1060; *Thole v. Martino* (1914) 56 Pa. Super. Ct. 371.

And though the statute provides that a contract for a contingent fee may contain a stipulation that neither attorney nor client shall settle, compromise, or discontinue without the consent of the other, if the contract

contains no such stipulation, the client can discontinue or compromise at will, leaving the attorney to his remedy by an action on quantum meruit for the services rendered. *Carbajal's Succession* (1916) 139 La. 481, 71 So. 774.

Where, after a trial resulting in a disagreement by the jury, the clients refuse to proceed further with the litigation, the attorneys can sue for the reasonable value of their services. *Yuells v. Hyman* (1903) 84 N. Y. Supp. 460.

And where attorneys were employed to collect claims against a city for a percentage of the amount received in settlement of the claims, and the client thereafter filed an affidavit with the city comptroller, asserting his desire to withdraw the claims, and declaring that they were for a larger amount of damages than he had actually suffered, the attorneys were entitled to withdraw from the cause, and recover upon a quantum meruit for the value of the services rendered. *Clark v. Nichols* (1908) 127 App. Div. 219, 111 N. Y. Supp. 66.

And where an attorney was employed to render services in surcharging a guardian's account, for 50 per cent of any credit claimed by the guardian and disallowed by the court, and the client subsequently withdrew his objections and exceptions to the account, the attorney was allowed to recover upon a quantum meruit, over the objection that he could not recover because there was no basis for computing the 50 per cent provided in the contract. *Thole v. Martino* (1914) 56 Pa. Super. Ct. 371.

The dismissal of a suit to set aside deeds, brought by an attorney under a contract giving him one fourth of any land decreed to be owned by the client, does not give the attorney a right of action against the client for one fourth of the value of the land, whatever other right of recovery it may give him. *McPhail v. Spore* (1916) 62 Colo. 307, 162 Pac. 151.

The attorney cannot recover the agreed percentage of the amount which would have been recovered if the action had proceeded. *ANDREWES v. HAAS* (reported herewith) ante, 458,

affirming (1913) 160 App. Div. 421, 144 N. Y. Supp. 1060.

If litigation against a railroad company is abandoned with the consent of the attorneys, because regarded by them as hopeless, they are not entitled to recover anything, though after such abandonment the client becomes a member of a syndicate which purchases the railroad. *Simrall v. Morton* (1890) 12 Ky. L. Rep. 31, 12 S. W. 185.

In *Seasegood v. Prager* (1911) 146 App. Div. 833, 131 N. Y. Supp. 771, reversing (1911) 70 Misc. 490, 127 N. Y. Supp. 482, it was held that a client's absence when his case was called for trial, resulting in a dismissal, when due to a mistake, did not entitle his attorney, employed on a contingent fee consisting of a percentage of the recovery, to withdraw from the case and recover on a quantum meruit.

In some jurisdictions, however, the attorney's compensation is apparently measured by the amount which would have been recovered. *Swinnerton v. Monterey County* (1888) 76 Cal. 113, 18 Pac. 135; *Williams v. Philadelphia* (1904) 208 Pa. 282, 57 Atl. 578; *Wilbur v. Lane* (1909) 53 Tex. Civ. App. 249, 115 S. W. 298. And see *Evans v. Bell* (1838) 6 Dana (Ky.) 479, and *Sullivan v. McCann* (1908) 124 App. Div. 126, 108 N. Y. Supp. 909.

Thus, an attorney employed by a county to bring actions against tax collectors for commissions unlawfully retained was held not entitled to anything as damages for the county's breach of the contract by dismissing the actions, where no commissions were illegally retained, and nothing could have been recovered if the actions had been prosecuted to judgment. *Swinnerton v. Monterey County* (1888) 76 Cal. 113, 18 Pac. 135.

And where the client fails to attend the trial, resulting in a dismissal of the action, it was held that the attorney could not recover without showing that a judgment would have been recovered if the action had been tried. *Wilbur v. Lane* (1909) 53 Tex. Civ. App. 249, 115 S. W. 298.

And where a city employed an attorney to prosecute claims against the

state for overpayments of taxes, for 10 per cent of the credits which might be secured, and, after certain credits had been secured, the city officials refused to permit him to prosecute further claims, by refusing to verify the statements of the claims, or to furnish him necessary information, because of their belief that if the accounts were opened there would be more debits against the city than credits in its favor, the attorney was held entitled to recover 10 per cent of the amount for which it was reasonably probable credit would have been obtained. *Williams v. Philadelphia* (1904) 208 Pa. 282, 57 Atl. 578. The court said: "Where the contract is to perform something in the future, the successful result of which is, therefore, necessarily uncertain, and performance is wrongfully prevented by the other party, a speculative element is unavoidably introduced into the question of damages, but cannot take away the right to just compensation. In such cases, all that can be reasonably required of a plaintiff is to produce to the jury sufficient evidence of the best character attainable, of a fair prospect of success, and the compensation which would have followed." The court, however, approved an instruction telling the jury that if the evidence as to the probable success of the attorney was so based on conjecture and speculation that it did not afford sufficient certainty to the jury's mind to reach a conclusion, then they should resort to the value of the services actually rendered, without regard to the contingent fee.

In *Evans v. Bell* (1838) 6 Dana (Ky.) 479, the attorney was employed to bring an action for slander, for one tenth of the damages recoverable. The client either compromised the suit, or dismissed it without any compromise (the case is not very clear on this point), and the attorney sued for a fee of \$30. It was apparently held that he could not recover on the contract of the client at all, because nothing had been recovered, and, according to client's testimony, nothing could have been recovered. It was, however, held that, if the client in-

duced him to take the case on such terms by a false representation of the facts, the attorney might treat the contract as a nullity, and recover the value of his services upon an implied promise to pay therefor.

In *Sullivan v. McCann* (1908) 124 App. Div. 126, 108 N. Y. Supp. 909, attorneys were employed to bring all necessary proceedings to enforce the rights or protect the interests of the clients in their father's estate, for 12½ per cent of any amount which they should recover, or be entitled to; or, in case of settlement or adjustment, 12½ per cent of the amount which they would be entitled to or would recover, except for such settlement and adjustment. An action brought by them was discontinued by the clients without any money being paid, or agreed to be paid; but it appeared that a provision in their father's will for an accumulation of income had been held void in another action, and that they would have recovered their proportion of the accumulated income. The attorneys were held entitled to recover 12½ per cent of the amount of the income which they would have recovered.

### *III. Definite fees contingent upon success.*

In connection with percentage fees, it was found necessary to treat the question of dismissal separately from the question of compromise; but in connection with contracts of the character discussed in this subdivision, there is little, if any, difference in the rules applicable, and settlements and dismissals are treated together.

Where the contract is not for a percentage of the recovery, but for a specified fee contingent upon success, there is a conflict of opinion as to the proper measure of recovery. One class of cases apparently holds that the attorney is entitled to recover the whole fee. Few of the cases in this class are late cases, and some of them appear to be somewhat ambiguous. The other class of cases holds that the attorney is only entitled to recover the reasonable value of his services. These cases will be considered first.

*Illinois*.—*Pratt v. Kerns* (1905) 123 Ill. App. 86.

*Iowa*.—*Ellwood v. Wilson* (1866) 21 Iowa, 523.

*Minnesota*.—*SOUTHWORTH v. ROSENDAHL* (reported herewith) ante, 468.

*Montana*.—*Harris v. Root* (1903) 28 Mont. 159, 72 Pac. 429; *Foley v. Kleinschmidt* (1903) 28 Mont. 198, 72 Pac. 432.

*New York*.—*Carey v. Gnant* (1871) 59 Barb. 574; *Haire v. Hughes* (1908) 127 App. Div. 530, 111 N. Y. Supp. 892, affirmed in (1909) 197 N. Y. 514, 90 N. E. 1159.

*Philippine*.—*Montinola v. Hoflena* (1909) 13 Philippine, 339.

*West Virginia*.—*Polsley v. Anderson* (1874) 7 W. Va. 202, 23 Am. Rep. 613; *Tomlinson v. Polsley* (1888) 31 W. Va. 108, 5 S. E. 457.

The whole amount of the fee may, however, be recovered, on proof that the services were reasonably worth that sum, but not where the evidence shows that the value of the attorney's services bore no just proportion to the amount of the fee. *Pratt v. Kerns* (1905) 123 Ill. App. 86.

In *SOUTHWORTH v. ROSENDAHL* (reported herewith) ante, 468, it is held that the attorney cannot recover a percentage of the amount for which the case is settled, though the parties, when making the contract, agreed that the property involved in the action was worth a specified sum.

But in *Marsh v. Holbrook* (1869) 59 Barb. (N. Y.) 577, note, 3 Abb. App. Dec. 176, the court upheld a recovery for a sum bearing the same proportion to the agreed fee that the amount of the settlement bore to the amount which would have been recovered in case of complete success. The judge writing the principal opinion said that the rule was, that, where performance was arrested and prevented by the act or omission of one party, the other had the election to treat the contract as rescinded, and recover on a quantum meruit, or to sue upon the contract and recover for what had been done, at the stipulated price, and for the loss in profits, or otherwise, sustained. That case is distinguished in *Carey v. Gnant* (1871) 59 Barb. (N. Y.) 574, on the ground that in that case the client, in reality, succeeded, and re-



ceived almost the whole claim, and said that where a recovery was doubtful, the attorney was only entitled to be paid for his services to the time of the settlement. The court held, however, that the amount agreed upon for all the services to be rendered might form the measure of damages, in proportion to the services rendered. The court said: "The contract did not require the defendant to continue the litigation at all events, and even if it did, it is very doubtful whether the plaintiff could claim the whole sum, if the contract was broken. . . . If it should appear that the defendant could in no event recover, he would not, under the contract, be required to continue a useless litigation, and it would be equally unjust to require him to pay to the plaintiff the sum agreed upon as compensation in the event of success." This was an ejectment action, and before trial the parties compromised the case.

In *Harris v. Root* (1903) 28 Mont. 159, 72 Pac. 429, the court held that an attorney, employed in a will contest for a specified fee in case the will was defeated and his clients should receive their shares, was not entitled to recover the stipulated fee, where the parties made a favorable compromise with his assistance. The court said that the attorney had no authority to compromise the suit by virtue of his original retainer, and that, when this authority was conferred upon and accepted by him, there was a mutual abandonment of the contract, and he could only recover upon a quantum meruit. The court further said that the case would have been no different had the compromise been effected without the aid or consent of the attorney, and that where the stipulation was for a contingent fee, no matter whether the rendering of the services was prevented by the client, or by circumstances over which he had no control, the measure of recovery by the attorney was the value of the services actually rendered, and not the amount of the stipulated fee. But see *Ingersoll v. Coram* (1908) 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92, involving the same contract, in which

the court held that the contingency upon which the fee was payable was satisfied where, by the compromise, the clients received a larger proportion of the estate than if the testator had died intestate (see also *Rose's Notes* to this case).

Where a party retained an attorney to prosecute the necessary proceedings to vacate the probate of a will and procure the probate of a later will, and, for his compensation, assigned to him a share of his legacy or devise to the extent of \$10,000, and it was apparent that the assignment was dependent on the vacation of the probate of the earlier will and the admission to probate of the later will, but, without the consent of the attorney, a compromise was made, whereby the estate was distributed independent of the wills, it was held that the attorney was not entitled to the agreed amount, whatever his right might be upon a quantum meruit. *Haire v. Hughes* (1908) 127 App. Div. 530, 111 N. Y. Supp. 892, affirmed in (1909) 197 N. Y. 514, 90 N. E. 1159.

And where an attorney was employed to defend two actions pending against a client, and was to be paid a specified sum and an additional sum in case the decision was in favor of the client, both parties contemplating that it would be necessary to take the case to the supreme court, but, after a decision in one of the cases in favor of the client by the trial court, the parties compromised, it was held that the attorney could not recover the contingent fee specified in the contract, but only reasonable compensation for the services rendered. *Montinola v. Hofilena* (1909) 13 Philippine, 339. The court said that the contract was made in contemplation of a state of facts which never arose, and that there was no agreement as to the compensation in the contingency which occurred.

As stated above, some of the cases apparently take the view that the whole fee may be recovered. *Hunt v. Test* (1845) 8 Ala. 713, 42 Am. Dec. 59; *Hall v. Gunter* (1908) 157 Ala. 375, 47 So. 155; *Baldwin v. Bennett* (1854) 4 Cal. 392; *Whitehead v. Duck-*

er (1848) 11 Smedes & M. (Miss.) 98; *McElhinney v. Kline* (1878) 6 Mo. App. 94; *Hill v. Cunningham* (1860) 25 Tex. 25. And see also *Ingersoll v. Coram*, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92, cited *supra* (see also *Rose's Notes* to this case), and *Marsh v. Holbrook* (1869) 59 Barb. (N. Y.) 577, 3 Abb. App. Dec. 176, where two of the judges expressed the opinion that the attorney was entitled to recover the whole contract price, though this point was not decided, as the attorney had not complained of the measure of damages adopted by the trial court.

In *Baldwin v. Bennett* (1854) 4 Cal. 392, the court apparently upheld the attorney's contention that he was entitled to the agreed fee, notwithstanding a compromise. The court said that the general measure of damages for breach of a contract was the value of the services rendered, that the rule applied to the damage sustained by the refusal to allow performance, but that where, from the nature of the contract, no possible mode was left of ascertaining the damage, the only measure of damages which could be adopted was the price agreed to be paid; that otherwise justice would be defeated and parties encouraged to violate their contracts, and that defendant not only broke his contract, but deprived the attorney of the opportunity of showing the amount of injury under the general rule. A judgment for the attorney was affirmed, but it does not clearly appear that the amount of the judgment was the amount of the stipulated fee.

In *McElhinney v. Kline* (1878) 6 Mo. App. 94, a person expecting to be ousted from land in a pending ejectment action employed an attorney to bring an action for breach of covenant against his grantor. After some work had been done by the attorney, the client compromised the ejectment action by purchasing the outstanding interest without consulting the attorney, and thus prevented the bringing of the action for breach of covenant. The court held the attorney entitled to the full sum of \$200, which was to be paid for bringing the action in case

of success, saying that it was by the act of the client, and not by the non-occurrence of any contingency contemplated by the contract, that the attorney was prevented from performing the agreed services; that it was to be assumed that the services would have been performed as agreed upon; that the damages sustained by the refusal were measured by the price fixed by the contract; that where an attorney was thus retained for a particular case, and did work, and was discharged without fault on his part, it would seem that the only measure of damages was the price agreed to be paid; and that the nature of the engagement exempted the case from the rule by which the contract price, in ordinary cases of services, was merely *prima facie* evidence.

In one of the cases cited above it was proved or found that the services were reasonably worth the contract price (*Hall v. Gunter* (1908) 157 Ala. 375, 47 So. 155).

In *Hunt v. Test* (1845) 8 Ala. 713, 42 Am. Dec. 659, it was held that, if the attorney consented to the compromise, he was entitled only to the value of the services actually rendered, as measured by the contract; his consent amounting to a rescission of the contract, which, however, must be looked to for some purposes; and that the law would not imply a promise to pay more for partial success than the attorney had considered adequate for complete success.

Where an attorney was employed to prosecute a claim to attached slaves, and the client agreed to convey one of such slaves to him if he succeeded, but not to warrant the title, and the attachment suit was compromised, it was held that the value of the client's interest in the slave, and not the value of the slave, was the basis of recovery; and that where the client had no title but a mere naked legal title, tainted with fraud (the slaves having been conveyed to her to defraud the attachment creditor), only nominal damages could be recovered. *Whitehead v. Ducker* (1848) 11 Smedes & M. (Miss.) 98.

Where, as the result of a compro-

mise, the client received all that he would have received if successful in the litigation, if not more, the attorney was held entitled to the stipulated fee. *Webster v. Rhodes* (1910) 49 Colo. 203, 112 Pac. 324. The court also pointed out, however, that the evidence showed that such fee was reasonable compensation for the services rendered, and that, therefore, it could be recovered, though the attorney was limited to a recovery on a quantum meruit.

Where attorneys were to have \$100 in any event for their services in connection with the collection of insurance policies, whether settled with or without suit, but any further fee was contingent on the recovery of more than the companies had offered to pay, so as to render the companies liable for attorneys' fees, and the client settled for an amount less than that sued for and less than the companies had offered to pay, the attorneys were entitled only to \$100, and such costs as they had paid. The amount received under the settlement represented the amount recovered by virtue of the suits, the same as if they had been prosecuted to final judgment. This is for the reason that the client may settle or dismiss without consulting the attorney, and the contract between attorney and client must be considered as though it contained a provision to that effect. *Davies v. Patterson* (1918) — Ark. —, 205 S. W. 118.

And where an agreement, under which an attorney was employed to collect money by an attachment of rents, provided that he should be paid \$250 in the event that the client should realize upon the attachment not less than \$1,000, and, third persons having claimed the rents attached, the client made an agreement with them under which the client received only \$573, the attorney was not entitled to the stipulated compensation, no fraud in making the compromise being shown. Though a recovery on quantum meruit was not sought, the court said that the attorney was remediless, and evidently meant to hold that the attorney could not recover at all. The court said

that the word "realize" was a very broad term, and might reasonably be said to include a compromise, and that it must be presumed that it was used advisedly. *Brittiner v. Gomprecht* (1899) 28 Misc. 218, 29 N. Y. Civ. Proc. Rep. 300, 58 N. Y. Supp. 1011.

Where a contract providing for a contingent fee of \$3,000 further provided that, if the client should notify the attorney of its intention not to further prosecute the suit, it would pay him \$50 a day for his services, \$3,000 was the limit of the client's liability under the \$50-a-day clause. *Elliot v. Rubel* (1890) 132 Ill. 9, 23 N. E. 400, reversing (1889) 80 Ill. App. 62.

Where an attorney was employed to prepare the necessary papers and take the necessary legal steps to have the client appointed administrator of his debtor's estate, for which he was to be paid \$100 out of the estate if the administration was obtained, otherwise nothing, and, after he performed the contemplated services, the client abandoned his purpose of obtaining administration, and adopted another method of collecting his debt, it was held in *Sulzbacher v. Wilkinson* (1881) 1 Tex. App. Civ. Cas. (White & W.) 555, that the attorney was entitled to recover the reasonable value of his services.

In *Riou v. Fraser* (1909) Rap. Jud. Quebec 37 C. S. 1, it was held that an agreement to pay an advocate bringing an action a sum in addition to the fee allowed by the tariff in case of success, and to pay double that sum if the client should revoke the advocate's authority before termination of the proceedings, was lawful, and the double sum recoverable, where the client revoked the advocate's authority, and discontinued the proceedings because of the death of the defendant and family considerations.

#### *IV. Agreement not fixing amount of fee.*

An attorney and client may, of course, agree that the attorney's fee shall be contingent, or, in other words, that he shall have no fee unless successful, without making any agree-

ment as to the amount of such fee in case the attorney becomes entitled thereto. There are two cases within the scope of this note, which seem to be of this kind.

Thus, in *Wright v. Wright* (1876) 9 Jones & S. (N. Y.) 432, affirmed in (1877) 70 N. Y. 96, it was held that an agreement that an attorney's fee should be contingent upon recovery did not, in itself, entitle the attorney to more than the value of his services, so as to require the allowance of something more than taxable costs as

a condition of discontinuance, upon a compromise between the parties.

Where the client claimed that the agreement was that he would pay the attorneys a liberal fee in case of success, and otherwise nothing but his expenses, an instruction that if the attorneys' fee was contingent upon success, and the client settled without their consent, they could recover what their services were reasonably worth, was approved. *Quint v. Opher Silver Min. Co.* (1868) 4 Nev. 304.

A. McT.

CORA THAW et al.

v.

P. H. GAFFNEY, Plff. in Err.

*West Virginia Supreme Court of Appeals — December 8, 1914.*

(75 W. Va. 229, 83 S. E. 983.)

**Landlord and tenant — perpetuity.**

1. A covenant permitting indefinite perpetuation of a lease does not violate the rule against perpetuities.

[See note on this question beginning on page 498.]

**— option for perpetual lease.**

2. A lease under seal, containing the following covenant by the lessor: "The said parties of the second part are to have said land for the purpose of building thereon two dwelling houses, and to have and to hold said land for and during the term of five years, or as much longer thereafter as the parties of the second part may elect to pay the parties of the first part in the sum of fifty dollars (\$50) per annum, to be paid semiannually in advance"—gives the lessee or his assignee the option to perpetuate the lease indefinitely by paying the stipulated annual rental in advance.

[See 16 R. C. L. 887.]

**— effect of obligation.**

3. A landlord's covenant to renew the lease at the end of the term, at the election of the lessee, is a binding obligation.

[See 16 R. C. L. 883 et seq.]

**— effect of seal — consideration.**

4. A seal upon a lease is sufficient to support a provision giving the privilege of extending the lease from year to year after its termination.

[See 16 R. C. L. 563.]

**— construction of covenant to renew.**

5. Covenants to renew in a lease are generally limited to a single renewal, unless the language is so plain as to admit of no doubt of the purpose to provide for perpetual renewal.

[See 16 R. C. L. 887.]

Headnotes 1 and 2 by WILLIAMS, J.

**ERROR** to the Circuit Court for Tyler County to review a judgment in plaintiffs' favor in an action brought to recover possession of certain land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. McCoy & Swiger, for plaintiff in error:

Defendant is not a tenant from year to year, but a tenant with a perpetual lease, or a lease for an indefinite period at his option.

Atkinson v. Orr, 83 Ga. 34, 9 S. E. 787; Penick v. Atkinson, 139 Ga. 649, 46 L.R.A.(N.S.) 284, 77 S. E. 1055, Ann. Cas. 1914B, 842; Myers v. Kingston Coal Co. 126 Pa. 582, 17 Atl. 891; Lewis v. Effinger, 30 Pa. 281; Effinger v. Lewis, 32 Pa. 367; Folts v. Huntley, 7 Wend. 210; Bowyer v. Seymour, 13 W. Va. 12, 9 Mor. Min. Rep. 67; Cook v. Bisbee, 18 Pick. 527; Taylor, Land. & T. § 74; Jones, Land. & T. § 111; Drake v. Board of Education, 13 Ann. Cas. § 1007, note.

Mr. William Beard for defendants in error.

Williams, J., delivered the opinion of the court:

Judgment for plaintiff in an action of unlawful detainer, and defendant brings error.

The action was originally brought before a justice of the peace, and from his judgment, rendered in favor of defendant, plaintiff appealed to the circuit court. The case was there tried by the court in lieu of a jury upon an agreed statement of facts, from which it appears that on the 14th of November, 1892, Eliza Williamson, owner of a life estate, and Cora L. Dils, owner of the remainder in fee, of a lot of ground in Sistersville, 90x115 feet, by writing under seal, leased it to J. W. and P. H. Gaffney for a period of five years, and as long thereafter as the lessees might elect to pay a rental of \$50 a year semiannually in advance. The parts of the lease that are necessary to be considered in deciding the case are as follows: "The said parties of the second part (lessees) are to have said land for the purpose of building thereon two dwelling houses and to have and to hold said land for and during the term of five years, or as much longer thereafter as the parties of the second part may elect to pay the parties of the first part the sum of fifty dollars (\$50) per annum, to be paid semiannually in advance. It is further agreed that the parties of

the second part shall have the right at any time to sell or remove buildings placed on said premises. All the conditions between the parties hereto shall extend to their heirs, executors, and assigns."

The writing was signed and sealed by both lessors and lessees. The lessees entered and each built a dwelling house on the land, together worth from \$2,500 to \$4,000. J. W. Gaffney sold and assigned his interest in the lease to Mike Sexton, who occupies one of the houses. The rent has been paid semiannually in advance up until the 14th of November, 1909, when a tender of a half year's rent was made and refused. Plaintiffs then offered to make a new lease in consideration of \$100 annual rental, which defendant declined, and hence this action. Mrs. Williamson died, and, later, Cora Dils also died, leaving as her heirs at law the plaintiffs, Cora, Theresa, Ruby, and Robert F. Thaw. On the 8th of April, 1910, plaintiffs gave defendant written notice to quit the premises on the 14th of November, 1910.

The terms of the lease are unambiguous and express the agreement of the parties, and according to their contract their rights must be determined, unless it contravenes some positive rule of law. The question presented for our decision is: Did the lessees have the right to extend the lease for an indefinite period after the five-year term had ended, by paying the stipulated yearly rental semiannually in advance; or was that provision which expressly gave them the right thus to extend it voidable at the election of lessors? It is argued by counsel for defendants in error that the right to terminate is mutual, and cannot exist exclusively in favor of one party to a lease. It is claimed that the lessee's right to terminate the lease at the end of any year, by electing not to pay the rent for another in advance, gives the lessor equal right to terminate it. But that principle is applicable to estates at will, and to apply it here would defeat the

contract, for the lessors expressly covenanted that the lessees might have the land as much longer than five years as they should elect to pay a rental of \$50 yearly in advance. It was clearly the purpose to make the continuation of the lease, after the definite term had ended, optional with the lessees. The landlord's

Landlord and  
tenant—effect  
of obligation.

covenant to renew the lease at the end of the term, at the election of the lessee, is a binding obligation. 1 Taylor, Land. & T. 9th ed. §§ 334, 335. The consideration for the five-year lease is not expressed in the contract, but being under seal the lease imports a valuable consideration, which is not only sufficient to support the lease for the term of years, but is also a consideration for the privilege of extending the lease thereafter from year to year. The

—effect of seal—  
consideration.

lessees are expressly given the option

to perpetuate the lease. Such covenants by the landlord are held valid in England under the common law. Hare v. Burges, 4 Kay & J. 45, 70 Eng. Reprint, 19, 27 L. J. Ch. N. S. 86, 3 Jur. N. S. 1294, 6 Week. Rep. 144; Copper Min. Co. v. Beach, 13 Beav. 478, 51 Eng. Reprint, 184, 8 Mor. Min. Rep. 326; London v. Mitford, 14 Ves. Jr. 41, 33 Eng. Reprint, 471, 9 Revised Rep. 234. Perpetual leases are also generally recognized as valid by the courts of this country. There is nothing in the policy of our law which forbids them. In fact, our mineral leases are generally of that character, especially oil and gas leases. They are usually made for a definite number of years, and also provide that, if oil or gas is produced within the term, they are to continue as long as oil or gas, or either of them, is produced. Harness v. Eastern Oil Co. 49 W. Va. 232, 38 S. E. 662; Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101, 22 Mor. Min. Rep. 545; and numerous other cases which it is unnecessary to cite. If an oil and gas lease may be perpetuated, why may not a lease for the surface like-

3 A.L.R.—32.

wise be perpetuated? The fact that the occupation and use of the ground are confined to the surface in one instance, and not wholly so limited in the other, is not sufficient reason for holding that one is perpetual and the other is not. The leading case in this country on the subject of perpetual leases is Folts v. Huntley, 7 Wend. 210, and the decision of that case has been followed in a number of the states. Warner v. Tanner, 38 Ohio St. 118; School Dist. v. Everett, 52 Mich. 314, 17 N. W. 926; Atkinson v. Orr, 83 Ga. 34, 9 S. E. 787; Lewis v. Effinger, 30 Pa. 281, and the same case again in 82 Pa. 367. The following cases also assert the same doctrine: Blackmore v. Boardman, 28 Mo. 420; Drake v. Board of Education, 208 Mo. 540, 14 L.R.A. (N.S.) 829, 123 Am. St. Rep. 448, 106 S. W. 650, 13 Ann. Cas. 1002; Boyle v. Peabody Heights Co. 46 Md. 625.

Courts do not favor perpetual leases, and therefore covenants to renew are generally

—construction  
of covenant  
to renew.

limited to a single renewal, unless the language is so plain as to admit of no doubt of the purpose to provide for perpetual renewal, and when thus clear the cov-

—option for  
perpetual  
lease.

enant is binding. 4 Kent. Com. \*109; 1 Taylor, Land. & T. 9th ed. § 334; Washb. Real Prop. 6th ed. § 674. "A definite covenant for the perpetual yearly renewal of a lease is not void." Hoff v. Royal Metal Furniture Co. 117 App. Div. 884, 103 N. Y. Supp. 371, affirmed in 189 N. Y. 555, 82 N. E. 1128. Although the point has not been directly passed upon by this court, the doctrine of perpetual leaseholds has been recognized in the opinions in Bowyer v. Seymour, 13 W. Va. at page 23, 9 Mor. Min. Rep. 67, and in Starcher Bros. v. Duty, 61 W. Va. at page 378, 9 L.R.A. (N.S.) 913, 123 Am. St. Rep. 990, 56 S. E. 524. A covenant to renew perpetually does not violate the rule against perpetuities. The

—perpetuity.

landlord may convey his land notwithstanding his covenant, but the covenant passes with the land, and is binding on his assignee. 1 Taylor, Land. & T. § 262.

This case differs materially from *Hinton Foundry Mach. & Plumbing Co. v. Lilly Lumber Co.* 73 W. Va. 477, 80 S. E. 773. That was a tenancy at will, there was no term designated in the lease; while in this

case there is a definite term for years, with a covenant by the lessor to renew from year to year, at a stipulated yearly rental, so long as the lessee may elect to pay the rental in advance.

The judgment will be reversed, and judgment entered here for the defendant.

Petition for rehearing denied, January 12, 1915.

### ANNOTATION.

#### Perpetual lease or covenant to renew lease perpetually as violation of rule against perpetuities or the suspension of the power of alienation.

The effect of express statutes against long-time leases is, of course, not within the scope of the present note, nor is it concerned with the question of construction whether a covenant to renew is to be deemed a covenant to renew perpetually.

It is not intended to include in this note cases involving oil, gas, or mineral leases which do not specifically consider the validity of a lease assailed on the ground that it creates a perpetuity. It is however a matter of common observation that the ordinary lease of this character is in effect perpetual, since it continues so long as the lessee continues to operate thereunder and pay the royalty provided for. A case upon this point is *Johnson v. Armstrong* (1917) 81 W. Va. 399, 94 S. E. 753, holding not to be invalid on the ground that it created a perpetuity, an oil and gas lease conveying the right to produce and market oil and gas from designated premises upon the payment of certain rentals and royalties, although no definite or specified limitation or restraint was prescribed as to the time when the right to explore would end and the license or privilege cease. The reported case (*THAW v. GAFFNEY*, ante, 495) is cited by the court with approval, and as authority for sustaining the validity of the lease.

Save in a single instance (*Morrison v. Rossignol* (Cal.) *infra*), it has been generally held that perpetual leases and leases containing a covenant for perpetual renewal are not violative,

either of the rule against perpetuities or of statutes limiting the period during which the absolute power of alienation may be suspended.

**Georgia.**—*Atkinson v. Orr* (1889) 83 Ga. 34, 9 S. E. 787 (lease for indefinite period conditioned upon yearly payments of rental by lessee).

**Illinois.**—*Henderson v. Virden Coal Co.* 78 Ill. App. 437 (lease for 999 years).

**Indiana.**—*Richmond v. Davis* (1881) 103 Ind. 449, 3 N. E. 130 (sustaining validity of lease by trustee to municipal corporation, although in its terms perpetual).

**Iowa.**—*Re Hubbell* (1907) 135 Iowa, 637, 13 L.R.A.(N.S.) 496, 113 N. W. 512, 14 Ann. Cas. 640 (lease for 99 years); *Todhunter v. Des Moines, I. & M. R. Co.* (1882) 58 Iowa, 205, 12 N. W. 267 (lease for 999 years).

**Maryland.**—*Hollander v. Central Metal & Supply Co.* (1908) 109 Md. 131, 23 L.R.A.(N.S.) 1135, 71 Atl. 442 (stating the rule); *Boyle v. Peabody Heights Co.* (1877) 46 Md. 625 (sustaining the validity of covenants for perpetual lease); *Banks v. Haskie* (1876) 45 Md. 207 (lease for ninety-nine years renewable forever).

**Michigan.**—*Toms v. Williams* (1879) 41 Mich. 553, 2 N. W. 814 (lease for forty years with provisions for renewal for another forty years); *School Dist. v. Everett* (1883) 52 Mich. 314, 17 N. W. 926 (lease of land to school district so long as it was used for school purposes).

**Missouri.**—*Drake v. Board of Edu-*

cation (1907) 208 Mo. 540, 14 L.R.A. (N.S.) 829, 123 Am. St. Rep. 448, 106 S. W. 650, 13 Ann. Cas. 1002 (recognition of validity of covenant for lease for all time); *Diffenderfer v. St. Louis Pub. Schools* (1894) 120 Mo. 447, 25 S. W. 542 (stating rule); *Blackmore v. Boardman* (1859) 28 Mo. 420 (provision for continuous renewal).

**New York.**—*Burns v. New York* (1915) 213 N. Y. 516, 108 N. E. 77, Ann. Cas. 1916C, 1093, reversing 158 App. Div. 729, 143 N. Y. Supp. 952 (stating rule); *Hoff v. Royal Metal Furniture Co.* (1907) 117 App. Div. 884, 103 N. Y. Supp. 371, affirmed without opinion in (1907) 189 N. Y. 555, 82 N. E. 1128 (provision for continuous renewals); *Folts v. Huntley* (1831) 7 Wend. 210 (assuming validity of lease containing provisions for continuous renewals).

**Ohio.**—*Warner v. Tanner* (1882) 38 Ohio St. 118 (stating rule).

**Pennsylvania.**—*Myers v. Kingston Coal Co.* (1889) 126 Pa. 582, 17 Atl. 891 (stating rule).

**West Virginia.**—*THAW v. GAFFNEY* (reported herewith) ante, 495 (provision for continuous renewals).

**England.**—*Sadlier v. Biggs* (1853) 4 H. L. Cas. 435, 10 Eng. Reprint, 531 (enforcing lease containing covenant for continuous renewals); *Hare v. Burges* (1857) 4 Kay & J. 45, 70 Eng. Reprint, 19, 27 L. J. Ch. N. S. 86, 3 Jur. N. S. 1294, 6 Week. Rep. 144 (enforcing covenant for perpetual renewal); *Nicholson v. Smith* (1882) L. R. 22 Ch. Div. 640, 52 L. J. Ch. N. S. 191, 47 L. T. N. S. 650, 31 Week. Rep. 471 (enforcing provision for continuous renewals); *Wynn v. Conway Corp.* [1914] 2 Ch. 705, W. N. 332, 78 J. P. 380, 30 Times L. R. 666, 59 Sol. J. 43 (provision for continuous renewal); *Copper Min. Co. v. Beach* (1823) 13 Beav. 478, 51 Eng. Reprint, 184, 8 Mor. Min. Rep. 326 (enforcing covenants for continuous renewals); *Furnival v. Crew* (1744) 3 Atk. 83, 26 Eng. Reprint, 851 (covenant for perpetual renewal); *Bridges v. Hitchcock* (1715) 5 Bro. P. C. 6, 2 Eng. Reprint, 498 (covenant for continuous renewals); *Brown v. Tighe* (1834) 2 Clark & F. 396, 6 Eng. Reprint, 1203, 2 Bligh, N.

P. 272, 5 Eng. Reprint, 944 (lease for perpetuity).

**Canada.**—*Alexander v. Herman* (1912) 2 D. L. R. 239, 8 Ont. Week. N. 755, 21 Ont. Week. Rep. 461 (stating rule).

But see *Morrison v. Rossignol* (1855) 5 Cal. 64, holding that a covenant for a lease to be renewed indefinitely at the option of the lessee in fact creates a perpetuity, since it puts it in the power of one party to renew forever, and is therefore against the policy of the law.

The reason why a lease containing a covenant for perpetual renewal does not contravene the rule against perpetuities is that the covenant to renew may be taken as part of the lessee's present interest. "The rule against perpetuities," says Professor Gray (*Perpetuities*, § 230), "although a strict rule, is yet a practical rule. An estate for years with a perpetual covenant for renewal is, so far as questions of remoteness are concerned, substantially a fee, and as such it is regarded."

And it is obvious that a perpetual lease, or a lease containing a covenant for perpetual renewal, is not a restraint or limitation upon the power of alienation of the fee, for there are at all times persons in being who by joining can convey the fee.

It has been held that a provision for the renewal of a lease for all time to come creates a perpetuity which is against the policy of the law, and which it does not favor; hence, unless it appears from the covenants in the lease, by express terms or by clear implication, that the lessee is entitled to have the lease renewed for all time to come, a court of equity will not decree specific performance of the covenant for that purpose. *Drake v. Board of Education* (1907) 208 Mo. 540, 14 L.R.A. (N.S.) 829, 123 Am. St. Rep. 448, 106 S. W. 650, 13 Ann. Cas. 1002.

In *Re Hubbell* (1907) 185 Iowa, 637, 13 L.R.A. (N.S.) 496, 113 N. W. 512, 14 Ann. Cas. 640, supra, the court said: "A lease for any number of years, whether for 99 or 999, is not in violation of the Statute of Perpetuities, for in neither is the les-



son precluded thereby from disposing of it at will nor the lessee hindered in selling or assigning the lease; and by uniting in a conveyance the lessor and lessee may freely and without restraint convey both the fee and the leasehold interest."

In *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* (1897) 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124, the question presented to the court was as to the validity of a mortgage covering a leasehold interest of the lessee under a lease for 100 years. On the theory that the lease created a vested interest, the court said that "a vested interest is not subject to the rule against perpetuities, because it is vested and by its very nature cannot be subject to a condition precedent. For this reason, reversions and vested remainders are exceptions to the rule; and leases for terms far longer than lives in being and twenty-one years are valid, both at common law and under the statute of Iowa, notwithstanding the suspension of power of the lessors to take actual possession, and to convey the property free from the lease."

The distinction, between the validity of a lease either for a long period of years or for all time, and a lease violative of the statutes against perpetuities, is made in *Hope v. Gloucester* (1855) 7 De G. M. & G. 647, 44 Eng. Reprint, 252, 25 L. J. Ch. N. S.

145, 2 Jur. N. S. 27, 4 Week. Rep. 138, which holds that a provision in a deed to a municipality is void as violative of the laws against perpetuities, where it provides in effect that the direct heirs of the grantor shall be entitled, upon the payment of a stated sum, to a lease of the premises conveyed for their lives, and that such provision shall extend to the nearest heirs of the grantor during all time.

It has been held that a life lease to the husband and wife does not create two life estates,—an estate for two lives in being,—and hence the creation of a succeeding life estate does not offend the statute against perpetuities, which prohibits the creation of an estate for more than two lives in being. *Truitt v. Battle Creek* (1919) 205 Mich. 180, 171 N. W. 338.

Where a special statute against perpetuities provides in effect that any disposition of real estate is void where the right of alienation is restrained beyond the period of the life of the owner and twenty-one years and fractions thereof, a lease is void which provides that the lessee has the option to extend it from year to year, and that this provision shall extend and apply to the heirs, assigns, executors, and administrators of both parties. *Starcher Bros. v. Duty* (1907) 61 W. Va. 378, 9 L.R.A.(N.S.) 913, 123 Am. St. Rep. 990, 56 S. E. 524.

A. G. S.

E. J. NUNN, Appt.,

v.

ALICE NUNN, Respt.

*Oregon Supreme Court (Dept. No. 2)—March 11, 1919.*

(— Or. —, 178 Pac. 986.)

### Divorce — duty to use force to prevent separation.

1. A man is not compelled to use physical force to prevent his wife leaving him to prevent the separation from being deemed collusive so as to bar his right to a divorce.

[See note on this question beginning on page 503.]

— permitting wife to leave.

2. The mere fact that a man whose wife was dissatisfied and self-willed succumbed to the inevitable and permitted her to leave his home after rea-

sonable remonstrance and attempt to persuade her not to go does not show that the separation was mutual so as to bar his right to a divorce.

[See 9 R. C. L. 354 et seq.]

— assisting wife to leave.

3. That a man assisted his wife with her trunks to the station upon her reaching a determination to leave him does not show that he acquiesced in the desertion so as to bar his securing a divorce.

[See 9 R. C. L. 359.]

— desertion — what is.

4. A man is entitled to a divorce on the ground of desertion where his wife left him without any intention of returning after she was honestly asked to remain, and it is evident that she will not return.

[See 9 R. C. L. 354 et seq.]

APPEAL by plaintiff from a decree of the Circuit Court for Marion County dismissing his suit for a divorce. *Reversed.*

The facts are stated in the opinion of the court.

Mr. W. C. Winslow, for appellant:

Desertion or abandonment consists in voluntary separation of one spouse from the other for the prescribed time, without the latter's consent, without justification, and with the intention of not returning.

14 Cyc. 611.

Desertion is wilful when it is intentional, and the term does not imply malice or the purpose of doing injury.

Ogilvie v. Ogilvie, 37 Or. 171, 61 Pac. 627.

Mr. Max Gehlhar, for respondent:

If, either expressly or by implication from the circumstances, complainant consents to the original separation or to its continuance and that consent is not revoked, there is no such desertion as warrants a divorce.

Luper v. Luper, 61 Or. 424, 96 Pac. 1099; 14 Cyc. 616.

Findings of fact of the trial judge who heard the witnesses testify should be given great weight on a controverted question of fact.

Hurlburt v. Morris, 68 Or. 259, 135 Pac. 531.

The appellate court cannot determine the preponderance of evidence with the certainty of a court or referee who heard the witnesses testify and noted their manner and appearance on the stand, and findings made under such circumstances will rarely be disturbed where corroborated or supported by other facts and circumstances.

Bruce v. Phoenix Ins. Co. 24 Or. 486, 34 Pac. 16.

McBride, Ch. J., delivered the opinion of the court:

This is an appeal from a decree of the circuit court denying plaintiff a divorce. The suit was predicated upon a charge of wilful desertion, and relief was denied by the circuit court upon the theory that the separation of plaintiff from defendant

was by mutual consent. The defendant defaulted and the state filed no answer to the complaint. The plaintiff's testimony is undisputed, and the fact that defendant left plaintiff's home and remained away for more than one year, and that she left with the avowed intention of deserting the plaintiff and never resuming marital relations, is fully established. It appears from the testimony that the defendant, a school-teacher by occupation, and a maiden about forty years of age, was married to plaintiff in Australia in 1913 and came immediately with him to this country. From the character of his testimony we infer that he was an ignorant, uncultured man, who earned his living as a laborer and a rancher, and was probably far beneath his wife in educational acquirements. They came to Marion county about 1914, and finally settled on a ranch, where plaintiff pursued the vocation of farming. How he succeeded does not appear, but his neighbors testify that things were apparently fairly comfortable, but evidently not to the satisfaction of the lady, who, in March, 1916, left plaintiff and went to Canada to teach school, with the avowed intention of not returning. According to plaintiff's testimony, her reason for not wishing to live with him was that she did not like country life, but wanted to live in the city and insisted on leaving home to teach school. He testified that about a year before she actually left she proposed to him to get a divorce, to which he gave her no definite answer; but finally she secured a position and announced her intention to

leave plaintiff. The circumstances occurring immediately preceding her final departure are detailed by plaintiff, as follows:

Q. What did she say to you about coming back?

A. She said she didn't care how things were going; she didn't intend to come back.

Q. What was your attitude in reference to her going away?

A. Well, I had talked to her and told her that I didn't want her to go, but that I was doing the best I could for her, and if it didn't suit her I couldn't help it. I tried to satisfy her, but couldn't do it. She insisted upon going back to her profession. I told her that the money was going out and nothing coming in, and would have to wait for something to come in.

Q. What did she say about this?

A. Well, she was a woman that had her own way about everything. You couldn't do anything. She was headstrong, indignant.

Q. Did you use every effort you knew how to use to keep her from going?

A. Yes.

Plaintiff testified that he had no arrangement with defendant about a divorce, and that when she asked him in reference to it he told her she could suit herself, that when she left he supposed she would try to get a divorce; that he never told her he would get a divorce; and that there was no arrangement between them on that subject.

He was asked this question by the district attorney:

Q. You didn't object to her going if she wanted to?

A. No, I don't want to put anything in anybody's way if they can do better.

Plaintiff also helped defendant take her baggage to the station when she went away. We do not think the answers made by plaintiff upon cross-examination show that

the separation was mutual. It is evident that plaintiff is an ignorant man, who is unable to express himself clearly; but the testimony indicates that he had on his hands a dissatisfied, self-willed wife, who was determined to go away and never return, and that after using reasonable remonstrance, and endeavoring, without avail, to persuade her not to go, he succumbed to the inevitable and allowed her to go without creating a useless scene.

So far as persuasion went, plaintiff did his part, and it was but good manners to help her with her trunks to the station when he found she was determined to go, and this act should not be construed to imply a consent to the separation. The law does not require that a man shall use physical force to detain his wife, or to protest to the iron heavens against her going, in order that the separation shall not be deemed collusive. It seems reasonably certain that no persuasion or objection on plaintiff's part would have prevented her going, and that he never consented to it, but, on the contrary, remonstrated against it. We think defendant's conduct falls fairly within the definition of desertion given by Mr. Commissioner Slater in *Luper v. Luper*, 61 Or. 418, 96 Pac. 1099: "Desertion or abandonment consists in the voluntary separation of one spouse from the other for the prescribed time, without the latter's consent, without justification, and with the intention of not returning."

The defendant went after she was honestly asked to remain; she went without the intention of returning, and it is evident she will not return. Under these circumstances, plaintiff ought not to be hampered in the transaction of his business or the transfer of his real

Divorce—  
permitting  
wife to leave.

—assisting  
wife to leave.

—duty to use  
force to prevent  
separation.

—desertion—  
what is.

property for the balance of his life, will be entered here in accordance simply because he submitted to the with the prayer of the complaint. inevitable like a gentleman.

Burnett, Benson, and Harris, JJ.,  
The decree is reversed, and one concur.

### ANNOTATION.

#### Desertion as affected by element of remonstrance or resistance.

The general rule is well established that the consent by one spouse to the departure of the other will prevent the obtaining of a divorce for desertion. This note deals with the necessity and extent of the remonstrance or resistance which will negative the consent to the separation. The question obviously depends upon the particular facts and circumstances of each case.

It will be observed that in the reported case (*NUNN v. NUNN*, ante, 500) there was held to be a desertion by the wife, which was not consented to by the husband, where it appeared that she became dissatisfied living on a farm and determined to go away and never return; that her husband told her he did not want her to go and attempted to persuade her to stay, but when he found she was determined to go he helped her to the station with her trunks.

As intimated by the court in this case, the spouse is not required to resort to physical force to prevent the other spouse's departure.

In a somewhat similar case, *Northway v. Northway* (1898) 116 Mich. 19, 74 N. W. 211, the evidence was held to justify a finding that the wife's separation was against her husband's will, where he testified that he never consented to her moving, and that she took her things away against his will, although on cross-examination he testified that he did not object to her taking her things and going, and did not forbid the man who moved her furniture doing so, but added in explanation that he knew that it would do no good for him to object.

And in *Hope v. Hope* (1915) — Tex. Civ. App. —, 178 S. W. 32, the evidence was held to show a voluntary abandonment by the wife not

agreed to by the husband, but merely acquiesced in by him, where he testified that his wife asked him to take her to her father's for a visit, and on the way over told him that she was not going to live with him any more, that he asked her to continue to live with him, and left her with the understanding that she would write him to come for her at a certain time if she decided to return and live with him; but that she never wrote.

And the testimony in *Craig v. Craig* (1909) 90 Ark. 40, 117 S. W. 765, was held to show that the wife left against her husband's will, and that her desertion was intentional and wilful, where there was testimony that the parties quarreled and that she left and returned to her father's where she remained, and refused to return to her husband, and that at the time she was preparing to leave her husband told his son to go in and try to persuade her to stay, and that he did so, but that she refused.

And in *Kaster v. Kaster* (1890) 43 Mo. App. 115, the evidence was held to show a desertion by the wife without the husband's consent where there was testimony that she took all of her household effects, left her husband's home, and went to keep house for her children by another marriage; that the husband objected to her departure, and told her he would consider her separation as a ground for divorce.

And in *Stoffer v. Stoffer* (1883) 50 Mich. 491, 15 N. W. 564, there was held to be a desertion by the wife, where it appeared that she avowed her purpose to separate from her husband and not live with him again; that he was opposed to the separation and endeavored through a friend to prevent it, but without success, and that on her demand he gave her a sum of

money when she left, in return for which she released her claims on his property.

And there was held to have been a desertion by the wife in *Ashburn v. Ashburn* (1903) 101 Mo. App. 365, 74 S. W. 394, where the husband warned her that if she accepted employment away from home in defiance of his wishes, as she proposed, she could not return, and she subsequently left and continued away for the statutory period authorizing a divorce.

And there was held to be an obstinate desertion against the husband's consent in *Bridge v. Bridge* (1915) — N. J. Eq. —, 93 Atl. 690, where, although he had several times told his wife to go, when she got ready to go he asked her not to go, and begged her to stay, and made efforts subsequently to see her, but she refused to see him and ignored his letters.

And in *Schanck v. Schanck* (1881) 33 N. J. Eq. 363, there was held to be a desertion by the husband where, although the wife told him that he could go his way and she would go hers, she immediately repented and asked him to come back, but he refused and went and never afterwards communicated with her.

And in *Fisher v. Fisher* (1907) 81 W. Va. 105, 93 S. E. 1041, the wife was held entitled to a divorce for the desertion of her husband where the evidence showed that against her continued protest he left her home where he had by an antenuptial agreement agreed to live, and, without a request that his wife reside with him, returned to his home and lived with his children by a former marriage.

But in *Reed v. Reed* (1896) 62 Ark. 611, 37 S. W. 230, it was held that the husband consented to the separation and that the wife did not wilfully desert him where, after a difference had arisen between them because of the wife's children, and when she told the husband that she was going to her home, he told her that he had the same team that brought her, and that it could take her back, and with his consent it was used to take her back, and he afterwards visited her regularly and the parties assisted each other.

And in *Herold v. Herold* (1890) 47 N. J. Eq. 210, 9 L.R.A. 696, 20 Atl. 375, a husband was held not entitled to a divorce on the ground of desertion where it appeared that the only steps taken by him to show that her leaving was against his wish was to call in a neighbor who had been in the habit of lending the wife money, and state that his wife wanted to leave him, that that was her home and where she belonged, and that if she went away he would not be responsible for anything.

And there was no desertion or breaking off of the marriage relation against the husband's will where, although he learned from neighbors of his wife's intention of going to a distant state to visit her daughter, he said nothing to her, and after she had gone did not correspond with her, or make any effort to have her return. *Wright v. Wright* (1890) 80 Mich. 572, 45 N. W. 365.

And the wife's desertion was held not obstinate in *Van Wart v. Van Wart* (1898) 57 N. J. Eq. 598, 41 Atl. 965, where it appeared, among other things, that on the day of her departure her husband stood by without asking her to stay and made no effort to have her return.

And where a husband knows that his wife intends going to another state to engage in business and he makes no effort whatever to have her remain with him, and offers no inducements for her return, but on the other hand appears to rejoice that she has gone, the desertion, if any, was not against his will, and he is not entitled to a divorce. *Beller v. Beller* (1883) 50 Mich. 49, 14 N. W. 696.

In *Neagley v. Neagley* (1915) 59 Pa. Super. Ct. 565, where the husband advised the wife not to go West, and stated that if she was bound to go he would not go with her, the evidence was held to justify a finding that she went without his consent, but that it did not show clearly that she left against his wish, and, she subsequently having made an offer to live with him before the expiration of the two-year period, which he rejected, there was held to be no wilful desertion.

J. T. W.

H. E. GINTER et al., Appts.,  
v.  
PENNSYLVANIA RAILROAD COMPANY.

A. F. McCLURE et al.

v.  
SAME.

*Pennsylvania Supreme Court — January 4, 1910.*

(262 Pa. 474, 105 Atl. 824.)

**Railroad — duty to extinguish fire.**

1. A railroad company whose engine, without negligence on its part, sets fire to property adjoining its right of way, is not liable for destruction of timber on nonadjoining property to which the fire spread because the crew of the train which started the fire refused to assist in extinguishing it.

[See note on this question beginning on page 509.]

**— liability for setting out fire.**

2. A railroad company is not liable for fire set to adjoining property by sparks from its engine if it takes the necessary precautions and employs the proper mechanism to prevent the escape of sparks from its engines and the mechanism is in proper condition.

[See 11 R. C. L. 965.]

**Damages — eminent domain — liability to fire.**

3. The liability of remaining property to fire is a proper element of damages to be awarded for the taking of land for a railroad right of way.

[See 10 R. C. L. 153-156.]

**Master and servant — scope of duty — extinguishment of fire.**

4. The extinguishment of fires which may start on land adjoining a railroad right of way is not within the scope of duty of members of train crews.

[See 11 R. C. L. 962-963.]

**— liability of employer.**

5. An employer is not liable for any act or omission of an employee that is not within the scope of his employment.

[See 18 R. C. L. 793 et seq.]

**APPEAL** by plaintiffs from judgments of the Court of Common Pleas for Jefferson County in favor of defendant, notwithstanding verdicts for plaintiffs in actions brought to recover damages for destruction of timber by fire. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. W. T. Darr, A. M. Liveright, and Miller & Hartswick, for appellants:

The railroad company is answerable in damages, and there need be no showing that it negligently originated the fire. It is sufficient to show that it was the moving cause of the fire, whether in the ordinary course of its operations or otherwise, and that it negligently failed to take those steps or precautions towards extinguishing the fire that ordinary prudence would dictate.

13 Am. & Eng. Enc. Law, 2d ed. 464; Ball v. Grand Trunk R. Co. 16 U. C. P. 252; Webb v. Rome, W. & O. R. Co. 49 N. Y. 420, 10 Am. Rep. 389; O'Neill v. New York O. & W. R. Co. 115 N. Y. 579, 5 L.R.A. 591, 22 N. E. 217; Bass v. Chicago, B. & Q. R. Co. 28 Ill. 18, 81 Am. Dec. 254; New York, C. & St. L. R. Co. v. Grossman, 17 Ind. App. 652, 46 N. E. 546, 1 Am. Neg. Rep. 584; Louisville, N. A. & C. R. Co. v. Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400; Hewey v. Nourse, 54 Me. 256; Terre Haute & L.

R. Co. v. Walsh, 11 Ind. App. 18, 38 N. E. 534; Indiana, B. & W. R. Co. v. Overman, 110 Ind. 538, 10 N. E. 575; Missouri P. R. Co. v. Platzer, 73 Tex. 117, 3 L.R.A. 639, 15 Am. St. Rep. 771, 11 S. W. 160; McCully v. Clarke, 40 Pa. 399, 80 Am. Dec. 584; Baylor v. Stevens, 16 Pa. Super. Ct. 365; Hunter v. Pennsylvania R. Co. 45 Pa. Super. Ct. 477.

Messrs. Don C. Corbett and Raymond E. Brown for appellee.

Fox, J., delivered the opinion of the court:

The plaintiffs in these cases were the owners of timberland in Gaskill township, Jefferson county. Their land was not immediately adjacent to the right of way of the defendant company, but there were lands of other owners intervening; the land nearest the railroad being that of the Madeira Hill Coal Company at Clover Run. The Madeira Company operated a mine on its property, which was in Clearfield county a short distance east of the Jefferson county line. The Madeira Company had cut the timber on its land, and there were at various points near the right of way of the defendant company an accumulation of tops, limbs, and other débris left upon the ground. It was in this combustible matter on the land of the Madeira Hill Coal Company that the fire which occasioned the injury in this case started.

The Hillman branch of the Bellwood division of the Pennsylvania Railroad was built to reach the operation of the Madeira Hill Coal Company. On the day of the fire a train consisting of two engines, six empty cars, and a passenger coach passed over this branch. The head engine went into a siding before reaching the tipple of the coal company, while the other engine pushed the six empty cars out on the tipple. Both engines were in good working order and were equipped with spark arresters. About fifteen or twenty minutes after the engines passed the tipple, a fire was observed in the rubbish on the land of the Madeira Coal Company at a distance of about 70

feet from the right of way of the railroad company.

Four employees of the coal company, shortly after the fire started, went to the point where it had started and endeavored to extinguish it, but without success, owing to the dryness of the tops, limbs, and other lumber, and the fact that a strong wind was blowing at the time. The train was running on a schedule, and shortly after the fire broke out (the witnesses differing as to the time which elapsed) the train left in order to make a connection with the main line of the Pennsylvania Railroad. The crews of the two engines consisted of four men each, and after the fire broke out the attention of a member of the crew, not identified by name, was directed to the fact that fire had started, and he was requested to call the crew and ask them to assist in extinguishing the fire. This he declined to do, on the ground that it was outside the line of his duty and that he was required to give attention to the operation of the train. It is also alleged that the other members of the crew saw the fire raging, but did nothing to assist in extinguishing it. After the train crew left they sent word to a section gang of the fact that the fire was burning, and in response to this the section gang came and joined the others in attempting to fight the fire. This attempt was unsuccessful, and the fire quickly spread to adjoining lands, and ultimately reached the land of the plaintiffs where a large amount of valuable timber was destroyed. This suit was brought to recover damages for this injury.

The case was submitted to the jury on the theory that the defendant company had been negligent in the operation of its engine and trains in permitting cinders to escape from the locomotive, and also that it was negligent in failing to extinguish the fire after it had started. After the jury had retired counsel for the plaintiffs requested the court to recall the jury and instruct them that the claim of the plaintiffs was based

entirely upon the ground that the railroad company had been guilty of neglect by reason of the failure of the crew to put out the fire or to make any effort to put it out after it had been started. The learned judge of the court below refused to take this course, and the jury returned a verdict in favor of the plaintiffs, in the one case for \$4,128, and in the other for \$3,732. This verdict was based generally on the ground that the railroad company was guilty of negligence. There was no proof which would justify a finding of negligence on the part of the railroad company because of its failure to equip the engine with a spark arrester, and the sole question presented for our determination is: Was the company negligent by reason of the failure of the train crew to abandon the train for the time being and devote its energies to the extinguishment of the fire?

The fire did not start on the right of way of the defendant company. The accumulation of debris was on the land of the coal company, and hence no negligence can be imputed to the defendant company in this regard. The learned counsel for the appellant in their printed argument based the right of the plaintiffs to recover upon these facts: That the men employed by the coal company told one of the train crew that the fire had started and could be readily extinguished; that there were eight men in the employ of the company in these two crews; that six of them could have been released for work about the fire; that after completing their railroad work the crews lay for a time in the yard while the fire was in progress and made no effort to extinguish it; that water was available both in the tender and boiler of the engines and at a water tank about 300 feet away near the railroad track; that the coal company had a company store within easy walking distance where they had pails and buckets for sale; and that it was the duty of the train crew to go to this store and procure buckets and go to the engines or the

tank and procure the water necessary to put out the fire. Was any such duty imposed upon the railroad company? Can it be held as a matter of law that it is the duty of the train crew in the employ of a railroad company to stop the work in which they are ordinarily engaged at any point along the line of the railway where they observe a fire on adjoining land, and take such measures as are possible to extinguish that fire? This proposition, if sound, must be applied not only in cases of timberland and in rural communities and farming districts, but in populous cities as well. If it is to be the rule on a branch line and where trains are infrequent and slow, it must also govern on the main line of a railroad such as that of the defendant company, with fast express trains and constant traffic. Judge Cooley, in his work on Torts, has defined negligence as "the failure to observe for the protection of the interests of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury." [3d ed. \* 752.] The test to be applied, therefore, is: Was there any obligation on the part of the railroad company under the circumstances to exercise any care or vigilance such as is complained of in the statement filed by the plaintiffs and now urged on this appeal?

We have repeatedly held that, where the railroad company takes the necessary precautions and employs a proper mechanism to prevent the escape of sparks from their engines, there can be no recovery of damages for any injury which results simply from the throwing of sparks, provided the mechanism is in proper condition. It is also true that one of the elements of damage taken into consideration by a jury when land is appropriated under the exercise of eminent domain by a railroad company

Railroads—  
liability for  
setting out fire.

Damages—  
eminent domain  
—liability to  
fire.



is the possibility of fires which may occur without negligence on the part of the railroad company. *Philadelphia & R. R. Co. v. Yeiser*, 8 Pa. 366.

If, therefore, the mere existence of a fire on land adjoining the right of way of a railroad company imposes no liability on the company unless there be proof of negligence, a fortiori no liability arises when the property destroyed is on land which is not adjacent to the right of way, but is separated therefrom by the land of several intervening owners, unless there be proof of actual negligence. If the fire is ignited by reason of the negligence of the railroad company, a different situation would arise, but where it is conceded, as here, that the fire was not started by the negligent act of the company,

**Railroad—duty  
to extinguish  
fire.**

it did not owe the duty of care, protection, and vigilance to the plaintiff to the degree that it is liable in damages under the particular circumstances proved in this case. It is *damnum absque injuria*.

The cases cited in the brief of counsel for the appellant do not sustain their view that the failure of the train crew to respond to the appeal for aid in extinguishing the fire constituted negligence on the part of the company. In both *McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584, and *Baylor v. Stevens*, 16 Pa. Super. Ct. 365, the fire started on the land of the defendant company, and there was evidence from which a jury could find negligence because of the conditions existing on the property of the defendant. These are the only Pennsylvania decisions cited. The cases cited from other jurisdictions are all readily distinguished by their facts from the case at bar. In most of them the railroad company negligently permitted an accumulation of grass, weeds, or brush upon the right of way, and the fire which occasioned the injury was ignited in this way. Sparks were negligently thrown from the engines of the defendant company because of defective mechanism, thus affording evidence of

negligence in this regard by the defendant. None of them go to the length of holding that a railroad company must police its lines with fire fighters, or impose upon train crews the duty of extinguishing fires which may arise along the lines of the railway at any point during the passage of a train over the tracks of the company. On the contrary, in the case of *Kenney v. Hannibal & St. J. R. Co.* 70 Mo. 252, it is held: "That the company is not liable because its servants neglected to extinguish the fire when they discovered it on the track. It was their duty as citizens to prevent the spread of the fire, and by their conduct on the occasion . . . they manifested a cruel and brutal indifference to the destruction of a neighbor's property; but it was not in the line of their employment, and was no more their duty to extinguish the fire than that of any other person who saw it."

In the case of *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251, the court said: "A company is not obliged to keep men stationed along the line of its road either to guard against or to extinguish fires which may happen. With trains passing almost at every hour on many roads, and with a rapidity unknown to any other power, it would be utterly impracticable to keep men stationed at every point where a fire may occur. To impose such a duty would not only be unreasonable in itself, but it would . . . make railroad companies insurers against loss by fire of all the property along the line of their roads."

In connection with the thought expressed in these decisions from other jurisdictions, the language of Chief Justice Gibson, in *New York & E. R. Co. v. Skinner*, 19 Pa. 298, 57 Am. Dec. 654, is suggestive. He said: "The irresponsibility of a railway company for all but negligence or wanton injury is a necessity of its creation. A train must make the time necessary to fulfil its engagements with the postoffice and the passengers; and it must be allowed to fulfil them at the sacrifice

of secondary interests put in its way; else it could not fulfil them at all."

We are, therefore, of the opinion that in the case at bar the defendant company cannot be held guilty of negligence because of the failure of its crew to leave their train and engage in the work of extinguishing the fire started on lands adjoining its right of way. To enforce this measure of duty would be to impose too heavy a burden on the company and one that would seriously interfere with the rights, not only of the company, but of the public as well. The delay incident to the movement of trains would be intolerable.

For another reason it is equally true that there could be no recovery by the plaintiffs in this case. The negligence alleged is the negligence of the train crew in not extinguish-

ing the fire. This duty was not within the scope of employment of the train crew. They

were employed for the purpose of

operating the train and moving it from one destination to another. Their employment related wholly to the movement of the trains. Their duties were confined to this and to this alone. It could not be successfully alleged that the terms of their employment contemplated the performance of any such duties as that of extinguishing fires. It is a well-recognized principle

of the law of negligence that an employer is not liable for any act or omission of the employee that is not within the scope of his employment. *Guille v. Campbell*, 200 Pa. 119, 55 L.R.A. 111, 86 Am. St. Rep. 705, 49 Atl. 938, 10 Am. Neg. Rep. 459; *Lake Shore & M. S. R. Co. v. Rosenzweig*, 113 Pa. 519, 6 Atl. 545, 10 Am. Neg. Cas. 79; *Rudgeair v. Reading Traction Co.* 180 Pa. 333, 36 Atl. 859, 1 Am. Neg. Rep. 523.

The assignments of error are not sustained, and the judgment is affirmed.

## ANNOTATION.

**Liability of railroad company for failing to aid in extinguishing fire set by its engine without negligence.**

**Duty of train crews to aid in extinguishing.**

Other cases concur with the conclusion reached in the reported case (*GINTER v. PENNSYLVANIA R. Co. ante*, 505) that, in view of the duty which a railroad owes to the public, the failure of the crew of a train, operated on schedule, to leave their train and assist in extinguishing a fire set by an engine without negligence, does not render the railroad liable. *Pittsburgh, C. C. & St. L. R. Co. v. Brough* (1907) 168 Ind. 378, 12 L.R.A. (N.S.) 401, 81 N. E. 57; *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.* (1892) 70 Miss. 119, 12 So. 156; *Galveston, H. & S. A. R. Co. v. Chittim* (1902) 31 Tex. Civ. App. 40, 71 S. W. 294; *Missouri P. R. Co. v. Donaldson* (1889) 73 Tex. 124, 11 S. W. 163.

In *Pittsburgh, C. C. & St. L. R. Co. v. Brough* (Ind.) *supra*, where a fire started off the defendant's right of way from sparks from an engine, and it was contended that, although it was started without the defendant's negligence, the company was liable because the train crew failed to attempt to extinguish it, an instruction was held erroneous that if it started from a locomotive, and the defendant's servants discovered it in time to extinguish it by the use of ordinary care, and prevent it from doing damage to others, and negligently failed to do so, the company would be liable, the court taking the view that a regular train crew was not bound to leave its train and neglect its duty to the public to fight fires, and stating that the instruction made the company liable

without regard to the duty it owed the public. It further said: "The primary duty of a railroad company is to the state. It is to operate its railroad with reasonable speed, at regular times, to accommodate passengers and shippers. It owes this duty to the state, and its obligation to discharge it is the consideration for its charter. . . . Stopping or delaying a train to put out a fire, which may have been set by a locomotive engine of the company, might throw the train out of its schedule time, and thus interfere with the schedule time of other trains, and greatly inconvenience, and even endanger, the lives of passengers on such trains."

And in *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.* (1892) 70 Miss. 119, 12 So. 156, where the fire apparently started off the defendant's right of way, an instruction was held properly refused that a railroad was liable for damage resulting from a fire set by its engine without negligence, if the spreading of the fire might have been prevented by its employees. The court said: "Fires from running trains are always to be apprehended, and if it is the duty of those in charge of a running train to stop its progress to put out a fire set by the engine without negligence, it would be equally their duty to see that all sparks and cinders, from which danger from fire might reasonably be anticipated, were extinguished. If the company is under a duty to extinguish non-negligently set fires when known to exist, it must be under the same duty in reference to such fires of the same character as the circumstances show will or may probably spring up. Under the principle of this instruction, railroad companies would be responsible absolutely for all fires set out by their engines, or would find immunity only upon condition of keeping constant and instant supervision over every foot of their road over which a train was passing, or had recently passed. It is manifest that the duty which these companies owe to the public, and which can only be discharged by running their trains upon schedules at stated

intervals, could not be performed at all if the persons in charge of trains should be required to give their attention to fires along the way, and that the danger to life and property intrusted to them would be greatly increased by requiring trains to be stopped at all times and places, in order that the servants of the company may engage in putting out fires, whether the same be negligently or accidentally set out."

And the rule that because of its duty to the public a regular train crew is not bound to leave its train to put out a fire set on the company's right of way by a locomotive, without negligence, was also recognized in *Missouri P. R. Co. v. Donaldson* (1889) 73 Tex. 124, 11 S. W. 163.

And in *Galveston, H. & S. A. R. Co. v. Chittim* (1902) 81 Tex. Civ. App. 40, 71 S. W. 294, although it was held that a railroad must take prompt steps to prevent the spread of a fire set by its locomotive without negligence, it was held that a train crew was not bound to leave their train to extinguish fires. The court, after quoting from the *Platzer Case* (1889) 73 Tex. 117, 3 L.R.A. 639, 15 Am. St. Rep. 771, 11 S. W. 160, set out, *infra*, said: "We think the amount of diligence required of a railway company, under the state of facts in this case, would be such as would be required of an ordinarily prudent man under like circumstances; and this duty would not be incumbent on the train crew, but must be placed on other agents or employees of appellant, not engaged in that or any like public duty. *Missouri P. R. Co. v. Donaldson* (Tex.) *supra*. The jury may have concluded from the charge of the court in this case that the train crew should have left the train and should have engaged in extinguishing the fire, and that the railroad company would be liable if 'prompt, proper and adequate means' were not used by them to extinguish the fire. As soon as information reached the employees whose duty it was to attend to such matters, it was incumbent on them to use such care to extinguish the fire as a prudent man would, under like circum-

stance, have exercised." It is not clear in this case whether or not the fire started on the railroad's right of way.

As to the crew of a train not operated on schedule, however, a different conclusion has been reached.

Thus, in *Rolke v. Chicago & N. W. R. Co.* (1870) 26 Wis. 537, in an action to recover for damages resulting from a fire set by the engine of a gravel train an instruction was held correct that, if the engine set a fire on the roadway adjoining the plaintiff's premises and the defendant's servants in charge of the train knew of the fire, they were bound to use ordinary care to extinguish it, and that if they used no effort to extinguish it, but went away and left it burning, such conduct was evidence of negligence and ought to be considered in determining whether the train was managed with care with regard to fire. The court said: "It appears that the train in question was a gravel train, engaged in the repair of the roadbed, and had about twenty-eight men on the train. And even if it had been prudent and necessary for the train itself to move off to the proper station as soon as it was unloaded, in order to avoid collision with other trains, what difficulty was there in leaving behind a sufficient number of men to put out the fire? It was a dry time in the summer, when a fire kindled upon the track of the road would very likely spread to the adjoining premises. Men of ordinary care would, under such circumstances, use proper diligence to prevent the fire from communicating to the property of others. And if, according to the hypothesis upon which the instruction is framed, the employees of the company knew that a fire had been kindled on the track by means of the locomotive, they were certainly bound to use ordinary care and diligence to extinguish it; and if they used no efforts whatever to extinguish it, but went away and left it burning, such conduct, we think, would amount to gross negligence. These remarks are made with reference to the character and condition of the train in question. It

was a gravel train, and there could be no difficulty, even if the train moved off, in leaving behind a portion of the men to look after the fire. In the case of an ordinary freight or passenger train, even if the employees knew the locomotive had kindled a fire upon the track, yet it might not be possible to stop the train and put it out, or leave behind anyone for that purpose. The safety of the train and passengers would be a matter of first importance, and negligence could not necessarily be imputed if the servants left the fire burning without using any efforts to extinguish it. But the instruction, when applied to the facts of this case, raises quite a different question; and that is, whether, when a fire has been set by a gravel train, which has a large number of men on the train who know about the fire, they can all go away, leaving the fire to spread and destroy the property of others, without being guilty of negligence. It seems to us that such conduct on the part of the servants of the company would almost deserve the warm language used by Judge Breese, in *Bass v. Chicago, B. & Q. R. Co.* (1862) 28 Ill. 9, 81 Am. Dec. 254, as being 'unworthy of civilized and Christian men.' At all events, if the jury found from the evidence that the supposed facts were established, we have no doubt the company would be liable for the loss occasioned by the fire." Negligence in starting the fire was, however, alleged in this case, and while the court states the duty to use care to extinguish fires broadly, and does not differentiate between those started negligently and others not so started, it is not entirely clear that it intended its remarks to cover cases where there was no negligence in starting the fire.

#### **Duty of employees other than trainmen.**

With respect to railroad employees other than trainmen, the view has been taken in some cases that no duty rested on them to aid in extinguishing fires set by locomotives without negligence.

Thus, in *Baltimore & O. R. Co. v. Shipley* (1873) 39 Md. 251, evidence

that none of the railroad's section hands were present, assisting in putting out a fire started by its engine, apparently off of its right of way, was held inadmissible for the purpose of showing negligence by the company, the court holding that the words, "without negligence," used in a statute imposing the burden of proof on the company to show that a fire was occasioned without negligence, meant the exercise of reasonable care to have its engines properly constructed and operated, but that it was not obliged to station men along its line to extinguish fires that might happen.

And in *Indianapolis & C. R. Co. v. Paramore* (1869) 31 Ind. 143, where wood placed near a railroad track was burned by fire originating from sparks from an engine, the company was held to owe no duty to keep a watchman to guard the wood against fire. The court said: "It was the duty of the company to use reasonable precaution by providing properly constructed machinery, and the duty of its servants to use reasonable care and diligence in its use, to avoid the communication of fire to the shed and wood; but no reason is received why the company was under any more obligation than the plaintiff to be at the expense of keeping a watchman stationed there, to protect the shed and wood and extinguish any fire that might be kindled by unavoidable accident. Every proprietor adjoining a railroad may lawfully deposit his property or goods, or erect valuable buildings on his own premises, in close proximity to such road; but in doing so he takes upon himself the risk of danger of fire being communicated thereto without the fault of the railroad company or its servants. And the existence of such danger does not impose on the company any obligation to incur the expense of a guard. The establishment of such a principle would require railroad companies to station guards along the whole line of their roads. The principle applicable to such cases is that a party in the exercise of his legal rights must use reasonable and proper care to avoid injury to others. But if such care be

exercised, and an injury unavoidably results to others, no liability attaches."

And in *Louisville & N. R. Co. v. Haggard* (1914) 161 Ky. 317, 170 S. W. 956, it was held that if the railroad did not negligently start a fire which resulted from sparks from its locomotive, and which, when discovered, had spread beyond its property, its failure to put it out imposed no liability upon the company. The court said: "If the defendant's negligence started the fire, it was answerable for the injury the plaintiff sustained therefrom, whether it used proper care to put it out or not after it had notice of it. If the defendant negligently failed to put out the fire when it could have done so, this added nothing to its liability if it negligently started the fire. If it had not negligently started the fire, its failure to put it out imposed no liability upon it. The fire had burned beyond its premises before it had notice of it, and while it was under a moral duty to protect the property of its neighbors, its duty in this regard was the same as that of the other neighbors. All the evidence on this subject should have been excluded, as the defendant's liability turned simply on the question whether it negligently started the fire."

In *Kenney v. Hannibal & St. J. R. Co.* (1876) 63 Mo. 99, there is an obiter statement that, even if the defendant's engine which set a fire was properly equipped and carefully managed, it was liable for the damage resulting from the fire if its section men saw the fire in time to extinguish it by the exercise of reasonable care and prudence before it extended to the plaintiff's property, the court stating that it was gross negligence on their part to suffer the fire to escape when it could readily have been prevented.

But on a subsequent appeal of this case (1879) 70 Mo. 243, a contrary view was taken, and with reference to the prior statement, the court said: "The record did not present the question of the liability of the company for the neglect of its section hands to extinguish the fire, and, therefore, the remarks on that subject are not au-

thoritative, but only entitled to that consideration which is due to any observation on legal questions falling from the able and learned judge who delivered the opinion of the court. With due deference to him, we hold that the company is not liable because its servants neglected to extinguish the fire when they discovered it on the track. It was their duty as citizens to prevent the spread of the fire, and by their conduct on the occasion, as testified to by one of their number, they manifested a cruel and brutal indifference to the destruction of a neighbor's property; but it was not in the line of their employment, and was no more their duty to extinguish the fire than that of any other person who saw it. *Baltimore & O. R. Co. v. Shipley* (1873) 39 Md. 251. To illustrate, if a fire should originate on A's premises through no fault of his, and should extend to B's and consume his property, A, if not liable for the occurrence of the fire, would not be liable on the ground that carpenters whom he had employed in repairing or building on his premises, or laboring men whom he had employed to dig a ditch through his farm, had neglected to extinguish it. If not liable for the origin of the fire, he cannot be held so on account of the neglect of a social duty by persons in his employment in a business not connected with origin of the fire, or imposing any duty to extinguish it in addition to that which every citizen owes to society."

But since the passage of a statute in Missouri making railroads liable for fires set by sparks from their engines notwithstanding any precautions they may have exercised, it has been held that, although a fire set by a locomotive was not due to any negligence of the company, it was nevertheless the duty of its agents and servants to prevent the spread of such a fire. *Lemen v. Kansas City Southern R. Co.* (1910) 151 Mo. App. 511, 132 S. W. 13. The question at issue in this case was as to the admissibility of evidence that a conductor of a train which had set out a fire notified a station agent

to send section men to put it out, such evidence being held admissible."

In *Atlantic Coast Line R. Co. v. Benedict Pineapple Co.* (1906) 52 Fla. 165, 42 So. 529, a count in an action against a railroad for damages for destruction by fire of canvas covering for pineapples, ignited by an engine, was held defective in failing to allege negligence, and in confining the defendant's alleged negligence to the permissive or negligent act of allowing the canvas covering to be burned, without any showing of a duty upon it to put out a fire which was not caused by its carelessness or negligence.

Those of the preceding cases which announce the broad rule that a railroad owes no duty to extinguish fires set by its engine without negligence are in conflict with the result which has been reached in other jurisdictions.

Thus, in *Missouri P. R. Co. v. Platzner* (1889) 73 Tex. 117, 3 L.R.A. 639, 15 Am. St. Rep. 771, 11 S. W. 160, it was held that notwithstanding the fact that an engine which set out a fire was properly equipped and managed, the railroad owed a duty to exercise such care as the circumstances of a given case would indicate to a prudent man was proper, to prevent its spread to other property. The court said: "The rule that a railway company owes no duty looking to the safety of property of persons situated on or near to its line, other than to use a high degree of care to prevent the kindling of fires through the escape of fire from their engines, seems to us a narrow rule. The business is conducted for the benefit of the company, and is of great advantage to the public, but there is no hardship in requiring them not only to use a high degree of care to prevent kindling of fires, but to extinguish them when they have their origin in the conduct of the company's business, if this can be done by the exercise of ordinary care. Every person has the right to kindle a fire on his own land for any lawful purpose, and if he uses reasonable care to prevent its spreading and doing injury to the property of others no just

cause of complaint can arise; yet, although 'the time may be suitable and the manner prudent, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars and injury is done in consequence whereof the liability attaches, it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant. . . . ' If one who had kindled a fire on his own land should see it spreading under the influence of a strong and unexpected wind, without which it would not have spread, should then use every possible effort to extinguish it before it reached the line of his own land, but be unable to do so, could he then cease his efforts and be heard to say that he had discharged the entire duty cast upon him by law and the clearest principles of right, and was not liable for the destruction of his neighbor's house or barn by the fire of his own kindling, if it appeared that by ordinary diligence he could have arrested the fire soon after it crossed his own line, and before it seriously injured his neighbor? We think not; for, having put in motion the destructive element, nothing short of the exercise of due care to prevent injury from it ought to relieve him from responsibility. He could not be heard to say that the limit of his obligation was fixed by and as narrow as the boundaries of his land. A failure under such circumstances to follow the fire across the line between him and his neighbor, and to extinguish it whenever he could, could not be said to be only the neglect of a social duty. If this be true as to an individual who in the exercise of the highest care has kindled a fire on his own land for a lawful purpose, and who has no suspicion that thereby his neighbor's property is imperiled, what must be the rule with a railway company claiming, as all do, that the business it is conducting is necessarily, when

conducted with the utmost care, attended with danger to property along its line? The very groundwork on which the two charges given by the court, and together before quoted, stand, is that to conduct the business of such companies successfully they must use fire in engines from which, with the use of the highest care, fire will sometimes escape, and property through this be destroyed. The cases show that it is not important whether the origin of a fire be in negligence, and that liability exists on the ground that the failure to use proper care to prevent the spread of fire lawfully kindled is negligence as clearly as is an originally unlawful kindling from which injury to another results. The kindling of a fire by the escape of sparks or coals from an engine, when the utmost care has been used to prevent their escape, and to prevent their kindling when they do escape, whether the fire arise on the company's right of way or on contiguous lands, cannot be more lawful or the obligation to extinguish less than it is when done by an individual on his own land, and it cannot be said without doing violence to reason and right that as high an obligation does not rest on a railway company to extinguish a fire when kindled under such circumstances as rests on the owner of land when fire lawfully kindled by him spreads. The kindling in the one case is absolutely lawful, while in the other it is lawful by permission if due care be used to control it, on the theory that engines on railways cannot be operated successfully without some danger of scattering fire. Without entering into any discussion as to the degree of care a railway company should use to extinguish a fire caused by the escape of fire from its engines, we feel constrained to hold that the duty does exist, however careful such companies may be to prevent the escape of fire from their engines, and that the failure to exercise such care as the circumstances of a given case would indicate to a prudent man was proper will give cause of action for an injury resulting." The question of what em-

ployees owed a duty to extinguish a fire was not dealt with in this case.

The decision in this case was held conclusive in *Missouri P. R. Co. v. Donaldson* (1889) 73 Tex. 124, 11 S. W. 163, where it was held the duty of railroad employees, other than trainmen, to use ordinary care to extinguish a fire set on or near the track by locomotive without negligence.

And in *Ball v. Grand Trunk R. Co.* (1866) 16 U. C. C. P. 252, it was held that where a fire was kindled on the defendant's track by coals which, without negligence, fell from its engine, and its trackmen saw it and neglected to put it out at a time when it was likely to spread to the plaintiff's premises, the company was liable for the damage caused by its subsequently spreading to the plaintiff's property. The court stated that the rule was clear that anyone may kindle a fire, or, finding it kindled on his own land, may let it burn, if he pleases, to any extent, provided it does not injure his neighbor, but that if it be likely to spread so as to injure his neighbor he is bound to put it out, or at least to use his best endeavors to prevent its spreading, and that if he does not he is liable. The view was apparently taken in this case that if a fire resulted on the plaintiff's premises from an engine without negligence by the defendant, it would not be liable for a failure to assist in putting it out.

And in *Eighme v. Rome, W. & O. R. Co.* (1890) 32 N. Y. S. R. 757, 10 N. Y. Supp. 600, where the engine was properly equipped and managed and it appeared that the fire started in inflammable material on the defendant's right of way and spread to the plaintiff's house, the company was held chargeable with the duty of using reasonable care to extinguish the fire, and the evidence was held to show negligence, where the fire started near a station and the agent saw it soon after, and in time to prevent it spreading to the plaintiff's house, but assumed that boys whom he saw putting it out would be successful, and failed to do anything until it was too late. There appears, however, to be an ele-

ment of negligence present in this case, that is, the allowing of inflammable material on its right of way.

In *Van Dyke v. Grand Trunk R. Co.* (1911) 84 Vt. 212, 78 Atl. 958, Ann. Cas. 1913A, 640, where a statute imposed liability on a railroad for fires set by its engines, unless it affirmatively showed that it was free from negligence, the view was apparently taken that although the railroad was not negligent in setting the fire it still owed a duty to take precautions during a dry season to employ extra men to assist in putting out fires, and the failure to take such precautions, considered in connection with other conduct, was held in this case to authorize a recovery against the company.

And in *Simmonds v. New York & N. E. R. Co.* (1884) 52 Conn. 264, 52 Am. Rep. 587, where a statute made railroads insurers against the consequences of fire communicated from their locomotives regardless of negligence, the court stated that in so doing the law implied in them the right and duty to put out fires when communicated. The railroad in that case contended that the act of one on whose land the fire started, in requesting its section men to allow the fire to burn, was the proximate cause of the damage sustained by the plaintiff to whose land it finally spread, but the court refused to take this view, and stated that the duty which the company owed could not be excused by any arrangement made with a third person.

The view was apparently adopted in *Lake Erie & W. R. Co. v. Keiser* (1900), 25 Ind. App. 417, 58 N. E. 505, that a duty rested on the company to extinguish a fire, although it might have been started by its engine without negligence, but nothing is said relative to what servants the duty extended. The point discussed in the case was as to whether there was a conflict between a general verdict and answers to special interrogatories relating to contributory negligence on the part of the person whose property was burned.

J. T. W.



## UNITED STATES, Plff. in Err.,

v.

HERMAN H. OPPENHEIMER et al.

*United States Supreme Court — December 4, 1916.*

(242 U. S. 85, 61 L. ed. 161, 37 Sup. Ct. Rep. 68.)

**Judgment — res judicata — dismissal of indictment.**

1. A judgment dismissing an indictment on the ground that the offense charged is barred by the Statute of Limitations is a bar, irrespective of any question of former jeopardy, to a second prosecution under a new indictment for the same offense.

[See note on this question beginning on page 519.]

**Appeal — by government in criminal case — sustaining plea in bar.**

2. A judgment of a Federal district court quashing an indictment because of a previous adjudication upon a former indictment for the same offense that it was barred by the Statute of Limitations is one sustaining a special plea in bar, within the meaning of the Act of March 2, 1907, governing the right of the government to a review in a criminal case, although the defense was presented by demurrer and motion to quash, and the court granted what was styled the motion to quash.

[See 2 R. C. L. 185-188.]

**— extent of right.**

3. The clause of the Act of March 2, 1907, giving a writ of error to the United States to review a decision of a Federal district court in a criminal case sustaining a special plea in bar, when the defendant has not been put in jeopardy, is not limited, like the earlier clauses of that statute, to judgments based on the invalidity or construction of the statute upon which the indictment is founded.

[See 2 R. C. L. 185-188.]

**ERROR** to the District Court of the United States for the Southern District of New York to review a judgment quashing an indictment because of a previous adjudication that a former indictment for the same offense was barred by the Statute of Limitations. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles Warren, Assistant Attorney General, and A. J. Clopton, for plaintiff in error:

The so-called "motion to quash" filed by the defendant was in fact and in law a special plea in bar.

2 Bishop, New Crim. Proc. 1913, p. 623; *United States v. Kissel*, 218 U. S. 601, 610, 54 L. ed. 1168, 1179, 31 Sup. Ct. Rep. 124; 10 Enc. Pl. & Pr. 569; *Durland v. United States*, 161 U. S. 306, 314, 40 L. ed. 709, 712, 16 Sup. Ct. Rep. 508; *United States v. Pond*, 2 Curt. O. C. 265, Fed. Cas. No. 16,067; *Archbold, Crim. Pr. & Pl. Pomeroy's Notes*, 8th ed. 318.

The defendant was not placed in jeopardy under the former indictments, nor did the decision of Judge Thomas on the pleas to those indictments become *res adjudicata*. The

erroneous decision that the indictments were barred by the one-year Statute of Limitations was rendered upon preliminary pleas which were interposed before any submission to or the swearing of a jury, and under such condition jeopardy could not attach or the case be finally determined on its merits.

*Kepner v. United States*, 195 U. S. 100, 128, 49 L. ed. 114, 124, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; 1 Bishop, New Crim. Law, 8th ed. § 1027, ¶ 4; 12 Cyc. 265; *Com. v. Gould*, 12 Gray, 171; *United States v. Rogoff*, 163 Fed. 311; *United States v. Van Vliet*, 23 Fed. 35; *Ex parte Lange*, 18 Wall. 163, 178, 174, 21 L. ed. 872, 877, 878; *Shoener v. Pennsylvania*, 207 U. S. 188, 196, 52 L. ed. 163, 166, 28 Sup. Ct. Rep. 110; *Joy v. State*, 14 Ind. 148; *Pritch-*

ett v. State, 2 Sneed, 285, 62 Am. Dec. 468; State v. Fley, 2 Brev. 338, 4 Am. Dec. 583; State, Duffy, Prosecutor, v. Britton, 48 N. J. L. 371, 7 Atl. 679, affirming 47 N. J. L. 251; Marshall v. Com. 20 Gratt. 845; 24 Am. & Eng. Enc. Law, 2d ed. 830.

The first ground of the pleading, termed "motion to quash," really renewed the defense of the one-year bar of limitation embodied in § 29b of the Bankruptcy Act which had been sustained to the former indictments, and necessarily involved a construction of the Conspiracy Statute under which the indictment here involved was brought.

United States v. Rabinowich, 288 U. S. 78, 59 L. ed. 1211, 35 Sup. Ct. Rep. 682.

A decision upon a special plea in bar when the defendant has not been put in jeopardy is subject to review here, whether or not it involves the construction of the statute upon which the indictment is based.

United States v. Keitel, 211 U. S. 370, 398, 399, 53 L. ed. 230, 244, 29 Sup. Ct. Rep. 123.

The indictment alleges that an additional overt act was committed by the defendant in error less than one year before it was brought, and as limitation begins to run from the commission of the last overt act, and not from the date of the formation of the conspiracy, the decision of Judge Thomas discharging the defendants under the former indictment, on the plea of the one-year bar can have no application, and necessarily cannot become the law of the case or constitute *res judicata*.

Brown v. Elliott, 225 U. S. 392, 401, 56 L. ed. 1136, 32 Sup. Ct. Rep. 812; United States v. Kissel, 218 U. S. 601, 607, 608, 54 L. ed. 1168, 1178, 31 Sup. Ct. Rep. 124.

Messrs. Benjamin Slade, Abram J. Rose, and L. Laffin Kellogg, for defendants in error:

The pleadings below were entitled and adjudicated as "demurrer" and "motion to quash." They were not "a plea in bar." This court will not construe pleadings and hold a demurrer or motion to quash to be anything else, unless it clearly appears that (a) the decision entered was based upon the construction of the statute upon which the indictment is founded.

United States v. Adams Exp. Co. 229 U. S. 381, 57 L. ed. 1237, 33 Sup. Ct. Rep. 878, or

(b) The court in the judgment ex-

pressly placed its decision that the United States could not prosecute the defendants upon the plea of the bar of limitations.

United States v. Barber, 219 U. S. 72, 55 L. ed. 99, 31 Sup. Ct. Rep. 209.

The action of the lower court in holding that the prior judgment was a bar to the prosecution of the last indictment was correct.

Whart. Crim. Pl. & Pr. 9th ed. § 406; 1 Chitty, Crim. Law, pp. 442, 448; 2 Bishop, New Crim. Proc. § 781 and note; Stephen's Digest Crim. Proc. art. 258, p. 171; Reg. v. Houston, 2 Craw. & D. (Ir.) 310; State v. Fields, 106 Iowa, 412, 76 N. W. 802; Archbold, Crim. Pl. Ev. & Pr. 21st ed. 149; Wells, Res Adjudicata, § 274; Northern P. R. Co. v. Slaght, 205 U. S. 122, 130, 51 L. ed. 738, 741, 27 Sup. Ct. Rep. 442; Lamar v. United States, 240 U. S. 60, 65, 60 L. ed. 526, 528, 36 Sup. Ct. Rep. 255; Detroit & M. R. Co. v. Michigan R. Commission, 240 U. S. 564, 571, 60 L. ed. 802, 807, 36 Sup. Ct. Rep. 424; Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. 240 U. S. 30, 60 L. ed. 507, 36 Sup. Ct. Rep. 234; Com. v. Ellis, 160 Mass. 165, 35 N. E. 773; Gelston v. Hoyt, 3 Wheat. 316, 4 L. ed. 399; Reg. v. Haughton, 1 El. & Bl. 501, 118 Eng. Reprint, 523, 22 L. J. Mag. Cas. N. S. 89, 17 Jur. 455, 1 Week. Rep. 164, 6 Cox, C. C. 101; Rex v. Brown, 17 Cox, C. C. 79; Coffey v. United States, 116 U. S. 436, 445, 29 L. ed. 684, 687, 6 Sup. Ct. Rep. 437; Bissell v. Spring Valley Twp. 124 U. S. 225, 233, 31 L. ed. 411, 414, 8 Sup. Ct. Rep. 495; Bouchaud v. Dias, 8 Denio, 238; State v. Wear, 145 Mo. 205, 46 S. W. 1099; Duchess of Kingston's Case (1776) 20 How. St. Tr. 538; District of Columbia v. Brewer, 32 App. D. C. 388; Oglesby v. Attrill, 14 Fed. 214.

Mr. Justice Holmes delivered the opinion of the court:

The defendant in error and others were indicted for a conspiracy to conceal assets from a trustee in bankruptcy. Act of July 1, 1898, chap. 541, § 29, 30 Stat. at L. 544, 554, Comp. Stat. 1913, §§ 9585, 9613, 1 Fed. Stat. Anno. 2d ed. pp. 509, 844. The defendant Oppenheimer set up a previous adjudication upon a former indictment for the same offense that it was barred by the one-year Statute of Limitations in the Bankruptcy Act for

offenses against that act, § 29d,—an adjudication since held to be wrong in another case. *United States v. Rabinowich*, 238 U. S. 78, 59 L. ed. 1211, 35 Sup. Ct. Rep. 682. This defense was presented in four forms, entitled, respectively, demurrer, motion to quash, plea in abatement, and plea in bar. After motion by the government that the defendant be required to elect which of the four he would stand upon, he withdrew the last-mentioned two, and subsequently the court granted what was styled the motion to quash, ordered the indictment quashed, and discharged the defendant without day. The government brings this writ of error, treating the so-called motion to quash as a plea in bar, which in substance it was. *United States v. Barber*, 219 U. S. 72, 78, 55 L. ed. 99, 101, 31 Sup. Ct. Rep. 209.

The defendant objects that the statute giving a writ of error to the United States from the decision or judgment sustain-

Appeal—by government in criminal case—sustaining plea in bar.

ing a special plea in bar, when the defendant has not been put in jeopardy, Act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, Comp. Stat. 1913, § 1704, 6 Fed. Stat. Anno. 2d ed. p. 149, is limited like the earlier clauses to judgments based on the invalidity or construction of the statute upon which the indictment is founded. But that limitation expressed in each of the two preceding paragraphs of the statute is not repeated here. The language used in *United States v. Keitel*, 211 U. S. 370, 399, 53 L. ed. 230, 245, 29 Sup. Ct. Rep. 123, had reference only to the construction of the indictment and to its sufficiency upon matters not involving a statute, in cases brought up by the United States under the earlier clauses of the act. That quoted from *United States v. Kissel*, 218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124, so far as material, also meant that the sufficiency of the indictment

would not be considered here upon a writ of error to the allowance of a plea in bar. In view of our opinion upon the merits, we do not discuss the preliminary objections at greater length.

Upon the merits the proposition of the government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the 5th Amendment, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the Statute of Limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is impaneled; or that it is conclusive if entered upon the general issue (*United States v. Kissel*, 218 U. S. 601, 610, 54 L. ed. 1168, 1179, 31 Sup. Ct. Rep. 124), but if upon a special plea of the statute, permits the defendant to be prosecuted again. We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words. *State v. Fields*, 106 Iowa, 406, 76 N. W. 802; *Whart. Crim. Pl. & Pr.* 9th ed. § 406.

Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law, and one

judgment that he is free as matter of substantive law is as good as another. A plea of the Statute of Limitations is a plea to the merits (United States v. Barber, 219 U. S. 72, 78, 55 L. ed. 99, 101, 31 Sup. Ct. Rep. 209), and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution. We

Judgment—  
res judicata—  
dismissal of  
indictment.

may adopt in its application to this case the statement of a judge of great experience in the criminal law: "Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings." Hawkins, J., in Reg. v. Miles, L. R. 24 Q. B. Div. 423, 431. The finality of a previous adjudication as to the matters de-

termined by it, is the ground of decision in Com. v. Evans, 101 Mass. 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins says. Com. v. Ellis, 160 Mass. 165, 35 N. E. 773; Brittain v. Kinnaird, 1 Brod. & B. 432, 129 Eng. Reprint, 789, 4 J. B. Moore, 50, Gow, N. P. 164, 21 Revised Rep. 680. Seemingly the same view was taken in Frank v. Mangum, 237 U. S. 309, 334, 59 L. ed. 969, 983, 35 Sup. Ct. Rep. 582, as it was also in Coffey v. United States, 116 U. S. 436, 445, 29 L. ed. 684, 687, 6 Sup. Ct. Rep. 437.

The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (Jeter v. Hewitt, 22 How. 352, 364, 16 L. ed. 345, 348), in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.

Judgment affirmed.

## ANNOTATION.

### Discharge of accused under a limitation statute as a bar to a subsequent prosecution for the same offense.

#### General rule.

Where an accused person is discharged by virtue of a statute providing a special limitation of time within which no prosecution may be had for certain designated crimes, offenses, or misdemeanors, such discharge will operate as a bar to subsequent prosecutions for the same offense, although under a later indictment. UNITED STATES v. OPPENHEIMER (reported herewith), ante, 516.

This rule is more frequently applied to cases construing statutes which require the discharge of the accused unless the action against him is tried within a designated time after his arrest, and it is held that under such statutes the discharge of the accused will constitute a bar to a subsequent prosecution for the same offense, es-

pecially where the statute in effect provides that the accused shall be discharged and acquitted of the offense if not tried within a stated time after arrest or imprisonment. Denny v. State (1849) 6 Ga. 491; Durham v. State (1851) 9 Ga. 306; Kerese v. State (1851) 10 Ga. 95; Jordan v. State (1855) 18 Ga. 532; Holt v. State (1858) 38 Ga. 187; Brown v. State (1890) 85 Ga. 713, 11 S. E. 831; McGuire v. Wallace (1886) 109 Ind. 284, 10 N. E. 111; State v. Wear (1898) 145 Mo. 162, 46 S. W. 1099; Hester v. Com. (1877) 85 Pa. 139.

The foregoing Georgia cases construed a provision of the Georgia Code to the effect that where the accused demands a trial after the lapse of a stated time, if he is not tried within a given time thereafter he shall be

absolutely discharged and acquitted of the offense. *Jordan v. State* (1855) 18 Ga. 582; *Holt v. State* (1868) 38 Ga. 187; *Brown v. State* (1890) 85 Ga. 713, 11 S. E. 831.

As suggested, the foregoing rule has been applied where the statute in effect provides for the discharge and acquittal of the accused for failure to prosecute him within a designated time after his arrest. It would seem, however, that it is not essential that the statute should, in express terms, provide for the acquittal of the accused in order that his discharge for failure to prosecute him may operate as a bar to further prosecution for the same offense. Thus, in *McGuire v. Wallace* (1886) 109 Ind. 284, 10 N. E. 111, in construing a statute which provided in effect that no defendant shall be detained in jail without a trial on a criminal charge beyond a designated period of time, and that if he is he may make application for his discharge, the court said that if the delay was not occasioned by any one of the matters within the exception, and if the trial court is satisfied that there is evidence for the state which reasonable diligence did not enable it to procure, and that there is just ground to believe that such evidence may be procured by the next term of court, it shall continue the case, and remand the prisoner. In such case, if the state fails to bring the accused to trial at the next term, he is entitled to his discharge, and this discharge amounts to an acquittal of the offense.

In *Johnson v. State* (1884) 42 Ohio St. 207, it is said that "in former times, persons were in many instances confined in prison for years, under various pretexts, without being brought to trial. Nothing could be more subversive of liberty. To prevent such abuse in this country, it is ordained in our Constitutions, Federal and state, that the accused shall be entitled to a speedy public trial, and statutory provisions have been enacted . . . in aid of that clause of our state Constitution. But it was not the purpose of the Constitution or the statute to screen guilty men from punishment, or to require of courts or officers things

physically impossible. Of course, when it appears that the statute has been disregarded the accused is entitled to a discharge. But it must be remembered that the discharge is equivalent to a verdict of acquittal with judgment thereon. . . . Again, the court of common pleas is a tribunal of superior jurisdiction, its record importing absolute verity, and the orders made in a cause pending in that court are, in the absence of anything appearing to the contrary, presumed to have been rightly and properly made. And, besides, an error in refusing to discharge for such cause can never be properly presented in this court until there has been a conviction . . . and here it is admitted that, aside from this alleged error, the prisoner was properly convicted. For these reasons, we are clear that in order to authorize this court to reverse a conviction on such ground, and order a discharge, the accused must come prepared to show that his case is plainly within the terms of the statute."

In *State v. Wear* (1898) 145 Mo. 162, 46 S. W. 1099, the prosecution was dismissed because the accused was not tried within the time prescribed by a statute, in effect providing that if any person indicted for any offense and held to answer should not be brought to trial by the end of the third term following his arrest, etc., he shall be entitled to be discharged so far as relates to such offense. Under these circumstances, it was held that the subsequent prosecution under a later indictment was barred by the prior discharge.

In *Henwood v. People* (1914) 57 Colo. 544, 143 Pac. 373, Ann. Cas. 1916A, 1111, it is apparently assumed that a discharge would constitute a bar to further prosecution where obtained under a statute providing in effect that if a person committed for certain crimes shall not be tried on or before a certain time thereafter, he shall be set at liberty by the court unless the delay shall have been on the application of the prisoner. It was, however, held that where the prisoner was accused of committing two murders at the same time, his discharge from im-

prisonment in one of the cases was no bar to his prosecution in the other case. The court said that, "generally speaking, the plea of *autrefois acquit* is a plea by the defendant that he had been formerly tried and acquitted of the same offense charged in the information to which the plea is made. Such a plea, when sufficient and established, is upheld by virtue of the provisions of our Bill of Rights, and the principle of the common law to the effect that a person shall not be twice put in jeopardy for the same offense. Conceding, but not deciding, that the plea alleged facts from which it appears the crimes charged in the two informations constitute one and the same offense, we will consider the contention on behalf of defendant that setting him at liberty in the Von Phul case was equivalent to an acquittal by a jury, or barred a prosecution for the murder of Von Phul, and was therefore a bar to the prosecution for the murder of Copeland. The proceeding setting the defendant at liberty in the Von Phul case was in no sense a trial on the merits; neither does it appear therefrom that he has been placed in jeopardy in that case. It was not the purpose of our statute to enable the guilty to escape, but to prevent unnecessary delays on the part of the prosecution, so that the utmost which can be claimed for the statute, generally speaking, is that it was thereby intended to give effect to that provision of our Bill of Rights which guarantees one accused of a criminal offense a speedy trial, and therefore, when one charged with a crime brings himself within its provisions, he is entitled to be set at liberty, and cannot afterwards be committed or held for the same offense, when charged therewith in a second indictment or information."

But in *Ex parte Clarke* (1880) 54 Cal. 412, the statute construed provided for the dismissal of prosecution of persons not indicted within a designated time. It was held that such a dismissal did not bar a subsequent prosecution for the same offense under a later indictment. The court said that the order dismissing the prosecu-

tion ends the action commenced by the complaint upon which the respondent was imprisoned. It ended the action, however, not by any judgment upon the merits of the case, but by an order in the nature of nonsuit, in effect amounting merely to a simple opinion of the court that that proceeding ought not to be further prosecuted. Inasmuch as there was no limitation of time applicable to prosecution for murder, and as the defendant has in his favor no order dismissing the action, he had never been put in jeopardy within the meaning of the Constitution. A new action on behalf of the people may, in such case, be initiated at any subsequent day.

In *State v. Garthwaite* (1851) 23 N. J. L. 143, the statute construed provided that every indictment should be tried at the term or session in which issue was joined, or the next term thereafter, and if such indictment is not so tried the defendant shall be discharged. A discharge granted under this statute was held not to bar a prosecution for the same offense commenced under a subsequent indictment.

In *Byrd v. State* (1834) 1 How. (Miss.) 163, in construing a statutory provision that if such prisoner is not prosecuted by indictment and trial within the stated time, he shall be discharged from further imprisonment, etc., the court said that the utmost extent to which this law can be carried was to a total discharge from imprisonment for the same offense, and cannot go to bar a prosecution for the crime charged. A discharge upon motion under this section can have no greater effect than a discharge for the same cause upon a writ of habeas corpus, which only goes to free the prisoner from imprisonment for the same cause unless, by the order of a court of competent jurisdiction, he shall be ordered into custody.

In *Hester v. Com.* (1877) 85 Pa. 139, a prosecution for murder was nolle prossed immediately before the hearing of the motion in behalf of the accused for his discharge. Although the discharge was three days after the expiration of the second term follow-

ing the indictment, the court said it was unnecessary to consider what the effect of a discharge under the statute prescribing the two-term rule would have been, since the motion for discharge was not grounded on that rule.

In *State v. Deslovers* (1917) 40 R. I. 89, 100 Atl. 64, where the state nolle prossed the indictment to avoid dismissing the defendant under a statute providing in effect that persons indicted and imprisoned for certain crimes shall be tried or bailed out within a designated time, it was held that the defendant was subject to trial upon a new indictment, notwithstanding such nolle pros. The court said that this statute made no express provision and contained no language from which any inference could be drawn as to the effect of such failure to try a prisoner, or bail him within the time specified, upon the subsequent status of a defendant, with reference to his further prosecution for the crime; hence it was reasonable to assume

that it was intended under such conditions that the defendant was to be left to his remedy to be released from imprisonment by habeas corpus, without thereby affecting the right to further prosecute him for the crime.

**Where statute limits effect of discharge.**

On the other hand, the statute may expressly provide that the effect of a discharge shall be so limited that it will not operate as a bar to a further prosecution.

For example, a statute providing that the court shall order a criminal prosecution to be dismissed where no indictment was returned within a designated time, and that the order of dismissal shall be a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony, the dismissal of the prosecution for homicide for failure to file an information within a designated time is not a bar to a subsequent action. *Re Butts* (1918) 19 Ariz. 318, 170 Pac. 792. A. G. S.

W. H. LAIRD, Appt.,

v.

STATE OF TEXAS.

*Texas Court of Criminal Appeals—March 1, 1916.*

(79 Tex. Crim. Rep. 129, 184 S. W. 810.)

**Judgment — collateral attack — right of one invoking jurisdiction.**

1. A judgment of divorce, void for want of jurisdiction in the court rendering it, cannot be collaterally attacked by the one who invoked the jurisdiction for the purpose of rendering his wife incompetent as a witness against him in a prosecution for perjury.

[See note on this question beginning on page 535.]

**Appeal — recognizance after expiration of term — sufficiency.**

2. A convict who fails to make the statutory recognizance for his release pending appeal, at the term at which he was convicted, does not oust the appellate court of jurisdiction by making the recognizance and securing his liberty at the next term of court, although the statute merely provides that if, after appealing, he fails to

make recognizance during the term of court, he may be permitted to give bail and obtain his release by giving, after the expiration of such term and in vacation, his bail bond to the sheriff.

[See 3 R. C. L. 15, 31.]

**Perjury — effect of court's want of jurisdiction.**

3. One is not relieved from liability for perjury in falsely swearing to resi-

dence to give the court jurisdiction of his suit for divorce, by the fact that the court had no jurisdiction because

he had not in fact acquired the necessary residence.

[See 21 R. C. L. 261.]

(Prendergast, P. J., dissents from proposition 1. Davidson, J., dissents from proposition 2.)

**APPEAL** by defendant from a judgment of the Criminal District Court for Dallas County, convicting him of perjury. *Affirmed.*

On the first hearing, Prendergast, P. J., stated the facts as follows: The term of court at which appellant was convicted, both as a matter of fact and as fixed by law, convened July 5th and adjourned October 2, 1915. The trial occurred, and the verdict was rendered and the judgment thereon entered, September 24, 1915. Within that term and in proper time appellant made his motion for a new trial, and by leave of the court within term time filed an amended motion. These were heard and overruled by the court on October 1, 1915, at which time the appellant gave notice of appeal to this court, which was duly then and there entered on the minutes of the court. Immediately thereafter he was properly sentenced. In overruling his said motions, the court, as a part of that order, fixed the amount of appellant's recognizance at \$2,000, and he, being present and in custody, was committed to jail until the decision of his case on appeal by this court. The sentence also is to the same effect.

Appellant did not enter into a recognizance at that term of court, nor attempt to do so, so far as this record discloses, but the sheriff, by virtue of said orders and the law, then having him in custody, properly confined him in the county jail. The next term of that court convened on Monday, October 4th, and continued in session for that October term, the time required and authorized by law. On October 8th, during that October term, in open court, appellant attempted to gain his liberty, and did so, by on that date, in open court, entering into a recognizance pending his appeal here. That re-

cognizance, both in substance and in form, follows the statute (Code Crim. Proc. art. 903). Under that recognizance he was discharged by the sheriff from jail and from his custody, and he has continuously since then been at liberty and still is.

Messrs. Robert B. Allen and Charles A. Phippen for appellant.

Mr. C. C. McDonald, Assistant Attorney General, for the State.

Harper, J., delivered the opinion of the court:

On a former day of this term this cause was dismissed because appellant, after the adjournment of the term of court at which he was convicted, entered into a recognizance at the next term of the court, it being held that after the adjournment of the court for the term at which appellant was tried, the statute only authorized the giving of a bail bond, and, he having given a recognizance, the jurisdiction of this court was ousted when he was allowed to go at large after giving a recognizance,—he would, in law, be regarded as having escaped confinement. At the time the case was originally before the court, the writer at that time suggested this was not the construction that should be given the statute, but, instead, the proper construction of it was that if the court was in session, a recognizance was authorized to be taken, and a bail bond could be given only when the court was in vacation. The articles governing this matter are articles 901-903, and 904. That the recognizance given is in accordance with article 903 is not questioned, but it is contended that the proper construction of these articles is that, if a recognizance is given, it must be



at the term at which the trial was had, and if not then given, a person can secure his release only by giving a bail bond, in lieu of a recognizance; and it is claimed this is the proper construction of article 904, which reads: "If, for any cause, the defendant fails to enter into and make the recognizance mentioned in article 903 during the term of court, but gave notice of and took an appeal from such conviction during such term, he shall, notwithstanding such failure, be permitted to give bail and obtain his release from custody by giving, after the expiration of such term of court and in vacation, his bail bond to the sheriff, with two or more good and sufficient sureties," etc.

To the writer's mind, this article was clothed in such language as to be subject to either construction, and while he thought that perhaps the better construction would be that, if the court was in session, a recognizance should be given, and a bail bond was only authorized to be taken when the court was in vacation, and, therefore, no recognizance could be entered into, yet, after discussing it with the other members of the court, as it was only a matter of procedure, he said he would not dissent from such holding, as he thought it better to get a settled construction. Since the original opinion has been handed down, we have been led to a further study of the question, and we find that when the criminal procedure required, when the court was in session, that a defendant, when arrested for a felony, enter into a recognizance in open court, and a sheriff was authorized to take bond only when the court was in vacation (articles 325 and 326, White's Anno. Proc.), it was held that if the court be in session, either at the term at which the indictment was returned or at a subsequent term, the sheriff could not take a bail bond, but the defendant was required to enter into a recognizance. *Kiser v. State*, 13 Tex. App. 201; *Gragg v. State*, 18 Tex. App. 295; *Le Rose v. State*, 29

Tex. App. 215, 15 S. W. 33. The legislature, apparently on account of these decisions and the inconvenience sometimes caused, in 1907 amended this article of the statute, now article 337, and authorized the sheriff to take a bail bond even though the court be in session; but it took an act of the legislature to authorize a sheriff to take a bail bond when the court was in session, whether at the term at which the indictment was returned, or a subsequent term. At the same session of the legislature, in 1907, the act was passed which, for the first time, authorized a person convicted of a felony to give a recognizance or bail bond on appeal, if the punishment assessed did not exceed fifteen years' confinement in the penitentiary. Sess. Acts 1907, chap. 19. In the emergency clause to this bill, the legislature declares: "The large amount of costs incurred by keeping the defendant in the custody of the sheriff during a trial, when he is charged with felony, and during the appeals taken from felony convictions, and the frequent hardships endured by the defendants who are not guilty of a violation of law, and the liberty of the citizen, as well as the interests of the state, create an emergency and an imperative public necessity requiring that the constitutional rule requiring bills to be read on three several days be and the same is hereby suspended, and that this act take effect from and after its passage, and it is so enacted."

The purpose of the legislature is made manifest by this act, to save costs of keeping the prisoners confined, to the counties, and to keep innocent people from being punished by confinement in the county jails. But in thus providing they wanted the court to have a supervision and see that adequate sureties were given, and if the court was in session a recognizance must be given so that he might investigate the solvency of the sureties; if the court was not in session, a bail bond could be executed, but the amount

of this bail bond must be fixed by the trial judge, and he must approve the bond, in addition to the sheriff—that he might inquire of the sheriff as to the investigation he had made as to the solvency of the sureties. At this session of the legislature, they dealt with both bail bonds and recognizances before conviction and after conviction, and in one instance (before conviction) they provided that a sheriff might take a bail bond even though the court was in session; but, after conviction, the only instance in which a sheriff was authorized to take a bail bond was (and they use the words) *in vacation*, and then provided, before the prisoner is released, the bond must be presented to the court trying the cause, and be approved by him. To the mind of the writer, it was the clear intent and purpose of the legislature, after conviction, to only authorize the sheriff to take a bail bond while the court was in vacation, and if the court was in session, even though at a subsequent term, a recognizance must be entered into in open court. This construction is in accordance with the construction of the former act, which applied to prisoners before conviction, and which the legislature amended at this session, and which it must in consequence have had in mind, and for this reason the writer thinks the cause should be reinstated; but, as hereinbefore stated, it is but a matter of procedure, and if a majority of the members of this court think the proper construction is that, even though the court at which one is convicted is in session at a subsequent term, a bail bond only will confer jurisdiction on this

**Appeal—**  
recognizance  
after expiration  
of term—  
sufficiency.

court, he will acquiesce in such construction, and dissent no further.

And being of the opinion that the case should be reinstated, he will proceed to pass on the questions raised in the record.

In the first place, we do not think there was any error in overruling the motion to quash the indictment.

The defendant, as plaintiff, brought suit in the civil district court of Dallas county for a divorce from his wife, Mrs. Jessie Laird, alleging that, at the time of the institution of the suit, he had been a resident of Texas for twelve months. In the indictment in this case this is alleged to be false and untrue, and appellant seemingly contends that, if he had not been in fact a resident of Texas twelve months, the district court of Dallas county would have no jurisdiction of the cause of action, and, therefore, if he swore falsely in such suit, no indictment for perjury would lie. The petition was introduced in evidence, in which it is alleged "that plaintiff is a resident of Dallas, Dallas county, Texas, and has been for more than twelve months next preceding the filing of the petition." If the defendant, Mrs. Jessie Laird, had appeared in that cause and filed a plea to the jurisdiction of the court and in abatement of the suit, alleging that appellant, plaintiff in that cause, had not been a resident of this state for twelve months, the court would have had jurisdiction to hear and determine that question; and if appellant, on the hearing of that plea, had been sworn, and testified he had been a resident of Texas for twelve months, yet, upon hearing the other testimony, the court had found his testimony false, and dismissed the suit for want of jurisdiction to hear the cause, yet an indictment for perjury would lie, because the testi-

**Perjury—effect  
of courts' want  
of jurisdiction.**

mony was given in the course of a judicial proceeding, in a court which had jurisdiction to hear and determine that question. And in as much as Mrs. Laird did not appear, and in order to get the court to hear and entertain the suit and grant him a divorce, if appellant testified he had been a resident of Texas for twelve months in order to obtain a decree of divorce from his wife, and such testimony was in fact untrue, an indictment for perjury based thereon will lie, and the court did

not err in so holding. *Cordway v. State*, 25 Tex. App. 405, 8 S. W. 670; *Anderson v. State*, 24 Tex. App. 705, 7 S. W. 40; *Higginbotham v. State*, 24 Tex. App. 505, 6 S. W. 201; *Etheridge v. State*, 76 Tex. Crim. Rep. 198, 173 S. W. 1031. And it has been held that assignment of immaterial matter, in connection with material matter, does not vitiate the indictment. *Dorrs v. State*, — Tex. Crim. Rep. —, 40 S. W. 311; *Jefferson v. State*, — Tex. Crim. Rep. —, 49 S. W. 88.

But the next question presented is one of more difficulty. Appellant contends that, even though perjury could be assigned on his testimony given on the divorce trial, the judgment and decree of divorce entered therein is absolutely void, and, if void, the woman from whom he was adjudged a divorce in that decree is his legal wife, and she cannot, therefore, be used as a witness against him. Appellant, according to this record, came to Texas from New York in December, 1913, leaving a wife and child in New York. In September, 1914, following, he filed a suit for divorce in the sixty-eighth district court of Dallas county, Texas, alleging that he had been a resident of Texas for twelve months, and making allegations in respect to his wife. In the petition he alleged he did not know the address of his wife, and she was cited by publication. When the case came on to be heard Judge Whitehurst testifies appellant took the stand as a witness and testified he had been a resident of Texas for twelve months immediately preceding the filing of the petition for divorce, and testified to the truth of the allegations upon which he sought a divorce. Judge Whitehurst, on the testimony of appellant, granted the divorce, and a decree was entered, granting him an absolute divorce from Mrs. Jessie Laird, the decree reading: "A jury being waived, and the court, having heard the pleadings and the evidence, and the argument of counsel, is of the opinion that the material allegations in plaintiff's

petition are true. It is, therefore, ordered, adjudged, and decreed by the court that the bonds of matrimony heretofore existing between said defendant, Jessie Laird, and plaintiff, W. H. Laird, be and the same are hereby annulled and dissolved, and that each party hereto is hereby restored to the status of single persons."

Appellant's contention is that, although he may have brought this suit, testified as stated above, and obtained to be decreed and entered this decree of divorce, as he had not been in Texas twelve months, the decree is a nullity and void, and, therefore, Mrs. Jessie Laird was not and is not a competent witness against him. One must bear in mind, in passing on this question, that there is nothing in the record of the proceedings in the sixty-eighth district court which would render the judgment void, or tend to show that he had not been a resident of Texas for twelve months. On the face of the pleadings and by the entire record made in that case, the jurisdiction of the district court is shown, and the regularity of its decree.

If the decree is either void or voidable, it must be shown by evidence aliunde the record. Now, so long as this record stands and no suit is brought to set it aside, can it be collaterally attacked, and especially can it thus be attacked by the person who caused and at whose instance it was entered? Upon the decision of this question rests the question of whether or not Mrs. Jessie Laird was a competent witness against appellant. If she was not a competent witness the case must be reversed, because she gave very material testimony to show the falsity of the testimony said to have been given by appellant on the trial of the divorce suit.

Now, the evidence, and all the evidence, shows that appellant brought the divorce suit, and procured that judgment of divorce to be entered. Under the Constitution and laws of this state, the district court of the

sixty-eighth district had jurisdiction of the subject-matter of the suit—the granting of divorce. Const. art. 5, § 8. Having jurisdiction of the subject-matter, the appellant in his petition alleged a state of case which invoked that jurisdiction, and on the *record*, as made in that court, the decree is valid and binding on all the world, and especially binding on appellant. In the case of *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550, Judge Stayton, speaking for the supreme court, says: "Such a court must determine whether the facts exist which make it lawful for administration to be granted in the county in which the court sits, and if in this respect, having power to make the inquiry, it comes to an erroneous conclusion, its decree founded on such conclusion is voidable, but not void,"—citing *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Burdett v. Silsbee*, 15 Tex. 604; *Giddings v. Steele*, 28 Tex. 733, 91 Am. Dec. 336. So, in this case, when appellant's petition in the district court, he being plaintiff in the action for divorce, came on to be heard, he having cited his wife by publication, the court, in accordance with the provisions of law, appointed an attorney to represent the defendant, the absent wife. This attorney filed a general denial, which put plaintiff to strict proof of his allegations. After this evidence, the court may have erred in the conclusion he came to, yet under the evidence offered the court came to the conclusion that plaintiff had been a resident of Texas for twelve months, and such judgment cannot be collaterally attacked; but the only way to nullify it is to bring a direct suit for that purpose. As said by our supreme court in *Crawford v. McDonald*, 88 Tex. 631, 33 S. W. 325: "The general rule is well established, that a judgment rendered by a court even of general jurisdiction is void, if it had, at the time of the rendition of the judgment, no jurisdiction of the person of the defendant or the subject-matter of the litigation. This principle is self-

evident, because, until the court acquired jurisdiction, it has no power to proceed to investigate and determine private rights. Logically, it can make no difference as to the validity of the judgment, whether the lack of jurisdiction of the person or the subject-matter appears from the face of the record, or is made to appear by evidence aliunde. For if, for instance, no service was had upon the defendant, he not appearing in the case, the court, having no jurisdiction whatever over his person, is absolutely without power to bind him by an adjudication that he had been in fact duly served; and, logically, this want of power is the same, whether the lack of jurisdiction appears on the face of the record or not. There is, however, another rule of law equally well settled upon principles of public policy, which precludes inquiry by evidence aliunde the record, in a *collateral attack upon a judgment of a domestic court of a general jurisdiction, regular on its face*, into any fact which the court rendering such judgment must have passed upon in proceeding to its rendition. Therefore, it is well settled that where a personal judgment has been rendered against a defendant by a domestic court of general jurisdiction, and under the same his property has been seized and sold, he will not, in a contest over the title to the property, be allowed to show by evidence *dehors the record* that the judgment was rendered without any service whatever upon him. Logically, the judgment is in fact void, but on grounds of public policy the courts, in order to protect property rights, apply the rule aforesaid, which precludes inquiry into facts *dehors the record*, for the purpose of showing the invalidity of the judgment; and, therefore, for all practical purposes, in such collateral attack, the judgment is held valid. This rule is analogous to, and probably as important as, the rule forbidding the introduction of verbal testimony to vary or contradict the terms of a written contract, except in a pro-

ceeding instituted for the purpose of correcting, reforming, or annulling the same. These principles have long been acted upon by this court, as applicable to judgments of the district, probate, and justice courts, and have become settled rules of property in this state. *Murchison v. White*, 54 Tex. 78; *Williams v. Ball*, 52 Tex. 603, 36 Am. Rep. 730; *Brown v. Christie*, 27 Tex. 73, 84 Am. Dec. 607; *Heck v. Martin*, 75 Tex. 469, 16 Am. St. Rep. 915, 13 S. W. 51; *Fowler v. Simpson*, 79 Tex. 611, 23 Am. St. Rep. 370, 15 S. W. 682; *Martin v. Burns*, 80 Tex. 677, 16 S. W. 1072; *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778. Whether an exception has been ingrafted upon this rule by the decision of the Supreme Court of the United States in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, and if so, what is the effect thereof, is foreign to this discussion. *Martin v. Burns*, 80 Tex. 676, 16 S. W. 1072; *Hardy v. Beaty*, *supra*.

"Since the rule of public policy above referred to precludes inquiry in a collateral attack into even a jurisdictional fact, when the evidence thereof does not appear from the face of the record, it must follow, for stronger reasons, that the judgment in this case, affirming the sale, cannot be attacked collaterally by evidence dehors the record, to the effect that the sale was not in fact made at the place required by law. The court in confirming the sale will be conclusively presumed in this collateral attack to have investigated and determined correctly that the sale was made at the proper place, and no evidence aliunde to the contrary will be permitted to impeach the correctness of the judgment. The only relief, if any, permitted by the rules of law against an improper determination of such question by the court in rendering such judgment of confirmation, is to be found in a direct attack upon the judgment, where the court has full power to adjust the equities of the parties litigant. We are, there-

fore, of the opinion that this judgment cannot be attacked by the evidence dehors the record of the probate court that the sale was not made at the courthouse door of Grayson county. *Brown v. Christie*, 27 Tex. 73, 84 Am. Dec. 607.

But were the above not the general rule our supreme court has settled the question that appellant, having instituted the civil suit, and prosecuted it to judgment, cannot collaterally attack it. In *Heffron v. Cunningham*, 76 Tex. 312, 13 S. W. 259, it was held: "One in whose favor a judgment is rendered in a suit brought in his name by counsel employed by him to sue, cannot be heard in a collateral proceeding to attack the *jurisdiction* of the court, so long as he resorts to no means to correct or annul the judgment." This is not only the rule in this state, but Cyc. vol. 23, p. 1067, says: The rule forbidding the collateral impeachment of judgments applied to all persons who were parties to the action in which the judgment was rendered,—citing cases from many different states.

In *Century Dig.* vol. 30, under title, Judgments, § 931, is cited a list of authorities which hold that a collateral attack on a judgment for want of jurisdiction of a party thereto, which must be shown by facts outside the record, can only be made by one not a party to the judgment. *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211; *Valentine v. McGrath*, 52 Miss. 112; *Hess v. Smith*, 16 Misc. 55, 37 N. Y. Supp. 635; *People's Bank v. Williams*, — Tenn. —, 36 S. W. 983, and cases cited.

It is thus seen that the rule of law is, that if the court rendering the judgment has jurisdiction of the subject-matter, and the record as made would show that its jurisdiction had been properly invoked, the judgment is not void, but voidable only, and cannot be collaterally attacked by the person securing the judgment to be entered, but must

be set aside by direct proceedings, if it is to be avoided.

And as in this case appellant had procured a decree of divorce to be entered in a court having jurisdiction of divorce proceedings, annul-

Judgment—  
collateral; at-  
tack—right of  
one invoking  
jurisdiction.

ling the bonds of matrimony existing between him and Mrs. Jessie Laird, he cannot collat-

erally attack that judgment, and, as the divorced wife is permitted under our law to testify, the court did not err in permitting her to do so.

The only other question presented in the brief is one of some difficulty to the writer. The petition filed by appellant to obtain the divorce, and the answer of the attorney appointed by the court to represent the absent defendant, whose residence was alleged to be unknown, and who was cited by publication, and the judgment decreeing a divorce, were properly admitted in evidence, and the admissibility of this testimony is not contested by appellant, but he contends the court erred in not limiting the purpose for which the jury might consider such testimony. The general rule is as contended by appellant. He says:

"On the trial of the defendant herein, the state introduced in evidence the original petition for divorce filed in the district court for the sixty-eighth judicial district of Texas in the case of W. H. Laird v. Jessie Laird, No. 18,000-C, and also introduced in evidence the judgment entered in said cause as of March 1, 1915. Said petition and said judgment were competent and admissible to show inducement in the matter assigned as perjury and for the purpose of showing that a trial was had in the district court for the sixty-eighth judicial district of Texas, of matters over which said court had jurisdiction, and for the purpose of showing the materiality of the particular matters assigned as perjury in this case.

"While said testimony was admissible for the purposes stated, it is well settled by an unbroken line

of decisions in this state that the court in his charge must limit and restrict the purpose or purposes for which same can be considered by the jury in arriving at their verdict. 'Wherever extraneous matter is admitted in evidence for a specific purpose incidental to, but which is not admissible directly to prove, the main issue, and which might be taken, if not explained, to exercise a wrong and undue or improper influence on the jury as injurious and prejudicial to the rights of the party, then it becomes the imperative duty of the court to so limit and restrict it as that such unwarranted results cannot ensue; and a failure to do so will be radical and reversible.' 'In perjury, the judgment and record of the trial in which the perjury was committed are legitimate as evidence by way of inducement, though not to prove the perjury, and it is error for the charge not to limit and restrict said evidence,'—citing *Davidson v. State*, 22 Tex. App. 372, 3 S. W. 662; *Washington v. State*, 23 Tex. App. 836, 5 S. W. 119; *Maines v. State*, 23 Tex. App. 568, 5 S. W. 123; *Littlefield v. State*, 24 Tex. App. 167, 5 S. W. 650; *Higginbotham v. State*, 24 Tex. App. 505, 6 S. W. 201; *Kitchen v. State*, 26 Tex. App. 165, 9 S. W. 461; *Foster v. State*, 32 Tex. Crim. Rep. 39, 22 S. W. 21; *Estill v. State*, 38 Tex. Crim. Rep. 255, 42 S. W. 305."

The writer thinks these cases correctly announce the law in holding that when the record of the proceedings in the case in which it is contended the perjury was committed is introduced, such evidence must be limited, as contended by appellant, when that is the only purpose for which such testimony is legitimately admissible.

But appellant, by objecting to Mrs. Laird testifying when called as a witness, rendered the testimony admissible for another purpose. It became compulsory on the state to show that a decree of divorce had been granted, and under said decree she was no longer the wife of appel-

lant, and when he sought to collaterally attack this decree as being void, on the ground that the court had no jurisdiction, it became compulsory on the state to show that the decree was entered in a court having jurisdiction to grant divorces, at the instance and request of appellant, and the record in that cause became admissible for that purpose as well as a matter of inducement, and to show the materiality of the alleged false testimony. Appellant, by objecting to Mrs. Laird testifying, compelled the state to procure and introduce this testimony to render her a competent witness, and he cannot be heard to complain that such testimony was only admissible as a matter of inducement. He, by his objection, had rendered it admissible for another and different purpose, and compelled its introduction to render a witness a competent witness, and this perhaps is the reason the trial court did not in his charge seek to limit the testimony.

However, appellant contends that the testimony was of such a nature that it could be used by the jury in establishing his guilt, and it was not admissible for that purpose. Appellant is correct in his contention that the petition and judgment were not admissible on the issue of his guilt of the charge of perjury; but would or could it have an undue influence in establishing appellant's guilt? The petition was an ordinary petition for divorce, in which it alleged appellant's residence, that the residence of Mrs. Laird was unknown, and, among other grounds, alleged that Mrs. Laird was an immoral woman, and had been guilty of immoral conduct. The charge of perjury is based on the allegation that appellant, on the trial of the divorce suit, testified to the truth of such allegations, and that the testimony so given by him was false and known by him to be untrue when he so testified. The petition or the judgment could and would have no bearing in proving the falsity of such testimony. In fact, if such

testimony had any bearing on that issue, which we doubt, its tendency would be to show that such testimony was in fact true, because the court had so found in the divorce suit, and adjudged a divorce on those grounds. So, on that issue, the falsity of his testimony could not have any bearing to the hurt of appellant, but would rather have been helpful.

On another issue in the case, however, we cannot say such testimony would have no tendency to establish its truth. The indictment alleged that on the trial of the divorce suit appellant had testified: "1. On September 11, 1914, I did not know the address or whereabouts of the defendant, Mrs. Jessie Laird. 2. On March 1, 1915, I did not know the address or whereabouts of the defendant, Mrs. Jessie Laird. 3. On September 11, 1914, I had been a resident of the state of Texas for twelve months next preceding the filing of my suit for divorce. 4. On September 11, 1914, I had been an actual bona fide inhabitant of the state of Texas for twelve months next preceding thereto. 5. From the 11th of September, 1913, to December 1, 1913, I was not an inhabitant or resident of the state of New York. 6. On or about September 1, 1913, I came to Texas, accompanied by my wife, Mrs. Jessie Laird, who lived with me in Texas until on or about December 1, 1913, at which time she, the said Mrs. Jessie Laird, left me at San Marcos, Texas, and left with another man for parts unknown to me. 10. Mrs. Jessie Laird was unfaithful to me and associated with immoral people."

It was incumbent upon the state to prove (1) that appellant had so testified in the trial of the divorce case, and (2) that said testimony was false, and known by appellant to be untrue when he so testified. As before said, on the second of these issues, the falsity of such testimony, the petition and judgment could and would have no bearing to the detriment of appellant, but on the first of these issues, that he had

so testified, the petition and decree might and probably would have some tendency to prove that he had so testified. When appellant pleaded not guilty to the charge of perjury, before he could be adjudged guilty, the state was required to prove, beyond a reasonable doubt, both that appellant had so testified and that such testimony was false; and as the petition and judgment could and might have some tendency to prove that appellant had so testified, or might be so construed by the jury, the court in his charge should have instructed the jury that such testimony could not be considered by the jury in passing on the guilt of appellant on the charge of perjury. Having said that much, we come now to consider whether or not a failure to so instruct the jury requires a reversal of the case at our hands. If it could have worked any injury to appellant, we should not hesitate to reverse the case, and upon this issue the writer has hesitated and been slow to arrive at a conclusion. Had the appellant on the trial of the perjury case offered any testimony that he had not so testified in the trial of the divorce case, the writer would not agree to an affirmance of this case, because the petition and judgment in that case might have had some tendency to prove that he had so testified. But inasmuch as appellant offered no testimony that he did not so testify, and the testimony and all the testimony introduced on that issue in the perjury trial was that appellant had so testified in the divorce suit, the jury, without the introduction of the petition and judgment, would not have been authorized to find that he had not so testified, or have grounds, under the evidence on the perjury trial, for a reasonable doubt that he had so testified, under such circumstances we have come to the conclusion that, in the absence of any testimony he had not so testified, we, under the decisions of this court, are not justified in reversing the case because the court failed to limit such testimony. The testi-

mony was admissible, as admitted by appellant, on some issues in the case, and as to the issue on which he claims it should not have been considered by the jury, appellant offers no testimony, while the state offered testimony upon which the jury could not have found otherwise, if the petition and decree had not been introduced in evidence. *Trent v. State*, 31 Tex. Crim. Rep. 251, 20 S. W. 547; *Elliott v. State*, 39 Tex. Crim. Rep. 242, 45 S. W. 711; *Marsden v. State*, 59 Tex. Crim. Rep. 38, 126 S. W. 1160; *Fitzpatrick v. State*, 37 Tex. Crim. Rep. 20, 38 S. W. 806. In the case of *Franklin v. State*, 38 Tex. Crim. Rep. 348, 43 S. W. 85, the court held that if the record introduced would not tend to show the falsity of the testimony alleged to have been given, it was not error to fail to limit the testimony.

In this case, after a careful review of the decisions of this court, we have arrived at the conclusion that the petition and judgment were admissible, not only for the purposes of showing inducement and materiality of the testimony alleged to be false, but was also admissible for another purpose, to show the competency of the witness, Mrs. Laird; and as said testimony would and could have no bearing on whether the alleged testimony, if given, was false, and from the further fact that the testimony and all the testimony adduced on the trial of this case shows that appellant did testify, as alleged, in the divorce suit, no such error is presented by the failure of the court to limit the purposes for which the petition and judgment were admitted as to authorize a reversal of the judgment.

In my opinion the case should be reinstated and affirmed.

Prendergast, P. J. concurring:

The opinion dismissing this cause was correct, and was agreed to expressly by both my associates before it was handed down, though Judge Davidson was absent the day it was handed down. But as it is merely a matter of practice for the first time



established, though wrong, I will not further discuss it.

In my opinion the petition in the divorce case was admissible in this, as an admission or statement by appellant, just as any other admission or statement by him would have been, and the court did not err in not limiting, as it is claimed by appellant it should have been.

Judge Harper's opinion, otherwise, is correct, and unquestionably the law of, and applicable to, this case.

The authorities and principles cited by Judge Davidson in his dissenting opinion, are wholly inapplicable to this case, and the questions decided therein.

Davidson, J., dissenting:

I do not purpose to discuss the question of reinstatement, but wish to say that I agree with the conclusion reached by Judge Harper that the dismissal was error. I deem it unnecessary to give my own views in regard to the reasons. His conclusion is correct.

I am persuaded that this judgment ought to have been reversed. Making a brief statement, the record discloses that appellant came to Texas from New York, leaving there on the 11th day of December. On the 11th of the following September he filed his petition for divorce in one of the district courts of Dallas county, being in Texas only nine months. This case was one of perjury, based upon appellant's testimony in that case, in which he stated that he had been a bona fide resident of Texas for the required twelve months and in the county of Dallas for the requisite six months. A divorce judgment was thereupon entered. It seems, further, that the wife had not been in Texas, but was a resident of New York at the time the petition for divorce was filed. She was cited, it seems, by publication.

Article 4632, Revised Statutes, as amended by the Act of the Legislature 1913, page 183, provides that no divorce shall be granted in this state unless the party is a bona fide

resident of this state, and has been for twelve months prior to instituting divorce proceedings, and of the county in which the suit is filed for six months prior to filing the suit. So far as the writer has been able to ascertain, a judgment of divorce obtained in this state is a nullity, and therefore void, without the necessary residence. I do not purpose to discuss the case cited by Judge Harper wherein the judgment was had in a probate court, and under which subsequently a sale of property occurred, and that property became involved in litigation. The court held the probate judgment could not be attacked in collateral proceedings under the facts stated in that case. Those interested in reading the opinion he cites may do so, but it has no application to this case, as will be evidenced by its perusal. It has been always regarded an essential difference between the judgments of those courts of competent jurisdiction which in some way improperly act, and those courts which have no jurisdiction. Such judgments are placed on different footings. I do not purpose now to discuss that question.

It is the law that wherever a citizen of one state seeks to secure a divorce in another state, he must become a bona fide resident of the state in which he seeks the divorce for the length of time and under the circumstances provided by the statutes of that state; and until this has been done no divorce proceedings can be instituted, and if instituted and judgment is obtained, it is a nullity. I will cite some of the authorities along this line. 9 Am. & Eng. Enc. Law, 734, and for cases collated, see note 2. I also refer to 9 Am. & Eng. Enc. Law, 741, 742, and notes for collated authorities. I also refer to 7 Standard Enc. & Proc. 739 and 740, as to what it takes to constitute a resident and citizenship. I also refer to 7 Enc. Pl. & Pr. 146, as to what it takes to constitute an appearance. I also cite *Emery v. State*, 57 Tex. Crim. Rep. 423, 136

Am. St. Rep. 988, 123 S. W. 183; Bell v. Bell, 181 U. S. 175, 45 L. ed. 805, 21 Sup. Ct. Rep. 551; Andrews v. Andrews, 188 U. S. 15, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; Strietwolf v. Strietwolf, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553. In addition I cite Wilson v. State, 27 Tex. App. 47, 11 Am. St. Rep. 180, 10 S. W. 749; Lutch v. Allen, 43 Tex. Civ. App. 102, 95 S. W. 572; Morgan v. Morgan, 1 Tex. Civ. App. 316, 21 S. W. 154; Chunn v. Gray, 51 Tex. 114; Redus v. Burnett, 59 Tex. 581; Norwood v. Cobb, 24 Tex. 554; 2 Black, Judgm. 927; 2 Freeman, Judgm. 580; State v. Fleak, 54 Iowa, 429, 6 N. W. 689; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21, 2 Am. Crim. Rep. 165; Davis v. Com. 13 Bush, 318, 2 Am. Crim. Rep. 163; State v. Armington, 25 Minn. 29; Fay v. Boston & W. Street R. Co. 196 Mass. 329, 82 N. E. 7; Smith v. Smith, 19 Neb. 706, 28 N. W. 296; Litowich v. Litowich, 19 Kan. 451, 27 Am. Rep. 145; Folger v. Columbian Ins. Co. 99 Mass. 267, 96 Am. Dec. 747. These matters were pretty thoroughly investigated and discussed in Emery v. State, *supra*, in an opinion by this court, and the same conclusion reached there that the writer believes to be correct, and here maintains.

It will be observed, with reference to such divorce matters, that they must be governed by state laws. The acts of Congress have no force and are not applicable,—I mean as applying to granting divorces. It may be further stated that the state control of these matters is limited to citizens. The courts of Texas cannot grant a divorce to citizens of other states. There must be not only residence, but a bona fide domicil. On this question see cases collated in 9 Am. & Eng. Enc. Law, pages 741, 742, in note 1. Also, as to domicil being the test, see page 742, *supra*, and page 743, and also 7 Standard Enc. & Proc. pages 739, 740. It may also be stated in this connection that appearance, merely, does not confer jurisdiction. Statutory requirements must be fully met

and complied with, or the judgment is a nullity. 9 Am. & Eng. Enc. Law, 746, and notes. It would be useless to follow this question as to what it takes to constitute appearance. Consent cannot confer jurisdiction. Such decrees are void. Douglas v. State, 58 Tex. Crim. Rep. 122, 137 Am. St. Rep. 980, 124 S. W. 933; Stuart v. Cole, 42 Tex. Civ. App. 478, 92 S. W. 1040; 7 Standard Enc. & Proc. 807, note 23.

Without amplifying this phase of the matter further, I turn to another line of authorities which ought to be deemed now as fully settling the question adversely to the state. Ex parte Degener, 30 Tex. App. 566, where a great number of cases are collated; the opinion having been written by Presiding Judge White; Ex parte Taylor, 34 Tex. Crim. Rep. 591, 31 S. W. 641; Ex parte Kearby, 35 Tex. Crim. Rep. 531, 34 S. W. 635; Ex parte Kearby, 35 Tex. Crim. Rep. 634, 34 S. W. 962; Ex parte Duncan, 42 Tex. Crim. Rep. 661, 62 S. W. 758; Ex parte Tinsley, 37 Tex. Crim. Rep. 517, 66 Am. St. Rep. 818, 40 S. W. 306; Ex parte Lake, 37 Tex. Crim. Rep. 656, 66 Am. St. Rep. 848, 40 S. W. 727; Ex parte Parker, 35 Tex. Crim. Rep. 12, 29 S. W. 480, 790; Ex parte Juneman, 28 Tex. App. 486, 18 S. W. 783; Ex parte Snodgrass, 43 Tex. Crim. Rep. 359, 65 S. W. 1061, 15 Am. Crim. Rep. 400. These cases lay down the proposition that three things must concur and are absolutely necessary to the jurisdiction of the court, or as jurisdictional matters: First, the court must have jurisdiction of the person; second, of the subject-matter; and third, power to render the particular judgment rendered, otherwise prosecution will be void, as will also the judgment. All of these cases hold the jurisdiction of the person is essential to the validity of the proceedings, otherwise it is a nullity and void. This rule has been followed in Texas in all its history, commencing with Fleming v. Nall, 1 Tex. 246; see also Tulane v. McKee, 10 Tex. 335; Glass v.

Smith, 66 Tex. 548, 2 S. W. 195; Mitchell v. Runkle, 25 Tex. Supp. 132; Horan v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Thouvenin v. Rodrigues, 24 Tex. 468; Foster v. Andrews, 4 Tex. Civ. App. 429, 23 S. W. 610. In 12 Encyclopedia of Pleading and Practice, page 179, this rule is stated: "It is an elementary principle, recognized in all the cases, that to give binding effect to a judgment of any court, whether of general or limited jurisdiction, it is essential that the court should have jurisdiction of the person as well as of the subject-matter; and that a judgment which appears upon the face of the record to have been rendered without jurisdiction of the subject-matter or of the person, or which may be shown to have been so rendered in cases where evidence upon the question is admissible, is absolutely void, no matter in what proceeding or in what action it may thereafter be set up or relied upon." This is supported by a great number of cases cited in the footnotes from many of the states in the Federal Union. Some of these are collated in *Emery v. State*, supra. This rule has been held to apply, also, where the court has not acquired jurisdiction of the person under necessary process or pleading, although in fact the accused was tried,—citing *Wilson v. State*, 27 Tex. App. 47, 11 Am. St. Rep. 180, 10 S. W. 749; *Garrett v. State*, 37 Tex. Crim. Rep. 198, 38 S. W. 1017, 39 S. W. 108; *Lawrence v. State*, 2 Tex. App. 479. This is the settled rule where the court has not the authority to try the case. Cases supporting this proposition are also collated in *Emery v. State*, supra.

Under all these authorities the proposition may be safely asserted that, if the court had not acquired jurisdiction of the person or the subject-matter, the judgment will be void. Article 4632, Revised Statutes, as amended by the legislature, 1913, says that no judgment for divorce shall be granted in this state unless the party seeking the divorce is a bona fide inhabitant for twelve

months in the state, and in the county six months. The evidence in this case demonstrates that appellant had been in the state but nine months at the time the suit was instituted, therefore the court was without jurisdiction as to his person and the subject-matter, and, of course, could not render a judgment.

There is another case I might notice in this connection, against the proposition that the judgment is only voidable and cannot be attacked in collateral proceedings. *Ex parte Parker*, 35 Tex. Crim. Rep. 12, 29 S. W. 480, 790. It is unnecessary to review that case at length, or to state the matters in full. Parker was tried in Nueces county and convicted of homicide, his punishment being confinement in the penitentiary for the term of his life. In that case it was held that a writ of habeas corpus could be used to attack the validity of the judgment of the court, and that it is competent, notwithstanding the recitals in the judgment, to go behind the judgment, and probe into the very truth of the matter as to whether an act done during the term was in fact done during the time recited by the record. Parker had been convicted, and the contention was made on trial of the writ of habeas corpus that the verdict was rendered after the adjournment, by law, of the term at which he was convicted. The writ was granted, the case tried, and the matter investigated, all of which is shown by the report of the case. These matters I have set out a little more fully than I anticipated. One of the main questions in the instant case turned on whether the wife of the defendant, who testified in this case, was a competent witness against him. The majority opinion is based upon the theory that the court did not have jurisdiction; that is, appellant had not been a citizen for twelve months, and, therefore, the testimony of appellant to that effect before the court granting a divorce was false, and constituted a basis for perjury. If the court had juris-

diction, it was not perjury, because appellant would have lived the requisite twelve months in Texas before exhibiting his application for a divorce. The perjury is predicated on appellant's testimony in the divorce case, to the effect that he had lived in Texas the necessary statutory time in order to get the divorce. If it was true he had been a citizen of Texas, as required by statute, the state has no case; there could be no perjury. The majority opinion holds that his testimony was false in showing jurisdictional facts; that the court had no jurisdiction to try the divorce case, or to entertain it; and yet it holds that the party is guilty of perjury in a proceeding over which the court had no authority or jurisdiction. If the judgment was valid, the divorce was properly granted, and the wife could testify, because no longer his wife. Her competency as a witness against her husband is predicated alone upon the proposition that appellant's testimony was the basis of the judgment. This being true, the wife was not divorced. There could be no divorce under the facts. She still labored under the incapacity as a witness, being the wife of the accused. Objection was interposed on the trial of the perjury case for the reasons stated. The court below should have sustained these objections, and this court should have reversed the case because the court below did not sustain objections to

the wife's competency as a witness. The wife cannot testify in Texas against her husband in perjury cases. She did not testify in the divorce case. She was not in Texas; she was in New York. The judgment is a nullity, first, because the court had no jurisdiction of the person, and his voluntary appearance under all the authorities did not confer jurisdiction. Consent could not confer jurisdiction. The *sine qua non* was the requisite residence. In order to have jurisdiction in this case the facts must be true that appellant had lived in Texas the necessary time. Second, it had no jurisdiction of the subject-matter. The divorce proceedings were not maintainable in the district court until the party had lived here the necessary time. The court did not have jurisdiction of the subject-matter. There was no cause of action, and none could exist until the expiration of the twelve months; and, third, not having jurisdiction of the person or subject-matter, the court was powerless to render a judgment on the facts. The authorities all sustain these propositions, so far as I am aware, and the question of the judgment being voidable does not enter into this case. It was void.

These are some of the reasons upon which I base my conclusions that the majority opinion is wrong in the affirmance.

I therefore respectfully enter my dissent.

## ANNOTATION.

### Collateral attack on judgment by party at whose instance it is entered.

- I. General rule, 535.
- II. Illustrations of rule:
  - a. In general, 537.
  - b. Divorce decree, 540.

#### I. General rule.

The party at whose instance a judgment is rendered is not entitled, in a collateral proceeding, to contend that the judgment is invalid. Neither want of jurisdiction, defect of procedure, or any other ground of invalidity can be availed of collaterally,

by the party who is responsible for the existence of the judgment.

California.—McDermott v. Isbell (1854) 4 Cal. 113; Elliott v. Wohlfrom (1880) 55 Cal. 384.

Georgia. — McLeod v. McLeod (1915) 144 Ga. 359, 87 S. E. 286; Brooks v. Tinsley (1913) 13 Ga. App. 268, 79 S. E. 160.

Illinois.—Bates v. Williams (1867) 48 Ill. 494; Fahnestock v. Gilham (1875) 77 Ill. 637; Supreme Lodge, O.

**M. P. v. Eckhardt** (1916) 197 Ill. App. 302.

**Indiana.**—**Harbaugh v. Albertson** (1885) 102 Ind. 69, 1 N. E. 298; **Robertson v. Smith** (1891) 129 Ind. 422, 15 L.R.A. 273, 28 N. E. 857; **Roberts v. Hill** (1894) 187 Ind. 215, 36 N. E. 843.

**Iowa.**—**Ellis v. White** (1883) 61 Iowa, 644, 17 N. W. 28.

**Kansas.**—**Bledsoe v. Seaman** (1908) 77 Kan. 679, 95 Pac. 576.

**Kentucky.**—**Asbury v. Powers** (1901) 28 Ky. L. Rep. 1622, 65 S. W. 605; **Rodman v. Moody** (1892) 14 Ky. L. Rep. 202.

**Minnesota.**—**Re Ellis** (1893) 55 Minn. 401, 23 L.R.A. 287, 43 Am. St. Rep. 514, 56 N. W. 1056.

**New York.**—**Russell v. Gray** (1851) 11 Barb. 541; **Re Morrisson** (1889) 52 Hun, 102, 5 N. Y. Supp. 90, affirmed in (1889) 117 N. Y. 638, 22 N. E. 1130; **Van Koughnet v. Dennie** (1893) 68 Hun, 179, 22 N. Y. Supp. 823; **Starbuck v. Starbuck** (1903) 173 N. Y. 503, 98 Am. St. Rep. 631, 66 N. E. 193, reversing (1901) 62 App. Div. 437, 71 N. Y. Supp. 104; **Re Swales** (1901) 60 App. Div. 599, 70 N. Y. Supp. 220, affirmed in (1902) 172 N. Y. 651, 65 N. E. 1122; **Hess v. Smith** (1896) 16 Misc. 55, 37 N. Y. Supp. 635; **Lacey v. Lacey** (1902) 38 Misc. 196, 77 N. Y. Supp. 235; **People ex rel. Shradv v. Shradv** (1905) 47 Misc. 333, 95 N. Y. Supp. 991; **Voke v. Platt** (1905) 48 Misc. 273, 96 N. Y. Supp. 725; **Buxbaum v. Mason** (1905) 48 Misc. 396, 95 N. Y. Supp. 539; **Simmonds v. Simmonds** (1912) 78 Misc. 571, 138 N. Y. Supp. 639. See also **Guggenheim v. Wahl** (1911) 203 N. Y. 390, 96 N. E. 726, Ann. Cas. 1913B, 201, affirming (1910) 189 App. Div. 931, 124 N. Y. Supp. 1116 (wherein the general rule is stated by way of dictum); **Muller v. Naumann** (1903) 85 App. Div. 337, 83 N. Y. Supp. 488; **Gibson v. Gibson** (1913) 81 Misc. 508, 143 N. Y. Supp. 37 (wherein the general rule is stated by way of dictum).

**Ohio.**—**Julier v. Julier** (1900) 62 Ohio St. 90, 78 Am. St. Rep. 697, 56 N. E. 661.

**Pennsylvania.**—See **Miltimore v. Miltimore** (1861) 40 Pa. 151.

**Texas.**—**Heffron v. Cunningham** (1890) 76 Tex. 312, 13 S. W. 259. And see the reported case (**LAIRD v. STATE**, ante, 522). See also **Moor v. Moor** (1901) — Tex. Civ. App. —, 63 S. W. 847 (wherein the general rule is stated by way of dictum).

The reason or principle on which these decisions rest is not technically the doctrine of estoppel, in the ordinary signification and acceptation of that term, but the principle that a person, having invoked the jurisdiction of a court, and submitted himself thereto, cannot be heard thereafter to question, in a collateral proceeding, the jurisdiction of that court, and to claim the nullity of the judgment or decree, the rendition of which he asked. See the cases cited throughout this note.

Thus, in **Bledsoe v. Seaman** (1908) 77 Kan. 679, 95 Pac. 576, the court said: "A party cannot invoke the jurisdiction and power of a court for the purpose of securing important rights from his adversary through its judgment, and, after having obtained the relief desired, repudiate the action of the court on the ground that it was without jurisdiction. The question whether the court had jurisdiction, either of the subject-matter of the action or of the parties, is not important in such cases. Parties are barred from such conduct, not because the judgment obtained is conclusive as an adjudication, but for the reason that such a practice cannot be tolerated. People who invoke the action of a court, and, through negligence or falsehood, mislead the court as to the existence of the facts upon which its jurisdiction depends, and obtain a judgment for relief, will not afterward be heard to deny the validity of such judgment."

In the case of **Re Morrison** (1889) 52 Hun, 102, 5 N. Y. Supp. 90, affirmed in (1889) 117 N. Y. 638, 22 N. E. 1130, the court said: "The position does not rest upon the doctrine of estoppel, as such term is ordinarily used, but upon a principle which has been repeatedly recognized by the courts, that, where a party has gone into a court and invoked its jurisdiction, he

cannot subsequently attack the decree of the court obtained at his instance, because of the want of jurisdiction of somebody else."

The closely related maxim of law, that "No man should take advantage of his own fraud," has been held to be applicable in two instances. *Elliott v. Wohlfrom* (1880) 55 Cal. 384; *Hess v. Smith* (1896) 16 Misc. 55, 37 N. Y. Supp. 635.

## II. Illustrations of rule.

### a. In general.

In *Bowne v. Mellor* (1844) 6 Hill (N. Y.) 496, it was held that one who had procured an attachment to be issued was not at liberty to show an irregularity in the process, for the purpose of defeating an action on the attachment bond.

In *McDermott v. Isbell* (1854) 4 Cal. 113, the court, stating that it had frequently held that a party who had availed himself of the process of an inferior court could not escape the responsibility of his own act on the ground that the tribunal had no jurisdiction over the subject-matter in controversy, held that a party who had sued out a writ of replevin from a justice of the peace, having no jurisdiction, and had obtained the property, could not, in an action on the replevin bond, set up as a defense the want of jurisdiction.

In *Stevenson v. Miller* (1822) 2 Litt. (Ky.) 306, 13 Am. Dec. 271, it was held that a defendant in an action on an injunction bond, on whose application the injunction was issued, was estopped to question the authority of the justices to grant the injunction. In holding that the act of the justices should be regarded as a *de facto* injunction, and valid on collateral attack, the court said: "If this rule applies in any case, it ought in the present, where the procurement of the acts of these justices was entirely the act of the party who now tries to avoid it. He meant to stop the progress of law and subject his adversaries to the costs and expense of a suit, by this proceeding. Before he could do this, he was bound, by the direction of the justices, to do an act for the benefit

of and to secure his adversary. This he did, and now he attempts, after having effected his purpose, to tell his adversary it was all a sham. He has reaped the benefit of the acts done for his own use, but the opposite side is precluded from making him responsible, because he himself had gotten his injunction from persons who had no authority to grant it. The admission of such a plea may have more extensive evil consequences than at first blush can be seen; and it was, therefore, erroneous to sustain the demurrer for this cause in the court below."

In *Russell v. Gray* (1851) 11 Barb. (N. Y.) 541, it appeared that the defendants, on the trial of a replevin suit, recovered judgment for the property or its value, and collected the judgment, on the ground that the sheriff had delivered it to the plaintiff. It was held, in an action against them by the plaintiff in replevin for the subsequent conversion of the property, that they could not deny the title of the plaintiff, acquired by virtue of the judgment in replevin.

In *Robertson v. Smith* (1891) 129 Ind. 422, 15 L.R.A. 273, 28 N. E. 857, it was held that where a plaintiff filed a complaint and bond, and procured an injunction to issue from a court of general jurisdiction, he was, when sued on the bond, estopped to say that the court granting the injunction was without jurisdiction, on the ground that it did not lie in the mouth of one who had affirmed the jurisdiction of a court in a particular matter, to accomplish a purpose, afterwards to deny such jurisdiction in order to escape a penalty.

In *Sammons v. Newman* (1867) 27 Ind. 508, a suit on a replevin bond, it was held that neither the plaintiff in replevin, who had obtained possession of the property, nor the sureties on the replevin bond, could allege that no writ of summons had ever issued in the replevin suit, and that therefore the suit had not begun when the bond was delivered. The court said: "To allow them to avoid liability on their bond upon that ground would be to give judicial sanction to the perpetra-

tion of a palpable fraud upon the other party. By the bond, the plaintiffs in that suit obtained the possession of the property. Shall they now be permitted to say: 'We had no replevin suit pending, the sheriff had no right to take the property and deliver it to us, the bond was unauthorized, and we are not bound?' Nor are the sureties in any better position in law to controvert the pendency of the replevin suit. The bond itself shortly recites, or rather assumes, that that action was then pending."

In *Bates v. Williams* (1867) 43 Ill. 494, an action on a replevin bond, the main objection taken to the declaration was that it did not aver that the justice of the peace, before whom the action of replevin was tried, had jurisdiction of the case. The court held, however, that when it was considered that the obligor himself sought that jurisdiction, and executed the bond in suit in order to avail himself of it, he could not make such an objection, as he was estopped by his own act and admission.

And in *Fahnestock v. Gilham* (1875) 77 Ill. 637, following the foregoing decision in *Bates v. Williams*, it was held that the defendants in the action on a replevin bond were estopped from insisting that the justice of the peace had no jurisdiction of the case. They had, the court said, filed an affidavit, obtained the process of the court, had it executed, and executed the bond, all the time claiming and insisting that the court had jurisdiction, and hence, later, when sued on the bond, they could not be heard to say that the process of the court, which they had caused to be issued and served, was without the jurisdiction of the justice.

In *Harbaugh v. Albertson* (1885) 102 Ind. 69, 1 N. E. 298, an action on a replevin bond, the surety of the plaintiff in the replevin suit claimed in his answer that the replevin bond, executed by him to enable that plaintiff to obtain possession, as by means thereof he did, of the property, was invalid and void, and of no binding force on the surety, because of the relationship of the justice to the par-

ties to the suit, disqualifying the justice from taking and approving the bond. The court held that the surety could not be permitted to avail himself of such a defense to defeat an action on the replevin bond, saying: "In the case at bar, we are of opinion that the appellee is and ought to be estopped, in equity and good conscience, from setting up the facts stated by him in the second paragraph of his answer, in bar of the appellants' action. Having, by his execution of the bond in suit, enabled his codefendant to get possession of, and convert to his own use, the appellants' wheat, the appellee ought not to be permitted to escape liability for the value of such wheat, upon the ground stated in such second paragraph of answer, when the record shows that his co-obligor and principal in such bond had voluntarily submitted his person to the jurisdiction of such justice of the peace. It is well settled that a party may voluntarily submit the jurisdiction of his person to a justice of the peace, who has jurisdiction of the subject-matter of the suit; and that, when this has been done, such party will not be permitted afterwards to controvert the justice's jurisdiction of his person."

In *Van Koughnet v. Dennie* (1893) 68 Hun, 179, 22 N. Y. Supp. 823, the plaintiff recovered a judgment before a justice of the peace. The answer consisted of a general denial and a plea of a former adjudication of the same subject-matter by another justice of the peace, wherein the husband of the present plaintiff was the plaintiff against the present defendant. That case resulted in an allowance of the portion of the claim then presented by the husband, but it was more than overcome by the counterclaim set forth and proved by the defendant, the result of all which was an affirmative judgment in favor of the defendant against the husband, which was not reversed or disturbed. The court stated that the judgment in the former action, by the husband of the plaintiff against this defendant, was not a former adjudication, technically so-called, because that action was not

between the parties to this record or their privies. But it appeared that the plaintiff in the present action was active and mainly instrumental in prosecuting the action brought by her husband, and in establishing the claims therein which were allowed to him by the justice of the peace. At the trial of the present action she testified that she attended the trial of the former action; that she conducted her husband to the justice's office and back again, because he was blind; that she heard plainly all that was said in the room; that she was sworn and gave evidence as a witness; that she knew her husband was going to bring that suit before it was brought; that she went to the justice's office on the return day, took note of the proceedings, and, there being a bill of items demanded by the defendant for certain portions of a claim made in the husband's complaint, the same was actually prepared and made up by this plaintiff herself. She testified that the items for \$21 for moneys loaned were, she supposed, the same as those mentioned on the trial of her husband's case, and that the work, for which this action was brought to recover compensation, was the same work which formed the basis of a portion of the complaint in the other action. Under these facts, notwithstanding the formal assertion by her that she did not know and was not informed that her claims made in this action were litigated and determined in the former action, the court held that the plaintiff was conclusively estopped by her acts which procured the judgment in the former case.

In *Hess v. Smith* (1896) 16 Misc. 55, 37 N. Y. Supp. 635, an action for conversion, the proof showed that the plaintiff had brought suit for the same claim on contract, and had collected a portion of the judgment by default recovered by her therein. In this second action, she sought to avoid the effect of the former judgment on the ground that the person serving the process was not shown by the record to have been authorized to make the service. The court held, however,

that, under the rule of law that no person could take advantage of his own wrong, the plaintiff could not show that a judgment which she had herself obtained was void because of fraud or want of jurisdiction over the person.

In *Brooks v. Tinsley* (1913) 13 Ga. App. 263, 79 S. E. 160, it appeared that a husband and father, and the beneficiaries of a homestead exemption allowed by a judgment of the ordinary under the Constitution of 1877, had been in possession and enjoyment thereof for a period of nineteen years. It was held that the wife and children were estopped from collaterally attacking the validity of the judgment setting apart the homestead, on any merely technical grounds. The court said: "It does not appear that any creditors of the applicant objected to the setting apart of the homestead, or that there were any creditors interested in the matter. The wife, who still is living, had notice of her husband's application for the homestead for her benefit and that of her minor children. She should not now be heard, after nineteen years of possession of this homestead by herself and her family, to complain that the original proceedings, setting it apart for her and her children, were void. If her husband were in life, after having acquired the homestead for himself and family and after having enjoyed the benefit of the homestead which he had asked the ordinary to set apart, he certainly could not be heard to attack its validity; and if he would be estopped, it would seem that his wife, who was privy with him in the application, should likewise be estopped."

In *Lowe v. Equitable Mortg. Co.* (1897) 102 Ga. 103, 29 S. E. 148, the question was whether minors could attack collaterally a judgment rendered by a court of competent jurisdiction, in an action brought in their name by one purporting to be their next friend, there being nothing on the face of the record suggesting fraud or want of good faith, or that the action was instituted by the plaintiff therein without authority, or with any intention other than a bona fide pur-



pose to protect the interest of the minors. The court held that, the judgment being apparently regular and legal, and the attack merely collateral, to allow it to prevail under such circumstances might result in great injustice to third persons, who had in good faith acquired rights under and by virtue of the original judgment.

In *Roberts v. Hill* (1894) 137 Ind. 215, 36 N. E. 843, the trustees of a Masonic lodge sued the defendant for the reformation of a deed and to quiet the title to certain real estate. In his answer, the defendant pleaded a former recovery by the plaintiffs, in a cause prosecuted to final judgment by them for the reformation of the same deed and to quiet title to the same real estate. To this answer, the plaintiff trustees replied that the former action was prosecuted by them without authority, "by reason of the fact that their certificate of election as such trustees had not been recorded in the recorder's office of the county where the real estate was situated," as required by the statute [Rev. Stat. 1894, § 5019 (Rev. Stat. 1881, § 3819)]. The court held that the plaintiff trustees were estopped from thus collaterally attacking the former judgment, as their acts were, at least, those of officers *de facto*, if not *de jure*.

In *Heffron v. Cunningham* (1890) 76 Tex. 312, 18 S. W. 259, a person in whose favor a judgment had been rendered claimed that the suit was brought without his knowledge or consent by an attorney. The court held that, the decree having been rendered in his favor, so long as he permitted it to stand and took no steps to set it aside, he could not be heard, in a collateral action, to deny that it was prosecuted for him and by counsel employed by him, or that the court did not have jurisdiction over the parties or the subject-matter.

*b. Divorce decree.*

The general rule that a person procuring a judgment may not attack it collaterally, has been frequently applied in actions for divorce, where the decree was obtained in one state and afterwards attacked in another.

In *Bledsoe v. Seaman* (1908) 77 Kan. 679, 95 Pac. 576, an action to recover damages for the alienation of the affection of the plaintiff's husband, it appeared from the averments of the pleadings that the husband commenced an action in another state to obtain a divorce. The wife appeared in that action, and filed an answer and cross petition, in which she asked for a divorce, for the custody of their infant child, and for alimony. The prayer of the cross petition was granted, and she obtained the decree requested. This decree was entered more than seven years before the present action, and the plaintiff had, since its entry, retained the possession and control of the child. The judgment for alimony still stood in her favor. The court held that the plaintiff could not attack this judgment on the ground of want of jurisdiction of the parties, by reason of the lack of the required residence in the state granting the divorce, on the theory that one who had invoked the action of the court, and, through negligence or falsehood, had misled it as to the existence of the facts on which its jurisdiction depended, would not afterwards be heard to deny the validity of the judgment obtained, granting the desired relief. While the rule applied in this case, the court stated, did not rest on the doctrine of estoppel as that term was ordinarily understood, yet there were some facts present which indicated that an ordinary estoppel might be applied. The plaintiff complaining of the defendant for having alienated the affections of her husband, when the divorce was procured by the plaintiff, the defendant, having knowledge thereof, had, the court held, a right to assume that the plaintiff no longer had, or claimed, any right to the affections or society of her former husband, and that any relations which she might assume with him thereafter would not in any way infringe on the rights of the plaintiff. The conduct of the plaintiff in this respect, the court held, was almost tantamount to an express withdrawal of objection to the illicit relations existing between the defendant and the plaintiff's hus-

band at the time of the divorce. But for the decree, the court stated, these relations might have ceased; by it, they were probably encouraged.

In *Elliott v. Wohlfrom* (1880) 55 Cal. 384, an action of ejectment, the defendant claimed title under a deed by a wife, and the plaintiff claimed under a title deraigned from her former husband. Some year prior to the dates of those deeds, the husband filed a complaint for a divorce against his wife in another state, in which the latter appeared by her attorney and answered the complaint, and a divorce was granted to the husband. It was proved that the attorney who appeared for the wife in the suit for divorce had no authority from her so to appear, and that in fact she had no knowledge of the proceedings. The court held that the judgment of divorce was voidable at most, and stated that it knew of no principle on which the plaintiff in that action could be permitted to impeach the judgment rendered in it, for the purpose of recovering property from the defendant in that action, which he could recover on no other ground than that he had obtained the judgment by fraud. The court stated that the maxim of the law was that "no man should take advantage of his own wrong," and that, while fraud rendered any transaction voidable at the election of the party defrauded, the party by whom the fraud was perpetrated had not that election. Hence, the court held that neither the former husband, nor the grantee, could attack and avoid the divorce judgment in a collateral action.

In the case of *Re Ellis* (1893) 55 Minn. 401, 23 L.R.A. 287, 43 Am. St. Rep. 514, 56 N. W. 1056, an appeal from an order appointing a second wife administratrix of the husband's estate, the first wife offered to prove, in order to impeach and avoid a judgment of divorce obtained by her from the intestate in another state, that she was compelled to bring the action by the intestate's conduct towards her. She offered to prove that during the period of two years he abandoned her at different times, at first for a week

at a time, gradually lengthening the periods of absence until they became three months at a time, leaving her unprovided with the necessaries of life, and threatening, whenever he returned, that he would continue that course of conduct unless she consented to bring the action, and that unless she so consented he would run away, and leave her without a penny; and also to prove other acts of his of a similar character, all of which had such effect on her that she was not a free agent in bringing the action. The court stated that it would not undertake to say whether at any time, and especially whether after she had received and enjoyed the fruits of the action, and had acquiesced for years, until the defendant had married again, and had died, and there was left solely the matter of distributing his property, a woman plaintiff could, because of such facts, obtain any relief in the same action; but held that it certainly would be no ground for assailing the divorce judgment in a collateral proceeding at any time. The court also held that it was proper to exclude evidence of the first wife that, at the time she brought the action for divorce in the other state against the intestate, neither party was a resident of that state. The court said: "It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the state for their subsequent acts. One reason why they ought not to be permitted, by going into another state and procuring a divorce, to escape accountability to the laws of their state, is that their act is a fraud upon the state, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape those consequences by saying: 'It is true that by false oath made by one of us, and connived at by the other, we committed a fraud in the

Wisconsin court, and induced it to take cognizance of the case; but now we ask to avoid its judgment, by proof of our fraud and perjury, or subornation of perjury.' Because we do not think it can be done the parties must, so far as their individual interests are concerned, abide by the judgment they procured that court to render; and, of course, what will bind them will bind those who claim through them, or either of them."

In the case of *Re Morrison* (1889) 52 Hun, 102, 5 N. Y. Supp. 90, affirmed in (1889) 117 N. Y. 638, 22 N. E. 1130, it appeared that a husband, who had always regarded himself as a resident of another state, procured a divorce therein from his wife, without any intent to evade the laws of the state wherein he was then living, or of avoiding giving notice to the defendant of the proceeding. It was held that the husband could not be heard to claim the nullity of this decree, he having invoked the jurisdiction of the court, and asked its rendition, and that the administrators of his estate occupied precisely the same position the husband would have occupied, had he been living.

In *Starbuck v. Starbuck* (1903) 173 N. Y. 503, 93 Am. St. Rep. 631, 66 N. E. 193, reversing (1901) 62 App. Div. 437, 71 N. Y. Supp. 104, an action for dower, the defendants offered in evidence an exemplified record of a decree of divorce, obtained by the plaintiff from her husband in another state. This decree was excluded from evidence, on the objection of the plaintiff. The court held that the decree should have been received in evidence, saying that while the plaintiff could not avail herself of a void decree, which she had procured to be entered, the defendants had the right to avail themselves of it, on the principle that, where a party had procured a judgment or decree to be entered, submitting himself to the jurisdiction of the court, he cannot thereafter be heard to question the jurisdiction of the court which entered the judgment or decree.

In the case of *Re Swales* (1901) 60 App. Div. 599, 70 N. Y. Supp. 220,

affirmed in (1902) 172 N. Y. 651, 65 N. E. 1122, it appeared that the plaintiff invoked the jurisdiction of the court of another state to free herself from all marital relations with the decedent, and that, having accomplished her object, she returned to the original state, and married another man, to whom she bore a child. On her application for letters of administration on her former husband's estate, she attempted to call in question the jurisdiction of the court which had granted the divorce decree. The court said that while it probably was not technically correct to assert that the plaintiff's acts constituted an estoppel, within the ordinary acceptation of that term, for the reason that they were not designed to, and did not, influence the husband to do anything which he would not otherwise have done, yet a somewhat similar principle was applicable, which was that where a party had invoked the jurisdiction of any court, and submitted himself thereto, he could not thereafter be heard to question that jurisdiction.

In *People ex rel. Shradly v. Shradly* (1905) 47 Misc. 333, 95 N. Y. Supp. 991, it appeared that the defendant had gone to another state and instituted divorce proceedings against his then wife. On obtaining a decree of absolute divorce, he returned to the original state and married another woman, the complainant in a subsequent proceeding against him for nonsupport. In that proceeding, it was held that he could not contend that the divorce which he himself had obtained in the other state was null and void for the reason that the court of that state had no jurisdiction of the parties.

In *Buxbaum v. Mason* (1905) 48 Misc. 396, 95 N. Y. Supp. 539, an action against a husband for the value of goods furnished his wife while he was separated from her, it was held that, the assumed wife having obtained a decree of divorce in an action brought by her against the defendant in another state, this decree fixed her status, and she could not assert the contrary, notwithstanding the defendant might have been in a position to assail the decree for lack of jurisdiction as

to him. To meet this situation, the plaintiff offered in evidence a decree of the same court, made seven years later, setting aside the decree of divorce on the wife's application and on the defendant's default. The court held, however, that the papers did not alter the wife's status, but, at best, established the fact that the one-time wife had asserted elsewhere that which she would not be permitted to assert for her own benefit before a court in the original state,—that the decree of divorce which she had obtained was invalid.

In *Lacey v. Lacey* (1902) 88 Misc. 196, 77 N. Y. Supp. 285, an action for divorce, it was held that the plaintiff, having invoked the jurisdiction of another court, should not, in all equity and good conscience, be permitted to attack the authority of the decree which her own acts induced that court to grant her.

In *Simmonds v. Simmonds* (1912) 78 Misc. 571, 188 N. Y. Supp. 689, an action for divorce, it appeared that the plaintiff, while living in another state, retained an attorney there to procure a limited divorce. He procured an absolute divorce, the decree declaring the plaintiff to be "divorced from the bonds of matrimony." The defendant married another woman, with whom he was living at the time of the trial. The court held that, having invoked the jurisdiction of the court of another state, and obtained a judgment of divorce in that court, the plaintiff could not now be heard to question its jurisdiction.

In *Yoke v. Platt* (1905) 48 Misc. 273, 96 N. Y. Supp. 725, it appeared that the plaintiff, having obtained a judgment of separation from her husband, removed to another state. She there secured a decree of absolute divorce from him on his default, the judgment rendered dissolving the marriage, and releasing and discharging the parties "from all the rights and privileges, duties and obligations, of said marriage contract and relations as fully and completely as if the same had never existed." The plaintiff then remarried. On the death of her former husband, the plaintiff brought an ac-

tion to recover her dower in real estate, of which the husband was seised at the time of the marriage with the plaintiff and prior to the date of the divorce, claiming to be his widow. The court held that the validity of the divorce judgment could not be questioned by the plaintiff, as she, at least, was bound by it. The court stated that it placed its decision on the ground that a woman who obtained in a foreign state a judgment of divorce a vinculo against her husband, who was a resident of the original state, on a ground not sufficient to justify such a divorce in that state, could not, after the death of the husband, claim dower in his real estate there situated.

In the reported case (*LAIRD v. STATE*, ante, 522), a prosecution for perjury, the divorced wife of the defendant was introduced as a witness against him. He contended that the divorce which was procured by him was absolutely void, as he had not been in the state the required length of time, and, being void, the woman from whom he was adjudged a divorce in that decree was still his legal wife. The court holds that the judgment of divorce could not be collaterally attacked by the defendant, the only way to nullify it being by a direct suit for that purpose.

In *Asbury v. Powers* (1901) 23 Ky. L. Rep. 1622, 65 S. W. 605, an action to settle an estate, it was alleged that the wife of the intestate employed counsel to bring suit for maintenance against her husband; that the attorney, without her knowledge or consent, instituted the suit in another county than that in which she and her husband resided, and sought a decree of divorce from bed and board, and alimony; and that afterwards, without her knowledge or consent, an amended petition was filed seeking an absolute divorce from the husband, which was granted against her desire, on default of answer and in the absence of proof. The court held that the wife was estopped to question the judgment and decree of the court after the lapse of more than twenty-five years, since it was obtained at her instance.

In *Julier v. Julier* (1900) 62 Ohio St. 90, 78 Am. St. Rep. 697, 56 N. E.

661, an action for dower, the answer pleaded a judgment of divorce obtained by the plaintiff from the defendant, by which, in pursuance of an agreement made between the husband and wife with respect to her alimony, it was ordered and decreed that the plaintiff should execute to her husband a quitclaim deed, releasing her dower in all the real estate which was then or might thereafter be owned by the husband; and in default of such conveyance the decree should so operate. The plaintiff's reply admitted the decree and the payment of the alimony thereunder, but alleged that that part of the decree which related to the release of her dower was void for want of jurisdiction, and was entered without her knowledge or consent. The court held that she could not, in a collateral proceeding, be released from the obligations of the judgment, on the plea that she was ignorant of its provisions as entered of record, or that her attorney was without authority to have it so entered.

In *Ellis v. White* (1888) 61 Iowa, 644, 17 N. W. 28, an action to partition lands, the plaintiff claiming a dower interest therein, the defendants alleged that the plaintiff had prosecuted against her husband a proceeding for a divorce and alimony, wherein a decree of divorce was had, and alimony was allowed to the plaintiff. It was shown that the amount allowed as alimony was paid by the husband to the attorney for the plaintiff who prosecuted the action, and that she had had full notice of all the proceedings, and had received the money allowed her. The plaintiff, in reply, alleged that the divorce proceedings were prosecuted without her knowledge, and that she never authorized the attorney appearing for her in the action to institute and prosecute it; and denied the receipt of any sum as alimony. She pleaded that the proceedings were void for want of jurisdiction of the court in which they were prosecuted. The court held that, without deciding whether the divorce court had had jurisdiction, the plaintiff was estopped to insist on the want of jurisdiction in that court.

In *McLeod v. McLeod* (1915) 144 Ga. 359, 87 S. E. 286, it appeared that a married man was convicted of a felony and sent to the penitentiary. While he was there, his wife brought a suit for divorce against him. The entry of service by the sheriff stated that the defendant was not to be found in the county, but was said to be in the penitentiary, and that the sheriff had left a copy at the residence of the defendant's wife in a named city. An absolute divorce was granted. After being discharged from the penitentiary, the defendant married another woman and later died, never having attacked the decree. The court stated that, under these circumstances, the divorce would not be declared void at the instance of his son by his first wife, on a collateral attack, in a contest over the grant of letters on his estate, on the ground that the service and all subsequent proceedings were void.

In *Miltimore v. Miltimore* (1861) 40 Pa. 151, an action for dower, the plaintiff alleged a judgment of divorce procured by her to have been void, because she herself caused and procured the subpoena to be issued in vacation and twelve days before the ensuing term, whereas the statute required the interval to have been at least thirty days. It was held that the decree, being voidable only, could only be reversed for error by a direct proceeding, and not collaterally.

But in *Holmes v. Holmes* (1870) 4 Lans. (N. Y.) 388, reversing (1871) 57 Barb. 305, an action for divorce a vinculo matrimonii, the plaintiff demurred to the defendant's answer, wherein she alleged that the plaintiff, claiming to be a resident of another state, instituted proceedings for and obtained a decree of divorce from her, personal service of due notice of such proceedings having been made on her in the state of their domicile. The court held that the personal service of notice, out of the state wherein the proceedings were brought, was a nullity, that the judgment of divorce was void, and hence that the plaintiff was not estopped from denying the validity of the divorce obtained by him.

And in *People v. Chase* (1882) 27 Hun (N. Y.) 256, the New York rule against the recognition of a divorce granted in another state upon constructive service of process, without appearance, against a resident of New York, was applied, in a prosecution for bigamy, to a decree of divorce obtained by the defendant prior to the first marriage charged in the indictment; with the result that the conviction was reversed. There was, however, no discussion of the right of the defendant to impeach collaterally a decree which he had himself obtained.

In *Williams v. Williams* (1885) 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110, an action for dower, the plaintiff claimed to be the widow of one Williams. It appeared that six months after her marriage with Williams the plaintiff brought an action against one Jones, who had previously married

her, for a divorce on the ground of desertion, and obtained a judgment therein. It was urged that she was thereby estopped from maintaining that she was never the lawful wife of Jones, or that she was ever the lawful wife of Williams. The court held that the marriage between the plaintiff and Jones was absolutely void ab initio, without any judgment of divorce or other legal proceeding, by reason of his incapacity to contract a valid marriage, as he had a former wife living at the time; and hence that the marriage between the plaintiff and Williams was valid and binding. This being the case, the court held that the plaintiff was not estopped by the subsequent judgment of divorce, from showing by facts de hors the divorce record that she was never the lawful wife of Jones, but was the lawful wife of Williams.  
H. D. B.

WILLIAM HANSCOM  
v.  
ELLA J. BLANCHARD et al.

*Maine Supreme Judicial Court—December 18, 1918.*

(117 Me. 501, 105 Atl. 291.)

**Option — what is.**

1. An option and not a sale contract is effected by an instrument which, after reciting the necessary elements of a contract of sale, concludes that in case the vendee shall fail to fulfil the agreement entered into then the down payment shall be forfeited.

[See note on this question beginning on page 576.]

**Broker — contract for commission — construction.**

2. An instrument reciting that for a consideration the owner gives one an option to purchase certain land at a certain sum per acre, and agrees to show the land to any customer he gets and pay him as a commission whatever he furnishes a customer for over said sum, is a contract for commission, not an option to buy.

[See 4 R. C. L. 247.]

**— right to commission.**

3. To entitle a real estate broker to a commission he must procure a purchaser who is ready and willing to  
3 A.L.R.—35.

meet the exact terms of his contract to make a sale.

[See 4 R. C. L. 307-310.]

**— change in terms of contract — effect.**

4. A real estate broker is entitled to his commission if the owner makes a sale to a customer introduced by him, although on different terms than those specified in his employment contract.

[See 4 R. C. L. 313, 322.]

**— option contract — effect.**

5. An agreement in writing to give a person the option to purchase land within a given time at a named price is neither a sale nor an agreement to

sell, within the operation of a contract for brokerage fees for effecting a sale.

[See 4 R. C. L. 315.]

—election to exercise option.

6. A real estate broker who procures an option contract for the purchase of the land is entitled to his commissions if the optionee is ready and willing to exercise his option, but is prevented by refusal of the owner to comply with the terms of the agreement.

[See 4 R. C. L. 315.]

Option — duty to comply with terms.

7. It is as much incumbent upon an

optionee to comply with the terms of his option as upon a direct contractee in an agreement of sale to comply with the terms of his agreement.

[See 6 R. C. L. 603.]

—default — failure to be at designated place.

8. One giving an option to purchase real estate cannot be charged with default in not being at the designated place at the appointed time to carry out the contract if, prior to its maturity, the optionee secures an extension of time.

REPORT by the Supreme Judicial Court for Androscoggin County for the opinion of the full bench in an action brought to recover commissions for the alleged sale of real estate. *Judgment for defendant Ella J. Blanchard.*

The facts are stated in the opinion of the court.

Messrs. McGillicuddy & Morey for plaintiff.

Messrs. E. E. Richards, Frank W. Butler, and W. H. Judkins, for defendant Ella J. Blanchard:

Plaintiff is not entitled to any commission until he produces a party able, ready, and willing to purchase, and a sale is actually completed, or a binding contract entered into. The broker must bring the minds of the seller and purchaser together in a sale or contract for a sale; until that is done his right to compensation does not accrue.

Garcelon v. Tibbetts, 84 Me. 151, 24 Atl. 797; Barnard v. Monnot, 33 How. Pr. 440; McGavock v. Woodlief, 20 How. 221, 15 L. ed. 884; Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441; Kingsley v. Kressly, 60 Or. 167, 111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746; Friendly v. Elwert, 57 Or. 599, 105 Pac. 404, 111 Pac. 690, 112 Pac. 1085, Ann. Cas. 1913A, 357; Coleman v. Applegarth, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; Tilton v. Sterling Coal & Coke Co. 28 Utah, 173, 107 Am. St. Rep. 689, 77 Pac. 758; Agar v. Streeter, 183 Mich. 600, L.R.A.1915C, 196, 150 N. W. 160, Ann. Cas. 1916E, 518; Pollock v. Brookover, 60 W. Va. 83, 6 L.R.A. (N.S.) 403, 53 S. E. 795; Pom. Spec. Perf. § 387; Mier v. Hadden, 148 Mich. 488, 118 Am. St. Rep. 586, 111 N. W. 1040, 12 Ann. Cas. 88.

The contract between the parties amounted simply to an option to be accepted on or before August 1, 1916.

Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 18, 24 Pac. 695; Wardell v. Wil-

liams, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796; Maynard v. Tabor, 53 Me. 511.

There was and could be no sale or legal contract for a sale whereby the plaintiff had earned his commission, until the offer to sell for cash had been accepted, either by a tender of the amount in cash or a written acceptance on which an action could be maintained.

Potts v. Whitehead, 23 N. J. Eq. 512; Stembridge v. Stembridge, 87 Ky. 91, 7 S. W. 611.

Where an option has been given on land which has not been converted into a binding contract of sale by acceptance in accordance with its terms, specific performance cannot be maintained.

Stembridge v. Stembridge, supra; Pollock v. Brookover, 60 W. Va. 75, 6 L.R.A. (N.S.) 403, 53 S. E. 795.

Although an option to purchase is not, strictly speaking, a contract of sale, because it is an executory unilateral agreement, yet an option is a contract by which the owner of property agrees with another that he shall have the right to buy the property at a fixed price within a certain time designated; in such case, time is always of the essence of the contract.

Fulenwider v. Rowan, 136 Ala. 287, 34 So. 975; Hollmann v. Conlon, 143 Mo. 369, 45 S. W. 275; Merk v. Bowery Min. Co. 31 Mont. 298, 78 Pac. 519; Coleman v. Applegarth, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; Glass v. Rowe, 103 Mo. 513, 15 S. W. 334; Niles v. Phinney, 90 Me. 122, 37 Atl. 880;

Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 108, 83 N. W. 110; Rude v. Levy, 43 Colo. 482, 24 L.R.A. (N.S.) 91, 127 Am. St. Rep. 123, 96 Pac. 560.

Spear, J., delivered the opinion of the court:

This is an action for the recovery of commissions for the alleged sale of real estate and comes up on report. Oramandal Blanchard makes no defense. But Ella J. Blanchard defends upon the ground that the plaintiff did not make a sale or procure a purchaser, in accordance with his contract of brokerage. The first contract between the plaintiff and defendants was of the following tenor:

Stratton, Me., March 28, 1916.

In consideration of (\$10) ten dollars we, Mrs. Blanchard and Mr. O. Blanchard, give William Hanscom an option until July 1, 1916, on our land, known as the Hedgehog land and Bemis land, at (\$10) ten dollars per acre, as the deeds call for about 2,270 acres, with all buildings thereon, and agree to go show the lines and timber to any customer he gets. We agree to pay Wm. Hanscom as a commission whatever he furnishes a customer for over the said \$10.

She contends this was not a contract for commission, but an option to buy. Construing this instrument with reference to all its phraseology, although it is somewhat mixed and inconsistent in its language, we are of the opinion that it

**Broker—contract for commission—** was intended by the parties to be regarded as a contract

for a commission on a sale above \$10 per acre. The language, "to any customer he gets," and to pay "as a commission whatever he furnishes a customer for over the said \$10," seems to quite clearly indicate that the defendant understood that the plaintiff was to realize his commission from a sale to another, and not from a purchase by himself, under the word "option" as used in the first part of the instrument. The subsequent action of the parties also

goes to show that this was their understanding, since the defendants, by virtue of parties being introduced under this agreement, did proceed to make an option to the parties thus produced.

Without question, the plaintiff by virtue of the above instrument brought parties to the defendants who were desirous of purchasing the tracts of land described therein and with these parties the defendants themselves made a contract for a disposal of the lands described. The interpretation of this new instrument determines the rights of the parties in this case. If it was a contract of sale, by which the parties were mutually bound, then the plaintiff would be entitled to his commission. *Veazie v. Parker*, 72 Me. 443. It was the duty, however, of <sup>—right to commission.</sup> the broker in the

first instance to procure a purchaser who was ready and willing to meet the exact terms of his contract to make a sale. Even an offer of better terms will not suffice. 4 R. C. L. 313, § 52. But if a broker <sup>—change in terms of contract—effect.</sup> introduces parties with whom the

seller makes a different contract, resulting in a sale, he is entitled to his commission. *Veazie v. Parker*, *supra*; *Ward v. Cobb*, 148 Mass. 518, 12 Am. St. Rep. 587, 20 N. E. 174; *Roche v. Smith*, 176 Mass. 595, 51 L.R.A. 510, 79 Am. St. Rep. 345, 58 N. E. 152; *Johnson v. Holland*, 211 Mass. 363, 97 N. E. 755; 4 R. C. L. 413, § 52. See also exhaustive note to *Hoadley v. Savings Bank*, 44 L.R.A. 321.

The present case, however, does not fall within either of the above rules entitling a broker to his commission. The contract between the parties to the alleged sale, upon which the plaintiff claims his commission, was not one by which the parties were mutually bound; it was unilateral. The vendor alone was bound. The character of this contract appears from an observation of its terms. It describes the parties, the tracts of land to be conveyed, the terms of payment, the



price per acre, the time of performance, and the consideration which is to be allowed as an initial payment upon the consummation of the contract. The concluding paragraph of this instrument is as follows: "In the event that the party of the second part shall fail to fulfil the agreements herein entered into, then the sum of \$1,000 already acknowledged as paid shall be forfeited to the party of the first part."

This clause, read in connection with the rest of the contract, clearly confines the contract to the exercise of an option on the part of the vendees. For definition, see "Option," 6 Words & Phrases; 3 Words & Phrases, 2d ed.

An agreement in writing to give a person the option to purchase lands within a given time, at a named price, is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price at a given time. The rights of a broker in case of an option granted by his principal to a would-be purchaser are well stated in 4 R. C. L. 315, § 53:

"Where a broker is engaged to negotiate a transfer or sale of certain real or personal property, the mere procurement of a prospective purchaser, who enters into an option to buy the property in question, but never in fact does so, is not sufficient to constitute a performance by the broker of his contract of employment, and he is not entitled to his commissions, nor even to a percentage of the earnest money deposited by the defaulting optionee. The fact that the employer consents to entering into a conditional or optional contract to purchase cannot be construed as a waiver by him of the original terms of employment, and an acceptance of such services as a complete performance on the part of the broker. It is a matter of common knowledge that

sales are frequently effected through options. By granting the option, the owner is merely helping to bring about the sale which he employed the broker to make. It is a step in that direction. It is not the end, but rather the means to an end. Consequently such action on the part of the owner does not imply that he has made a new contract with the broker, by which he agrees to pay for something different from the services he originally contracted for, but merely indicates a desire upon his part to aid the broker in the performance of the original agreement."

See also exhaustive note to Warnekros v. Bowman, 43 L.R.A. (N.S.) 91.

It is, therefore, evident as a matter of law that an optional contract to purchase land is not a compliance with a broker's contract to sell land. A broker has not found a purchaser, so as to be entitled to compensation, until the option has been exercised and the contract completed.

There is no claim that the option in the present case has been completed by a sale of the property in accordance with its terms. But the fact that an option for the purchase of real estate has not been exercised does not, per se, conclude the broker. It is well settled that if the optionee is ready and willing to exercise the option, but is prevented by the refusal of

the owner to comply with the terms of the agreement, the broker is then entitled to his compensation. The rule is stated in 4 R. C. L. 315, § 53, as follows: "While, as above shown, according to the great weight of authority the mere procuring of one to take an option does not entitle the broker to commissions if the optionee elects not to exercise the same, yet it is apparently well settled that the broker is entitled to his commissions if the option is actually exercised, or the optionee is willing to exercise it, but is prevented from so doing by the refusal of the

—election to exercise option.

owner to comply with his part of the agreement."

See also 43 L.R.A. (N.S.) 94, note.

This brings us to the one question of fact involved in the case: Who was in fault in refusing to abide by the terms of the option? It is not our purpose to discuss the evidence in detail, as it is so fragmentary as to just what the optionees were able to do after getting the option as to practically preclude such discussion. In the first place, it is apparent that the optionees were not able to finance the proposed purchase. They were evidently trying to find someone whom they could induce to finance it for them. But the evidence fails to show that anyone appeared who was ready or offered to comply with the terms of the option. But in order to hold the option this must be done. It is as much incumbent upon an optionee to comply with the terms of his option as upon a direct contractee in an agreement

**Option—duty to comply with terms.**

of sale to comply with the terms of his agreement. And

we have before seen that such compliance is minutely required. 4 R. C. L. 315, § 52, supra. The option provided that "on or before the 1st day of August, 1916, the parties agree to meet at Farmington," where they were to carry the agreement into effect. Nothing was done at this time. The optionees did not appear. On the 31st day of July, one of them, Mr. Mason, met the defendant on her way to Farmington and said to her:

I have been unable to raise this money, but I have a new proposition, which is a cash deal. I have an explorer by the name of Mr. West with me, and I have some bankers that are interested, and upon the report of Mr. West, if his report is favorable, I can put in the money for the whole tract, and I would like a little more time.

Q. What answer did you give him?

A. I told him that I was on my way to Farmington to carry out my part of this agreement, and in event

this deal didn't go through and he wanted—no, I asked how much time that he wanted. He stated: "Let me see. It will take two or three days to explore the land, a day to return to Lewiston, a day to make my report," he says, "Mrs. Blanchard, one week is sufficient."

She gave Mr. Mason one week.

That is an entirely new contract, proposed by the optionee, Mr. Mason, and relieved the defendant from the charge of

any default in not being present at Farmington on the 1st day of August, to carry out the terms of the option. This option, declared on in the plaintiff's writ, and upon which he relies as the contract of the parties procured by him, became invalid after August 1st, both by lapse of the time and by the substitution of a new contract. But the new contract was to run a week, and nothing being done within this time, all the contractual relations of the optionee and the defendant early in August came to an end. The evidence of Mrs. Blanchard is fully corroborated by Mr. John C. West, the very party referred to by Mr. Mason in the conversation above testified to by Mrs. Blanchard. Mr. West had been approached by Mason and O'Brien to finance this proposed purchase. He accordingly in September had an interview with Mrs. Blanchard in regard to the matter, which on direct examination he recites as follows:

**—default—failure to be at designated place.**

Q. What did she say to you at this time that you had this conversation with her?

A. I talked with her about financing the deal and taking it up on a cash basis. I had parties that had the money, and had a proposition to finance it, to take up the whole tract, as well as other tracts there that we have under consideration. And I explained it to her, and she said that—well, she didn't know but she would look at it favorably, but she wanted to consult someone; and I told her that I wanted her to. I

says, "It means a cash deal, if I can have the deeds in a certain way." I explained it.

He saw her again the next day. In answer to the question, "What did she say then?" he testified:

A. She said that she couldn't consider it; it was only a drag-out, or something like that, and it was all off; and I told her under those circumstances I wasn't going to say any more about it—probably the other parties would have something to say, but as far as I was concerned, I should stop.

Neither the testimony of Mrs. Blanchard nor Mr. West is in any way contradicted or modified. It is accordingly clear that the optionees were never prepared to comply with the terms of their option. Nor did they furnish anyone who was. They were working upon an entirely new scheme of trading upon a cash basis, to which the defendant was willing to accede, and gave an option, on a cash basis, for a week. It accord-

ingly results that the optionees, in their agreement of July 5th, failed to comply with its terms, and that their option was lost by their own fault, and not the fault of the defendant Ella J. Blanchard.

Judgment for defendant Ella J. Blanchard.

#### NOTE.

The question as to when an instrument for the purchase of land may be regarded as a contract of sale, and when as a mere option, is discussed in annotation beginning on page 576, in which it is pointed out, that while, as in the reported case (*HANSCOM v. BLANCHARD*, ante, 545), contracts have been held to be mere options on the ground that they did not bind the second party to purchase, the fact that a contract does not formally bind such party to make payment is not conclusive of its character, and that where it is held, as a matter of construction, to bind him to complete the purchase, it is more than an option.

D. C. STELSON, Plff. in Err.,

v.

ARTHUR W. HAIGLER, Doing Business under the Firm Name and Style of Haigler Realty Company.

*Colorado Supreme Court — May 7, 1917.*

(— Colo. —, 165 Pac. 265.)

#### Option — contract — purchase or option.

1. An option and not a contract to purchase is effected by an agreement to sell real estate for payments to be made at specified times and providing for forfeiture of money paid upon failure to make payment, where the purchaser does not agree to purchase, to make payment, or to bind himself in any way other than the forfeiture of payments made.

[See note on this question beginning on page 576.]

**Broker — commission — willingness to purchase.**

2. Readiness and willingness to make the first payment on a contract to purchase real estate is not sufficient to entitle a broker to a commission which is to be paid out of the first payment if it is not paid or tendered.

[See 4 R. C. L. 307-310.]

**Vendor and purchaser — failure to make payment — excuse.**

3. One having an option to purchase real estate is not justified in refusing to make the first payment because of defects in the abstract of title, if the contract gave a reasonable time to cure such defects and they were cured within such time.

**Option — effect.**

4. An option gives the right to purchase within a limited time without imposing any obligation to purchase.

[See 6 R. C. L. 603.]

**Broker — option contract — right to commission.**

5. One employed to sell real estate or find a purchaser for it does not earn his commission by procuring a mere option contract.

[See 4 R. C. L. 315.]

**ERROR** to the District Court for El Paso County to review a judgment in favor of plaintiff in an action brought to recover an amount alleged to be due as a real estate broker's commission. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. R. L. Chambers and Robert Kerr, for plaintiff in error:

The understanding and intention of the parties was that the contract was an option, and if there were any doubt, this intention must control.

Butler v. Rockwell, 14 Colo. 125, 28 Pac. 462; 9 Cyc. 577; Hossell v. Neal, 25 Colo. App. 300, 137 Pac. 72; Brown v. Keegan, 32 Colo. 463, 76 Pac. 1056; Warnekros v. Bowman, 14 Ariz. 348, 43 L.R.A. (N.S.) 91, 128 Pac. 49; Lawrence v. Pederson, 34 Wash. 1, 74 Pac. 1011; Dwyer v. Raborn, 6 Wash. 213, 33 Pac. 350.

A contract of sale creates mutual obligations on the part of the seller to sell and on the part of the purchaser to buy, while an option gives the right to purchase, within a limited time, without imposing any obligation to purchase.

James, Option Contr. § 105; Brickell v. Atlas Assur. Co. 10 Cal. App. 17, 101 Pac. 16; Re Allen, 183 Fed. 172; Ellsworth v. Southern Minnesota R. Extension Co. 31 Minn. 543, 18 N. W. 822; Dillinger v. Ogden, 244 Pa. 20, 90 Atl. 446, Ann. Cas. 1915C, 533; Block v. Maddox, 104 Ga. 157, 30 S. E. 723.

Unless the contract contains language which may reasonably be construed as an agreement on the part of the vendee to purchase the property or to assume some obligation thereunder, it will be held to be an option contract and not an agreement of sale and purchase.

Indiana & A. Lumber & Mfg. Co. v. Pharr, 82 Ark. 573, 102 S. W. 686; Gordon v. Swan, 43 Cal. 564, 3 Mor. Min. Rep. 84; White v. Bank of Hanford, 148 Cal. 552, 83 Pac. 698; Strauss v. Brier, 57 Colo. 65, 140 Pac. 183; Simpson v. Sanders, 130 Ga. 265, 60 S. E. 541; Kessler v. Pruitt, 14 Idaho, 175, 93 Pac. 965; Cortelyou v. Barnsdall, 236 Ill. 138, 86 N. E. 200; O'Neill v. Risinger, 77 Kan. 63, 93 Pac. 340; Darr v. Mummert, 57 Neb. 378, 77 N.

W. 767; Swank v. Fretts, 209 Pa. 625, 59 Atl. 264; Uhlman v. Sullivan, 242 Pa. 436, 89 Atl. 550; Gira v. Harris, 14 S. D. 537, 86 N. W. 624; Wheeling Creek Gas, Coal & Coke Co. v. Elder, 170 Fed. 215; Witherspoon v. Staley, — Tex. Civ. App. —, 156 S. W. 557; Heydrick v. Dickey, 154 Ky. 475, 157 S. W. 915.

An agent employed to sell or find a purchaser has not performed the contract by negotiating a mere option contract, and therefore is not entitled to recover from the principal the agreed, or any, compensation for such services.

James, Option Contr. § 205; Fox v. Denargo Land Co. 37 Colo. 203, 86 Pac. 344; McGonigal v. Raughley, 6 Penn. (Del.) 61, 63 Atl. 801; Martin v. Wilson, 24 Idaho, 353, 134 Pac. 532; Ramsey v. West, 31 Mo. App. 676; Ward v. Zborowski, 31 Misc. 66, 63 N. Y. Supp. 219; Benedict v. Pincus, 191 N. Y. 377, 84 N. E. 284; Breckenridge v. Claridge, 91 Tex. 527, 43 L.R.A. 593, 44 S. W. 819; Runck v. Dimmick, 51 Tex. Civ. App. 214, 111 S. W. 779; Lawrence v. Pederson, 34 Wash. 1, 74 Pac. 1011; Kinney v. Eckenberger, 74 Or. 442, 145 Pac. 665; Tibbs v. Zirkle, 55 W. Va. 49, 104 Am. St. Rep. 977, 46 S. E. 701, 2 Ann. Cas. 421; Scott v. Merrill, 74 Or. 568, 146 Pac. 99.

There is not a scrap of evidence except the unsupported word of Kloke that he ever was ready, able, or willing to pay \$30,000, and similar evidence has been held to be insufficient.

Fox v. Denargo Land Co. 37 Colo. 203, 86 Pac. 344; Neiderlander v. Starr, 50 Kan. 766, 32 Pac. 359; Little v. Herzinger, 34 Utah, 337, 97 Pac. 639.

Messrs. Harris & Price, for defendant in error:

The payment of the \$30,000 and the tender of the deed were concurrent acts, and until the deed was tendered by Stelson, there could be no default on the part of Kloke.

Byers v. Denver Circle R. Co. 13

Colo. 552, 22 Pac. 951; 1 Sugden, Vend. & P. 366; Leaird v. Smith, 44 N. Y. 618; Connelly v. Pierce, 7 Wend. 129; Irvin v. Bleakley, 67 Pa. 24; Low v. Marshall, 17 Me. 232; Peck v. Brighton Co. 69 Ill. 200; Parker v. Parmele, 20 Johns. 130, 11 Am. Dec. 253; Huffman v. Hummer, 18 N. J. Eq. 83, 2 Mor. Min. Rep. 242; Welch v. Matthews, 98 Mass. 131; Hoagland v. Murray, 53 Colo. 50, 123 Pac. 664; Van Campen v. Knight, 63 Barb. 205; 36 Cyc. 730; Powell v. Dayton, S. & G. R. Co. 14 Or. 356, 12 Pac. 665.

The contract was a binding one on Kloeke.

Cummings v. Nielson, 42 Utah, 157, 129 Pac. 619; Colorado Iron Works v. Taylor, 12 Colo. App. 451, 55 Pac. 942; Guyer v. Warren, 175 Ill. 328, 51 N. E. 580; 36 Cyc. 625; Johnston v. Trippe, 33 Fed. 530; Vassault v. Edwards, 43 Cal. 458; James, Option Contr. § 825, p. 335; Castle Creek Water Co. v. Aspen, 76 C. C. A. 516, 146 Fed. 8, 8 Ann. Cas. 660; Johnson v. Lennox, 55 Colo. 125, 133 Pac. 744.

Where a broker produces a customer able, ready, and willing to buy, and a contract is entered into that the owner thereby accepts, the broker has earned his commission.

Corson v. Mulvany, 49 Pa. 88, 88 Am. Dec. 485; James, Option Contr. § 1218, p. 576; Smith v. Bangham, 156 Cal. 359, 28 L.R.A. (N.S.) 522, 104 Pac. 689; Hamburger v. Thomas, 103 Tex. 280, 126 S. W. 561, — Tex Civ. App. —, 118 S. W. 770; Breckenridge v. Claridge, 91 Tex. 527, 43 L.R.A. 593, 44 S. W. 819; Albritton v. First Nat. Bank, 38 Tex. Civ. App. 614, 86 S. W. 646; Berg v. San Antonio Street R. Co. 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929; Stringfellow v. Powers, 4 Tex. Civ. App. 199, 23 S. W. 313; Parker v. Walker, 86 Tenn. 566, 8 S. W. 391.

The principal cannot evade payment of commissions by refusing to convey to purchaser.

Swigart v. Hawley, 140 Ill. 186, 29 N. E. 883; Perkins v. Russell, 56 Colo. 120, 137 Pac. 907; Gilder v. Davis, 137 N. Y. 504, 20 L.R.A. 398, 33 N. E. 599; Kalley v. Baker, 132 N. Y. 1, 28 Am. St. Rep. 542, 29 N. E. 1091; Wray v. Carpenter, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; Buckingham v. Harris, 10 Colo. 455, 15 Pac. 817; Fairly v. Wappoo Mills, 44 S. C. 227, 29 L.R.A. 215, 22 S. E. 108; Finnerty v. Fritz, 5 Colo. 174, 1 Mor. Min. Rep. 437; Colburn v. Seymour, 32 Colo. 480,

76 Pac. 1058, 2 Ann. Cas. 182; Deweese v. Brown, 55 Colo. 430, 135 Pac. 800; Roche v. Smith, 176 Mass. 595, 51 L.R.A. 510, 79 Am. St. Rep. 345, 58 N. E. 152; Lang v. Hand, 57 Ill. App. 134; Lockwood v. Halsey, 41 Kan. 166, 21 Pac. 98; King Powder Co. v. Dillon, 42 Colo. 316, 96 Pac. 439; Smith v. Roe, 7 Colo. 95, 1 Pac. 909; Moses v. Bierling, 31 N. Y. 462.

The commission does not depend upon the purchaser carrying out his contract.

Fairly v. Wappoo Mills, 44 S. C. 227, 29 L.R.A. 215, 22 S. E. 108; Little v. Fleishman, 35 Utah, 566, 24 L.R.A. (N.S.) 1182, 101 Pac. 984; Moore v. Irvin, 89 Ark. 289, 20 L.R.A. (N.S.) 1168, 131 Am. St. Rep. 97, 115 S. W. 662; Yoder v. Randol, 16 Okla. 308, 3 L.R.A. (N.S.) 576, 83 Pac. 537; Squires v. King, 15 Colo. 416, 25 Pac. 26.

Scott, J., delivered the opinion of the court:

The action is by the Haigler Realty Company to recover from Stelson the sum of \$5,000, alleged to be due as a real estate broker's commission for the sale of Stelson's ranch. The commission is claimed both under a written contract and as the value of the services rendered. The record discloses that Stelson gave the Haigler Realty Company a written agreement, which both agree was intended as a contract of employment to sell the ranch to Stelson. Later the Haigler Realty Company presented R. F. Kloeke, a real estate broker of Omaha, Nebraska, who received from Stelson the following memorandum of agreement, omitting so much thereof as is immaterial in this proceeding:

"The party of the first part sells and agrees to convey to the party of the second part by warranty deed and abstract brought down to date of transfer, the same to show marketable title, the following described lands and water rights: [Here follows description.]

"The full purchase price for the above-described lands and water rights being \$131,000, to be paid as follows: One thousand dollars to be placed in escrow with the Exchange National Bank of Colorado Springs, to be turned over to the party of the

first part upon the finding of marketable titles by party of the second part; \$30,000 on or before December 1, 1912; \$100,000 March 1, 1918, the same to be evidenced by promissory note bearing interest at the rate of 6 per cent per annum, payable semiannually, to be secured by first mortgage covering the aforesaid lands and water rights.

"Tenth. That he will execute warranty deed showing marketable titles free and clear of all liens and encumbrances as above set forth covering the above-described land, conveying the said lands and water rights to the party of the second part, his heirs or assigns, or to anyone whom said party of the second part may direct upon the payment of the said \$30,000 and the execution of note and mortgage as above set forth, the same to be paid and executed on or before December 1, 1912.

"It is further agreed between the parties hereto that should there be any defects in the title covering above-described lands and water rights that the party of the second part gives the party of the first part reasonable time through the courts to have such defects set aright.

"It is mutually agreed that the time of payment shall be an essential part of this contract, and in case of failure of the said party of the second part to make either of the payments above mentioned this contract shall be forfeited and determined, at the election of the said party of the first part, and the said party of the second part shall forfeit all payments made on this contract, as liquidation of all damages to party of the first part.

"Colo. Springs, Colo., Sept. 2, 1912.

"Received of R. F. Kloke, Omaha, Neb.—\$1,000 to apply as part payment on the land mentioned in contract between myself and R. F. Kloke, copy of which is attached hereto.

"Should the said R. F. Kloke not find the abstracts covering the lands and water rights marketable as men-

tioned in the said contract, I do hereby agree to return to said R. F. Kloke the \$1,000 paid to me on this date; and said \$1,000 being paid to me in lieu of the \$1,000 which is to be placed in escrow in the Exchange National Bank, Colorado Springs, Colorado, as recited in said contract.

"[Signed] D. C. Stelson."

Haigler testifies that the receipt above set forth was a modification of the preceding agreement. Verdict and judgment were rendered against the plaintiff in error in the full sum of \$5,000.

It is contended by the defendant that the agreement between Stelson and Kloke was a mere option, and not an agreement of sale and purchase; that the option did not ripen into a sale, and therefore the plaintiff did not produce a purchaser ready, able and willing to purchase the lands, and for such reason is not entitled to a commission. The contention of the plaintiff is that the agreement was an absolute contract of purchase and sale.

There were no further payments made by Kloke, nor was there any tender of payment. It is true that Kloke testified that he was ready and willing to make the first payment at the time it became due, but if this be true, it was not sufficient, in view of the fact that he did not make the payment nor offer to do so.

Broker—  
commission—  
willingness  
to purchase.

He further says that he came to Colorado Springs and saw Haigler and told him that he was ready to pay, but he did not see Stelson, nor seek to see him, and immediately returned to Omaha.

We said in *Bailey v. Lay*, 18 Colo. 405, 33 Pac. 407: "The averment that Cummings and Olcott and the Iron Mask Company were ready and willing to accept the premises and make payment is not equivalent to an averment of payment or of an offer to pay. In a case of this kind, when the time for payment has actually arrived, mere readiness and willingness to pay are immaterial; such readiness and willingness,

without more, will not discharge contract obligations. An averment of readiness and willingness to pay presents nothing tangible or substantial; it involves little more than the state of mind of the party presenting the plea; and the determination of an issue taken thereon would not decide the rights of the parties. On the other hand, an averment of payment or of an offer to pay is an averment of an overt act, an important and substantial fact; and the determination of an issue taken thereon would, subject to other issues in the case, be decisive of the controversy."

Kloke was a real estate broker, and it is plain from the record that he did not intend to make a purchase of the premises, but rather to secure an option that he might have opportunity to sell the lands. It is also made clear that Kloke did not come to Colorado Springs on December 2, 1912, for the purpose of making the payment, or any tender of the same. This appears from a night-letter telegram from Haigler to Kloke sent on the evening of November 29th, with but one intervening day before time for payment. This telegram was as follows:

To R. F. Kloke, Omaha National Bank Bldg., Omaha, Neb.

Letter received. Stelson demands \$1,000 for extension of contract for twenty days to apply on purchase price, but according to terms of contract we think if you get abstracts here with your requirements on title by December 2d that it would continue in force until he furnished marketable title therefor. Do not fail to get abstracts here with your requirements by December 2d. Answer.

Kloke appears to have come to Colorado Springs in response to this telegram, bringing the abstracts with him, and returned to Omaha without even advising Stelson of his presence. It is palpable that the purpose was to secure time, and not to make either payment or tender. The plaintiff's agreement specifically

recites: "The title is to be marketable and good and sufficient warranty deed to be executed and delivered by the said D. C. Stelson to the Haigler Realty Company, their heirs or assigns, on or before the 1st day of December, 1912, together with abstract showing marketable title, provided the \$1,000 is tendered or paid on or before the 3d day of September, 1912, and \$30,000 is tendered or paid on or before the 1st day of December, 1912. If the said payment as above mentioned is not paid or tendered on or before the dates mentioned above, then this contract is to be void and of no effect, and both parties are released from all obligations therein, and in that event the said \$1 paid on this date is to be held by D. C. Stelson as liquidated damages."

And: "If sale is made as above stated, I agree to pay Geo. W. Morse \$1,000 and the Haigler Realty Company \$5,000 out of the \$30,000 payment above mentioned."

It will be seen from this that the \$30,000 payment must be either tendered or paid on or before the 1st day of December, 1912, and that such tender or payment was a condition precedent to the execution of the deed and its delivery with the abstracts, and that, if not so tendered or paid, the agreement was to be void, and both parties to stand released therefrom; again, that the compensation to the Haigler Realty Company in any event was to be made from the first or \$30,000 payment.

It is agreed that this sum was not paid nor tendered, nor any part thereof, as stipulated, nor at all. It is clear, therefore, that unless such first payment or tender was excused, or made unnecessary by the acts and conduct of Stelson, the plaintiff cannot recover; for this was the result which the Haigler Company agreed to produce in consideration of the commission. But, independent of this express provision, it was the duty of Kloke to make the first payment provided in his agreement. It

was held in the case of *Bailey v. Lay*, supra, that:

"The gravamen of the complaint is that defendants Lay, Mallory, and Brown refused to make and deliver a deed of conveyance of their certain mining property to the Iron Mask Mining & Smelting Company, as by said agreement in writing they had contracted to do. According to the terms of the written agreement, the defendants were to deliver the deed to the mining property at the time of the first payment of \$250,000. . . .

"The agreement in regard to the first payment and the agreement to deliver the deed were to be performed at the same time; they were mutual and dependent agreements; and performance or an offer to perform in respect to first payment was necessary to make it incumbent upon the defendants to deliver the deed. *Englander v. Rogers*, 41 Cal. 420; *Bakeman v. Pooler*, 15 Wend. 637; 2 *Parsons, Contr.* 528; *Chitty, Contr.* 11th ed. 1082."

The record does not disclose that Stelson at any time refused to comply with this written agreement, but, on the contrary, and for a long time after December 2, 1912, when the first payment became due, and even up to the commencement of this action, he still offered to make the sale upon the terms stated in the agreement.

Stelson, after December 1, 1912, wrote letters both to the Haigler Realty Company and to Kloke urging that the matter be closed up as it was important to prepare for the approaching season's work on the ranch. As late as March, 1913, more than four months after the first payment became due, Kloke wrote Stelson asking for an extension of time, and declared that "the chances are that nothing can be done for some little time in the way of closing it up."

The plaintiff below undertakes to excuse the payment of the \$30,000 and the completion of the contract by Kloke, upon the ground that the title to the premises was defective,

and was not a marketable title. Very soon after, or perhaps at the time of, the signing of the Kloke agreement, Stelson turned over the abstracts of title to Haigler, who in turn delivered them to Kloke for examination. These were not returned to Stelson until after December 1, 1912, and after the first payment was due, whereupon Stelson delivered them to H. W. Wing, an attorney of Colorado Springs, with experience in titles and abstracts, together with certain objections of Kloke's attorney, for the purpose of having irregularities in the title corrected so as to meet these objections. The plaintiff below offered the testimony of Wing to support its contention as to defective or non-marketable title.

Wing testified that he proceeded at once to, and did, have the defects remedied. He says that the objections were by Ramsey, the Omaha attorney of Kloke, and were about 150 in number; that in great part they dated back from forty to fifty years, and were technical in character, many being matters of identification where names appeared by initials and with the full Christian name; that there were some apparent defects in case of tax titles, some of which he proceeded to have cleared through court action; that there were no legal or valid defects in the titles or any of them; that Stelson and his grantors had been in open and actual ownership and possession of the premises for about twenty-six years to his personal knowledge; that he caused all the objections to be satisfied; and that in his opinion the title to the premises and to all water rights connected therewith was a marketable title at the time the abstracts were placed in his hands.

It appears from this testimony that about three months were required to clear up all of the irregularities complained of. It does not appear that Kloke made any objection to the abstracts thereafter, though he asked for an extension of time to make the payment.



No other testimony was offered concerning the question of title, and there is no testimony in the case which tends to show any valid defect therein to any of the lands or water rights involved. The irregularities complained of were not suggested to Stelson until after the date when the first payment was to be made, and these appeared to have been cured with all reasonable diligence.

It was expressly agreed in the contract given to Kloke that: "It is further agreed between the parties hereto that should there be any defects in the titles covering above-described lands and water rights that the party of the second part gives the party of the first part reasonable time through the courts to have such defects set aright."

Under the facts thus disclosed and in view of this express agreement, there was no sufficient justification

for Kloke to refuse or neglect to make the tender of payment as provided in the agreement because of defective title. Indeed, he made no such objection until after the expiration of the time for payment.

Neither Kloke nor Stelson claim any rights under the agreement as between themselves. But under all settled rules of construction the agreement between Stelson and

Kloke was an option to purchase, and not a contract of sale. Nowhere in the agreement does Kloke agree to purchase, not to make any payment, or to bind himself in any other respect, aside from the forfeiture of the amount paid at the time the contract was made. Both Stelson and Kloke treated and construed the agreement as an option at the time, and at all times since.

In letters of both each refers to and speaks of the agreement as an option, and Kloke in his deposition testified as follows:

Q. But was it a sale, or was it an option, from your point of view?

A. I consider it a contract to purchase and with a forfeiture clause, without any liability in case I did not come across or he did not come across.

Again he says: "Of course I will admit, as purchaser, that I took this precaution that in case any unforeseen accident should happen I was not bound, but he was. I did not have to comply with my part of the contract if I did not want to, and he did."

And he further testified: "My understanding, so far as I was concerned, was that in case I did not want to take the property, did not want to fulfil my contract, naturally I would have to lose what I put up."

So that upon the face of the agreement it was unilateral in character, and fully intended by the parties as an option only.

It may be laid down as an established rule of law that, unless the contract contains language which may reasonably be construed as an agreement on the part of the vendee to purchase the property, or to assume some obligation thereunder, it will be an option contract, and not an agreement of sale and purchase. It is impossible to conceive of an agreement of sale and purchase without obligation on the part of the vendee to purchase. On the other hand, the absence of such obligation is the distinctive characteristic of an option contract. A contract of sale creates mutual obligations on the part of the seller to sell, and on the part of the purchaser to buy, while an option gives the right to purchase, within a limited time, without imposing any obligations to purchase. James, Option Contr. § 105, and authorities cited; Hessel v. Neal, 25 Colo. App. 300, 137 Pac. 72.

An agent employed to sell or find a purchaser has not performed the contract by negotiating a mere option contract and therefore is not entitled to recover the

Vendor and purchaser—failure to make payment—excuse.

Option—contract—purchase or option.

—effect.

Broker—option contract—right to commission.

agreed or any compensation for such services. Fox v. Denargo Land Co. 37 Colo. 203, 86 Pac. 344; Brown v. Keegan, 32 Colo. 463, 76 Pac. 1056. See also James, Option Contr. § 205, and authorities cited. We must hold, therefore, that under the facts and circumstances of this case the Haigler Realty Company is not entitled to recover.

The questions here considered were properly raised by demurrer, by instructions tendered and refused, and by instructions given and objected to. There are other assignments of error which we do not deem important to consider.

The judgment is reversed.

White, Ch. J., and Garrigues, J., concur.

**NOTE.**

The question as to when an instrument for the purchase of land may be regarded as a contract of sale, and when as a mere option, is discussed in annotation beginning on page 576, in which it is pointed out that while, as in the reported case (STELSON v. HAIGLER, ante, 550), contracts have been held to be mere options on the ground that they did not bind the second party to purchase, the fact that a contract does not formally bind such party to make payment is not conclusive of its character, and that where it is held, as a matter of construction, to bind him to complete the purchase, it is more than an option.

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HARRY R. SOLOMON

v.

JACOB SHEWITZ, Appt.,

and

JUSTICE R. PIERSON et al.

*Michigan Supreme Court — April 19, 1915.*

(185 Mich. 620, 152 N. W. 196.)

**Option — contract — sale or option.**

1. An agreement between one having an option to purchase real estate and another that the former agrees to sell and the latter agrees to buy the property is a contract of sale, and not an option.

[See note on this question beginning on page 576.]

**— right of holder.**

2. One having an option to purchase real estate has a legal right to enter into an executory contract to sell the property.

**Real property — contract to sell — time as essence.**

3. The mere insertion in a contract to sell real estate, that the deal is to be consummated within thirty days, does not make time of the essence of the contract.

[See 6 R. C. L. 898; 23 R. C. L. 1330.]

**Vendor and purchaser — bona fide purchaser — who is.**

4. One who has sufficient notice of an outstanding contract by his vendor

to sell real estate which he intends to purchase, to put him on inquiry before he pays the purchase money, cannot claim the rights of a bona fide purchaser.

**— contract of sale — prejudice of vendee's rights.**

5. One having an option to purchase real estate and contracting to sell it to a third person cannot prejudice the rights of the vendee by taking the deed to himself and wife.

**Husband and wife — duty of wife to release dower.**

6. A wife cannot be compelled to release her dower in land which her husband has contracted to sell.

[See 9 R. C. L. 585 et seq.]

**Party — specific performance — wife.**

7. A woman with notice of a contract by her husband to sell real estate at the time a deed was executed to him and her under an option contract is a proper party to a suit to compel specific performance of the contract. [See 20 R. C. L. 679.]

**Specific performance — discretion of court.**

8. Application for specific performance of a contract to convey real estate is addressed to the sound discretion of the court.

**— denial — change of contract.**

9. Specific performance against the husband alone will not be decreed where, having an option to purchase real estate, he contracted to sell it to a third person and then took title under his option to himself and wife, since it would change the contract between the parties and compel the vendee to accept an imperfect title which he had not in mind when he agreed to purchase.

APPEAL by defendant, cross complainant, from a decree of the Circuit Court for Wayne County in Chancery in favor of complainant in a suit to quiet title to certain real property. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Fred W. Smith and Benjamin & Betzoldt for appellant.

Messrs. Louis Smilansky and Harold H. Smilansky for defendants Pierson.

Stone, J., delivered the opinion of the court:

The facts in this case are somewhat involved. On January 16, 1913, the title to the premises (consisting of two and one half lots in Hunt & Leggett's subdivision of certain lands in the city of Detroit) was in John W. Leggett. Mr. Leggett had previously given Justice R. Pierson an option to purchase said premises, which option would expire some time in March, 1913. While this option was in force, and on January 16, 1913, the agreement (Exhibit 2) was made by Justice R. Pierson with Jacob Shewitz, as follows:

Memorandum of agreement, made and entered into this 16th day of January, 1913, by and between Justice R. Pierson and Bessie L. Pierson, his wife, parties of the first part, and Jacob Shewitz, party of the second part, all of the city of Detroit, county of Wayne, and state of Michigan.

Said parties of the first part agree to sell and said party of the second part agrees to buy the property situated and being in the city of Detroit, county of Wayne, and state of Michigan, to wit: Lots two hundred forty-seven (247), two hundred for-

ty-eight (248), and the east twenty (20) feet of lot two hundred forty-six (246), Hunt & Leggett's subdivision of the south half of the south half of quarter section twenty-four (24), 10,000-acre tract, Hamtramck, being on the northwest corner of Harmon and Oakland avenues, as recorded in liber ten (10), page 40 of Plats.

The purchase price to be three thousand and fifty (\$3,050) dollars, payable as follows: One hundred dollars (\$100) upon the date hereof, the receipt of which is hereby confessed and acknowledged by the parties of the first part; four hundred (\$400) dollars upon the examination of a Burton abstract of title, brought down to date, showing good and merchantable title in said vendors, and upon the execution of a Union Trust form land contract, the balance of two thousand five hundred and fifty (\$2,550) dollars in semiannual payments of one hundred (\$100) dollars or more each, and interest at the rate of six (6%) per cent per annum, payable semi-annually, the full purchase price to be due and payable on or before three (3) years from the date of said land contract.

Said parties of the first part hereby sell the above-described property free and clear of all and any restrictions, and further agree to obtain a quitclaim deed from John W. Leg-

gett and Grace F. Leggett, his wife, releasing the property from the following restrictions, to wit:

"That no saloon or store shall be erected on said premises or that no dwelling house of the value of less than \$1,500 or less shall be erected 15 feet from the street line upon said premises within ninety-nine years from the date of a certain warranty deed given by the said Leggetts to Charles H. Green and William W. Snyder, to wit, September 21, 1895."

Said party of the second part agrees to pay parts two, three, and four of the Harmon avenue paving tax, due in the amount not exceeding two hundred and fifty (\$250) dollars.

Said parties of the first part are hereby given the privilege of mortgaging the above-described premises in any amount not exceeding fifteen hundred (\$1,500) dollars. Deal is to be completed and consummated within thirty (30) days from date thereof. Possession to be given immediately upon said consummation.

In witness whereof, the parties hereto have hereunto set their hands and seals at the city of Detroit this day and year first above written.

Justice R. Pierson. [L. S.]

Jacob Shewitz. [L. S.]

About March 1, 1913, Pierson exercised his option with Mr. Leggett, paid the amount named in the option, and took a warranty deed of the premises to himself and wife. On the same day Pierson and wife sold and joined in a deed conveying the property to Harry R. Solomon for \$3,375; the latter assuming a \$1,500 mortgage which Pierson had given to the bank. The contract between Pierson and Shewitz was placed on record in the office of register of deeds, after the deed from Leggett to Pierson and wife was recorded, but before the deed from Pierson to Solomon was recorded.

On April 24, 1913, Solomon filed a bill of complaint in the Wayne circuit court, in chancery, against defendant Shewitz, claiming to be a

bona fide purchaser for value by deed from said Pierson and wife of said premises, and that said agreement above set forth was of no force, and to have the said agreement between Pierson and Shewitz declared to be a cloud upon his title, and to have the same declared null and void, and discharged of record.

The defendant Shewitz filed a petition to the end that Justice R. Pierson and Bessie L. Pierson be made parties cross defendants in said cause, and that process issue to bring them in. The petition was granted, and said parties were brought in. Thereupon said defendant Shewitz answered the bill of complaint, among other things, denying that complainant Solomon was a bona fide purchaser for value of said premises, and claiming the benefit of a cross bill against said Solomon and Justice R. Pierson and Bessie L. Pierson. He set up his said agreement with said Pierson, stated that he had paid the \$100 therein specified; that early in February, 1913, he informed said Justice R. Pierson that he was ready to carry out his part of the agreement, and instructed his attorney to prepare the necessary land contract and have the same in readiness for its execution, and arranged with said Pierson to close the transaction at a time and place named; that said Pierson appeared, and said defendant and cross complainant made a tender to said Pierson of the \$400 provided for in the said agreement, but that said Pierson refused to sign said contract, claiming that he desired a short delay to perfect a mortgage before closing said deal, unless cross complainant desired to pay the entire purchase price in cash; that cross complainant consented to a delay of a couple of weeks in order that said mortgage might be perfected, but since that time, although frequently requested, said Pierson had at all times refused to carry out his part of said agreement; that on March 3, 1913, cross complainant, having heard that said Pierson was attempting to sell said property to

someone else, made an affidavit confirming the purchase aforesaid, and attached the same to the original agreement, and had the same recorded on the 4th day of March, 1913, at 9:30 A. M. in the office of the register of deeds of said county; that at that time there was no change in the record title which might have affected his interest; that he was informed and believed that said Solomon had knowledge of the contract between cross complainant and said Pierson, when he purchased said premises, but that said Solomon claimed and considered cross complainant's interest in said property as an expired option, which was not the fact; that any interest which the said Solomon obtained by virtue of the deed mentioned in his bill of complaint was subject to the rights of this cross complainant, by virtue of said agreement; that the deed from said John W. Leggett and wife to said Pierson and wife was recorded March 4, 1913, at 9:45 A. M.; that said cross defendant Bessie L. Pierson had no interest in said property other than her dower interest. The cross complainant prayed that it might be decreed that the said deed from said Pierson and wife to said Solomon be held void and of no effect as to said cross complainant, and that said Solomon be decreed to quitclaim any interest he may have obtained to said property to said Pierson and wife, and, should said Solomon refuse so to do, that said decree might have the effect and force of a quitclaim deed; that it be decreed that said Pierson and wife specifically perform said agreement above set forth, and execute the proper conveyance to said cross complainant, upon the payment of the balance in full of the purchase price of said property in accordance with the terms and conditions of said agreement; and that it may be decreed that said Pierson and wife deliver to cross complainant a Burton abstract of title, brought down to date, showing a good and merchantable title in themselves, free and clear of all liens and encum-

brances, and that, in default thereof, cross complainant be allowed a sufficient amount to have such abstract made. There was also a prayer for general relief.

The said complainant Solomon, as cross defendant, and the said Justice R. Pierson and Bessie L. Pierson, cross defendants, answered said cross bill reiterating the allegations of the bill of complaint, and denying that said cross complainant had any interest in said property, and denying most of the allegations of the cross bill. The answers admit, however, that defendant Bessie L. Pierson, at the time of answering, had no interest in said property, but claim that on January 26, 1913, she and her said husband became owners in the entirety of said property.

The case, being at issue as to all of the parties, was heard upon testimony taken in open court. Complainant Solomon, among other things, testified as follows on his direct examination: "I learned of the existence of an alleged claim of the defendant on this property the day I made the first payment of \$200, on the 27th day of February. Mr. Pierson, from whom I purchased the property, told me he had given a sort of option to the defendant, whom I had never seen and did not know, but that the option had expired; that he had asked the defendant to live up to this particular option, but he refused to do so, and he was at liberty to dispose of it.

Mr. Pierson explained it to me very thoroughly. I bought the property and accepted the deed in good faith, and paid my money for it. . . . I left the deed with the bank on Saturday, the 1st day of March, the day that the mortgage was put on there by Mr. Pierson in the bank, and Mr. Borgman suggested that I leave the deed with him so that he would put the mortgage on record before the deed went on record. I know from examination of the record that Mr. Pierson came into possession of the title the day he transferred it to me."

On cross-examination complain-

ant Solomon testified, in part, as follows:

About the same time I paid the \$200 I heard about the contract between Pierson and Shewitz. I had not departed from the place; it was right there at the time of the transaction. Mr. Pierson brought it up. I do not remember, before or after the paper was signed, but it did not make any difference to me whether it was signed before or afterwards, or whether I had knowledge of the fact that there had been a paper existing before I signed the paper, but relied upon Mr. Pierson's explanation. He stated to me that some man by the name of Shewitz had been given an option on this property, and that the option had expired a week or ten days before, and that Shewitz did not live up to his part of the agreement. . . . I don't know what Shewitz had agreed to pay for the place, but Mr. Pierson had told me approximately the same amount I was to pay. I never made any attempt to see the paper that was signed by Shewitz and Pierson, and I never made any attempt to find out who the man Shewitz was, as I did not think there was any occasion to, either before I paid the \$200 or afterwards. I did not care what sort of paper he had. I was willing to rely upon Mr. Pierson's word, irrespective of what papers were signed by the parties. I took Mr. Pierson's word for it. Mr. Pierson said it was an agreement, but that it had expired. The deal was closed the 1st day of March.

Q. Who paid for the expense of this litigation, you or Mr. Pierson?

A. Why, at the time Mr. Pierson tendered the \$100 back to Mr. Shewitz, he refused to take it, and Mr. Pierson wanted to return the money, and he refused to take it, and he said he would turn it over to his attorney. Mr. Pierson had given a warranty deed, and he stated he would be willing to clear up the matter.

Q. The suit was primarily in your name, but Mr. Pierson's proceeding?

3 A.L.R.—36.

The Court: That is the inference I will have to draw.

A. It was not part of my understanding and agreement with Mr. Pierson that I would buy the property with the understanding that Mr. Pierson would clear up the defect, as he claimed. I did not consider that there was any defect, and, as soon as I found out that the contract had been placed on record, I took it up with Mr. Pierson.

Justice R. Pierson was sworn as a witness for complainant. He testified that he did not own the property on January 16, 1913, but had an option on it from Mr. Leggett, the record owner. That witness subsequently acquired title jointly with his wife, and sold it to Mr. Solomon. On cross-examination he testified as follows: The option was given to me personally, but I did not take the deed in my own name because Mrs. Pierson was furnishing some money to finance it, and the deed was made jointly. It was just a question of turning the property from Leggett over to Solomon, and it would not have made any difference whether it was in my name alone, as I lost all interest in the property as soon as it was sold to Solomon. I did not have a land contract, though I told Mr. Shewitz I had a contract from Mr. Leggett, and that the deed would have to come from Mr. Leggett in the form of a quitclaim, for he would not make a warranty deed and release the restrictions that were on the property at that time.

The contract or agreement with Shewitz had expired before I had an opportunity to sell it for cash. My option was a ninety-day option for \$1,710, describing the property to be sold for cash, in which I had ninety days to accept, and which privilege I took advantage of. I did not take advantage of the option until Mr. Shewitz's option had expired, but I took advantage of it within the three months.

This witness further testified that, at the time he made the contract with Mr. Shewitz, the option

from Leggett was in his name; that, under the terms of the contract, he was to get a release of the restrictions, but he never made a tender of it to Mr. Shewitz, and never got it until after his (Shewitz's) option had expired; that he got the deed from Mr. Leggett, including the release, and did not make a tender to Mr. Shewitz after his option had expired; that he never submitted a contract and asked him for money; that witness asked Mr. Shewitz if he was ready to carry out the deal, and he said he was not; that witness never gave notice of forfeiture, except by oral statement that the time was up, and he would not go ahead with the deal. Witness denied that Mr. Shewitz told him that he (Shewitz) was ready to close the deal, and he denied that Shewitz ever made him any tender at all.

Jacob Shewitz testified that he saw Mr. Pierson five or six times during the deal, and that he (Shewitz) was always ready to consummate his part of the deal at any time when the restrictions were removed; that he made a tender of the \$400 to Mr. Pierson; but thought it was after the thirty days; that Pierson asked for an extension, and said he could not take that much money; that witness should try to raise more money. Shewitz was corroborated by another witness as to the tender of the \$400.

The trial court entered a decree in favor of complainant Solomon, holding that the agreement of January 16, 1913, was null and void and a cloud on the title of complainant, and that Shewitz delivered up the said instrument to be canceled, and that said Solomon was the owner of said land in fee simple by a title perfect as against said Shewitz, and costs were awarded to complainant. Shewitz has appealed.

We have read the entire record with much care, and are of opinion that the above-quoted instrument between Justice R. Pierson and Jacob Shewitz was not an option, as appears to have been

claimed by Pierson, but was an executory land contract, valid and of binding force as to the parties thereto. Pierson had the legal right to make such contract.

We do not think that time was of the essence of the contract, and we are of opinion that such contract was in force at the time of the purchase of said premises by complainant Solomon.

—right of holder.

Real property—contract to sell—time as essence.

By a preponderance of the evidence it appears that Shewitz had not forfeited his rights under such contract, but had made the tender claimed by him, and that complainant Solomon had notice of the existence of such contract at the time of his purchase, or at least sufficient notice to put him on inquiry as to Shewitz's rights, and that Solomon was not a bona fide purchaser of said premises for value before notice.

Vendor and purchaser—bona fide purchaser—who is.

Justice R. Pierson could not legally ignore his contract with Shewitz, and take a deed to himself and wife, to the prejudice of Shewitz.

—contract of sale—prejudice of vendee's rights.

He was precluded by his contract from so doing. In so far as he was concerned, the transaction should stand as though the deed had been made by Leggett to him. The right of Mrs. Pierson, then, would be an inchoate dower right in the land. She, never having joined in the contract with her husband to Shewitz, cannot be compelled to release her dower in the land. It is well settled in this

state that the wife cannot be compelled to release her dower in lands which her husband has contracted to sell, and she is not a proper party to a bill by the purchaser for specific performance. *Weed v. Terry*, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257; *Richmond v. Robinson*, 12 Mich. 193; *Buchoz v. Walker*, 19 Mich. 224; *Phillips v. Stauch*, 20 Mich. 369.

Husband and wife—duty of wife to release dower.

The evidence in the instant case

\* Option—contract—sale or option.

fails to show that Mrs. Pierson had any notice or knowledge of the contract with Shewitz,

Party—specific performance—wife.

when the deed was made by Leggett.

Had she had such notice or knowledge, she would have been a proper party. Daily v. Litchfield, 10 Mich. 29.

In Walker v. Kelly, 91 Mich. 212, 51 N. W. 934, specific performance, subject to the dower rights, was given, where the wife was not a party to the contract; the decree providing for compensation to complainant for present value of such contingent right of dower. However, it has frequently been held that the jurisdiction of a court of equity to decree the specific performance of contracts is not a matter of right in the parties to be demanded *ex debito justitiæ*, but applications invoking this power of

Specific performance—discretion of court.

the court are addressed to its sound

and reasonable discretion, and are granted or rejected according to the circumstances of each case. Specific performance is frequently refused, although the defense is not such as would warrant the rescission of the contract at the suit of the defendant. 36 Cyc. 548, and note; Rust v. Conrad, 47 Mich. 449-454, 41 Am. Rep. 720, 11 N. W. 265, and cases cited; Chicago, K. & S. R. Co. v. Lane, 150 Mich. 162, 113 N. W. 22.

We think there are cogent reasons why specific performance of the Shewitz contract against defendant Pierson alone, with an abatement for the present value of the wife's dower interest, should not be decreed. One reason is that it changes the contract between the

—denial—change of contract.

parties, and another is that it compels the vendee to accept an imperfect title, which he

had not in mind when he agreed to purchase. See cases cited in Kuratli v. Jackson, 60 Or. 203, 38 L.R.A. (N.S.) 1195, 118 Pac. 192, 1013, Ann. Cas. 1914A, 203.

We are of opinion that the circuit court erred in holding that the agreement of January 16, 1913, was null and void, and in ordering the same to be delivered up and canceled. We think, however, that Jacob Shewitz should be denied relief here, and should be relegated to a court of law for any relief in damages to which he may be entitled. His cross bill will be dismissed without prejudice to his right to sue at law for damages. The bill of complaint of Solomon will also be dismissed, and the decree below reversed, with costs to defendant Jacob Shewitz against Solomon. The defendant Bessie L. Pierson will recover her costs to be taxed against Shewitz.

Brooke, Ch. J., and McAlvay, Kuhn, Ostrander, Bird, Moore, and Steere, JJ., concur.

#### NOTE.

The question as to when an instrument for the purchase of land is to be regarded as a contract, and when as a mere option, is discussed in annotation, beginning at page 576, in which it is pointed out that while a contract in which the second party binds himself unconditionally to pay the purchase price is often (as in the reported case SOLOMON v. SHEWITZ, ante, 557), held to be a contract of purchase, such a contract may nevertheless be an option, if, by reason of further stipulations therein, the purchaser may withdraw without incurring any liability other than the forfeiture of his initial payment or deposit.



JAMES W. DAVIS and Wife

v.

J. E. ROSEBERRY et al., Appts.

*Kansas Supreme Court — May 8, 1915.*

(95 Kan. 411, 148 Pac. 629.)

**Broker — commission — procurement of customer.**

1. Plaintiffs employed defendants, who are real estate brokers, to find a purchaser for a farm. They procured a customer who entered into a written contract with plaintiffs by which plaintiffs agreed to sell and he agreed to purchase the farm for \$12,000, a warranty deed to be executed by plaintiffs and deposited in escrow and delivered to the purchaser on payment of the balance. When the contract was executed he paid \$500 on the purchase price, which was placed in the hands of the defendants as agents for the plaintiffs. There was a provision in the contract that if the purchaser failed to make the subsequent payment he should forfeit the \$500, which should be retained by the plaintiffs as liquidated damages, and the parties were to be relieved from the further performance of the contract. Held, the contract is not an option but an agreement for a sale and purchase of lands.

[See note on this question beginning on page 576.]

**— compromise of contract.**

2. Plaintiffs, having agreed to accept \$500 in lieu of performance, cannot, as against the defendants, deny that the payment of that sum was equivalent to performance.

[See 4 R. C. L. 303.]

**— amount of commission.**

3. The defendants were entitled to their commission on the \$12,000.

[See 4 R. C. L. 332.]

**— commission on option contract.**

4. A broker commissioned to sell real estate who secures an option contract with down payment, which is to be forfeited in case the purchase is not

consummated, is entitled to his commission on the amount of the down payment in case the option is permitted to lapse.

[See 4 R. C. L. 315.]

**— inability to pay — effect.**

5. The inability of a customer produced by a real estate broker with whom a contract to purchase was made to pay, and the rescission of the contract by mutual consent because of such inability, does not deprive the broker of his right to commission in the absence of any express agreement to that effect.

[See 4 R. C. L. 307.]

Headnotes 1-3 by PORTER, J.

(Mason, J., dissents.)

APPEAL by defendants from a judgment of the District Court for Cowley County in favor of plaintiffs in an action brought to recover the proceeds of a check collected by defendants, which plaintiffs alleged belonged to them. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Albert Faulconer for appellants.  
Messrs. William P. Hackney, J. T. Lafferty, and L. D. Moore for appellees.

Porter, J., delivered the opinion of the court:

This case presents a single ques-

tion of law which arises on the pleadings. The plaintiffs sued to recover \$500, the proceeds of a check collected by the defendants which the plaintiffs claim belong to them. The court sustained a motion for judgment on the pleadings and gave

judgment against the defendants for the amount sued for. The defendants appeal.

The plaintiffs owned a farm and listed it for sale with the defendants, who are real estate agents. The answer alleged that the defendants procured M. L. Harris as a purchaser and brought him to the plaintiffs; that Harris was then and there able, ready, and willing to purchase the farm at plaintiffs' price, and that on the 13th day of December, 1913, the plaintiffs entered into a written contract with him for the sale of the farm. A copy of the contract was attached to the answer. The first payment on the purchase was \$500, and this sum was paid to the defendants as agents of the plaintiffs. The defendants claim that they had earned their commission of \$325, and in their answer alleged that they had tendered the plaintiffs \$175, the balance above the commission. The case turns upon the question whether the contract entered into between the plaintiffs and Harris was a contract of sale or a mere option. The trial court held it to be an option, and that the defendants had not earned a commission on the purchase price.

The contract expressly states that the plaintiffs "agree to sell and do sell to party of the second part" the real estate (describing the same) for the sum of \$12,000. There was the usual provision for furnishing an abstract, and it was agreed that upon the execution of the contract Harris should pay \$500 of the purchase price, and that the contract, together with a warranty deed conveying the premises from the plaintiffs to him, should be deposited in escrow in a bank to be delivered to Harris upon his payment of the balance of the purchase price, \$11,500, which payment was to be made on or before the 15th day of April, 1914. The contract in express terms recited that in consideration of the covenants of the parties of the first part Harris agreed to purchase the real estate at the price mentioned. Possession was delivered to him "on

the 15th day of April, 1914, or as hereafter agreed upon." When the contract was executed Harris made the first payment of \$500 by check to the defendants as agents for plaintiffs. Afterwards he declined to complete the purchase and submitted to a forfeiture of the \$500. The decision of the question turns, however, upon the effect to be given to the following clause in the contract: "It is further agreed . . . that in the event party of the second part fails, neglects, and refuses to pay the balance of the purchase price, to wit, \$11,500 . . . on or before the 15th day of April, 1914, then and in that event the . . . bank is hereby authorized to return to the parties of the first part the deed deposited with it conveying said described premises to party of the second part, and the amount of \$500 paid . . . by party of the second part is hereby forfeited . . . as liquidated damages, said parties of the first part retaining said amount as herein provided, and the parties hereto relieved from the further performance of any of the covenants herein set forth, and this contract is to be held null and void and of no effect."

Plaintiffs rely very largely on the case of *Aigler v. Carpenter Place Land Co.* 51 Kan. 718, 33 Pac. 593. That case merely decides that where a broker, who agrees to produce a purchaser ready, able, and willing to take the land at the price named by the principal, produces a person who is unwilling to do that, but accepts a mere option to purchase, the broker is not entitled to his full commission. Of course, in a case of that kind he is entitled to the usual commission on the amount of the option forfeited. In the *Broker-commission on option contract.* *Aigler Case* the contract itself is not set forth, but the opinion states that it was treated "by the parties and the court below as only an option on the property," and that the person introduced as a purchaser "signed a written option contract to pur-

chase the real estate" (p. 719) for a stated price. The opinion, therefore, is an authority no further than to hold, what may be conceded to be the law everywhere, that in such a case the agent is not entitled to a full commission. Was the contract between the plaintiffs and Harris a mere option?

The distinction between a sale, an agreement to sell, and an option to purchase lands, is well defined in the opinion in *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695: "The first is the actual transfer of title from grantor to grantee, by appropriate instrument of conveyance. The second is a contract to be performed in the future, and, if fulfilled, results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur, by which the contemplated sale never takes place. The third, an option originally, is neither a sale nor an agreement to sell. It is simply a contract, by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land; he does not then agree to sell it; but he does then sell something, viz., the right or privilege to buy at the election, or option, of the other party." p. 11.

The contract in the present case is an agreement to sell as well as one to purchase. It recites that the owners of the land (the plaintiffs) agree to sell and do sell the real estate (describing the same) for the sum of \$12,000; that in consideration of the covenants made and entered into by the owners, Harris "agrees to purchase and does purchase . . . the real estate above described for the sum of \$12,000, to be paid as set forth, to wit, \$500 upon the execution of this contract," the balance to be paid to the bank for the benefit of the plaintiffs upon the delivery of the warranty deed, which was to be executed and deposited by the plaintiffs on the ex-

ecution of the contract. While the contract was not a sale, it was an agreement to sell and an agreement to purchase at a stated price. If it had been a mere option there would have been no occasion for the execution and deposit of the title deeds. The plaintiffs' construction of the contract, which the trial court appears to have adopted, would look alone to the subsequent clause, which we construe to be nothing more than a provision attempting to liquidate the damage in case of the failure of the purchaser to comply with the agreement and make the subsequent payment. The defendants procure a person who was willing to enter into an enforceable contract with the principal for the purchasing of the lands at the price and terms agreed

upon. The plaintiffs saw fit to provide in the contract that the payment of \$500 should be equivalent to the performance of the contract by <sup>—commission—  
procurement of  
customer.</sup>

Harris. They are certainly not in a position now to deny that the payment of that sum is, as between themselves and the defendants, equivalent to any advantage they may have gained by the full performance of the contract. Upon what theory can plaintiffs claim the right to recover any portion of the \$500 except for the services performed by the defendants in procuring Harris to enter into the contract in compliance of which he paid the money?

In *Green v. Fist*, 89 Kan. 536, 132 Pac. 179, the agent procured a person who entered into a contract with the principal to exchange properties, and a clause in the contract provided that in case of failure of either party to perform the contract he should forfeit to the other the property represented by the deed and bill of sale as damages. The trial court construed the contract as granting to each party a mere option to exchange, and instructed that plaintiff was not entitled to a commission. The judgment was re-

versed, and it was held that the mere fact that "by its terms the parties might be held to have attempted to liquidate the damages in case of a breach made it no less an enforceable contract." p. 537. It was further said in the opinion: "Whether the courts would declare the provision that in case of a breach of the contract the party in fault should forfeit all his property involved in the trade to the other, regardless of the actual damages sustained, was an agreement for liquidated damages or for a penalty, is not before us. All that we decide is that the contract was not an option, but an agreement for an exchange of properties, which was enforceable." p. 538.

In *Betz v. Williams & W. Land & Loan Co.* 46 Kan. 45, 26 Pac. 456, it was held that when the broker has procured a party with whom his principal is satisfied and who enters into a written contract to buy and is financially able to perform the contract, the commission has been earned, although the principal has the option under the contract to declare a forfeiture thereof if the instalments are not paid, and does declare the contract forfeited for such nonpayment; and the general rule which obtains everywhere is, that where the broker by his efforts has brought the parties together and procured a person ready, able, and willing to purchase, and their meeting results in the execution of an enforceable contract for the sale and purchase of the land, he has performed all he is called upon to do. It is no part of his duty to see that the terms of the contract are complied with (*Beougher v. Clark*, 81 Kan. 250, 27 L.R.A. (N.S.) 198, 106 Pac. 39), and the subsequent inability of the purchaser

to pay and the re-  
 —inability to pay scission of the con-  
 —effect. tract by mutual  
 consent because of such inability will not deprive the broker of his right to a commission in the absence of an express agreement to that effect (*Hutton v. Stewart*, 90 Kan.

602, 135 Pac. 681). In the case last cited the contract was held valid and binding because Stewart could have maintained an action thereon for specific performance or for damages. The same rule was applied where the principal kept the amount paid by the purchaser, and refused to sue for the balance under a binding contract. *Ward v. Cobb*, 148 Mass. 518, 12 Am. St. Rep. 587, 20 N. E. 174.

A quite similar situation arose in *Gilder v. Davis*, 137 N. Y. 504, 20 L.R.A. 398, 33 N. E. 599. In that case, too, the earnest money was paid to the broker, who insisted upon his right to retain a commission, and the action was brought by the owner of the land to recover the earnest money. The broker had negotiated the sale at the price named by the principal, \$125,000. The agreement provided that \$10,000 was to be paid to bind the transaction, and it was paid to the broker. The balance was to be paid within four months. There was a provision, however, that if the purchaser failed to make the \$115,000 payment within that time, the \$10,000 deposited should be forfeited, and no further liability of any kind should be incurred by the purchaser. By a subsequent arrangement between the principal and the broker the latter agreed that the commission on the sale should not be due until the final purchase money was paid. The purchaser did not take the property and forfeited the \$10,000. The plaintiff demanded the whole of that sum from the broker, who refused to pay more than \$9,500, claiming the balance as a commission on the \$10,000. The trial court held that the principal was entitled to recover the \$500, and directed a verdict. The court of appeals reversed the case, and held that the broker was entitled to the \$500 commission, and in the opinion used this language: "While it is not necessary to be determined upon this appeal, it is by no means clear that when the contract was closed between the plaintiff and [the

purchaser] the defendants were not entitled to their full commissions. They had then negotiated a contract of sale which was satisfactory to the plaintiff and which was approved and confirmed by him. If there had been no further agreement between the parties as to the commissions, it might be claimed, at least with some plausibility, by the defendants, that they were entitled to their commissions, *as they would have been if they had negotiated a contract containing a stipulation for the payment of liquidated damages in case of failure of performance by either party.*" (Italics ours.) p. 509.

This case is cited by the defendants in their brief, but it does not decide the precise question, because it was not involved.

In *Leete v. Norton*, 43 Conn. 219, the broker procured a purchaser who entered into a contract which provided for a sum of money as liquidated damages in case the purchaser failed to take the property. It was held by the Connecticut court that the principal could not be allowed to deny that this money was an equivalent, as between himself and the broker, to the purchase money, and thus avoid payment of commissions, because the broker had rendered services for him which he agreed were an equivalent to procuring an exchange of the property.

We think the doctrine of the case just cited applies to the situation here, and that plaintiffs cannot be permitted, as against their agents, to deny that they were satisfied to accept the stipulated sum as equivalent to the performance of the contract. They are entitled, of course, to the balance of the deposit less the commission of \$325, and the defendants upon the pleadings are entitled to judgment for costs.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

Mason, J., dissenting:

The writing signed by the parties appears to me to be, on the part of

Harris, a mere option rather than an enforceable contract to buy. Its character should be determined by its legal effect rather than by what the parties chose to call it. Essentially it amounts to this: Harris pays \$500, in return for which he obtains the right to take the property on the terms stated, with the unrestricted privilege of refusing to do so if he shall so elect. If the money paid is regarded as liquidated damages in the event of his refusal or inability to carry out the deal, that does not affect the question. An agreement as to the amount of damages to be recoverable in such case would not prevent the specific enforcement of the contract. "The fact that by its terms the parties might be held to have attempted to liquidate the damages in case of a breach made it no less an enforceable contract." *Green v. Fist*, 89 Kan. 536, 537, 132 Pac. 179. The writing here involved, if enforceable at all, would support an action by the vendor for specific performance (36 Cyc. 565); but such proceeding is prevented by its concluding provision that if Harris refused to pay the stipulated price at a fixed time the parties were relieved from further performance of its covenants, and it was to be held null and void.

#### NOTE.

The question as to when an instrument for the purchase of land is to be considered as a contract of sale, and when as a mere option, is discussed in annotation beginning on page 576, in which it is pointed out that while an instrument in the form of a contract of purchase may nevertheless be an option, if by its terms the purchaser may withdraw without incurring any liability other than the forfeiture of his initial payment or deposit, such a provision will not make the contract a mere option to purchase where (as in the reported case, *DAVIS v. ROSEBERRY*, ante, 564), such provision is construed as making it optional with the vendor whether he will accept the stipulated damages or insist upon performance of the contract.

F. W. RAMPTON, Appt.,  
v.  
G. L. DOBSON, County Treasurer.

*Iowa Supreme Court—June 8, 1912.*

(156 Iowa, 315, 136 N. W. 682.)

**Tax — land contract — enforcement or penalty — option.**

A contract to purchase land for a certain price with a down payment and balance to be paid at specified times when the deed shall be executed, with a right to forfeit the contract for default in payments and retain the amounts paid, is taxable as a credit, although the seller has an option to enforce the contract or rely upon his penalty for noncompliance, since that does not create an option on the part of the purchaser, which would not be taxable.

[See note on this question beginning on page 576.]

(Evans, J., dissents.)

APPEAL by plaintiff from a judgment of the District Court for Polk County confirming a tax assessment. *Affirmed.*

Statement by Deemer, J.:

This is an appeal from an assessment of omitted moneys and credits. Plaintiff was assessed by the treasurer of Polk county with omitted credits to the amount of about \$15,000, and from such assessment appealed to the district court. Upon trial in that court the assessment was confirmed, and plaintiff appeals.

Messrs. W. L. Smith and E. P. Hudson, for appellant:

A contract granting an option to purchase land in the future on specified terms is not taxable against the grantor as a credit.

Re Shields Bros. 134 Iowa, 559, 10 L.R.A.(N.S.) 1061, 111 N. W. 963; Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469; Warvelle, Vend. § 125; Sheehy v. Scott, 128 Iowa, 551, 4 L.R.A.(N.S.) 365, 104 N. W. 1139; Schoonover v. Petcina, 126 Iowa, 261, 100 N. W. 490.

Messrs. Hewitt, Miller, & Wallingford for appellee.

Deemer, J., delivered the opinion of the court:

The land contract upon which the assessment was based was entered into between Rampton, party of the first part, and Milne & Milne, party

of the second part, on October 29, 1907. It is an ordinary contract for the sale of certain lands in Benton county, Iowa, for the agreed consideration of \$34,560; the agreement of the first parties being to sell to the parties of the second part, on performance of the agreements of said second parties, by good and sufficient warranty deed, the premises described. The agreement of the second parties was as follows: "And the said party of the second part, in consideration of the premises, hereby agrees to and with the party of the first part to purchase all his right, title, and interest in and to the real estate above described for the sum of \$34,560, and to pay said sum therefor to the party of the first part, his heirs, or assigns, as follows: Nine hundred 00-100 dollars on the execution of this agreement, and the party of the first part hereby acknowledges receipt of the same. Thirty-three thousand six hundred sixty dollars in two payments, to wit: First payment, 1st day of March, 1908, \$28,660 cash, and by assuming a mortgage of \$5,000 now against the

premises, with interest thereon from March 1, 1908, all subject to a lease between first party and Powell Brothers, expiring March 1, 1909, which is to assign to second parties on March 1, 1908, with rent notes for the year 1908. Second party will insure the buildings on the premises, and if buildings should be damaged or destroyed by fire prior to March 1, 1908, second party shall be entitled to insurance collected, and shall accept same in full of damages done to premises. With interest from this date at the rate of — per cent per annum on all sums as shall remain unpaid, until all is paid, payable at Dysart Savings Bank, Dysart, Iowa."

And the agreement further provides: "And it is expressly agreed by and between the parties hereto that the time and times of payment of said sums of money, interest, and taxes as aforesaid is the essence and important part of the contract, and that if any default is made in any of the payments or agreements above mentioned to be performed by the party of the second part in consideration of the damage, injury, and expense thereby resulting, or that may be incurred by or to the party of the first part hereby, this agreement shall be void and of no effect, and the party of the second part shall have no claim in law or equity against the party of the first part, nor to the above-mentioned real estate, nor any part thereof; and any claim, or interest or right the party of the second part may have hereunder up to that time by reason hereof, or if any payments and improvements made hereunder, shall, on all such default, cease and determine, and become forfeited, without any declaration of forfeiture, re-entry, or any act of the party of the first part. And if the party of the second part, or any other person or persons, shall be in possession of said real estate, or any part thereof, he or they will peaceably remove therefrom, or, in default thereof, he or they may be treated as tenants holding over un-

lawfully after the expiration of a lease, and may be ousted and removed as such. But if such sums of money, interest, and taxes are paid as aforesaid, promptly at the times aforesaid, the party of the first part will, on receiving said money and interest, execute and deliver, at his own cost and expense, a warranty deed of said premises as above agreed. Possession reserved until March 1, 1909."

On the face of it, this contract was taxable as moneys and credits under a long line of authorities. See *Talley v. Brown*, 146 Iowa, 360, 140 Am. St. Rep. 282, 125 N. W. 248, and cases cited. But, to avoid its listing for taxation, *Rampton* and one of the *Milnes* took the stand and gave testimony which, it is claimed, shows that the contract was not taxable because it was a mere option. That we may have the testimony before us, we here quote:

*Rampton* testified, in substance:

Made a contract with Mr. Milne to sell the farm the 1st of March. Nine hundred dollars was paid.

Q. In case of nonpayment of the purchase price the 1st of March, what, if anything, was to happen?

A. I was to still hold the farm.

Q. This money that was to be paid, what was to be done with that?

A. It was to be forfeited. . . .

At the time of signing the contract to sell the farm to G. H. Milne and J. S. Milne, \$900 was paid. The balance was paid according to the terms of the contract, shortly after March 1, 1908, and deed was executed to these parties in March, 1908. . . . I paid the taxes on the farm for 1906 and 1907. Mr. Milne paid the taxes for 1908, which became due January 1, 1909. He took possession of the farm in March, 1908, after the deal was closed up. . . . The place had been insured, and just run out, and I told him it would not pay me to get it insured. I was responsible for the building up to the 1st of March, because I owned the

Tax—land  
contract—  
enforcement  
or penalty—  
option.

farm up to the 1st of March. I supposed if the buildings burned he would not want to take the farm without me losing the buildings. I supposed he expected to take it.

Q. Do you wish the court to understand that Milne and his brother and yourself entered into a contract in good faith, which provided in substance that you were to receive from Milne the sum of \$900 that you were to keep, that you were to give them any and all right that you might have in the proceeds of the insurance policy on the premises if the improvements would burn prior to the 1st day of March, 1908, and after the signing of the contract, and that you at the same time would have no right under the contract to compel Mr. Milne or his brother to carry out the provisions of them if they didn't want to?

A. Provisions of taking the place?

Q. Yes.

A. No, I could not compel them to take the place.

Q. That is what you wish the court to understand?

A. Yes, sir.

Q. You were to keep the \$900 in that event, and not give them any part of it?

A. That, according to contract.

Q. They were willing to give you \$900 simply for the right to buy on March 1, 1908?

A. Yes, sir.

Q. Without any rebate if they decided not to buy?

A. Yes, sir. I came right home and never saw the Milnes until I went back the 1st of March. . . . Received the purchase price on the farm on the 1st of March or thereabout, A. D. 1908.

Milne gave this testimony:

My brother and I bought Mr. Rampton's farm October 29, 1907, made the first arrangements for the purchase at Dysart. Found Mr. Rampton at his sister's at Dysart, talked the matter over there, and went uptown and drew up the contract. Henry Mohler, cashier of

the Savings Bank, drew up the contract. . . .

Q. What was said or what was your understanding, in regard to this \$900 that was paid, in case you failed to make further payments the 1st of March?

A. The way I took it, we was to lose it if we didn't make the terms.

Q. You was to lose it?

A. That is the way I had it figured out.

Q. And if you made the payment according to the terms, that was to apply on the purchase price of the farm?

A. Yes, sir. We got possession of the farm March 3, 1908, when we got the deed. We paid the money and got the deed March 3, 1908. Rampton paid the taxes due the 1st of January, A. D. 1908. The place was rented for a year, and we got possession subject to the one-year lease. . . . We talked over the terms first at the house, and then with Henry Mohler when he drew the contract. Nine hundred dollars was paid cash; the balance, the following March. Did not have the money on hand to pay for the farm. We borrowed a good part of it. We made arrangements to borrow the money to pay for the farm along in February. Did not make any arrangement in October, November, or December. Did not ask anybody to loan us the money at that time.

Q. When you signed this contract, you agreed to it, didn't you, to buy the farm?

A. In one way we did; if we could not meet it, we had a right to forfeit that.

Q. I am asking if, in the contract, you did not agree to buy the farm, and didn't Mr. Rampton agree to sell the farm to you?

A. Yes, he did; but at the same time we had a right to forfeit.

Q. I am asking if you did not agree to buy it by signing the contract. When you signed that contract, and your brother signed it, when you paid the \$900, it was your intention to carry it out, wasn't it?

A. Yes, it was our intention.



Q. You had no other intention?

A. That was our intention. But at the same time, if we did not do it, we had a chance to forfeit the \$900 and let it go.

Q. What was said about forfeiting the \$900 if you did not?

A. If we didn't take the place, that was the last of it.

Q. Who said that?

A. I think the contract did.

Q. Who else said that? Did Rampton tell you before the contract was written that was to be the understanding?

A. It was the understanding between the three of us when he drew it up.

Q. How did you reach that understanding? What was said about it? That is what I want to know.

A. Because he wanted some kind of a bond he would get something out of it if we didn't take it.

Q. You had paid \$900, and he was to keep it if you didn't carry out the contract?

A. That is the way I understand it.

Q. But you intended at the same time always to carry out the contract?

A. Yes, intended to if we could.

Q. You know that if there had been a fire at any time after October 29, 1908, that you and your brother would have been entitled to the proceeds of the insurance policy, don't you?

A. If we took the place.

Q. You knew you would have been entitled to it?

A. If we had took the place we would have; if we didn't, I don't suppose we would.

Q. Didn't you understand this part in case insurance money was paid by reason of a fire having occurred, in case it was paid to you at any time ahead of March 1, 1908, and you didn't take the farm, that you would pay all of the insurance money to Rampton, and he would keep your \$900, and you would be out the insurance money and be out the \$900, was that your understanding?

A. That was the way I understood it, yes.

Q. Did you have the money on hand with which to pay for the farm when the contract was signed?

A. Had to borrow a large part of it in the spring. We figured on selling another place we had in Tama county, and didn't get that sold. In case we could not have borrowed or sold, we would have had to forfeit the \$900. There would have been no other way out of it.

This is the entire record, and it will be noticed that there is no testimony of any mistake in the drafting of the contract. The parties say it is just as they intended it to be, and about all they attempt to do in their testimony is to put a legal interpretation upon it. They say that if the Milnes did not make the final payment the \$900 was to be forfeited; but if they did it was to be part of the purchase price. They do not say, nor could they, that this was a mere option secured by the Milnes. As a legal conclusion, they say that Rampton could not have enforced anything but a forfeiture; but this legal conclusion is not binding upon us. There was a binding contract of sale, which Rampton might have enforced at any time by suit, or, at his election, if the Milnes did not make the deferred payment, he could retain the \$900 and still keep his land. An option of the seller to enforce his contract or to rely upon a penalty for noncompliance is something quite different from an option on the part of the buyer. In the one case there is a sale or valid agreement to sell, and in the other a mere option on the part of the buyer to buy or to enter into a contract of purchase. An "option" is not an actual or existing contract, but merely a right reserved in subsisting agreement. It is a continuing offer of a contract, and if the offeree decides to exercise his right to demand the conveyance or other act contemplated, he must signify that fact to the offerer. *Rivers v. Oak Lawn Sugar Co.* 52 La. Ann. 762, 27 So. 118;

Sizer v. Clark, 116 Wis. 534, 93 N. W. 539. An option is not a sale. It is not even an agreement for a sale. At best, it is but a right of election in the party securing the same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell. Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469. "An option is nothing more than a continuing offer to sell; but until it is accepted it does not become a contract of sale, for it lacks the element of an agreement between the minds of the parties. It is only when there has been an acceptance of a proposal to sell that the vendee becomes in any sense the equitable owner of the subject-matter of the option." Milwaukee Mechanics' Ins. Co. v. Shea, 60 C. C. A. 103, 123 Fed. 9, 11. "There is a decided distinction between an 'option' to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, where one of the parties agrees to sell and the other to buy certain property; the sale to be completed within an agreed time. In the latter case the mere lapse of time with a contract unperformed does not entitle either party to refuse to complete it, and therefore time is not of the essence of the contract; but where the contract is merely an option generally, without consideration, and especially as applied to mining property, of course . . . time is of its essence." Clark v. American Developing & Min. Co. 28 Mont. 468, 72 Pac. 978, 981, citing Snyder, Mines, § 1378.

The cases differ from *Re Shields*, 134 Iowa, 559, 10 L.R.A.(N.S.) 1061, 111 N. W. 963, in that the parties to the contract both testified in that case that all they intended, understood, or agreed upon was an option, and that they so informed the scrivener, and supposed he had so written the contract. Upon their testimony, a court of equity would have reformed their contract. Not so here. No court would have been justified, on the testimony adduced,

in reforming the contract between Rampton and the Milnes. In so far as shown, it was written just as the parties intended, and all they ask the court to do is to put such a legal interpretation upon the contract as they think it will bear. The *Shields Case* does not hold that the contract is a mere option, but proceeds wholly upon the thought that, under the testimony, the parties intended to create a mere option, and that by mistake of the scrivener it was not so worded. The testimony in such a case should be clear, satisfactory, and conclusive, and of such import as to justify a reformation. That does not appear here. That the vendor might enforce the contract, notwithstanding the provision for forfeiture, is well established by the authorities. See *Wilcoxson v. Stitt*, 65 Cal. 596, 52 Am. Rep. 310, 4 Pac. 629; *Higbie v. Farr*, 28 Minn. 439, 10 N. W. 592; *Rourke v. McLaughlin*, 38 Cal. 196; *Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330; *Moore v. Smith*, 24 Ill. 512.

The trial court correctly sustained the assessment.

The judgment should therefore be affirmed.

Evans, J., dissenting:

I. I am of the opinion that the majority holding is in conflict with the former holding of the court in the case, *Re Shields Bros.* 134 Iowa, 559, 10 L.R.A.(N.S.) 1061, 111 N. W. 963. An examination of the opinion in the *Shields Brothers Case* will not, in my opinion, justify the distinction which purports to be made in the majority opinion.

It so happens that in the written contract in the case before us the same blank printed form was used as was used in the *Shields Brothers Case*, so that the two written contracts are identical in their general nature and in the form of their undertakings. Both parties to the contract involved in the present case testified as witnesses as to the real understanding between the parties to the contract. It is said in the majority opinion that this testimony is a mere interpretation of the

written contract by the parties. If this be so, it is precisely what was contended for by the appellants in the Shields Brothers Case, as will appear from the following statement of the issue as made in the opinion in such case: "Shields Brothers appeared before the treasurer pursuant to notice, and, in writing, objected to an assessment on the grounds: First, that the contract between the parties, as evidenced by the writing and by the facts and circumstances attending the making thereof, was not intended or understood to be a contract of sale, or one creating an absolute indebtedness; that, on the contrary, it was mere option, giving Flynn the right to purchase in the future on the terms and conditions specified, and that it was so intended and understood by the parties thereto. Second, that an assessment based on said contract as an item of credit would result in double taxation. And it was upon the issues as thus outlined that the case was tried below and is now presented in this court." At page 561 of 134 Iowa.

It will be seen from the foregoing that the appellants in that case based their appeal upon the contract between the parties, "as evidenced by the writing" and by the "facts and circumstances attending the making thereof." There was no claim made of a mistake in the writing. The parties to the contract were agreed in their construction of it, and acted upon such construction. And all this must be said also in the case at bar. The following comprises all the rest of the discussion and holding of this court in the Shields Brothers Case: "The hearing was had in the district court as in equity, and on such hearing the appellants brought into the record proof of the circumstances attending the making of the contract. Each of the respective parties to such contract was called to the stand, and, over objections as to competency, etc., testified that it was their understanding that mere op-

tion to purchase was all that was in contemplation and being granted; that they informed the scrivener that such was their contract and supposed he had so written. A contract rests in the intention of the parties thereto. It is true by general rule that, where the contract has been committed to writing, the nature and extent of the undertakings must be ascertained by an inspection of such writing. Oral evidence is not allowable to work a change or variance in the terms, conditions, etc., as fairly expressed by the writing. But this rule is enforced only where a controversy arises between the parties to the contract or their privies. As against a stranger to the contract, a party thereto may assert that the agreement was other or different, in any respect and to any extent, than that which the writing imports. *Livingstone v. Stevens*, 122 Iowa, 63, 94 N. W. 925; *Logan v. Miller*, 106 Iowa, 511, 76 N. W. 1005; *Roberts v. First Nat. Bank*, 8 N. D. 474, 79 N. W. 997; 11 Am. & Eng. Enc. Law, 548, note; Page, Contr. §§ 1196 et seq. Now, it may be doubted if the writing here in question imports a sale. In terms the agreement is for a sale, not an agreement of sale. There was to be no change in possession in virtue of the contract, and the appellants were to pay the taxes on the lands for the current year. Moreover, if Flynn failed to present himself on March 1st, following, and make payment, etc., the money paid as of the date of the contract was to be regarded as forfeited, and all his rights should at once, and without action on the part of appellants, cease and determine. But however this may be, we must treat the contract as one granting only the right to exercise an option. The parties to it so intended and understood; and, as we have seen, all other parties are concluded from asserting that it was other or different. And as against a stranger, it is not necessary that the writing be reformed, in an action brought for that pur-

pose, before the real contract can be asserted and made the basis of a recovery or defense. Logan v. Miller, *supra*. Now, an option is not a contract to pay. It creates no enforceable indebtedness on the part of the person to whom it is granted. Hopwood v. McCausland, 120 Iowa, 218, 94 N. W. 469; Warvelle, Vend. § 125. And, this being true, there cannot arise out of such a contract a taxable credit within the meaning of the Tax Laws of the state." At pages 561, 562, and 563 of 134 Iowa.

It will be noted from the foregoing that grave doubts were expressed by this court as to whether the form of written contract adopted amounted to anything more than an option. This only emphasizes the reasonableness of the attitude of the parties herein in putting an agreed construction upon the contract. There is no claim of fraud or collusion. The evidence on behalf of the appellee is undisputed and unimpeached, either in its facts or its motive. The conduct of the parties with reference to the contract after it was entered into was consistent with their present claim, and that, too, in a very substantial and significant sense. The contract in question was entered into in October. Under the statute, the taxes for the ensuing year became a lien upon the property on the last day of December. The appellant, as owner of the land, paid these taxes, for which he was in no manner liable if the October contract amounted to a sale.

II. I disagree, also, with some emphasis, with the last paragraph of the majority opinion. It is there held that the testimony in such a case as this "should be clear, satisfactory, and conclusive, and of such import as to justify a reformation." Such is the kind of testimony which must be produced in order to justify a reformation as *between the parties to the contract*. If the same rule is to be applied as

between a party to the contract and a third party, then the distinction pointed out in the Shields Brothers Case is wholly ignored. It is there held especially that the existence of a written contract between two parties does not preclude oral evidence to contradict it, as between one of the parties and a third party. Such oral evidence is admissible for the all-sufficient reason that the parties to the suit are not the parties or privies to the contract. It is not essential, in such a case, that it be shown that the written contract is reformable as between the parties thereto.

Of course, if any question of fraud or collusion were involved, or if the evidence were conflicting, the court, as a trier of fact, might properly give greater weight to the written contract and find the facts in accord therewith. But no question of that kind is involved here. The appellee introduced no evidence in the court below, and has submitted no argument here. I think, therefore, the case is ruled squarely by the former case.

I should have less objection to the majority opinion if the Shields Brothers Case were frankly overruled therein. As between the two, however, I think the Shields Brothers Case reached a more equitable result. The contrary holding is not wholesome in its practical operation. We can hardly fail to take judicial notice of the universal custom which obtains in the sale of farm lands, viz., that the contracts are always made with a view to consummation on the 1st of March following. December 31st usually intervenes between the date of contract and the date of consummation, and the practical effect of the present holding will usually result in double taxation.

For the reasons indicated, I respectfully dissent from the majority.

Petition for rehearing denied.

## ANNOTATION.

### Instrument for purchase of land as a contract or an option.

- I. In general, 576.
- II. Characteristics of options and contracts of purchase — judicial definitions, 580.

#### *I. In general.*

The question whether an instrument of an ambiguous character is a contract for the purchase of land, or only an option to purchase, is common to a considerable number of cases, involving ultimate questions of a diverse character. Although the necessity for deciding it most frequently arises in ascertaining the rights of the parties as between themselves, or as against persons claiming through either of them, it is also material in determining whether a broker employed to effect a sale has earned his commission, or whether there has been a breach of the condition in an insurance policy as to sole and unconditional ownership, or, as in *RAMPTON v. DOBSON* (reported herewith) ante, 569, whether a taxable interest is created thereby. It has been deemed, therefore, that a collocation of the cases involving this common question, rather than one considering it with reference to the ultimate questions involved, is likely to prove useful.

Although the distinguishing characteristics of contracts for the sale of land, and contracts creating merely an option to purchase, are well known (see *infra*), it is unfortunately true that in a great number of cases there are no earmarks by which the type of contract can be immediately recognized, and the presence of such characteristics cannot be definitely determined until the contract has received judicial construction.

It has been very truly remarked that whether an instrument in writing, transferring an interest in real estate, shall be construed as an absolute agreement, or only an agreement to convey or an option to purchase, depends not on any particular words or phrases, but on the intention of the

- III. Instances in which instrument has been held to be a contract of sale, 582.
- IV. Instances in which instrument has been held to be an option only, 593.

parties, to be derived from the instrument itself by a consideration of all its parts, and, when that is doubtful, from the circumstances attending it. *Barnes v. Rea* (1908) 219 Pa. 279, 68 Atl. 836; *McHenry v. Mitchell* (1908) 219 Pa. 297, 68 Atl. 729.

The truth of the statement above made that there are no earmarks by which the character of a contract may be immediately known, may be demonstrated by a comparison of the results reached in the decisions on the question.

Thus in some cases contracts have been held to be mere options on the ground that they did not bind the second party to purchase.

**Arkansas.**—See *Indiana & A. Lumber & Mfg. Co. v. Pharr* (1907) 82 Ark. 573, 102 S. W. 686.

**California.**—*Gordon v. Swan* (1872) 43 Cal. 564, 3 Mor. Min. Rep. 84; *White v. Bank of Hanford* (1906) 148 Cal. 552, 83 Pac. 698.

**Colorado.**—*STELSON v. HAIGLER* (reported herewith) ante, 550.

**Georgia.**—*Black v. Maddox* (1898) 104 Ga. 157, 30 S. E. 728; *Hodnett v. Mann* (1912) 10 Ga. App. 666, 73 S. E. 1082.

**Iowa.**—*Schoonover v. Petcina* (1904) 126 Iowa, 261, 100 N. W. 490.

**Kentucky.**—*Noble v. Mann* (1907) 32 Ky. L. Rep. 30, 105 S. W. 152; *Fields v. Vizard Invest. Co.* (1916) 168 Ky. 744, 182 S. W. 934, Ann. Cas. 1918D, 336.

**Louisiana.**—*Union Sawmill Co. v. Lake Lumber Co.* (1907) 120 La. 106, 44 So. 1000.

**Maine.**—*HANSCOM v. BLANCHARD* (reported herewith) ante, 545.

**Maryland.**—*Grabenhorst v. Nicodemus* (1875) 42 Md. 236.

**Minnesota.**—*Womack v. Coleman* (1904) 92 Minn. 328, 100 N. W. 9.

**Missouri.**—Dunaway v. Day (1901) 163 Mo. 415, 63 S. W. 781; Huggins v. Safford (1896) 67 Mo. App. 469.

**Nebraska.**—Darr v. Mummert (1899) 57 Neb. 378, 77 N. W. 767.

**North Carolina.**—Alston v. Connell (1906) 140 N. C. 485, 53 S. E. 292.

**Oregon.**—Friendly v. Elwert (1909) 57 Or. 599, 105 Pac. 404, 111 Pac. 690, 112 Pac. 1085, Ann. Cas. 1913A, 357; Scott v. Merrill (1915) 74 Or. 568, 146 Pac. 99.

**Pennsylvania.**—Berwind v. Williams (1895) 172 Pa. 1, 33 Atl. 353; Swank v. Fretts (1904) 209 Pa. 625, 59 Atl. 264.

**South Dakota.**—Gira v. Harris (1901) 14 S. D. 537, 86 N. W. 624.

**Texas.**—Runck v. Dimmick (1908) 51 Tex. Civ. App. 214, 111 S. W. 779.

**Washington.**—Title Guarantee & T. Co. v. McDonnell (1903) 32 Wash. 418, 73 Pac. 484.

**Wisconsin.**—Perrigo v. Milwaukee (1896) 92 Wis. 236, 65 N. W. 1025; Nelson v. Stephens (1900) 107 Wis. 136, 82 N. W. 163.

**Canada.**—Paterson v. Houghton (1909) 19 Manitoba L. R. 168.

In others, the fact that a contract does not formally bind such party to make payment has not been regarded as conclusive of its character.

**United States.**—See Gutierrez Del Arroyo v. Graham (1913) 227 U. S. 181, 57 L. ed. 472, 33 Sup. Ct. Rep. 248.

**California.**—Benson v. Shotwell (1890) 87 Cal. 49, 25 Pac. 249.

**Georgia.**—Ellis v. Bryant (1904) 120 Ga. 890, 48 S. E. 852.

**Idaho.**—Kessler v. Pruitt (1908) 14 Idaho, 175, 93 Pac. 965.

**Iowa.**—Cross v. Snakenberg (1905) 126 Iowa, 636, 102 N. W. 508.

**Kansas.**—Gilmore v. Gilmore (1899) 60 Kan. 606, 57 Pac. 505.

**Kentucky.**—Golden v. Cornett (1913) 154 Ky. 438, 157 S. W. 1076; Golden v. Lewis (1917) 176 Ky. 28, 195 S. W. 144.

**Louisiana.**—Whited & Wheless v. Calhoun (1908) 122 La. 100, 47 So. 415.

**Nebraska.**—Gibbons v. Sherwin (1889) 28 Neb. 146, 44 N. W. 99; Abel v. Gill (1914) 95 Neb. 279, 145 N. W. 637, 147 N. W. 686.

3 A.L.R.—37.

**New York.**—Simonson v. Kissick (1871) 4 Daly (N. Y.) 143.

**North Carolina.**—Davis v. Martin (1907) 146 N. C. 281, 59 S. E. 700.

**South Dakota.**—Sweet v. Purinton (1918) — S. D. —, 166 N. W. 161.

**Texas.**—Newton v. Dickson (1909) 53 Tex. Civ. App. 429, 116 S. W. 143; Slayden v. Palmo (1909) 53 Tex. Civ. App. 227, 117 S. W. 1054; Cheek v. Nicholson (1911) — Tex. Civ. App. —, 133 S. W. 707; Griffith v. Bradford (1911) — Tex. Civ. App. —, 138 S. W. 1072; Heath v. Huffhines (1912) — Tex. Civ. App. —, 152 S. W. 176.

**Utah.**—Roberts v. Braffett (1907) 33 Utah, 51, 92 Pac. 789.

**Washington.**—Langer v. Ross (1890) 1 Wash. 250, 24 Pac. 443; Anderson v. Wallace Lumber & Mfg. Co. (1902) 30 Wash. 147, 70 Pac. 247; Roberts v. White River Water & P. Co. (1902) 30 Wash. 430, 70 Pac. 1104; Wright v. Suydam (1913) 72 Wash. 587, 133 Pac. 239.

**West Virginia.**—Monogah Coal & Coke Co. v. Fleming (1896) 42 W. Va. 538, 26 S. E. 201.

And where the contract is held, as a matter of construction, to bind him to complete the purchase, it is more than an option. Thus, it has been held that a contract which does not in express terms bind the second party to buy the property, and to pay the consideration stated, may be considered as binding him to do so, where it is signed by him and stipulates that he shall have a reasonable time within which to have the title to the property examined by his attorney, and recites that as a consideration for the agreement to convey he has deposited in bank a considerable sum of money, to be returned to him if his attorney shall fail to approve the title (Griffith v. Bradford (1911) — Tex. Civ. App. —, 138 S. W. 1072); and that an agreement to purchase may be implied from the fact that the other party has subscribed his name to the instrument, where no other meaning can be attached to the fact of subscription. See Simonson v. Kissick (1871) 4 Daly (N. Y.) 143; Slayden v. Palmo (1909) 53 Tex. Civ. App. 227, 117 S. W. 1054. Again, a contract in which the sec-

ond party binds himself unconditionally to pay the purchase price is often, for that reason, held to be a contract to purchase.

**Arkansas.**—See *Vance v. Newman* (1904) 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574; *Bonanza Min. & Smelter Co. v. Ware* (1906) 78 Ark. 306, 95 S. W. 765.

**California.**—*Brickell v. Atlas Assur. Co.* (1909) 10 Cal. App. 17, 101 Pac. 60.

**District of Columbia.**—*Hazleton v. Le Duc* (1897) 10 App. D. C. 379.

**Georgia.**—*Clark v. Cagle* (1914) 141 Ga. 703, L.R.A.1915A, 317, 82 S. E. 21.

**Indiana.**—*Re Aurora Gaslight, Coke & Coal Co.* (1916) — Ind. App. —, 113 N. E. 1012.

**Iowa.**—*Cone v. Cone* (1902) 118 Iowa, 458, 92 N. W. 665.

**Kentucky.**—*Bowling v. Bowling* (1916) 172 Ky. 32, 188 S. W. 1010.

**Minnesota.**—*Libby v. Parry* (1906) 98 Minn. 366, 108 N. W. 299; *Chapman v. Propp* (1914) 125 Minn. 447, 147 N. W. 442.

**Michigan.**—*Hedrick v. Firke* (1912) 169 Mich. 549, 135 N. W. 319; *SOLOMON v. SHEWITZ* (reported herewith) ante, 557.

**North Carolina.**—*Sitterding v. Grizard* (1894) 114 N. C. 108, 19 S. E. 92.

**Oklahoma.**—*Thompson v. Wilkinson* (1915) 46 Okla. 115, 148 So. 117.

**Pennsylvania.**—*Hoon v. Miller* (1904) 33 Pa. Co. Ct. 17.

**South Dakota.**—*Heimberger v. Rudd* (1912) 30 S. D. 289, 138 N. W. 374.

**Texas.**—*Collier v. Robinson* (1910) 61 Tex. Civ. App. 164, 129 S. W. 389.

**Wisconsin.**—*Baraboo Land, Min. & Leasing Co. v. Winter* (1907) 130 Wis. 457, 110 N. W. 418.

This result has been reached even where the contract was styled by the parties themselves an "option." See *Williams v. Renza* (1910) 4 Alaska, 154; *Chenoweth v. Butterfield* (1908) 11 Ariz. 315, 94 Pac. 1181; but compare *Gard v. Thompson* (1912) 21 Idaho, 485, 123 Pac. 497, in which it is said that use of the word "option" in a contract excludes the idea of an absolute agreement to purchase.

But such a contract may nevertheless be an option if, by reason of further stipulations therein, the purchaser may withdraw without incurring any liability other than the forfeiture of his initial payment or deposit.

**Alabama.**—See *Lauderdale Power Co. v. Perry* (1918) — Ala. —, 80 So. 476.

**Arkansas.**—*Jones v. Lewis* (1908) 89 Ark. 368, 117 S. W. 561.

**California.**—*Pehl v. Tanton* (1911) 17 Cal. App. 247, 119 Pac. 400; *Beckwith-Anderson Land Co. v. Allison* (1915) 26 Cal. App. 473, 147 Pac. 482; *Compton Land Co. v. Vaughan* (1917) 33 Cal. App. 130, 164 Pac. 610.

**Colorado.**—*Hessell v. Neal* (1913) 25 Colo. App. 300, 137 Pac. 72.

**Idaho.**—*Martin v. Wilson* (1913) 24 Idaho, 353, 134 Pac. 532.

**Kentucky.**—*Litz v. Goosling* (1892) 93 Ky. 185, 21 L.R.A. 128, 19 S. W. 527.

**Missouri.**—*Ramsey v. West* (1888) 31 Mo. App. 676; *Wallace v. Figone* (1904) 107 Mo. App. 362, 81 S. W. 492.

**Pennsylvania.**—*Yerkes v. Richards* (1893) 153 Pa. 646, 34 Am. St. Rep. 721, 26 Atl. 221; *Verstein v. Yeane* (1904) 210 Pa. 109, 59 Atl. 689; *Barnes v. Rea* (1908) 219 Pa. 279, 68 Atl. 836; *McHenry v. Mitchell* (1908) 219 Pa. 297, 68 Atl. 729.

**South Dakota.**—*Hanschka v. Vodopich* (1906) 20 S. D. 551, 108 N. W. 28.

**Texas.**—*Slade v. Crum* (1917) — Tex. Civ. App. —, 193 S. W. 723.

**Washington.**—*Dwyer v. Raborn* (1893) 6 Wash. 213, 33 Pac. 350.

**West Virginia.**—*Pollock v. Brookover* (1906) 60 W. Va. 75, 6 L.R.A. (N.S.) 403, 53 S. E. 795.

Thus, in *Hanschka v. Vodopich* (1906) 20 S. D. 551, 108 N. W. 28, it is held that a provision in a contract that the party of the second part may elect not to make either or both of the deferred payments without incurring any liability for damages because of such election, but that the sole effect of such failure to comply with the agreement should be the termination of all his rights therein and forfeiture of all prior payments, shows the contract to be a mere option.

But a provision for the forfeiture of the initial payment, in event of non-compliance with the terms of sale, does not make the contract a mere option to purchase, where such provision is construed as making it optional with the vendor whether he will accept the stipulated damages or insist upon performance of the contract.

**United States.**—See *Mound Mines Co. v. Hawthorne* (1909) 97 C. C. A. 394, 173 Fed. 882.

**District of Columbia.**—*Hazleton v. Le Duc* (1897) 10 App. D. C. 379; *Griffith v. Stewart* (1908) 31 App. D. C. 29.

**Illinois.**—*Mason v. Caldwell* (1848) 10 Ill. 196, 48 Am. Dec. 330.

**Kansas.**—*Williams v. Osage County* (1911) 84 Kan. 508, 34 L.R.A. (N.S.) 1221, 114 Pac. 858; *Green v. Fist* (1913) 89 Kan. 536, 132 Pac. 179; *DAVIS v. ROSEBERRY* (reported herewith) ante, 564.

**Kentucky.**—*Allison v. Cocke* (1899) 106 Ky. 763, 51 S. W. 593.

**Michigan.**—*Hedrick v. Firke* (1912) 169 Mich. 549, 135 N. W. 319.

**Missouri.**—*Knisely v. Leathe* (1915) — Mo. —, 178 S. W. 453.

**Nebraska.**—*Gibbons v. Sherwin* (1889) 28 Neb. 146, 44 N. W. 99.

**Texas.**—*Hamburger v. Thomas* (1909) — Tex. Civ. App. —, 118 S. W. 770.

And it has even been held immaterial that the vendor has, by the terms of the contract, no recourse against the purchaser in event of his failure to complete the purchase, other than the retention of the amount paid, as liquidated damages. See *Moss v. Wren* (1908) 102 Tex. 567, 113 S. W. 739, 120 S. W. 847; *Wright v. Suydam* (1913) 72 Wash. 587, 131 Pac. 239.

A contract stipulating that the purchase money paid shall be forfeited in case of failure to pay the remainder of the price by a certain date is not a mere option to purchase, where it expressly provides that the obligation to purchase shall remain notwithstanding such failure. *Heman v. Wade* (1897) 140 Mo. 340, 41 S. W. 740.

A provision in articles for the sale of land, by which the vendee cove-

nants to pay, and the vendor covenants to convey on payment, that if the vendee shall fail in his covenant the contract shall be void, does not convert such contract into a mere option, the contract being void only at the election of the vendor. *Canfield v. Westcott* (1826) 5 Cow. (N. Y.) 270.

The fact that the down payment constitutes a substantial portion of the sum for which the owner agrees to sell, while not conclusive, goes to show that the parties had in contemplation something more than a mere option (see *Fulenwider v. Rowan* (1902) 136 Ala. 287, 34 So. 975); and while the fact that the payment made is on account and as part of the purchase price is expressive of an intention to make a contract for the sale of the property, and not merely a contract for a contract (see *Simonson v. Kissick* (1871) 4 Daly (N. Y.) 143; *Bennett v. Egan* (1893) 3 Misc. 421, 33 N. Y. Supp. 154; *Newell v. Lamping* (1907) 45 Wash. 304, 88 Pac. 195), the mere fact that the initial payment is to be applied upon the purchase price does not change the character of a contract, otherwise a mere option (*Compton Land Co. v. Vaughan* (1917) 33 Cal. App. 130, 164 Pac. 610; *Grabenhorst v. Nicodemus* (1875) 42 Md. 236).

The fact that a memorandum of agreement stipulates no specific time for performance is a circumstance strongly indicative that it is not an executory contract of sale, conveying an equitable title. *Stone v. Snell* (1906) 77 Neb. 441, 109 N. W. 750.

Where the agreement shows that it was not regarded by the parties as one of purchase, but that they contemplated the making of such a contract at a future date, such circumstance is indicative of its optional character. See *Bennett v. Egan* (1893) 3 Misc. 421, 23 N. Y. Supp. 154; *Levy v. Kottman* (1895) 11 Misc. 372, 32 N. Y. Supp. 241; *Seidman v. Rauner* (1906) 51 Misc. 10, 99 N. Y. Supp. 862; but compare *Gutierrez Del Arroyo v. Graham* (1913) 227 U. S. 181, 57 L. ed. 472, 33 Sup. Ct. Rep. 248.

The court will incline to construe an ambiguous contract as one of sale



rather than as an option, where there is undisputed evidence to the effect that at the time of its execution both parties expressly declared their purpose to enter into such a contract (*Heath v. Huffhines* (1912) — Tex. Civ. App. —, 152 S. W. 176); or where it appears that it has been treated by the parties as such (see *Hopwood v. McCausland* (1903) 120 Iowa, 218, 94 N. W. 469; *Low v. Young* (1912) 158 Iowa, 15, 138 N. W. 828; *Standiford v. Thompson* (1905) 68 C. C. A. 425, 135 Fed. 991; *Arizona Copper Estate v. Watts* (1916) 150 C. C. A. 467, 237 Fed. 585).

Where it is manifest that the interest of the second party in the subject-matter of the contract is contingent upon performance by him of the terms of purchase, the contract is a mere option (see *Montgomery v. Waldeck* (1905) 2 Alaska, 581; *Re Shields Bros.* (1907) 184 Iowa, 559, 10 L.R.A. (N.S.) 1061, 111 N. W. 963; *Brown v. Thomas* (1887) 37 Kan. 282, 15 Pac. 211; *Moore v. Allen* (1909) 109 Minn. 139, 123 N. W. 292; *Louisville & N. R. Co. v. Gulf of Mexico Land & Improv. Co.* (1903) 182 Miss. 180, 100 Am. St. Rep. 627, 33 So. 845; *John v. Elkins* (1907) 68 W. Va. 158, 59 S. E. 961); and it is immaterial that it may be in the form of a deed conditioned upon such performance (see *Borst v. Simpson* (1889) 90 Ala. 373, 7 So. 814; *Arizona Copper Estate v. Watts* (1916) 150 C. C. A. 467, 237 Fed. 585), at least, where the condition is precedent and not subsequent (see *Bethea v. McCullough* (1916) 195 Ala. 480, 70 So. 680).

A provision in a contract for the sale and conveyance of certain land for a stated sum, part of which was paid down, and the balance was to be paid on delivery of the deed, free of encumbrances, within sixty days thereafter, that "in case of failure to make deed, money paid to be returned," does not give the vendor the option of conveying or not, as he may choose. *Grant v. Beronio* (1893) 97 Cal. 496, 32 Pac. 556.

## *II. Characteristics of options and contracts of purchase—judicial definitions.*

An option is an unaccepted offer to sell and convey within the time stated

and upon the conditions set forth in the written agreement. *Yerkes v. Richards* (1890) 153 Pa. 646, 34 Am. St. Rep. 721, 26 Atl. 221; *Barnes v. Rea* (1908) 219 Pa. 279, 68 Atl. 836.

An option is a contract by which the owner of property agrees with another that he will have the right to buy that property, for a fixed and lawful consideration, and within a certain time prescribed (*Lauderdale Power Co. v. Perry* (1918) — Ala. —, 80 So. 476; *Hamburger v. Thomas* (1909) — Tex. Civ. App. —, 118 S. W. 770); or within a reasonable time in the future (*Menzel v. Primm* (1907) 6 Cal. App. 204, 91 Pac. 754).

An option is a continuing offer which the offerer may not withdraw until the expiration of the time limited. *Adams v. Peabody Coal Co.* (1907) 230 Ill. 469, 82 N. E. 645.

The obligation by which one binds himself to sell and leaves it discretionary with the other party to buy is what is termed at law an option, which is simply a contract by which the owner of property agrees with another person that he shall have a right to buy the property at a fixed price within a certain time. *Black v. Maddox* (1898) 104 Ga. 157, 30 S. E. 723.

An option is simply a contract by which the owner of property agrees with another person that he shall have a right to buy his property at a fixed price within a certain time. By such an agreement he does not sell his land, nor does he at that time enter into an absolute contract to sell and convey; but he does agree to sell something, that is, the right or privilege to buy at the election or option of the party with whom the agreement is made. *Barnes v. Rea* (1908) 219 Pa. 287, 68 Atl. 839.

An option may be defined as a contract by which an owner agrees with another person that he shall have the privilege of buying the property at a fixed price within a specified time. It is neither a sale of land nor an agreement to sell, but merely the disposal of the privilege of electing to buy at a fixed price within the time limited. *Myers v. Stone* (1905) 128 Iowa, 10, 111 Am. St. Rep. 180, 102 N. W. 507, 5 Ann. Cas. 912, quoted with approval

in *Cameron v. Shumway* (1907) 149 Mich. 634, 113 N. W. 287.

An obligation whereby one party, for a valuable consideration, binds himself to sell at a fixed price within a certain time, but which makes it discretionary with the other party to purchase, being a contract by which the vendor stipulates that the proposed vendee shall have the right to buy at such fixed price and within such certain time, or not, at his election, is in law an option. *Neeson v. Smith* (1907) 47 Wash. 386, 92 Pac. 131.

An option given for the sale of land, supported by a valuable consideration, is not a sale of real estate nor an agreement to sell, but is an executed contract, giving the optionee the exclusive privilege of purchasing within the time limited, and which cannot be withdrawn during the time stipulated for; and upon acceptance within that time it becomes an executory contract for the sale of land. *Pollock v. Brookover* (1906) 60 W. Va. 75, 6 L.R.A. (N.S.) 403, 53 S. E. 795.

In *Ide v. Leiser* (1890) 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695, it is said: "An option, originally, is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property at a fixed price within a time certain. He does not sell his land; he does not then agree to sell it; but he does then sell something, viz., the right or privilege to buy at the election or option of the other party. The second party gets, in *præsentia*, not lands or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy."

An option is an unaccepted offer to sell. It transfers no title or right in rem, but creates a right in personam, and that right is to accept or reject the first offer within a limited or rea-

sonable time in the future. *Standiford v. Thompson* (1905) 68 C. C. A. 425, 135 Fed. 991.

An option conveys no title to the thing sold, but creates a right in personam, which may be again sold or assigned by the vendee. *Womack v. Coleman* (1904) 92 Minn. 328, 100 N. W. 9.

An option is not a contract to pay. It creates no enforceable indebtedness on the part of the person to whom it is granted. *Re Shields Bros.* (1907) 134 Iowa, 559, 10 L.R.A. (N.S.) 1061, 111 N. W. 963.

An agreement in writing to give a person the option to purchase land within a given time, at a named price, is neither a sale nor an agreement to sell. It is simply a contract, by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a given time. *HANSCOM v. BLANCHARD* (reported herewith) ante, 545.

An option is not a contract by which one agrees to sell and the other to buy, but it is only an offer by one to sell within a limited time and a right acquired by the other to accept or reject such offer within such time. When this privilege is exercised by acceptance, then, and not until then, does it become a contract of sale. *Swift v. Erwin* (1912) 104 Ark. 459, 148 S. W. 267, Ann. Cas. 1914C, 363; *Gard v. Thompson* (1912) 21 Idaho, 485, 123 Pac. 497; *Re Aurora Gaslight, Coke & Coal Co.* (1916) — Ind. App. —, 113 N. E. 1012; *Hopwood v. McCausland* (1903) 120 Iowa, 218, 94 N. W. 469.

An option is an unaccepted offer which states the terms and conditions on which the owner is willing to sell or lease his land, if the holder elects to accept them within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract. The contract of sale or lease fixes definitely the relative rights and obligations of both parties at the time of its execution. The offer and the acceptance are concurrent, since the minds of the contracting parties meet

in the terms of the agreement. *McMillan v. Philadelphia Co.* (1893) 159 Pa. 142, 20 Atl. 220.

Where there is a contract between the owner of lands and another person that, if such person shall do a specified act, then he (the owner) will convey the land to him in fee, the relation of vendor and purchaser does not exist between the parties, unless and until the act has been done as specified. *Waterman v. Banks* (1891) 144 U. S. 394, 36 L. ed. 479, 12 Sup. Ct. Rep. 646.

The test, in determining whether an agreement is a contract of sale and purchase or a mere option, is: Could the agreement be specifically enforced? *Brickell v. Atlas Assur. Co.* (1909) 10 Cal. App. 17, 101 Pac. 16.

An option to buy, on condition of making specified payments at specified dates, is not an actual purchase or an executed contract to purchase. *Scott v. Merrill* (1913) 74 Or. 568, 146 Pac. 99.

An option contract is a contract which gives a party the right to purchase the thing to which the contract pertains. Usually, when applied to real estate, if the party securing the option forfeits whatever he pays for the option in case he elects not to purchase the property, but does not incur any liability for breach of contract, he has merely secured an option to purchase. A contract for the sale of land is one where one party agrees to buy and the other agrees to sell, and each one will be held responsible in damages for a breach of the contract. *Williams v. Renza* (1910) 4 Alaska, 154.

A written contract for the sale of land is not complete if the vendor has an option to put an end to the contract. *Skeen v. Ellis* (1912) 105 Ark. 513, 152 S. W. 153.

An agreement is only an option where no obligation rests on the second party to make any payment, except such as may be agreed upon between the parties as a consideration to support such option, until he has made up his mind, within the time specified, to complete the purchase. *Brickell v. Atlas Assur. Co.* (Cal.) *supra*.

Unless the contract contains language which may reasonably be construed as an agreement on the part of the vendee to purchase the property, or to assume some obligation thereunder, it is an option contract, and not an agreement of sale and purchase. *STELSON v. HAIGLER* (reported herewith) ante, 550; *Union Sawmill Co. v. Lake Lumber Co.* (1907) 120 La. 106, 44 So. 1000; *Darr v. Mummert* (1899) 57 Neb. 358, 77 N. W. 767; *Berwind v. Williams* (1895) 172 Pa. 1, 33 Atl. 353; *Swank v. Fretts* (1904) 209 Pa. 625, 59 Atl. 264.

Where the second party is bound absolutely by the contract to purchase the land, it is not an option, but an agreement of purchase and sale. *Thompson v. Wilkinson* (1915) 46 Okla. 115, 148 So. 177; *Collier v. Robinson* (1910) 61 Tex. Civ. App. 164, 129 S. W. 389.

### *III. Instances in which instrument has been held to be a contract of sale.*

A contract, one of the parties to which has given the other, in consideration of the payment of the sum of \$500, an option to purchase certain property for the additional sum of \$19,500 cash, at any time within sixty days from date, in which case they bound themselves to sell and convey to him or to his assigns by deeds and covenants of warranty the land therein described, entered into within the sixty-day period, whereby the owner acknowledged receiving the sum of \$7,500 "on account of purchase price named in the within option [the latter contract having been written evidently on the first], making in all the sum of \$8,000 paid by him on account of the purchase money, and in consideration of this payment we do hereby agree to extend the time for the payment of the balance of the purchase money for the period of twelve months from this date, with interest thereon at 6 per cent per annum, and do hereby agree that the said [second party] may at any time pay the balance of the purchase money with interest then due, and that we will, upon payment being made, execute to him titles according to the terms of his option," is a contract for the sale and purchase

of the lands in question, and not merely an extension of the time for the exercise of the option. *Fulenwider v. Rowan* (1902) 186 Ala. 287, 84 So. 975.

A contract, although styled an "option agreement," and in terms granting to the second party the exclusive right of option to purchase certain property, but which also provides that "the full purchase price of said property is \$18,000, \$12,000 of which said sum has this day been paid as above stated, the remainder, or \$6,000, the said party of the second part hereby binds himself and agrees to pay on or before" a certain date, is a contract for the sale of land, rather than a mere option contract. *Williams v. Renza* (1910) 4 Alaska, 154.

The phrase, "during the life of this option," as used in a contract by which the parties of the first part, in consideration of the performance of the covenants therein by the party of the second part, agreed to convey to the party of the second part an interest in certain mines, in consideration of which the parties of the second part agreed to pay to parties of the first part, at the time of signing the contract, the sum of \$500, and a further sum of \$14,500 within one year from date, "and to pay all government taxes on the above-described property, in advance, during the life of this option," is not sufficient to change the character of the agreement from an ordinary contract to purchase land, to what is termed an optional contract. *Chenoweth v. Butterfield* (1908) 11 Ariz. 315, 94 Pac. 1181.

A bond for title, reciting that the obligees have purchased real property and have paid thereon \$150, and are to make future payments in the amounts and at the times stipulated, is a contract for the sale of the land, and not merely an option giving the right to buy at the price named within the time specified in the contract. *Vance v. Newman* (1904) 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574.

Where the owner of land executed a deed which he placed in escrow, to be delivered upon the payment of certain notes, each of which recited that it was given "for part of the purchase money of" the land in question, the

transaction amounted to a sale, and not to a mere offer to sell on the part of the vendor, which the vendee could accept or reject at pleasure, within the time prescribed for the payment of the note. *Bonanza Min. & Smelter Co. v. Ware* (1906) 78 Ark. 306, 95 S. W. 765.

A memorandum signed by the owner of property, reciting the receipt of \$1,000, "being deposit on account of sale by me to him" of certain property for the sum of \$16,000, "purchaser to pay" broker's commission, for pavement and street improvements then under way, the taxes for the current year, and to have the rent of the lot on and after a certain date, and further stipulating "possession of lot given and guaranteed to purchaser on transfer of title. Fifteen days given to purchaser for examination of title and making of deed. If title not satisfactory to purchaser, sale to be null and void, and above deposit returned to him," is a valid contract for the purchase and sale of the lot, and not a mere option to purchase. *Benson v. Shotwell* (1890) 87 Cal. 49, 25 Pac. 249.

An agreement, by the terms of which the owner undertakes to sell and the second party to buy certain premises, for the sum of \$10,000, of which payments are conditioned to be made as follows: \$3,000 upon the execution and delivery of the agreement, and at least \$250 on the first day of each month thereafter, with interest on the unpaid portion of the principal, the second party agreeing to pay the whole of said purchase price and interest on or before a certain date, and, further, to pay all the taxes assessed against the premises and to keep the improvements insured against fire for the benefit of the first party, and further providing that, in the event the second party shall default in any of the conditions or covenants contained therein, the first party shall have the option to re-enter and take possession of the premises and terminate the agreement, in which case he is to retain a part of the purchase price already paid as compensation for occupation and use of the premises, or shall be at liberty to bring an action

to enforce payment of the remainder of the purchase price, or to foreclose the interest of the purchaser, constitutes a contract of sale and purchase, and not an option. *Brickell v. Atlas Assur. Co.* (1909) 10 Cal. App. 17, 101 Pac. 16.

A contract which recites that the owner's attorney, who signed it, has received of the other party "the sum of \$200 on account of the purchase money" of certain real estate, "which they sold to him by me," setting forth the terms of sale, and stating: "Terms of sale to be complied with within fifteen days, or deposit will be forfeited," accompanied by an undertaking on the same paper, by the second party: "I agree to make the above-mentioned purchase on terms as stated," is not a mere option, but a contract of purchase. *Hazleton v. Le Duc* (1897) 10 App. D. C. 379.

The contract expressed in an informal paper, whereby the owner of lands acknowledged the receipt of the sum of \$50 as part of the purchase money for the land, describing it, and also stating the terms of payment, concluding: "Said Ellis to have thirty days to raise the money," is not an option, but the evidence of an absolute agreement to sell. *Ellis v. Bryant* (1904) 120 Ga. 890, 48 S. E. 352.

A contract reciting that the first party has sold the second party certain property for a stated sum, and the payment of the sum of \$50, "to further bind this agreement and sale," and that "the conditions of this agreement are that" the second party shall pay to the first party \$1,000 on a certain day, as part payment, and that the first agrees to take second party's note for the balance for a term of three years, is not a mere option, but a contract of mutual obligation on the part of the vendor and purchaser. *Clark v. Cagle* (1914) 141 Ga. 703, L.R.A.1915A, 317, 82 S. E. 21.

An agreement reciting that "whereas parties of the first part have this day agreed to sell and convey, according to the terms and conditions herein-after specified, certain land" therein described, and that "the parties of the first part, for and in consideration of the sum of \$150 cash to them in hand

paid by" the second party, "as part of the purchase price for said land, having this day executed a warranty deed for said land, it is hereby agreed by the parties hereto that the said warranty deed, together with a copy of this contract, shall be placed in escrow . . . to be delivered . . . upon the balance of the purchase price . . . being paid, on or before March 1, 1906. And it is further agreed that if said [second party] fail to pay the balance of said purchase price . . . on or prior to March 1, 1906, the said bank shall deliver said deed to the said parties of the first part," is a contract for the sale of real property, and not a mere option. *Kessler v. Pruitt* (1908) 14 Idaho, 175, 93 Pac. 965.

A provision in a bond for title that should the obligee or his assignee "fail to pay said sum of money specified in said notes within ten days after the same become due he hereby forfeits all claim to said lots, and all moneys paid thereon; and this bond in such event shall be void, both in law and equity, and the title to said lots shall continue in the original proprietor, as if no sale had been made," does not convert the bond into a mere option to purchase. *Mason v. Caldwell* (1848) 10 Ill. 196, 48 Am. Dec. 330.

Two instruments executed at the same time and which expressly provided that they should be construed together, the first being in the form of a lease for the term of nine years, but providing that the lessee should pay, as rental, amounts the aggregate of which during the term was equal to the value of the property, that the payments subsequent to the execution of the instrument should bear interest, and that, at the end of the term, if all payments had been made, the lessor should convey the property to the lessee, the only right of re-entry being in case of default in the payments called for, and the other instrument being in the form of an option to purchase the property, containing similar provisions as to payment, conveyance, and re-entry only after default, do not amount to a simple option for the purchase of the property. *Re Aurora Gaslight, Coke & Coal Co.* (1916) — Ind. App. —, 118 N. E. 1012.

An agreement reciting that the first parties have contracted and agreed to sell to the second party a certain farm then being cultivated and managed by the second party under lease, and agreeing that the first party, during his lifetime, shall receive the rent by him reserved for the use of said land according to the terms of such lease, and that during the period of his lifetime he shall have the same right to manage and control said land as held by him prior to the execution of the agreement, and the second party assuming and agreeing to pay a portion of the encumbrance on the premises, and concluding: "This agreement to sell is made for a good and valuable consideration in addition to the agreement to assume the \$2,500 aforesaid, and the parties hereto agree that the performance of the conditions herein named shall be taken as a full and complete payment of the full purchase price of the said land. And upon the fulfilment of the conditions herein named upon the part of W. L. Cone, he shall be entitled to demand and receive of the legal representatives of W. D. Cone a deed, conveying full title to said land," is a contract of sale, and not a mere option of purchase. *Cone v. Cone* (1902) 118 Iowa, 458, 92 N. W. 665.

An agreement by which the owner of real estate bound himself to convey it if the other parties should pay certain promissory notes given for the purchase price and should execute other notes for the remainder of the purchase price, secured by mortgage, is a contract for the sale of real estate, and not a mere option to purchase, although the contract contained no formal agreement by the vendee to make payment and was not signed by him, where it was delivered to him and he placed it on record and executed the notes for the purchase money, and it was evident that the parties intended the contract to be binding on both. *Cross v. Snakenberg* (1905) 126 Iowa, 636, 102 N. W. 508.

An agreement stating that A has sold to B certain described lands for a stated sum, to be paid in the instalments mentioned, the placing of a deed for said lands in escrow until the

notes given for the purchase price shall be reduced to a certain amount, during which period B shall not encumber said premises in any way or manner, is a contract of sale, and not a mere option of purchase. *Gilmore v. Gilmore* (1899) 60 Kan. 606, 57 Pac. 505.

A contract is one of sale and not of mere option, where the second party becomes inferentially liable for the amount of the purchase price, notwithstanding it provides that if the purchaser shall fail to make the deferred payments within a reasonable time after the same become due and payable then the contract shall "cease and terminate and be forever void," such provision being one in favor of the seller only. *Williams v. Osage County* (1911) 84 Kan. 508, 34 L.R.A. (N.S.) 1221, 140 Pac. 858.

A contract by which one party agrees to sell and the other to buy a certain stock of merchandise, the seller agreeing to take the purchaser's equity in certain real estate at a stipulated figure, is, notwithstanding a provision therein that "the said deed for the house and bill of sale for said stock of merchandise shall be put in escrow . . . and that in case of failure to perform his part of this contract said party failing to do so forfeit to the other party the property represented by said deed and bill of sale as damages," a binding contract, and not a mere option to exchange property. *Green v. Fist* (1913) 89 Kan. 536, 132 Pac. 179.

An agreement reciting that the owners of land agree to sell and do sell such land, describing it, for the sum of \$12,000, that in consideration of the covenants made and entered into by the owners the second party "agrees to purchase and does purchase . . . the real estate above described for the sum of \$12,000, to be paid as set forth," providing for the execution and deposit of a title deed in escrow, and containing a provision that if the purchaser shall fail to make the subsequent payments he shall forfeit \$500 which he paid on the purchase price when the contract was executed, which shall be retained by the parties of the first part as liquidated dam-

ages, "and the parties hereto relieved from the further performance of any of the covenants herein set forth, and this contract is to be held null and void and of no effect," is not a mere option, but a contract of purchase. *DAVIS v. ROSEBERRY* (reported herewith) ante, 564.

An agreement by which the parties of the second part agreed to purchase certain real estate for the sum of \$250,000, to be paid one fourth cash, and the balance on or before one, two, and three years, and to pay 5 per cent of the cash payment on or before a certain date, and the residue of such cash payment about two months thereafter, and, further, that "in the event that they do not pay the residue of said cash payment by May 1, 1891, then said sum of \$12,500, paid by them on or before the 1st day of March, 1891, shall be wholly forfeited," the first party agreeing that in the event the residue of said cash payment is paid on or before May 1, 1891, and the notes for the deferred payments and the deed of trust to secure them shall be executed and delivered, they will convey by good and sufficient deed, etc., and in which it was further agreed by the parties that in the event that the residue of said cash payment should not be paid on or before May 1, 1891, "then this contract to be null and void and of no effect, except as to the payment of the said \$12,500," is not a mere option, but a contract of sale. *Allison v. Cocke* (1899) 106 Ky. 763, 51 S. W. 593.

A contract reciting that certain persons, the owners of land, "hereby sell to" another person, for the sum of \$10 per acre, the lands described, "and we agree to convey said land, and the fee-simple title thereto, to him by a deed of general warranty, and free from lien, defect, or encumbrance," to be executed and delivered as soon as the title should be shown to be perfect and the acreage ascertained by a competent surveyor, "and then he is to pay us the purchase price aforesaid per acre, and we will thereupon surrender possession of said land to him. We agree to do no damage to any of said land or anything upon it,

and not to cut any timber upon it. It is agreed that the work in ascertaining the acreage, perfecting the title, and making the conveyance shall be done before December 1, 1907," is an agreement of sale, and not a mere option. *Golden v. Cornett* (1913) 154 Ky. 438, 157 S. W. 1076.

A contract by which the second party was obligated to accept and pay for the land, according to the agreement, if an abstract of the first party's title to the land disclosed a merchantable title, is not shown to be an option contract by a clause, inserted after the contract was drafted, that "all timber on the above tract of land over 14 inches in diameter, clear of bark, is excepted, and not conveyed in this contract, and, if grantee takes and accepts this contract and takes said land, the grantor shall have ninety days in which to brand the timber over 14 inches in diameter." *Bowling v. Bowling* (1916) 172 Ky. 32, 188 S. W. 1070.

A contract reading: "We [first parties] hereby sell to [second party] for the sum of \$10 per acre, the land herein described, and we agree to convey said land, and the fee-simple title thereto, to him by deed of general warranty," to furnish the title papers, and further providing that, as soon as the title shall be shown to be perfect in first party, the second party shall have the acreage ascertained by a competent surveyor, "and when all this shall have been done we bind ourselves to execute and deliver to said [second party] such deed as herein described, and then he is to pay us the purchase price aforesaid per acre, and we will thereupon surrender possession of all said land to him. . . . It is agreed that the work of ascertaining the acreage, perfecting the title, and making the conveyance shall be done before December 1, 1907," is not a mere option. *Golden v. Lewis* (1917) 176 Ky. 28, 195 S. W. 144.

An instrument declaring that one party shall transfer and assign to the other certain described property, for and in consideration of a stated sum, of which amount \$500 was then and there paid in cash, the balance of the purchase price to be paid on the execution of a satisfactory deed, and declar-

ing that the first party shall have thirty days to perfect the title, and that the second party shall have the right to take such title from him as he has within thirty days from that date, and that the \$500 cash payment shall be returned in the event satisfactory title cannot be made, in which event the act shall be null and void, is not a mere option. *Whited v. Calhoun* (1908) 122 La. 100, 47 So. 415.

A contract providing that the parties of the first part, in consideration of a stated sum, agreed to sell unto the party of the second part such described land for such sum, "which said party of the second part hereby agrees to pay the said parties of the first part, as follows: Upon the execution and delivery of this contract \$500; March 1, 1911, \$8,560, at which time said second party will assume and agree to pay \$9,900, when due, the then balance remaining unpaid upon a certain real estate mortgage now upon such described premises, and at which time first parties will execute and deliver to second party a good and sufficient warranty deed, as hereinafter provided. It is agreed by second party hereto that should he make default in the conditions of the payments herein specified, and neglect or refuse to complete the terms of this contract as herein provided to be done March 1, 1911, the \$500 paid upon the execution of this contract shall be retained by the first parties as forfeit money, and to pay them for their trouble and damages by reason thereof. . . . It is mutually agreed between said parties that the said party of the second part shall have possession of said premises on March 1, 1911, and shall keep the same in as good condition as they are at the date hereof until the said sum shall be paid as aforesaid; and, if said party of the second part shall fail to perform this contract or any part of same, said parties of the first part shall, immediately after such failure, have a right to declare the same void, and retain whatever may have been paid on such contract, and all improvements that may have been made on said premises, as liquidated damages," is not a mere

option agreement. *Hedrick v. Firke* (1912) 169 Mich. 549, 185 N. W. 319.

An agreement reciting that parties of the first part agree to sell and party of the second part agrees to buy certain described property, the purchase price to be \$3,050, "payable as follows: One hundred dollars upon the date hereof, the receipt of which is hereby confessed and acknowledged by the parties of the first part; \$400 upon the examination of a Burton abstract of title, brought down to date, showing good and merchantable title in said vendors, and, upon the execution of a Union Trust form land contract, the balance of \$2,550, in semiannual payments of \$100 or more, each," etc. "Said parties of the first part are hereby given the privilege of mortgaging the above-described premises in any amount not exceeding \$1,500. Deal is to be completed and consummated within thirty days from date thereof. Possession to be given immediately upon said consummation," is not an option, but an executory land contract, valid and of binding force as to the parties thereto. *SOLOMON v. SHEWITZ* (reported herewith) ante, 557.

An instrument originally a mere option becomes a contract to purchase, where, by indorsement thereon, the optionee agrees to purchase the property upon the conditions prescribed therein. *Libby v. Parry* (1906) 98 Minn. 366, 108 N. W. 299..

A contract whereby the first party sold and delivered a stock of merchandise and agreed to make a future cash payment, and the second party in consideration thereof agreed to convey, nine months after the cash payment should be made, certain lands, the rents and profits of which were to go to the first party from the date of the contract, is not an option contract, but one for the sale of land. *Chapman v. Propp* (1914) 125 Minn. 447, 147 N. W. 442.

A contract reciting that "in consideration of \$1, receipt whereof is hereby acknowledged, I have this day agreed to sell to" the second party certain premises, for the sum of \$850,000, payable in instalments as therein specified, and providing that "a fail-



ure by the party of the second part to comply with the above contract or to make such payments as they come due shall make this contract null and void," is a contract of sale. *Knisely v. Leathe* (1914) 256 Mo. 341, 166 S. W. 257, s. c. on subsequent appeal (1915) — Mo. —, 178 S. W. 453.

The contract evidenced by a receipt reading: "Received of [certain persons named] \$500 as part of the purchase money on [certain described premises]. The price of said land is \$15,000, of which \$2,250 is to constitute the first payment, which must be paid on or before April 21, 1887, or this \$500 is to be forfeited. Upon the payment of the first payment of \$2,250 I will deliver to the above-named parties contracts, on which they are to make the following payments on said lands. . . . Upon the payment of which I will deliver a warranty deed to said premises," is a sale, and not merely an option to purchase. *Gibbons v. Sherwin* (1889) 28 Neb. 146, 44 N. W. 99.

A contract reciting that "in consideration of the sum of \$100 in hand paid, the receipt whereof is hereby acknowledged, the undersigned . . . hereby grant, bargain, sell and agree to convey to James Wolfe, or assigns," certain described real estate, the said Wolfe to have until the 1st day of January, 1910, and March 1, 1910, "within which to pay the remainder of the consideration of said land," in instalments as specified, and that, "should said Wolfe fail or refuse to fulfil this contract, the amount this day paid is to be forfeited to the undersigned as liquidated damages," impliedly obligates the second party to make the specified payments, and therefore is more than a mere option to purchase. *Abel v. Gill* (1914) 95 Neb. 279, 145 N. W. 637, 147 N. W. 686.

A contract which does not provide that the owner will convey if the other party elects to pay a certain sum on or before a certain day, but binds both parties, the one to sell and convey, and the other to accept the deed and pay for the property, is not an option. *Sit-terding v. Grizzard* (1894) 114 N. C. 108, 19 S. E. 92.

A contract by the owner of land to convey for \$2 per acre, provided such sum be paid within three years from date, and reciting the receipt of \$25 as "earnest" money, is not a mere option, but a contract of sale, which may be specifically enforced, notwithstanding it was not signed by the purchaser. *Davis v. Martin* (1907) 146 N. C. 281, 59 S. E. 700.

An instrument in writing in these words: "This is to certify that I, Samuel Kissick (the defendant), sell to Peter Gilmore, etc., for the sum of \$17,000, the house (describing it), and that I have received the sum of \$75, the balance, amounting to \$16,925, to be paid in thirty days," signed by both the owner and the purchaser, is not an option, but a contract to purchase, there being nothing to show that the \$75 was received by the owner as a consideration for keeping the property thirty days, or that Gilmore might have that time to elect whether he would take it or not. *Simonson v. Kissick* (1871) 4 Daly (N. Y.) 143.

A contract by which the owner of lands covenants to convey on or before a certain date such lands, and the other party covenants to pay therefor a stated sum on instalments, as specified, but containing the clause: "Provided, however, and it is hereby expressly understood and agreed, that this contract shall be null and void and of noneffect as to either party, the same as if the said contract had never been made, if the said purchase money shall not be paid on or before January 1, 1891," is an option. *Yerkes v. Richards* (1890) 153 Pa. 646, 34 Am. St. Rep. 721, 26 Atl. 221.

A contract signed by the parties, whereby one agrees to sell and the other to purchase certain realty, and providing that \$3,500 of the purchase money should be paid in cash as "hand money," the vendor to give his notes for the same, "to be refunded in case the title should prove unsatisfactory," that a further sum of \$19,500 should be paid in cash on the execution and delivery of the deed, and the balance to be secured on the premises, and that the rents, issues, and profits of the property should go to the other party from the date of the agreement, is not

a mere option to purchase by reason of a stipulation therein that "the said parties of the second part shall have thirty days within which to examine the title to the said real estate, and only on condition it should prove to be satisfactory to them shall they be bound to perform this contract on their part," as such stipulation does not give the vendee the right to reject the title capriciously. *Dillinger v. Ogden* (1914) 244 Pa. 20, 90 Atl. 446, Ann. Cas. 1915C, 533.

A contract containing an accurate description of the property in question, an agreement on the part of the vendors to sell and convey, and on the part of the vendee to purchase, and providing for the payment by the vendee to the vendor of the greater part of the purchase money in cash, and, in lieu of the balance, the assumption by the vendee of a certain obligation incurred by a former owner, is in no sense an option, but is clearly an executory contract. *Hoon v. Miller* (1904) 33 Pa. Co. Ct. 17.

In *Hobart v. Frederiksen* (1905) 20 S. D. 248, 105 N. W. 168, the facts in which are of no general interest, a contract resting in letters and telegrams passing between the parties was held to be one of purchase rather than an option.

A contract between the owner of property and another, which contains a covenant by the second party to purchase the property for a stated sum, "and to pay for the same at the time and in the manner described above," is not an option, but a mutual contract, enforceable by either party. *Heimberger v. Rudd* (1912) 30 S. D. 289, 138 N. W. 374.

A contract whereby the owner of land agrees to sell a one-half interest therein to the other party for the sum of \$4,850, the other party then and there paying \$1,000 and executing a note for the balance, which was placed in the custody of a bank together with a deed executed by the owner, accompanied by a memorandum which, among other things, stated that the bank should hold said deed and note, and should deliver and turn over said deed to the second party upon his payment of the note, is more

than a mere unilateral option to purchase land. *Sweet v. Purinton* (1918) — S. D. —, 166 N. W. 161.

A stipulation in a contract for the conveyance of land that, if the "purchaser fails to comply with the terms hereof relating to the payment and securing of the purchase price as above mentioned and by the time herein designated, purchaser shall forfeit the amount paid hereon to seller, and the same shall be paid to seller by said trustees and accepted by said seller as and for liquidated damages for such injury and damage as the seller may suffer by reason of the non-performance of this contract on the part of the purchaser," does not affect its character as a contract for sale of the land. *Moss v. Wren* (1908) 102 Tex. 567, 113 S. W. 739.

An agreement stating: "This contract shows that M. Palmo agrees to deed the Brazos plantation farm to S. W. Slayden, or to whom S. W. Slayden may direct, in consideration of \$6,000 in vendor's lien notes," and signed by both parties, is not a mere proposition or option. *Slayden v. Palmo* (1909) 53 Tex. Civ. App. 227, 117 S. W. 1054.

A contract by which the owner of land agrees to sell and convey it to the second party, for the consideration of \$19,000, payable in the instalments therein specified, and concluding: "And to bind the above contract we, the above contracting parties, deposit the sum of \$1,000 each with Dickson, Moore, & Smith, the same to be forfeited by the party failing to fulfil his part of above contract. This contract to be consummated within thirty days," is something more than an option to purchase, and evidences a valid contract. *Newton v. Dickson* (1909) 53 Tex. Civ. App. 429, 116 S. W. 143.

A contract signed by both parties, acknowledging the receipt from the second party of \$1,000 "as part payment of the purchase money for the following described property, . . . which property we have this day sold to said Baker, his heirs and assigns, for the full sum of \$13,500 cash. Upon payment of the purchase money, \$13,500 less the amount herein receipted for, we agree to convey or cause to be

conveyed to the said Baker, by good and sufficient warranty deed, the above-described property. We hereby agree to furnish within ten days from this date a complete abstract of the above-described property, certified to date. If the title to the said property is not good in the opinion of the said Baker, then the \$1,000 herein receipted for shall be returned to him; but if the title to said property, in his opinion, is good, and said property is not taken within ten days from delivery of complete abstract of title of the property to him, then the \$1,000 herein receipted for shall be forfeited . . . and this receipt shall then be null and void, and all parties herein named released," is not a mere option, but a contract of sale. *Hamburger v. Thomas* (1909) — *Tex. Civ. App.* — 118 S. W. 770.

A contract by which the owners, "for and in consideration of \$30,000 cash to us in hand paid and to be paid, of which sum \$50 has this day been paid as earnest money . . . agree and bind ourselves to grant, bargain, sell [and] convey" certain real property, and "further agree to furnish within two days hereafter a complete abstract of title to the above-described property for examination by Sun Company, and said Sun Company shall have three days after delivery of the same for the examination thereof and the consummation of this trade. The title to the various tracts of land described herein to be good and satisfactory title, and sellers agree to execute warranty deeds to the same. If title is not satisfactory to Sun Company all parties are released therefrom," signed by both parties, is a binding contract of purchase and sale, and not a mere option. *Cheek v. Nicholson* (1911) — *Tex. Civ. App.* —, 133 S. W. 707.

A contract, signed by the parties, whereby the first party obligates himself to sell certain described lands for a consideration to be paid as therein specified, to furnish a complete abstract of title, to convey by a good and sufficient warranty deed, and to give possession of the same upon delivery of the deed, and further reciting that, as a fifth "part of the cash consider-

ation above mentioned, the said A. N. Evans has this day paid to the said Heath \$700 cash, and the said Heath has accepted the same as a part of the cash consideration. It is agreed and understood that should there be any defect in said title that the said Heath shall have a reasonable time to cure said defect, and in case that title is not good the \$700 this day paid shall be refunded to the party of the second part, but should the said Heath furnish a good and sufficient warranty deed and abstract of title as above set forth, and the said Evans fails or refuses to carry out his part of this contract, the said \$700 shall be forfeited to the party of the first part," is a contract of sale and not an option, an agreement by the purchaser to take the land being implied. *Heath v. Huffhines* (1912) — *Tex. Civ. App.* —, 152 S. W. 176.

A contract, the terms of which were contained in a letter making a certain offer, and a reply stating: "I am willing to sell you the ranch" for the sum and upon the terms stated, "title to pass when payments are completed, if completed on the date mentioned, you to assume the taxes to accrue this fall, and to assume any expenses in connection with water assessments and trial of water case," is not a mere option to purchase, but an agreement to sell on the one part and to buy on the other. *Roberts v. Bruffett* (1907) 33 Utah, 51, 92 Pac. 789.

A memorandum in writing, signed by the owner of property, reading: "Received of Charles Langert, \$5 as part payment for" certain lots, "conditioned as follows: \$2,495 to be paid on or about the 20th day of March, 1888, the balance of \$1,500 to run on time to suit C. Langert's convenience. I also agree to furnish said C. Langert a warranty deed upon the payment of the \$2,495, and a clear title," is a full contract for the sale of the real estate in question, and not simply an option which terminated by the terms of the memorandum itself on the 20th day of March named therein. *Langert v. Ross* (1890) 1 Wash. 250, 24 Pac. 448.

A memorandum reading: "This is to certify that I have this day sold to the Wallace Lumber & Manufacturing

Company" certain realty, "and also to acknowledge the receipt of \$25 in hand paid as part payment of purchase price, namely, \$3,000, and it is understood that balance to be paid in ten days from date, if records appear all right," is not merely an option. *Anderson v. Wallace Lumber & Mfg. Co.* (1902) 30 Wash. 147, 70 Pac. 247.

An agreement reciting that in consideration of the sum of \$200, the receipt of \$150 of which is acknowledged, the first party will convey to the second party a right of way across his lands according to a certain line of survey, that such party shall have a right to enter upon the lands for the purpose of constructing a ditch along the proposed right of way, across which the second party agrees to construct a bridge at a point to be designated by first party; and that, in consideration of the premises, the first party will execute a good and sufficient conveyance on or before one year from date, upon the payment of the balance of \$40 in cash, is not an option, but a mutual agreement. *Roberts v. White River Water & Power Co.* (1902) 30 Wash. 430, 70 Pac. 1104.

A contract evidenced by a receipt for "\$50" as earnest money, to be applied on the purchase of "certain described property," purchase price to be \$150 per lot, and conditioned on furnishing a good and sufficient title within thirty days from date," is not a mere option for thirty days, but in effect an agreement to convey the property, and obligates the owner, if he desires to cut off the purchaser's right at the end of the thirty days, to tender a good and sufficient deed and demand the payment of the balance of the agreed purchase price within that time. *Newell v. Lamping* (1907) 45 Wash. 304, 38 Pac. 195.

In *Wright v. Suydam* (1913) 72 Wash. 587, 131 Pac. 239, a contract reading: "Received of W. Hammond Wright the sum of \$100 as part payment upon purchase price of the following described real estate . . . the balance of the purchase price of the said premises is \$7,900, to be paid in cash upon delivery of deed. The undersigned owners of said premises agree within fifty days to deliver to

the purchaser an abstract of title . . . and to convey such title to the purchaser, his heirs or assigns, by warranty deed. . . . If, upon investigation, title to the said premises shall be found to be insufficient in any of the respects aforesaid, either in fact or as shown in the abstract, or shall be unsatisfactory to the attorney for the purchaser, the purchaser may at any time thereafter, at his option, elect to have the sums of money heretofore paid by him as part payment of the purchase price immediately repaid to him, and in the event of such election the owners shall return such sums, and all further obligation upon their part shall then cease. . . . If title to said described premises shall not be subject to objection in any of the respects aforesaid, and shall be satisfactory to the attorney for the purchaser, and the purchaser shall fail upon his part to perform any of the terms of this agreement, then the said sum of money first above mentioned shall be retained by the undersigned owners as stipulated damages, and they shall also be entitled to a return to them of the said abstract, and neither party shall be under any further liability," and signed by the owner of the property, was held not to be a mere option contract, notwithstanding the provision therein made that, in case of forfeiture in event of the purchaser's failure to perform, "neither party shall be under any further liability." The court said: "That the contract is not an option in form is apparent from a casual reading of it. It is expressly stated therein that the \$100 was received from Wright as part payment upon the purchase price of the land, followed by provisions clearly contemplating the consummation of a sale of the land from Suydam to Wright, amounting to an agreement on the part of Suydam to sell and on the part of Wright to purchase. The argument is, in substance, that Wright cannot, under the terms of the contract, be compelled to specifically perform; that is, that he cannot be compelled to take the land and pay the balance of the purchase price, even though the title is satisfactory to him; that the only remedy available to

Suydam is that he may retain the \$100 paid upon the purchase price as liquidated damages, resulting from Wright's failure to perform, and that therefore the contract is, in substance, a mere option. This is a plausible argument, but loses sight of the substance of the contract, and rests solely upon the provisions thereof relating to the remedy available to Suydam in the event Wright fails to perform. The fact remains, however, that the contract constitutes an agreement on the part of Suydam to sell, and on the part of Wright to purchase, the land. This, we think, distinguishes it from a mere option contract, which, upon the failure of the prospective purchaser to exercise his option rights within the time agreed upon, would automatically cut off such right without any notice given or demand made for performance by the owner of the land. . . . Now the fact that the contract by its terms confines Suydam's remedy against Wright to the recovery of liquidated damages, and that is what the right to retain the \$100 paid upon the purchase price in effect amounts to, does not change the fact that the contract is, on Suydam's part, a promise to sell, and, on Wright's part, a promise to purchase. An agreement in a contract, specifying and limiting the particular remedy available to a party to the contract upon the breach thereof by the other, does not change the respective mutual promises which constitute the substance of the contract. Wright did not contract and pay for a mere privilege to purchase land at a future time, but he agreed to purchase, and paid part of the purchase price. We are of the opinion that the contract is one for the sale of land, both parties being bound thereby as seller and purchaser, respectively, though the remedy of Suydam upon breach by Wright may be confined to liquidated damages."

An instrument reading: "I have this day sold to J. E. Watson the coal under my farm on West Fork river . . . said Watson is to pay one fourth down on the 1st day of May, 1890, when I am to make deed for said coal, as per option made on the 25th

of September, 1888. It is further agreed that I am to have interest on all said purchase money from 1st day of November, 1889. The deferred payments in one, two, and three years from 1st day May, 1890," and signed by the owner of the property, is not an option, but an unconditional and absolute contract of sale. *Monongah Coal & Coke Co. v. Fleming* (1896) 42 W. Va. 538, 26 S. E. 201.

In *Wheeling Creek Gas, Coal, & Coke Co. v. Elder* (1903) 54 W. Va. 335, 46 S. E. 357, an instrument, signed only by the owner of the property, whereby he agreed to sell and convey to the party of the second part certain coal, "for which the party of the second part, heirs or assigns, shall pay \$6 per acre for each and every acre as follows: One third when deed is signed, sealed, and delivered. . . . It is expressly understood and agreed that if the first payment aforesaid is not made on the 30th day of November, A. D. 1899, or as soon thereafter as the title shall be examined and accepted by the party of the second part, or his heirs or assigns, this agreement shall be considered as rescinded, and neither party shall be bound thereby," was held to be not an option, but an actual sale, notwithstanding the presence of the subsequent condition of defeasance.

But compare *Standiford v. Thompson* (1905) 68 C. C. A. 425, 135 Fed. 991, and *Wheeling Creek Gas, Coal & Coke Co. v. Elder* (1909) 170 Fed. 215, elsewhere set forth, in which like contracts were held to be mere options; and in the latter of which the above decision is said to be out of harmony with subsequent decisions of the West Virginia supreme court.

A contract reciting that whereas the first parties "are now the owners of, as vendees, of certain leases and options" therein described, "now, therefore, for a valuable consideration, the said first parties do hereby grant, bargain and sell, assign, set over, and deliver unto the said second party all of their right, title, and interest in and to the said options hereinabove described, upon the following terms and conditions, to wit: "With the express understanding and agree-

ment that this contract is to be in force for and during the period of nineteen months from the date hereof, and that on or before the expiration of said nineteen months the said second party is to pay to the said first parties for such options for all the lands described therein the sum of \$300 for each and every acre thereof. . . . In other words, the whole 194½ acres to be taken and paid for at the rate of \$300 per acre. At which time and upon the payment of which said sum the said first parties are to deliver or cause to be delivered to the said second party a deed of the premises described in said options. It is understood herein that all liabilities attendant as on the option herein described, which are herein imposed upon the said first parties, are to be and are hereby assumed by said second parties," is, although not entirely clear and explicit, a contract to sell, and not a mere option, the agreement by express terms to pay not being optional with the second party. *Baraboo Land, Min. & Leasing Co. v. Winter* (1907) 130 Wis. 457, 110 N. W. 413.

An agreement, signed by both parties, by which the owner "com-promised himself to sell" certain parcels of land, to be paid for in cash, and another parcel to be paid for "in instalments during the two years following the delivery of the document," and the other party agreed to execute a mortgage to secure the payment, the contract to be "extended in a public document" as soon as a "deal" then pending should be "ultimated," failing which the contract should be void, is a binding contract of sale, and not a mere option agreement. *Gutierrez del Arroyo v. Graham* (1918) 227 U. S. 181, 57 L. ed. 472, 33 Sup. Ct. Rep. 248.

An agreement between one, who, as the owner of a warehouse, had transferred it to a bank in satisfaction of his indebtedness, and the bank, whereby the bank offered, if he would take back the property, to lend him money to go on with his business, and he agreed to pay the interest on the debt to the bank, to pay the ground rental, insurance, and all repairs, and to pay for the property "when he

could," is sufficient to warrant the jury in finding that he was a vendee rather than the holder of a mere option. *Milwaukee Mechanics' Ins. Co. v. Rhea* (1903) 60 C. C. A. 103, 123 Fed. 9.

A contract by the terms of which the owner of property agrees to sell and convey, and the other party agrees to pay therefor a certain consideration on a date named, is not an optional one, but a contract of bargain and sale, notwithstanding it provides that, "in the event of a failure to comply with the terms thereof by the said party of the second part, the said party of the first part shall be released from all obligations in law or equity to convey said property, and the said party of the second part shall forfeit all right thereto." *Mound Mines Co. v. Hawthorne* (1909) 97 C. C. A. 394, 173 Fed. 882.

#### *IV. Instances in which instrument has been held to be an option only.*

A deed, given without consideration, purporting to grant certain lands "upon the following conditions only, to wit: The estate herein conveyed shall not vest in [parties], their heirs or assigns, until and unless he or they shall, on or before" a certain day, pay to the grantors a stated sum, "upon the happening of which condition the estate herein conveyed shall become absolute. But if such money shall not be paid on or before said dates, then this instrument to become null and void, and all rights thereunder shall cease and determine," is in effect an option, revocable at any time. *Borst v. Simpson* (1889) 90 Ala. 373, 7 So. 814.

But such is not the case where the instrument contains a formal grant in fee upon a recited valuable consideration presently paid, followed by a stipulation, not that no title should vest, but in substance that the title thereby vested shall be divested upon a failure to pay the additional consideration; and this, notwithstanding the instrument then proceeded to say that, "if such payment is so made, then this conveyance is binding from the date hereof." *Bethea v. McCullough* (1916) 195 Ala. 480, 70 So. 680.

A contract between the owner of land and another person, whereby, in consideration of such other person's undertaking to bring to the attention of capitalists the water power on the property and to proceed at once to develop the water power and get ready to subdivide said land, and, within four months from the date of the instrument, to "commence actual operation to develop the water power," the owner agrees "to make a deed of general warranty to the said lands when all the purchase money is paid," and, fixing the time for payment thereof, contained a further provision that "if actual work has not commenced on the development of the water power herein stipulated within the period of four months, then this contract shall be null and void, and no damages shall accrue to the said [second party] and his associates." It was held that the provision giving the second party the right to withdraw at pleasure from the enterprise, within the time limit fixed, without incurring damage therefor, shows that the contract was not more than a mere option to such party and a promise by the owner to sell, on compliance therewith by such second party or assigns. *Lauderdale Power Co. v. Perry* (1918) — Ala. —, 80 So. 476.

An agreement, signed only by the owners of the property, containing a covenant on their part to sell and convey certain lands to the other party within a certain period, with a corresponding covenant on the part of such other party, in consideration of the owners' covenant, to purchase said lands within the same period, but further stipulating that, upon the payment of the cash part of the agreed price for the land and upon the deposit of certain stock according to the terms of the agreement, the escrow holder shall turn over the deed from the first party to the second party, and that in case the money and stock should not be deposited with the said escrow holder in accordance with the terms of the contract, on or before a stated date, then "the said escrow holder is authorized and directed to return said deed to said party of the first part, or their representatives, for cancelation,"

is an option, and not an absolute agreement to sell and convey. *Montgomery v. Waldeck* (1905) 2 Alaska, 581.

A contract reciting the receipt of the sum of \$100 "as earnest money and part payment for the following described property, a warranty deed to be furnished as soon as the title is examined, which is guaranteed perfect," and, further, that "the entire deal is to be closed within sixty days," is an option rather than a contract of purchase, there being nothing obligating the second party to take the land if the title should be found to be perfect. *Indiana & A. Lumber & Mfg. Co. v. Pharr* (1907) 82 Ark. 573, 102 S. W. 686.

An instrument styled an "option deed," by which it was provided that, in consideration of \$1 and the undertaking of the other party to pay the sum of \$1,000 before a certain date, the owner granted and sold the property in question to the second party, with a further provision that, if the second party should fail to pay the said sum within a certain time, the conveyance should be void and all rights and liabilities thereunder should cease, is a mere offer to sell. *Jones v. Lewis* (1909) 89 Ark. 368, 117 S. W. 561.

A contract by the owners of stock in a mining corporation as parties of the first part, reciting that the parties of the second part desire to buy stock and mine if the test which they shall cause to be made prove satisfactory, "and shall take possession of the mine and make improvements in it, and that the stockholders shall assign the stock to trustees and that the parties of the second part shall pay, at a time fixed, a certain sum to the trustees for the stockholders, and have the stock, but forfeit their improvements and redeliver possession if they fail to pay," but which contains no obligation on the part of the second parties to purchase the stock, is a mere option. *Gordon v. Swan* (1872) 43 Cal. 564, 3 Mor. Min. Rep. 84.

An agreement in the following language: "This is to certify that Sandy J. White has an option of purchase of [certain described property] for

the sum of \$10,200, to be paid as follows, to wit: \$250 cash down, the balance of \$9,950 to be paid on or before August the 15th, 1903, and if said sum is not paid at said date then the above sum to be forfeited. . . .

We agree to give an abstract of title and also to give possession within thirty days from date if sale is made. Said \$250 is receipted as part payment upon said land," amounts to an option to purchase and no more, there being no mutuality of obligation, and the agreement nowhere imposing liability upon White to make the purchase. *White v. Bank of Hanford* (1906) 148 Cal. 552, 83 Pac. 698.

An escrow instruction directed by a prospective purchaser to the depository, wherein it was stated: "I herewith hand you check for \$1,000, and agree to deposit with you \$4,500 in cash on or before fifteen days from this date, and agree within said fifteen days to execute and deliver to you one promissory note and mortgage, securing claim on property described below," in favor of the owner of the property, and the depository was instructed to deliver the \$1,000, together with the mortgage agreed to be executed and the \$4,500 agreed to be deposited, to the owner, upon receipt of the deed for the property, accompanied by a certificate of title, and further providing that "in event you are unable to comply with these instructions within fifteen days from the date hereof, on account of my failure to comply with the terms herein stated, you are authorized to pay to the seller \$1,000 as forfeit, and hold balance subject to my order," is a mere option, and not a contract to purchase, in as much as the intending purchaser does not obligate himself to complete the purchase. *Pehl v. Fanton* (1911) 17 Cal. App. 247, 119 Pac. 400.

A contract for the sale of real property for the sum of \$30,000, of which \$1,000 was paid forthwith, \$14,000 was to be paid on execution and delivery of the deed, and the balance in subsequent instalments, providing that, upon the failure of the second party to comply with the terms of the

agreement, the parties of the first part should be relieved from all obligation in law and equity to convey said property, and that all rights of the second party therein should cease, and the said sum of \$1,000 should be forfeited as damages, gives the proposed purchaser an option to purchase without any obligation beyond the fact that he is subject to the loss of his forfeit money if he does not complete the transaction. *Beckwith-Anderson Land Co. v. Allison* (1915) 26 Cal. App. 473, 147 Pac. 482.

An agreement reciting that the owner has received from the second party the sum of \$300, "as part payment for the following described real property," and that "the entire price to be paid for the above-described real property is \$28,500, and to be paid as follows: Three hundred dollars cash as hereinbefore mentioned. Six thousand two hundred dollars on or before ninety days after date. The balance of \$22,000 to be divided in six equal payments," and, further, that "it is distinctly understood that this instrument is an option exclusively, and that the holder of said option has no right to enter on, or in any manner assume ownership or possession of, any part of said above-described property until the above-mentioned \$6,200 is paid, and said [second party] has executed above-mentioned notes, and the agreement for sale of real estate, as herein called for, is duly escrowed. A good and sufficient agreement for the sale of real estate, . . . to be executed and delivered . . . on or before [a certain date.] If the said payment of \$6,200 is not paid or tendered on or before the said 14th day of March, 1912, then this contract to be void and of no effect, and both parties released from all obligations herein; and in that event the said \$300 paid on this date is to be retained by the [first party] as liquidated damages," is a mere option to purchase. *Compton Land Co. v. Vaughan* (1917) 38 Cal. App. 130, 164 Pac. 610.

An agreement stating that the party of the first part sells and agrees to convey to the party of the second part certain described property for a



stated sum "to be paid as follows: \$1,000 to be placed in escrow . . . to be turned over to the party of the first part upon the finding of marketable titles by party of the second part; \$30,000 on or before December 1, 1912; \$100,000 March 1, 1918, the same to be evidenced by promissory note bearing interest at the rate of 6 per cent per annum, payable semi-annually, to be secured by first mortgage," that the first party will execute warranty deed to the second party, his heirs or assigns, or nominee, "upon the payment of the said \$30,000, and the execution of note and mortgage as above set forth," and that "it is mutually agreed that the time of payment shall be an essential part of this contract, and, in case of the failure of the said party of the second part to make either of the payments above mentioned, this contract shall be forfeited and determined, at the election of the said party of the first part, and the said party of the second part shall forfeit all payments made on this contract as liquidation of all damages to party of the first part," is an option to purchase, and not a contract of sale. *STELSON v. HAIGLER* (reported herewith) ante, 550.

An agreement, signed by the owners only, reciting the receipt of the sum of \$500 as part of the purchase price of certain described property, and providing that if a subsequent payment should not be made or tendered on or before a stated date, "then this receipt to be void and of no effect, and both parties released from all obligation herein; and in that event the said \$500 paid on this date is to be forfeited as liquidated damages. In case title is found defective and cannot be corrected within a reasonable time, then this deposit of \$500 is to be returned, and this receipt shall be null and void," is nothing more than an option of purchase. *Hessell v. Neal* (1913) 25 Colo. App. 300, 137 Pac. 72.

An agreement by which the owners of land undertook, in consideration of a specified sum to be paid as designated, to sell and convey to the other party, or his assigns, the mineral interests in the land described at any

time within a given number of days, if the latter should see fit to pay the balance of the purchase money, but containing no corresponding agreement on the part of the second party to buy such mineral interest and pay the stipulated sum, is a mere option. *Black v. Maddox* (1898) 104 Ga. 157, 30 S. E. 723.

A contract by which the owner of land agreed to sell it to the second party for \$800, to be paid in instalments, to fall due as therein provided, and further stipulating that, in case the second party should fail to pay "one or either of those notes as they come due," he would pay certain rent for the use of said farm, is a lease with an option to the tenant to purchase. *Hodnett v. Mann* (1912) 10 Ga. App. 666, 73 S. E. 1082.

A contract entered into by the owner of an interest in real estate, which recites that the purchaser agrees to buy the undivided one-half interest of three minor heirs, and that, "if he shall not buy said interest of said minor heirs for the said sum of \$2,500, upon the terms aforesaid, then this agreement shall be of no effect, and the first party shall be under no obligation to convey her interest in said property," is a mere option, and not a contract of sale. *Martin v. Wilson* (1913) 24 Idaho, 353, 184 Pac. 532.

An agreement reciting that the party of the first part has bargained and hereby sells and agrees to convey by warranty deed on or before a certain date, to the party of the second part, certain described realty, and for the same consideration to deliver full possession of said property to the second party on or before such date, and further providing that, if the second party shall fail to pay the second instalment of the purchase price, "this contract shall be null and void and terminate by limitation, and the first party shall keep the said \$50, as a forfeiture and damages," is, although ambiguous in its terms, an option rather than a sale, where it appears that all parties to the contract so understood it at the time. *Hopwood v. McCausland* (1908) 120 Iowa, 218, 94 N. W. 469.

A provision in a lease that the tenant may become a purchaser within the period specified in such lease, by payment of a stipulated amount, is merely an option to purchase, notwithstanding such lease was made in pursuance of an understanding that the lessor should take a conveyance of the land from the owner and execute a lease to the lessee, fixing the rental price of the premises at an amount to be determined by some agreed rate of interest on the amount of money invested, and such amount was the amount for which the lessee might acquire title. *Schoonover v. Petcina* (1904) 126 Iowa, 261, 100 N. W. 490.

In *Re Shields Bros.* (1907) 184 Iowa, 559, 10 L.R.A.(N.S.) 1061, 111 N. W. 963, it was held that a contract which recited that the first party "hereby agrees to sell to the second party on the performance of the agreement by the second party as hereinafter mentioned," the second party, "in consideration of the premises," agreeing to purchase certain described real estate for a stated sum, to be paid in the amounts and at the times stipulated, "deed to be delivered and possession given" at a date subsequent to that of the contract, and by which the first parties were to pay the taxes on the land for the current year, and which recited that if default shall be made in payment, "in consideration of the damage, injury, and expense thereby resulting, . . . this agreement shall be void and of no effect, and the second party shall have no claim in law or equity against the first party, nor to the above-mentioned real estate; and any claim, or interest, or right the second party may have hereunder . . . or any payments made hereunder shall, on such default, cease and determine and become forfeited without any declaration or act of the first party. . . . But if said sums of money and interest are paid as aforesaid . . . the first party will . . . execute and deliver a warranty deed to said premises as above agreed," must be treated, in view of the provisions therein above quoted and the testimony of the parties that it was so intended and understood by

them, as one granting only the right to exercise an option, rather than as an agreement of sale.

A written instrument, consisting of a printed blank embodying the usual provisions of a contract of sale of land, with certain stipulations written in blank spaces left for the purpose of specifying the description of the property, the names of the parties, and the terms of payment, which, after reciting the consideration to be paid, contained the following stipulation: "If said note of \$9,950 is not paid when due, this contract is null and void. Second party forfeits his \$50 paid, and first party refunds notes given by second party. It is agreed that tile now on said land, not laid, shall be property of the second party," may be construed in the light of the circumstances under which the blank contract was filled out and signed, and the subsequent practical abandonment thereof by the second party, indicated by his proposal to the first party to effect a second sale of the land to another party on wholly different terms from those embodied in the contract, as evidencing an intention of the parties to enter into a contract which would give the second party nothing more than a mere option. *Low v. Young* (1912) 158 Iowa, 15, 138 N. W. 828.

An agreement for the sale of real estate upon certain conditions precedent, by which neither a legal nor an equitable title is conveyed to the purchaser, and the provision for forfeiture in which showed it to be clearly the intention of the parties that such title should not pass until the purchase price was paid, and stipulating that time shall be of the essence of the contract, and that the failure to perform any of its conditions shall render the contract null and void, is a mere option to purchase. *Brown v. Thomas* (1887) 37 Kan. 282, 15 Pac. 211.

An agreement, reciting a consideration of \$1, to sell land for a certain price, and providing that the party of the second part shall have twelve months to explore for metals and minerals, that the party of the first part

shall continue in possession, and that in case payment or other satisfactory arrangements to complete the bargain shall not be made in the time specified, "then all obligations, express or implied, under this agreement, shall cease and neither party shall have any claim, either in law or equity, on the other by virtue of this agreement," is a mere option. *Litz v. Goosling* (1892) 93 Ky. 185, 21 L.R.A. 128, 19 S. W. 527.

An agreement by the owner of a tract of land, reciting the consideration as \$1 paid by another, to convey such land, upon the payment of \$3 an acre, within twelve months of its date, and not binding the other party in any way, is a mere option. *Noble v. Mann* (1907) 32 Ky. L. Rep. 30, 105 S. W. 152.

A contract binding the owner of land, for a valuable consideration, to convey the land to the other party and his assignees upon demand, in payment of the purchase price within one year, but which does not bind the other party to take the land at any time, is merely an option. *Fields v. Vizard Invest. Co.* (1916) 168 Ky. 744, 182 S. W. 934, Ann. Cas. 1918D, 336.

A contract by which the vendor alone is bound, and which provides that, in the event that the party of the second part shall fail to fulfil the agreement therein entered into, the sum therein acknowledged as paid shall be forfeited to the party of the first part is merely an option. *HANSCOM v. BLANCHARD* (reported herewith) ante, 545.

An agreement entered into between the owner of property and another, whereby he agreed that the other party might, during the year, purchase the same for the sum of \$5,000, and the other agreed and obligated himself to pay to the owner for the privilege the sum of \$1,000, at the expiration of the year, if he did not purchase the property for the aforesaid sum of \$5,000, and stipulated that, if he should complete the purchase within the year, the \$1,000 should be considered as included in the purchase money and should not be required of him, is not an agreement of sale, but

a mere option. *Grabenhorst v. Nico-demus* (1875) 42 Md. 236.

In *Womack v. Coleman* (1904) 92 Minn. 328, 100 N. W. 9, an agreement reciting that whereas the party of the first part "has represented that he holds an option of purchase on the hereinafter described property, and that said option expires on or about the 1st day of April, A. D. 1901, and whereas he is desirous of conveying an option and confirming the sale of the hereinafter described premises to" the second party, the said party of the first part, in consideration of the covenants and agreements of said party of the second part, "does hereby sell and agree to convey or cause to be conveyed unto the said party of the second part or his assigns, by deed of warranty, upon the prompt and full performance by the said party of the second part of his part of this agreement, the following described premises . . . and the said party of the second part, in consideration of the premises, hereby agrees to pay to the said party of the first part as and for the purchase price of said premises, the sum of \$145,000, in manner and at the times following, to wit: First, at the signing of this contract, said second party's certain promissory note for \$15,000 "shall be placed in escrow," conditioned that the said second party shall fulfil the terms of this contract, and, should he not fulfil same, that the said note, or the moneys equivalent thereto, shall be absolute forfeiture and indemnity to the said party of the first part, or those whom he may represent, and that this agreement and all the conditions thereof, upon such forfeiture, shall be absolutely null and void as to all parties thereto," the agreement further providing that, should the title of the property prove defective, the said note should be returned to the second party, and that, should the first party for any reason be unable to fulfil the conditions of the contract and deliver deed of warranty to the property, "then and in that case this agreement shall be void and of no effect, and the said forfeiture hereinbefore set forth shall be returned in

full to the said party of the second part, time being of the essence of this contract," although in the form of a contract of purchase and sale, was held to be no more than an option, the second party not being obligated to make the remaining payments and accept the conveyance, even though a good and sufficient title should be tendered.

An agreement, signed by the owner's agent and the prospective purchaser, whereby the latter agreed to purchase the premises for a stated sum, and \$50 was acknowledged paid as earnest money and in part purchase, \$450 was to be paid on or before sixty days after date, and the balance on or before one year from the date of closing the deal, and also providing that in case the title to the premises could not be perfected the agreement should be void and the \$50 refunded, but that, if the title was perfected and not taken within sixty days from the date thereof, the \$50 was to be forfeited, is only an option. *Libby v. Parry* (1906) 98 Minn. 366, 108 N. W. 299.

A contract witnessing "that said first party agrees to release and convey by quitclaim deed, without covenants, to second parties, or to any person designated by them or either of them, within three years from and after the date hereof, with the right to said second parties to demand an extension of said term of two years' additional time, if they should require and so elect and demand, which additional time, if required and demanded, said first party agrees to extend and grant . . . for \$500 for each and every lot, all his interest in and to the following described" city lots, the second party agreeing to assume and pay all taxes and assessments assessed or levied upon the premises during the life of the contract, and interest at the rate of 5 per cent per annum, from the date of the contract to the date of any conveyance which might be executed by the first party under the terms of the contract, the second party being given the right to build a house on each of certain described lots, and agreeing to build not less than five such houses, to

cost not less than a stated amount, and to be completed within four months, "and to keep and maintain such work so that every of said lots and property affected thereby shall be free from judgment, attachment, and liens of any kind or sort whatsoever; and containing a further provision that whenever a house and lot should be sold by the second party the first party would receive in payment a mortgage thereon; that in event of the second party's failure to comply with his undertaking the first party should have the right, at his election, to cancel and terminate the contract and all rights of the second party thereunder, it being further expressly understood and agreed "that said second parties have no estate, right, title or interest in or to said lands or any of them in this contract described, beyond the right to build and construct houses on certain of said lots, and to handle and control the sale of all said property to third parties at prices and upon making payment as herein provided; but all and every of said lots are to remain the property of said first party until conveyance and release is furnished in accordance herewith,"—is an option for the sale of real estate, and not an executory contract of purchase. *Moore v. Allen* (1909) 109 Minn. 139, 123 N. W. 292.

An instrument reciting that the party of the first part, in consideration of the sum \$1 in hand paid, and in further consideration of the benefit derived from the location of the railroad of the said party of the second part across the land of the party of the first part, "does by these presents hereby agree to the contract and sell and convey by deed of warranty to the party of the second part" certain described lands, "and the party of the first part agrees to execute and deliver to the party of the second part a warranty deed to said land at any time within two years from the date of this instrument, whenever required by the party of the second part so to do; provided and upon condition, nevertheless, that the said party of the second part, their successors or as-

signs, or legal representatives, pay to the party of the first part the whole sum of \$1 for the amount of land so conveyed as aforesaid," conveys no title, but gives simply an option to demand a conveyance within two years from the date, upon tender of the purchase price. *Louisville & N. R. Co. v. Gulf of Mexico Land & Improv. Co.* (1903) 82 Miss. 180, 100 Am. St. Rep. 627, 33 So. 845.

An instrument in the form of a deed, witnessing that the parties of the first part "have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the party of the second part," certain described premises, and stating: "The conditions of this indenture are: First, the parties of the first part are to receive on the 1st day of October, 1897, the sum of \$100 per acre for said lands, payable on that day as follows: \$500 in cash and the balance thereof in three promissory notes of equal amounts, due in one, two, and three years . . . said notes to be secured by a first deed of trust upon said lands; . . . second, at the time of the payment of the said cash and notes and trust deed securing the same the said parties of the first part shall deliver to the party of the second part a good and perfect warranty deed of said lands; . . . third, the party of the second part has the right to enter upon said lands for the purpose of drilling for mineral, to sink a shaft or shafts thereon, and to extract ore therefrom; to build and equip a reduction plant thereon; to use timber, stone, and other material for its construction from said lands; at all times having due regard for the preservation of the growing crops thereon," is, notwithstanding the use of the words, "grant, bargain, and sell," nothing more than an option. *Dunaway v. Day* (1901) 163 Mo. 415, 63 S. W. 731.

A contract reciting that the first party, in consideration of the sum of \$20,000, to be paid as thereafter specified, "has this day sold in fee simple" to the second party the certain described premises, and in which the second party, for himself and as-

signs, agreed, "subject to the conditions hereinafter named, to pay the said sum of \$20,000 as follows," but concluding: "It is understood that, if the said [second party] or his assigns shall neglect or fail to pay or make tender of the first payment of \$5,000 on or before the time stipulated, then this agreement to be wholly void, and shall cease to be binding on either of the parties hereto," is a mere option. *Ramsey v. West* (1888) 31 Mo. App. 676.

A contract which simply provides that one party may purchase the land of the other party at a stipulated price, if the amount should be paid on or before a certain date, and, if not paid by that time, then that said contract should be null and void, constitutes a mere option to buy the property within the time specified, and gives neither party any claim for damages for its violation. *Huggins v. Safford* (1896) 67 Mo. App. 469.

A contract for the purchase of land, containing a clause stating: "It is understood and agreed that said purchase shall be made at the option of the said party of the second part, and if said party of the second part does not elect to so purchase said land on or before said 1st day of January, 1903, then this contract shall be null and void," is a mere option. *Wallace v. Figone* (1904) 107 Mo. App. 362, 81 S. W. 492.

An agreement stating that, "in consideration of the covenants and agreements herein specified, the said party of the first part hereby agrees to sell unto the said party of the second part the following described real estate . . . for the sum of \$2,000, \$400 of which has been paid in hand, the receipt of which is hereby acknowledged. Now if the said party of the second part shall pay to the party of the first part punctually the several sums set forth, and at the dates set forth below, to wit . . . then the said first party will convey or cause to be conveyed to said party of the second part by warranty deed, the above-described premises," is simply an option. *Darr v. Mummert* (1899) 57 Neb. 378, 77 N. W. 767.

In an instrument stating: "We . . . do hereby agree to sell [certain described property] to Henry Rothmann, and I, Henry Rothmann, hereby do agree to purchase the above-described premises, at the purchase price of \$34,650, and pay in hand to [first parties] \$50, the receipt whereof is hereby acknowledged, to bind contract, which is to be executed at [a place named] and upon payment of \$1,000, and the balance according to contract as follows," etc., is not an enforceable contract for the sale and purchase of the real estate therein referred to, but was merely—at least, so far as the vendee was concerned—an agreement that he would thereafter execute a contract to purchase, or forfeit the \$50 paid as liquidated damages. *Bennett v. Egan* (1893) 3 Misc. 421, 23 N. Y. Supp. 154.

The contract evidenced by a receipt for "the sum of \$50 on account of contract price of \$25,500 on the sale of [certain described premises], \$950 to be paid on this day and \$24,500 on the delivery of the deed, the contract to be made at the office of" a person named, and signed by the owner of the property, is not a contract for the purchase and sale of the premises, but merely an option. *Levy v. Kottman* (1895) 11 Misc. 372, 32 N. Y. Supp. 241.

A memorandum stating that A sells to B a certain house, "selling price \$29,800, on which Mr. Kurzman lets \$25 deposit. . . . Contract to take place at" a certain place and at a certain time, "\$725 to be paid on contract," is nothing more than an option, and certainly not an enforceable contract. *Seidman v. Rauner* (1906) 51 Misc. 10, 99 N. Y. Supp. 862.

A contract by which the owner of land binds himself at any time previous to a fixed date to sell a certain tract of land to anyone whom the second party may direct, for a designated sum, but not obligating the second party to pay such sum, is an option. *Alston v. Connell* (1906) 140 N. C. 485, 53 S. E. 292.

A contract reciting the receipt of the sum of \$300, "on account of purchase price of \$10,000, for the follow-

ing real property . . . terms of sale are as follows: I am to furnish complete and satisfactory abstract of title and warranty deed, conveying a good and marketable title in fee simple, free of encumbrances, satisfactory to the attorney of the nominee of said F. V. Andrews & Co. . . . If said title is not satisfactory as aforesaid, I agree to refund the said \$300," and signed by the owner only, is a mere option to purchase. *Friendly v. Elwert* (1909) 57 Or. 599, 105 Pac. 404, Ann. Cas. 1913A, 357.

A receipt describing certain realty, and stating therein in effect that the money was received as earnest of the payor's intention to purchase the land in question at an agreed price, to be paid as specified, with an agreement that in case of failure of title or if for any other cause the land should not be conveyed free of encumbrances, the money should be returned, and that the "purchaser failing to make the payments above specified, the deposit money will be forfeited as stipulated damages," is a mere option, and not a contract of purchase. *Scott v. Merrill* (1913) 74 Or. 568, 146 Pac. 99.

An agreement to purchase land, with a stipulation that if the purchaser does not make the payment provided by the agreement within the limit of the time specified, the agreement shall be null and void and all parties released from liability, is a mere option. *Verstine v. Yeane* (1904) 210 Pa. 109, 59 Atl. 689.

An agreement entered into by one who had procured options from divers landowners giving him the right to elect to purchase the coal underlying their respective properties, within certain limits and at certain prices, and who, in addition to the option coal, owned or controlled a couple of tracts in his own right, by which he agreed to grant, bargain, and sell to the second party all the coal or land optioned by him as therein described and to convey the same to said second party or his assigns by deeds of general warranty in fee simple, provided that on or any time before March 2, 1901, said second party should give to said first party notice in writing of his election

to accept the property described, "in consideration whereof said second party, for himself or his assigns, agrees to pay to said first party the sum of \$1, the receipt whereof is hereby acknowledged, in full for this option, and, in the event of this agreement being absolute by the election and notice above mentioned, then and not otherwise said second party agrees to pay said first party the sundry sums between the prices mentioned in said options to the individual farmers, and the sum of \$40 per acre for each and every acre which may be taken up and to which good titles are to be had, payable as follows: When the deeds are delivered from the present owners the payments to the farmers to be as stipulated in the options, and the same may be determined by surveys," is not a contract for the sale of land, but one for the sale of the option. *Strasser v. Steck* (1907) 216 Pa. 577, 66 Atl. 87.

An agreement by which one party agrees to sell and convey, and the other agrees to pay or cause to be paid a certain sum in manner specified, but containing a clause "that, in case payment is not made as hereinbefore stipulated, then this agreement to be null and void and of no effect whatever, and all parties hereto to be released from all liability hereunder," is an option to purchase, and not a binding contract of sale. *McHenry v. Mitchell* (1908) 219 Pa. 297, 68 Atl. 729.

An agreement by which the first party agrees to sell and convey to the second party certain mineral rights, "for which the party of the second part, their heirs or assigns, shall pay \$60 per acre for each and every acre, as follows: one fourth of the purchase money at the time of making and delivering of said deed, and the balance in three equal annual payments from the date of said deed with interest at the rate of 5 per cent per annum on deferred payments. An abstract deed with a certificate of title to be made to [second party] when the first payment is made, and the others are secured by . . . mortgage on the property hereby sold.

. . . It is expressly understood and agreed that if the first payment aforesaid is not made on October 2, A. D. 1899, or within ten days thereafter, this agreement shall be considered as rescinded and neither party shall be bound thereby," is not a completed contract of sale, but a mere option to purchase. *Barnes v. Rea* (1908) 219 Pa. 279, 68 Atl. 836.

And see also, to the same effect, *Barnes v. Rea* (1908) 219 Pa. 287, 68 Atl. 839.

A contract which expressly states that its purpose is "to give to the party of the second part an extension of thirty days to carry out the terms of the written contract previously made" and executed by the same parties, which was conclusively of an optional character, is not to be construed as converting the agreement, as between the parties, from an option to a contract of purchase and sale, by reason of a recital therein "that the terms in the contract are to be complied with on or before" a day named,—especially where it has been treated by the parties as a mere extension of the option. *Standiford v. Kloman* (1912) 284 Pa. 443, 83 Atl. 311.

An agreement signed only by the owner of land, wherein he agrees to convey to the party of the second part on payment of a stated sum on a certain date, is not a contract of purchase, but simply an option. *Gira v. Harris* (1901) 14 S. D. 537, 86 N. W. 624.

An agreement by the owner of land, reciting that the "party of the first part, for the consideration of \$8,000 as purchase price by the party of the second part, the payment to be as follows: Four hundred dollars in hand paid to party of the first part . . . as earnest money and part payment, and \$3,600 cash within thirty days of above date, together with three notes," etc., agrees to convey and deliver within thirty days certain described lands "together with clear title and abstract to date, and with above property include implements and stock as per bill of sale attached to this contract; also purchaser of said property is to receive one third of the present

crop of cabbage, to be marketed and delivered on market, also to give peaceable possession to the above property upon the consummation of this deal within thirty days of above date," party of second part agreeing "to comply with the above conditions within thirty days or forfeit earnest money," but which contains no agreement on the part of the second party to take and pay for the lands, is merely an option, although it contains the further stipulation that "both parties agree to comply with the above conditions and clear this transaction through" a certain bank. *Runck v. Dimmick* (1908) 51 Tex. Civ. App. 214, 111 S. W. 779.

A contract in which the prospective purchaser agrees that the sum of \$2,000, paid to the seller as part of the cash payment, shall be forfeited to the seller in event the former shall fail or refuse to perform his part of the contract, but that it shall be returned to the buyer in event the title should be found defective, and that "in the event the buyer forfeits the \$2,000 paid, and the contract thereby is at an end, then the said sum is to be divided between the seller" and the seller's agent, is an option contract, and not an absolute sale. *Slade v. Crum* (1917) — Tex. Civ. App. —, 193 S. W. 723.

A contract which expressly stipulates that the second party does not agree to make any of the other payments therein specified, that "failure for thirty days to make any of the payments at the time herein specified shall, at the option of the parties of the first part, work an absolute forfeiture of this agreement and of all moneys theretofore paid for said party to the second part thereunder," is conditional, and not absolute. *Title Guaranty & T. Co. v. McDonnell* (1908) 32 Wash. 418, 73 Pac. 484.

An agreement by which one party agrees to sell and convey to the other certain lands, for which the other party agrees to pay a specified sum, is an option, and not a contract of sale, where it also provides that the second party shall have until a certain date in which to elect whether to take the

land, and that in case he shall fail to pay the purchase money on or before such date, or elect not to take the property, "then this agreement shall be null and void, and the parties thereto shall be mutually relieved therefrom." *Pollock v. Brookover* (1906) 60 W. Va. 75, 5 L.R.A. (N.S.) 403, 53 S. E. 795.

An agreement witnessing that in consideration of \$1 in hand paid, and for the further consideration of \$150 per acre for each and every acre used by second parties for a railroad over the premises, "and to be paid upon delivery of the general warranty deed after notice of acceptance by said second party," and containing the stipulation that, if the railroad should not be "commenced or constructed across said land within twelve months from this date, then this contract shall be null and void and of no effect; but, on the other hand, if the road is commenced or constructed within twelve months from this date across said land, then said second party shall be entitled to hold such strip of land in fee simple . . . and it is further agreed that in the event that the said second parties fail to complete said railroad within twenty-four months from this date, then said second parties shall pay to said first party a forfeit or penalty of \$200 for every year said second parties fail to complete said railroad," is an option, and not an executory contract. *John v. Elkins* (1907) 63 W. Va. 158, 59 S. E. 961.

A contract reciting the execution of a promissory note in consideration for the sale of land, and giving the maker thereof the option to pay the note at maturity or offset it by a conveyance of other lands, evidences a sale of the land of the promisee, not an exchange of lands, and constitutes a mere option of sale of the land of the promisor, to be exercised before the date of the maturity of the note. *Womack v. Agee* (1916) 79 W. Va. 22, 90 S. E. 792.

An agreement by which the owner of real estate agreed that on the payment by a city of a certain sum down, and a certain further sum on or before ten years from that date, with in-



terest, the owners of the property would convey it to the city on demand, and that in the meantime the city should pay the taxes, and if the city should fail to make any payments of purchase money or interest, or to pay the taxes, the owners might foreclose all right or equity of redemption of the city in and to the premises, and by which the owners of the land agreed that the contract should create no corporate liability whatever against the city, is merely an option, and not a contract to purchase. *Perigo v. Milwaukee* (1896) 92 Wis. 236, 65 N. W. 1025.

A contract entered into for the purpose of settling an action brought upon an undertaking given upon appeal from a judgment foreclosing a land contract, whereby the owner stipulated that in consideration of \$325 then paid and \$12,000 to be paid by defendant's wife within thirty days the said lands were to be conveyed to the wife, the action dismissed, and the surety released, and that in case said sum should not be paid within such thirty days, then the sum of \$325 should be forfeited and a deed for the property placed in escrow should be handed back to the grantor, and a further contract stating that in consideration of the sum of \$625 "it is hereby agreed that the time for the performance of the stipulation heretofore entered into . . . shall be and the same hereby is extended for sixty days; and in consideration of such extension, it is agreed that Mary E. Jacobs or her assigns shall, at the expiration of said sixty days, pay the sum of \$11,000, with interest thereon at the rate of 6 per cent per annum, and on such payment shall be entitled to a conveyance of the lands mentioned in said prior stipulation in fee simple: Provided, however, that in case said sum is not paid upon the said date, that the \$1,000 paid into said bank shall be forfeited," but not signed by Mrs. Jacobs, constitutes an option to buy, and not a contract for the sale of the lands in question. *Nelson v. Stephens* (1900) 107 Wis. 186, 82 N. W. 163.

A contract whereby the owner of

coal lands agrees to sell and convey to the other party, and the other party agrees to pay a specified price therefor, but which contains a stipulation that "if the first payment aforesaid is not made on or before the 1st day of October, 1900, or as soon thereafter as the title shall be examined and accepted by the party of the second part . . . or his heirs or assigns, this agreement shall be considered as rescinded and no party shall be bound thereby," is an option rather than a contract of purchase, especially where it has been so characterized and treated by the parties. *Standiford v. Thompson* (1905) 68 C. C. A. 425, 135 Fed. 991.

In *Wheeling Creek Gas, Coal & Coke Co. v. Elder* (1909) 170 Fed. 215, the court, in construing a like contract, elected to follow *Standiford v. Thompson* (Fed.) *supra*, rather than a decision of the West Virginia court of appeals, on the same contract, in (1903) 54 W. Va. 335, 46 S. E. 357, construing the contract not as an option, but as an actual sale.

In *Arizona Copper Estate v. Watts* (1916) 150 C. C. A. 467, 237 Fed. 585, the owners of a large tract of land, which they wished to sell, met a possible purchaser who wished to obtain a deed to the property because he thought he could use that better for the purpose of selling the land. It was finally agreed that the property should be deeded to a corporation formed for the purpose, which executed its notes for the agreed price, and also a reconveyance, to be void in case the notes should be paid according to their tenor and effect. No payment was ever made on the notes and no foreclosure suit was ever brought upon the indenture purporting to have been given to secure the payment thereof. The corporation never at any time took possession of said real estate nor asserted ownership over the same. Fifteen years thereafter the successors in interest of the original owners of the property brought suit to quiet title. It was held that the instrument would be construed in the light of the intention of the parties as creating merely an option of purchase.

An agreement contained in a contract for the sale of land, whereby, "as a further consideration for the within transaction, the purchaser hereby covenants and agrees to and with the said vendor, to give said vendor a transfer" of certain described lands, "on the vendor first paying the said purchaser the sum of \$500, and inter-

est thereon at 6 per cent from the date hereof, such payment to be made on or before the 1st day of December, 1906, and, if not then made, the said purchaser shall be at liberty to cancel this agreement to convey said land," only gives an option to purchase. *Paterson v. Houghton* (1909) 19 Manitoba L. R. 168. E. S. O.

E. C. NOYES

v.

DES MOINES CLUB, Appt.

*Iowa Supreme Court — January 27, 1910.*

(— Iowa, —, 170 N. W. 461.)

**Damages — increase in cost of living.**

1. The increase in the cost of living and in all the necessities of life over the cost at the time lower verdicts allowing damages for personal injuries were rendered must, to some extent, be taken into consideration in determining whether or not a verdict in such a case was excessive.

[See note on this question beginning on page 610.]

**Appeal — second appeal — law of case.**

2. A ruling upon one appeal that the case should have been submitted to the jury is binding on second appeal where the evidence is practically the same as on the former one.

[See 2 R. C. L. 223 et seq.; 15 R. C. L. 959.]

**— refusal of instructions — error.**

3. The refusal of requested instructions is not reversible error if the instructions given were full and complete and fairly submitted the case to the jury.

[See 2 R. C. L. 261.]

**— immaterial evidence — introduction by both sides.**

4. In the absence of a showing of prejudice a case should not be reversed for admission of evidence of a conversation regarding the condition of a gate subsequent to the accident upon which the action is based, if the conversation is gone into by counsel on both sides.

[See 2 R. C. L. 247 et seq.]

**Elevator — unsafe gate — liability of owner.**

5. An instruction in an action to hold the owner liable for injuries caused by failure of an automatic gate guarding an elevator well to operate, that plaintiff cannot recover unless it appears from the evidence that defendant had notice that the gate was not in place or not in working order for a sufficient time prior to the accident to have enabled the same to be remedied, is not unfavorable to defendant.

[See 2 R. C. L. 256 et seq.]

**Damages — amount — tubercular infection.**

6. Eight thousand dollars is not excessive to be allowed for injuries to one falling down an elevator well, although his immediate loss of time and earnings together with pain and suffering endured are comparatively slight, if he suffered a curvature of the spine, and increased temperature and loss of weight, in the opinion of expert witnesses, indicate possible tubercular infection.

[See 2 R. C. L. 199 et seq.; 8 R. C. L. 678.]

**APPEAL** by defendant from a judgment of the District Court for Polk County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Messrs. Parker, Parrish & Miller, for appellant:

The verdict of \$8,000 for the plaintiff is clearly so grossly excessive and so clearly the result of passion and prejudice that it should be set aside and a new trial granted.

Fraser v. London Street R. Co. 29 Ont. Rep. 411; Mullady v. Brooklyn Heights R. Co. 65 App. Div. 549, 72 N. Y. Supp. 911; Cool v. Peterson, 189 Mo. App. 717, 175 S. W. 244; Furnish v. Missouri P. R. Co. 102 Mo. 438, 22 Am. St. Rep. 781, 13 S. W. 1044; Aaron v. Metropolitan Street R. Co. 159 Mo. App. 307, 144 S. W. 145; Knutson v. Moe Bros. 72 Wash. 296, 130 Pac. 347; Reems v. New Orleans G. N. R. Co. 126 La. 511, 52 So. 681; Tweedy v. Inland Brewing & Malting Co. 75 Wash. 25, 134 Pac. 468; Toms v. Whitby Twp. 35 U. C. Q. B. 195; Rogers v. Mann, — R. I. —, 70 Atl. 1057; Pfeiffer v. Radke, 144 Wis. 430, 129 N. W. 413; James v. Hayden Bros. 97 Neb. 619, 150 N. W. 1013; Sewing v. Harrison County, 156 Iowa, 229, 136 N. W. 200; Kentucky Traction & Terminal Co. v. Wilson, 165 Ky. 123, 176 S. W. 991; Reick v. Great Northern R. Co. 129 Minn. 14, 151 N. W. 408; McDonald v. Ashland, 78 Wis. 251, 47 N. W. 434; Commercial Teleph. Co. v. Davis, 43 Tex. Civ. App. 547, 96 S. W. 939; Egan v. Dry Dock, E. B. & B. R. Co. 12 App. Div. 556, 42 N. Y. Supp. 188; Robinson v. St. Louis & Suburban R. Co. 103 Mo. App. 110, 77 S. W. 493; Quaite v. Swift & Co. 173 Ill. App. 197; Stuhr v. Wright County Teleph. Co. 119 Minn. 508, 138 N. W. 693; Hall v. Wabash R. Co. 165 Mo. App. 114, 145 S. W. 1169; Missouri, K. & T. R. Co. v. Hay, 39 Tex. Civ. App. 51, 86 S. W. 954; Gardner v. Metropolitan Street R. Co. 167 Mo. App. 605, 152 S. W. 98; Citizens' R. Co. v. Wade, 40 Tex. Civ. App. 561, 91 S. W. 645; Levin v. Nassau Electric R. Co. 138 App. Div. 491, 122 N. Y. Supp. 863; Union Show Case Co. v. Blindauer, 75 Ill. App. 858, affirmed in 175 Ill. 325, 51 N. E. 709; Seaboard Air-Line R. Co. v. Maddox, 131 Ga. 799, 63 S. E. 344; Youngvert v. Chicago, 174 Ill. App. 299; Louisville & N. R. Co. v. Abell, 14 Ky. L. Rep. 239; Degnan v. Brooklyn City R. Co. 14 Misc. 388, 35 N. Y. Supp. 1047;

Blackden v. Blaisdell, 113 Me. 567, 93 Atl. 540; Kentucky Wagon Mfg. Co. v. Shake, 137 Ky. 742, 126 S. W. 1095; Illinois C. R. Co. v. Cunningham, 102 Ill. App. 206; Interurban R. & Terminal Co. v. Bierman, 31 Ohio C. C. 663.

A verdict resulting from passion and prejudice is tainted and should be set aside in furtherance of justice, and cannot be cured by reduction or remittitur.

Chapman v. Pfarr, 145 Iowa, 196, 123 N. W. 992; Ahrens v. Fenton, 138 Iowa, 559, 115 N. W. 233; Darland v. Wade, 48 Iowa, 547; Waltham Piano Co. v. Freeman, 159 Iowa, 567, 141 N. W. 403; Jolly v. Doolittle, 169 Iowa, 658, 149 N. W. 890; 29 Cyc. 1023, § B; Carpenter v. Dickey, 26 N. D. 176, 143 N. W. 964.

The evidence fails to establish actionable negligence on the part of the defendant, either with respect to the lighting of its premises and the elevator, or with respect to the construction, maintenance, and operation of the gate to its elevator shaft, and, therefore, the plaintiff was not entitled to recover.

Trybula v. A. Plamondon Mfg. Co. 153 Ill. App. 298; Moran v. Racine Wagon Co. 74 Hun, 454, 26 N. Y. Supp. 852; Skellenger v. Chicago & N. W. R. Co. 61 Iowa, 714, 17 N. W. 151; Kitteringham v. Sioux City & P. R. Co. 62 Iowa, 285, 17 N. W. 585; Artz v. Chicago, R. I. & P. R. Co. 34 Iowa, 153; Payne v. Chicago, R. I. & P. R. Co. 39 Iowa, 523; Starry v. Dubuque & S. W. R. Co. 51 Iowa, 419, 1 N. W. 605; McLeod v. Chicago & N. W. R. Co. 125 Iowa, 270, 101 N. W. 77; Powers v. Iowa C. R. Co. 157 Iowa, 347, 136 N. W. 1049; Landis v. Inter-Urban R. Co. 166 Iowa, 20, 147 N. W. 318; Accousi v. G. A. Stowers Furniture Co. — Tex. Civ. App. —, 87 S. W. 861; Dunn v. Kemp & Hebert, 36 Wash. 183, 78 Pac. 782; Massey v. Sellers, 45 Or. 267, 77 Pac. 397, 16 Am. Neg. Rep. 553.

Plaintiff's failure to heed said automatic warning was negligence.

Massey v. Sellers, 45 Or. 267, 77 Pac. 397; Shearm. & Redf. Neg. § 25; Missouri, K. & T. R. Co. v. Collier, 88 C. C. A. 127, 157 Fed. 347; Walker v. Louis Werner Sawmill Co. 76 Ark. 436,

(— Iowa, —, 170 N. W. 461.)

88 S. W. 988; Van Winkle v. Chicago, M. & St. P. R. Co. 93 Iowa, 509, 61 N. W. 929; Coles v. Union Terminal R. Co. 124 Iowa, 48, 99 N. W. 108; Accousi v. G. A. Stowers Furniture Co. — Tex. Civ. App. —, 87 S. W. 861; Dunn v. Kemp & Hebert, 86 Wash. 188, 78 Pac. 782.

It was error to allow plaintiff in rebuttal to contradict defendant's witness, Murphy, in reference to the immaterial fact to which he had testified on cross-examination, that the ground-floor gate to the elevator shaft had not stuck, a year after the accident, on an occasion when the plaintiff claimed he and Murphy had tried the gate and it had stuck.

Seibert v. Germania F. Ins. Co. 182 Iowa, 58, 106 N. W. 507; State v. Wasson, 126 Iowa, 320, 101 N. W. 1125; State v. Sheridan, 121 Iowa, 164, 96 N. W. 730.

Defendant was entitled to presume that the gate would continue to perform its functions, and that the defendant would not be responsible, in the absence of notice, if the gate was stuck and up at the time of the accident.

Trybula v. A. Plamondon Mfg. Co. 153 Ill. App. 298; Moran v. Racine Wagon Co. 74 Hun, 454, 26 N. Y. Supp. 852; Skellenger v. Chicago & N. W. R. Co. 61 Iowa, 714, 17 N. W. 151; Kitteringham v. Sioux City & P. R. Co. 62 Iowa, 285, 17 N. W. 585.

Mr. C. Woodbridge also for appellant.

Messrs. E. P. Hudson and R. L. Hudson, for appellee:

The verdict was not excessive.

Knott v. Dubuque & S. C. R. Co. 84 Iowa, 462, 51 N. W. 57; Harker v. Burlington, C. R. & N. R. Co. 88 Iowa, 409, 45 Am. St. Rep. 242, 55 N. W. 316; Rowell v. Williams, 29 Iowa, 210; Deppe v. Chicago, R. I. & P. R. Co. 38 Iowa, 592; Rice v. Des Moines, 40 Iowa, 638; Belair v. Chicago & N. W. R. Co. 43 Iowa, 662; Reed v. Chicago, St. P. M. & O. R. Co. 74 Iowa, 188, 37 N. W. 149; Latman v. Douglas & Co. 149 Iowa, 700, 127 N. W. 661; Murphy v. Southern P. R. Co. 31 Nev. 120, 101 Pac. 322, 21 Ann. Cas. 502; Sedgw. Damages, § 1320; Toney v. Interstate Power Co. 180 Iowa, 1862, 163 N. W. 394.

It is not necessary, in order to render a statement of a witness available for the purpose of impeachment, that it should be of such character as to be

admissible as independent evidence in the case.

Robinson v. Craver, 88 Iowa, 381, 55 N. W. 492; State v. McPursley, 144 Iowa, 414, 121 N. W. 1031, 122 N. W. 930; State v. Criswell, 148 Iowa, 254, 127 N. W. 65; DeBois v. Luthmers, 147 Iowa, 315, 126 N. W. 147; Lodge v. State, 82 Am. St. Rep. 39, note.

Mr. W. L. Smith also for appellee.

Stevens, J., delivered the opinion of the court:

This is the second time this case has been before us on appeal. Upon the former trial, the court directed the jury to return a verdict for defendant upon the ground that no negligence was shown. The question of plaintiff's contributory negligence was also urged upon that appeal. A careful comparison of the record upon this and the former appeal reveals but little difference therein. Some additional evidence, largely cumulative in character, was offered, but this does not tend materially to remove the conflict.

The court held upon the former appeal that the cause should have been submitted to the jury, and, as <sup>Appeal—second appeal—law of case.</sup> both the question of

defendant's negligence and plaintiff's contributory negligence were involved and passed upon by the court, the holding there announced is decisive and binding upon this appeal. Boeck et al. v. Modern Woodmen, — Iowa, —, 166 N. W. 1048; Hawthorne v. Delano, — Iowa, —, 167 N. W. 196.

II. Counsel for defendant offered many requests for instructions, all of which were overruled. We are unable to discover any prejudicial error of the court in this respect. Several of the requested instructions were argumentative in character, and gave too much prominence to <sup>—refusal of instructions—error.</sup> particular items of

evidence. While some of the suggestions therein set forth might have been properly included in the court's charge, yet, taken as a whole, the instructions given by the court were reasonably full and complete, and fairly submitted the case to the

jury. An extended discussion of the errors relied upon in the refusal to give the offered instructions is not called for.

III. Counsel for plaintiff, upon cross-examination of a witness, elicited evidence regarding a conversation between him and plaintiff regarding the condition of the automatic elevator gate at a time subsequent to the injury. The answers, to some extent, left the meaning of the witness in doubt, whereupon defendant's attorney recalled him and had him detail the conversation. Plaintiff was then permitted, over defendant's objection, to take the stand and give his version of the conversation, which

—immaterial  
evidence—  
introduction by  
both sides.

resulted in leaving the evidence in direct conflict as to what occurred.

As the conversation was gone into by counsel for both parties, and their respective versions placed before the jury, in the absence of a showing of prejudice there should not be a reversal upon this ground.

IV. Exceptions were also taken to the court's ninth instruction. The ground of the exception here urged was included in one of defendant's requested instructions. The instruction complained of placed upon the defendant the duty to exercise reasonable and ordinary care in maintaining the gate at the entrance to the elevator in a reasonably safe condition. The jury was specifically told that it was not the duty of defendant to furnish an operator for the elevator and gate, nor to maintain someone constantly in charge thereof. The duty to exercise such care as a reasonably prudent person would have exercised in inspecting the gate was enjoined upon the defendant. The court also told the jury that unless it appeared from the evidence that defendant had notice that the gate was not in place, or not in working order, for a sufficient length of time prior to the accident to have enabled the same to be remedied, the defendant could not be charged with neg-

ligence. The evidence was in conflict as to whether the gate had previously failed to work. The burden was placed upon plaintiff, under the instruction, to show that the defendant knew the gate was not in place at the time of the accident, or had been out of working order for such a length of time that, by the exercise of ordinary care, defendant should have obtained knowledge thereof and failed to remedy the same. The instruction was not unfavorable to defendant.

Elevator—  
unsafe gate—  
liability of  
owner.

V. The verdict, which was for \$8,000, is vigorously assailed by counsel as excessive, and the result of passion or prejudice on the part of the jury. We find nothing in the record to sustain the latter claim. No testimony whatever was offered, and the record discloses nothing as happening during the trial from which it could be inferred that the jury might have been influenced in reaching their conclusion by ulterior motives or influence. Prior to the accident, plaintiff, who was twenty-six years of age, was earning \$70 per month, and at the time of the trial \$65 per month. His former weight was about 178 pounds, but since the accident he has weighed from 138 to 144 pounds. He fell a distance of 16½ feet, striking upon a hard floor. He appears to have been partially conscious when rescued, and claims to have suffered severe pain from his injuries. He was confined to his bed for about ten days and unable to work for several weeks. The physician who attended him testified that he was bruised in several places, principally on the back. He suffered a severe contusion to the tissues of the back, between and a little above the shoulder blades. His scalp was cut in several places; the lower part of the cervical, and the upper part of the dorsal, vertebræ were injured. This witness further testified that at the time of the last trial plaintiff was suffering from the effects of some of the injuries; that he has

fever daily, and if this continues will probably have a permanently diseased condition of some of the bones of the vertebræ; that he has a large curvature at the junction between the dorsal and cervical vertebræ. He gave it as his judgment that the condition of the injured vertebræ indicates tubercular trouble. Other experts called on behalf of plaintiff testified to the curvature of the spine; that he is slightly stooped; that he has an abnormal temperature, and Dr. Ely testified that he examined him shortly before the trial and found his pulse very rapid; that it was 120 when the examination began, and rose to 148 before it was concluded. This, however, may be accounted for, in part at least, by nervousness due to the examination.

All of the expert witnesses testified to symptoms of tubercular infection. Numerous witnesses, who had worked with plaintiff prior to the accident, testified that he was not then stooped, and that he is not able to do as heavy work as formerly. He complains of pain in his back, and his wife testified that his sleep is often disturbed; that he lies with a pillow under his back, and frequently is so exhausted when he returns from his day's labor that he immediately retires, and that she always applies liniments and alcohol, with rubbing, before he retires; that he at times has difficulty in breathing, has dizzy spells, and a numbness in one arm and hand.

The immediate loss of time and earnings, together with the pain and suffering endured, would hardly justify a verdict in plaintiff's favor of \$8,000. His earning capacity does not appear to have been materially lessened, but he cannot follow his former occupation. The question, however, whether his injuries are of a permanent nature, and, if so, the probable extent thereof, is very material upon this point. At one time he worked at the carpenter's trade, but at the time of the trial claimed he was unable to follow this line of work, and that he

has, since the accident, worked at somewhat reduced wages. If it were conceded that injuries referred to in the evidence of the expert witnesses were reasonably certain to result in tuberculosis, probably no one would complain of the verdict as excessive. The physicians who examined him immediately before the trial found him nervous, but were unable to determine whether it was due to his injuries or whether it was temperamental. It is unfortunate that there is no definite standard by which expert witnesses could have determined whether the injuries complained of will ultimately result in tuberculosis. Doubtless the best the medical experts could do was to express an opinion, based upon physical and symptomatic conditions. None of them were willing to say that he would ultimately permanently recover, but were rather inclined to the opinion that the probabilities were that the diseased vertebræ would in time become tubercular.

The credibility of the witnesses was for the jury, and we cannot assume that the conditions described or conclusions expressed by the physicians were unworthy the belief of the jury.

Their testimony is not disputed. We can easily perceive

Damages—  
amount—  
tubercular  
infection.

how some of the symptoms manifested may proceed from psychological causes, but the diseased condition of the back, the curvature of the spine, increased temperature, serious loss of weight, and the possibility of tubercular infection cannot be accounted for in this way. The question of the extent of plaintiff's injuries, whether permanent or otherwise, together with the possibility that a fatal disease may yet follow, were all properly questions for the jury, and under the evidence, it might have found that the injuries were permanent in character, and that there was a reasonable probability of tubercular infection. Reed v. Chicago, St. P. M. & O. R. Co. 74 Iowa, 188, 37 N. W. 149; Lat-

man v. Douglas & Co. 149 Iowa, 699, 127 N. W. 661.

We are invited to make comparison of the verdict returned by the jury herein with verdicts held excessive in numerous cases from other jurisdictions. We have examined a large number of the authorities cited, and some of them may not be

in entire accord with the conclusion reached by us in this case; but conditions have changed greatly since many of the cited cases were decided. The immense increase in the cost of living and in all the necessities of life must be, to some extent, taken into consideration in determining whether the verdict was in fact excessive. It may be that plaintiff will entirely recover, and suffer little or no per-

manent impairment of his health, comfort, or earning capacity; but, under the evidence, the jury could have reasonably found otherwise. The question was peculiarly for the jury, and we do not feel that same should be interfered with by this court.

Other questions discussed have been considered, but as in our opinion they present no sufficient reason for reversing the lower court, it will not be profitable to discuss them.

Finding no error in the record justifying a reversal, the judgment of the court below is affirmed.

Gaynor, Weaver, and Preston, JJ., concur.

Petition for rehearing denied, May 21, 1919.

## ANNOTATION.

### Increase in cost of living as affecting damages for personal injuries or death.

#### I. Personal injuries:

##### a. In general, 610.

##### b. Judicial consideration of change, 610.

##### c. Consideration of change by jury, 611.

#### II. Death, 612.

#### *I. Personal injuries.*

##### *a. In general.*

In comparing present and past verdicts for similar personal injuries, the difference in the purchasing power of money, or, in other words, the increase or decrease in the cost of living at the present time as compared with such power at the time the prior awards were made, may be taken into consideration. *Louisville & N. R. Co. v. Williams* (1913) 183 Ala. 138, 62 So. 679, Ann. Cas. 1915D, 483, 4 N. C. C. A. 182; *Seaboard Air Line R. Co. v. Miller* (1908) 5 Ga. App. 402, 63 S. E. 299; *Canfield v. Chicago, R. I. & P. R. Co.* (1909) 142 Iowa, 658, 121 N. W. 186; *NOYES v. DES MOINES CLUB* (reported herewith) ante, 605; *Dole v. New Orleans R. & Light Co.* (1908) 121 La. 945, 19 L.R.A.(N.S.) 623, 46 So. 929; *Rogers v. Hiram J. Allen Lumber Co.*

(1912) 129 La. 900, 39 L.R.A.(N.S.) 202, 57 So. 166; *Cross v. Lee Lumber Co.* (1912) 130 La. 66, 57 So. 631; *Johnson v. St. Paul City R. Co.* (1899) 67 Minn. 260, 36 L.R.A. 536, 69 N. W. 900, 1 Am. Neg. Rep. 93; *Hays v. United R. Co.* (1914) 183 Mo. App. 608, 167 S. W. 656; *Gale v. New York C. & H. R. R. Co.* (1878) 13 Hun (N. Y.) 4.

##### *b. Judicial consideration of change.*

In the reported case (*NOYES v. DES MOINES CLUB*, ante, 605), it was held that the immense increase in the cost of living and in all the necessities of life must be, to some extent, taken into consideration in determining whether a verdict for personal injuries of a permanent character is excessive. So, in the Iowa case of *Canfield v. Chicago, R. I. & P. R. Co.* (1909) 142 Iowa, 658, 121 N. W. 186, the increased cost of living was held to be a potent factor when considering prospective damages to be awarded an injured person, as where his earning capacity is destroyed. In this case, in answering the contention of plaintiff's counsel in support of a

large verdict for personal injuries, that "the expenses of living have increased during the past ten or twelve years, and that the necessities of life, nursing, medicines, professional services, etc., are more than they used to be," the court said: "This argument is, of course, potent in considering prospective damages, but it is a two-edged sword as applied to plaintiff's probable accumulations, and the damage to his estate. It appears that his salary had not increased in proportion to expenses; and, if the proposition be true that the cost of living has increased without a proportionate increase in earnings, it is manifest that had he lived to his full expectancy, he would not have accumulated and saved as much as he would have done before this increase of the cost of living. Assuming, however, that he cannot in the future earn anything by manual or other labor, this increase in expenses may well be considered, as also the fact that interest rates are not as large as they used to be."

And seemingly without attaching especial importance to the permanent character of the injuries, a similar rule has been laid down in a number of other cases. Thus, in *Sea Board Air-Line R. Co. v. Miller* (1908) 5 Ga. App. 402, 63 S. E. 299, the Georgia supreme court, in approving a verdict that was larger in amount than any of the juries of that state, so far as reports showed, had previously awarded for personal injuries, said: "It must be remembered, too, that, owing to the low purchasing power of money at the present time, every dollar awarded a few years ago afforded as much compensation as do \$2 now." And again in *Dole v. New Orleans R. & Light Co.* (1908) 121 La. 945, 19 L.R.A. (N.S.) 623, 46 So. 929, in sustaining an award for personal injuries greater in proportion than the court had previously been in the habit of allowing, the court considered, as it said it was bound to do, the fact that the purchasing power of money was less than it had been in the past. And in *Gale v. New York C. & H. R. R. Co.* (1878) 13 Hun (N. Y.) 4, the court stated that, in making comparison of

other personal injury cases with the present, it must notice that the relative value of money had diminished in recent times. And in *Hays v. United R. Co.* (1914) 183 Mo. App. 608, 167 S. W. 656, the court declared a verdict for personal injuries not excessive, broadly stating the rule to be that, in comparing verdicts, the difference in purchasing power of money at the present time as compared with such power at the time prior decisions were given may be considered. So in *Rogers v. Hiram J. Allen Lumber Co.* (1912) 129 La. 900, 39 L.R.A. (N.S.) 202, 57 So. 166, the court, in reducing an excessive verdict for personal injuries, made a smaller reduction "in view of the decrease, within the past few years, in the purchasing power of money." And in *Cross v. Lee Lumber Co.* (1912) 130 La. 66, 57 So. 631, the court, "in view of the decrease in the purchasing power of money," increased the award in a personal injury action.

And a similar principle, although based upon a contrary point of view as to the purchasing power of a dollar, was applied in the Minnesota case of *Johnson v. St. Paul City R. Co.* (1899) 67 Minn. 260, 36 L.R.A. 586, 69 N. W. 900, 1 Am. Neg. Rep. 93, wherein, in conditionally reducing a verdict in a personal injury action, the court took into consideration the "greater" purchasing power of money, saying: "There is another consideration which we think we may take into account, and that is that, however statesmen and financiers may disagree as to the cause, a given sum of money has greater value, . . . that is, greater purchasing power, . . . than it had years ago."

And see *Louisville & N. R. Co. v. Williams* (1913) 183 Ala. 138, 62 So. 679, Ann. Cas. 1915D, 483, 4 N. C. C. A. 182, as set out in the following subdivision.

#### *c. Consideration of change by jury.*

That the fact that the value of the dollar has greatly depreciated since the accident may be taken into consideration by the jury, in estimating the damages for personal injuries, was ruled in the recent case of *Washington & R. R. Co. v. La Fourcade* (1919)



48 App. D. C. 364, wherein, in holding that a statement of the plaintiff's counsel, in his argument to the jury in a personal injury action, to the effect "that, although the accident happened several years before, yet the jury were giving compensation now, and that \$10,000 now is only equal to \$5,000 five years ago," was not prejudicial, the court said: "We think it was competent for the jury, in order to arrive at a just compensation, to take into consideration a condition directly affecting their decision, especially where, as here, the matter in question, the present value of the dollar, is elemental, within the knowledge and experience of men in general, and based upon an economic principle notoriously accepted as true. The dollar is merely a representative of value, a medium of exchange, the value of which is fixed by its purchasing power. That power varies, relatively with the shifting conditions which control the exchange of things capable of valuation. Hence, in measuring it in dollars, it is competent for the jurors to take into consideration those conditions, social and economic, which at the time are generally known and acknowledged to exist, and which, from universal experience, are applied by mankind in fixing values." And as

stated in *Louisville & N. R. Co. v. Williams* (1913) 183 Ala. 188, 62 So. 679, Ann. Cas. 1915D, 483, 4 N. C. C. A. 182, the tendency in recent years has been for juries to award, and appellate courts to sustain, increasingly larger sums as compensation for personal injuries, which tendency is largely "attributable, no doubt, to the greatly decreased purchasing power of a dollar, as exemplified in the rise in the price of nearly all commodities, and the enormous increase in the cost of living."

## II. Death.

That, when determining probable accumulations and the damage to one's estate, consideration of the increased cost of living, unless accompanied by a corresponding increase in wages, is a detriment rather than a benefit to the injured person's cause, see *Canfield v. Chicago, R. I. & P. R. Co.* (1909) 142 Iowa, 658, 121 N. W. 186, as quoted *supra*.

And applying the general rules applicable to damages for death by wrongful act, it would seem that the taking into consideration of an increase in the cost of living would have a tendency to decrease the amount of the awards in such cases. However, no case which expressly involved this point has been discovered. G. J. C.

## FREDERICK LAMBERT

v.

## AMERICAN BOX COMPANY, Limited, Appt.

*Louisiana Supreme Court — February 3, 1919.*

(— La. —, 81 So. 95.)

### Highway — use of trailer — injury to gallery supports.

1. It is gross negligence for the chauffeur of a motor truck, having a trailer in the form of a wagon behind it, to drive the tandem through a much-frequented thoroughfare in a populous city, after one of the two attachments connecting the trailer at its front axletree, with the truck, has parted, and the trailer for several hundred feet has zigzagged across the roadway, at times scraping the curb, until finally it mounts the banquette, and, one after another, breaks and knocks down three cast-iron posts, set near the curb, which support a gallery that extends across the banquette

from the house; and the owner of the truck and trailer is liable in damages for the loss and injury thereby inflicted upon the owner of the gallery, which, deprived of its support, falls to the ground and is destroyed.

[See note on this question beginning on page 618.]

**Damages — destruction of gallery.**

2. In such case, the owner of the gallery is entitled to recover an amount sufficient to pay for a gallery as good as that destroyed, and is not required to build or accept a gallery constructed of the broken material, matched, patched, and welded, which constituted the old gallery.

[See 8 R. C. L. 484-486.]

**Highway — obstruction — removal.**

3. No citizen may, with impunity, whether wilfully or negligently, destroy the property of another which causes him no injury, and which, under a claim of right, and with the sanction of a municipal government,

occupies a portion of a street administered by such government.

[See 13 R. C. L. 196 et seq.; 20 R. C. L. 489, 490.]

**Nuisance — right of action by individual.**

4. One has no right of action for removal of an obstruction alleged to be a nuisance, from a public street, unless it causes a particular injury to his person or property.

[See 20 R. C. L. 458 et seq.]

**— right to abate.**

5. One has no right wilfully or negligently to destroy property obstructing a public street, which he alleges to be a nuisance, unless it causes a particular injury to his person or property.

[See 20 R. C. L. 489.]

**APPEAL** by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiff in an action brought to recover damages for injuries to property, alleged to have been caused by the negligence of an employee of defendant. *Affirmed.*

Statement by Monroe, Ch. J.:

Defendant brings up this appeal from a judgment awarding plaintiff \$2,120.75 as damages, alleged to have been caused by the negligent handling of a motor truck and trailer by one of defendant's employees, as a result of which the trailer collided with, and knocked down, or broke, one after the other, three cast-iron posts, which, being set in the banquette, near the curb, in front of a building owned by plaintiff, supported a gallery composed of iron scroll work with floors of plank, and extending from the front of the building on the second and third stories, across the banquette, which gallery, by reason of the removal of its supports, fell to the banquette and was reduced to a mass of unavailable debris, and in so doing tore loose its attachments to, thereby damaging, the front of the house, breaking the window blinds, and subjecting defendant to other pecuniary loss. Testimony as to the occurrence and extent of the damage, given by a number of witnesses

who corroborate each other, establishes the facts beyond doubt.

It is thus shown that a negro chauffeur, with another employee of defendant at his side, was driving a 40-horse power Packard truck, to which was attached a "trailer" in the form of a spring wagon, down Camp street at about 9 o'clock on a morning in April; that the wagon had a pole extending out in front, which was attached to or formed a Y at the rear end, the arms or branches of which, respectively, were bolted, or should have been bolted, to the front axletree of the trailer; while the forward end of the pole was hooked to the truck. As this tandem of vehicles approached St. Joseph street, upon which the Illinois Central Railroad Company has a track, the gatekeeper employed by that company observed that the right arm of the Y had become detached from the axletree of the trailer and was hanging loose, and, in consequence, that as the truck, which was moving at (what we consider) a pretty rapid

pace, under the circumstances, moved off and on the street car track (on Camp street), the trailer zigzagged behind in rather an irresponsible fashion, scraped the curb on the right for perhaps 100 feet, and then came near colliding with the gate which the keeper was operating; and the same thing attracted the attention of an ice man, who attempted to warn the chauffeur by whistling at him, but was successful only to the extent that one of the two men on the truck glanced around, and, seeing nothing that interested him, the truck proceeded across St. Joseph street; and about that time the eccentric movements of the trailer attracted the attention of another witness who, walking up Camp street, had arrived in front of plaintiff's building, and, seeing the trailer again scraping the curb and heading for the gallery, realized that a collision was imminent and attempted to avert it by vocally warning the men on the truck.

His testimony as to what he saw and did reads, in part, as follows:

I saw the thing coming, grinding the curb all the way down Camp street. . . . About 30 feet from the house when I hollered. . . . I moved off when I saw the trailer coming in on the banquette. . . .

Q. When you first saw the truck, had you passed from under the gallery?

A. No, sir; I walked out—about the center of the gallery—to the curb and hailed the darkey, and the two negroes were so deeply interested in conversation that they did not pay any attention. As soon as I saw that there was to be an accident, I got from under about 10 feet.

Q. You saw the whole thing?

A. Yes, sir; I saw when the trailer struck the third post, I think; it broke loose, and the truck ran ahead about 70 or 80 feet or more.

Q. Did the truck break loose from the trailer?

A. Yes, sir; on the third post; either the chain pulled off or the pole broke, I don't know which."

From the testimony thus quoted, with much other, it appears that the trailer scraped the curb until it reached a point immediately above plaintiff's house, where the curb was opened for the purpose of an entrance for vehicles into plaintiff's premises, into which it swerved until, controlled by the onward pull of the truck, the wheels on the right side mounted the banquette and the trailer began its assault upon the gallery posts, which were set in the banquette a few inches inside of the curb and probably about 8 feet apart, and, breaking them off in one, two, three order, stopped at the third post with the first two inside of it (the trailer), where they had fallen, together with other debris of the gallery, and with the third post broken off at the bottom and leaning against the front of the trailer—the truck having, in the meanwhile, parted company with it, and run on down the street for a distance, most of the witnesses say, of about 100 feet, by which time the chauffeur and his companion had probably finished their conversation.

The chauffeur's explanation of the affair, given in his own words, is as follows: "My idea was, it simply could not be helped. My idea was, a pin must have broke when I pulled off the track, and that accounted for the wagon going wild, and it hit the curb and jumped up on the sidewalk."

He says that all that he could do was to stop when the collision occurred; that he did stop, with the truck still connected with the trailer, for about half an hour; that he then, by direction of the policeman who had come upon the scene, went back and unhooked the trailer from the truck.

The policeman testifies that when he got there, about ten minutes after the accident, "the truck was away from the trailer about 90 feet." And of the fifteen or twenty witnesses who testified in the case, not one saw the truck and the trailer any closer together from the moment of the collision with the first

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post; some, who witnessed the collision, saw them part company at that moment; and some, who were on the spot immediately afterwards, saw them from 80 to 100 feet apart.

The chauffeur says that the truck was slow—the slowest that he ever handled; that 8 miles an hour was its best gait; that he was running slowly at the time of the accident, not more than 5 or 6 miles an hour. Asked what he found when he went back to the trailer, he replied: "On the right side, I noticed where a pin was out and a key through the bolt. I noticed that the pin was out of that; the whole [hole] was vacant; the shaft [referring to the right arm of what we have called the Y] was hanging on that side, after it struck the building; I didn't notice it before it struck."

A witness called by defendant testifies that he was defendant's saw filer and millwright; that he keeps up the truck and looks after the trailer; makes the bolts that go into the shaft and gives them to the chauffeur. Asked whether he had inspected the trailer or the truck on the day of accident, he was unable to recall such inspection, nor does he say when he had inspected them.

It is shown that plaintiff called for estimates of the cost of replacing the gallery; that the lowest estimate that he received was \$2,066; that he paid \$55 for having the debris removed from the banquette and \$5.75 for some other work that was required for the safety of the public; a further claim for \$300, for the loss of the use of the gallery, was rejected. He has not asked that the judgment be amended.

Messrs. John Dymond, Jr., A. Giffen Levy, and A. G. Williams, for appellee:

A front gallery of a building, the width of the sidewalk, fronting on a busy thoroughfare in the commercial district of the city of New Orleans, and supported by iron pillars set in the sidewalk near the curbing, is an obstruction; and, since it conserves no good public purpose, is an illegal obstruction.

Wolff v. District of Columbia, 196

U. S. 152; 49 L. ed. 426, 25 Sup. Ct. Rep. 198, 1 Ann. Cas. 967, 17 Am. Neg. Rep. 439; 28 Cyc. 892 et seq.; Hibbard, S. B. & Co. v. Chicago, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 256; Field v. Barling, 149 Ill. 566, 24 L.R.A. 406, 41 Am. St. Rep. 311, 37 N. E. 850.

The owner of a vehicle is not responsible for damages caused by an accident arising out of a latent defect in the mechanism which, shortly before the accident, had been inspected and found in good condition.

20 R. C. L. §§ 11, 28, pp. 16, 84.

Mr. Henry W. Robinson, for appellee:

Where the front galleries of a property owner overhang the sidewalk, supported by iron columns near the curb, which construction has been a common one in New Orleans for over a hundred years, made desirable by climatic conditions and not prohibited by city ordinances, such structures do not constitute a public nuisance.

New Orleans v. Kaufman, 138 La. 897, 70 So. 874; McCormack v. Robin, 126 La. 598, 139 Am. St. Rep. 549, 52 So. 779.

Structures on the public sidewalks are not necessarily nuisances. Some are entirely lawful.

Wolff v. District of Columbia, 196 U. S. 152, 49 L. ed. 426, 25 Sup. Ct. Rep. 198, 1 Ann. Cas. 967, 17 Am. Neg. Rep. 439.

A gallery over Canal street during carnival is proper, but the method of constructing its supports may be negligent.

Stern v. Davies, 128 La. 181, 54 So. 712.

Recovery may be had for trees on the sidewalk uprooted by a paver, and for cutting branches overhanging the sidewalk, of trees planted behind the front line.

New Orleans v. Wire, 20 La. Ann. 501; Tissot v. Great Southern Teleg. & Teleph. Co. 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 So. 261; Bright v. Bell, 113 La. 1078, 37 So. 976.

A private corporation may not tear down an awning on the thoroughfare without subjecting itself to damages.

Laviosa v. Chicago, St. L. & N. O. R. Co. v. McGloin (La.) 299.

Monroe, Ch. J., delivered the opinion of the court:

The defense seems to rest upon the proposition that plaintiff's gallery was an illegal obstruction to the banquette, hence that plaintiff was

a trespasser; that *no one* owes any duty to a trespasser, save to abstain from wilfully and wantonly injuring him, and that he is entitled to no compensation for loss and damages inflicted upon him by the mere negligence of another; that the owner of a vehicle is not responsible for damages caused by an accident arising out of a latent defect in a mechanism which, shortly before the accident, had been inspected and found in good condition.

1. Whatever may be said as to the obligation of an owner of private property towards a trespasser thereon, we have been referred to no authority, and we know of none, which sustains the view that one citizen may, with impunity, whether wilfully or negligently, destroy the property of another, which in no way inconveniences him, and which, upon a claim of right and with the sanction of a municipal government, occupied a portion of a street administered by such government.

A citizen has no right of action for the removal of an obstruction,

alleged to be a nuisance, from a public street, unless he is able to show that it causes a particular injury to his person or property; and still less has he the right either to take the law into his own hands and wilfully destroy

such property, or to destroy it by his negligence. The question of nuisance vel non in such case is to be determined between the corporation administering the street, and the citizen claiming ownership of the property. 28 Cyc. 898, 899; 29 Cyc. 1216; Wood, Nuisances, § 64; *Blanc v. Murray*, 36 La. Ann. 163, 164, 51 Am. Rep. 7.

It is a matter of public and judicial history that galleries, or "verandas," as they are also called, have been sanctioned by usage in New Orleans almost from time im-

memorial. More than sixty years ago, where one citizen sought to abate, as a nuisance, a veranda, such as that here in question, which had been constructed by his neighbor, this court said:

"Every front proprietor is clearly under an obligation not to obstruct the free use of the street; and the enforcement of this obligation concerns the municipal authority, which has enforced it, as shown by the ordinance of 1852, by the prohibition to erect awnings or balconies, which shall be less elevated than 8 feet above the sidewalk. As to verandas of the kind erected by the defendant, extending over the whole breadth of the sidewalk and elevated far above it by columns on a line with the curbstone, which the evidence shows to have become so common of late years, they are very obviously, so far as the public is concerned, a great improvement as compared with the hanging galleries and wooden sheds which extend only to the half or the third of the width of the sidewalk, and from which the drip, in rainy weather, is so great an annoyance to foot passengers.

"These modern verandas, on the contrary, afford a perfect shelter from the sun and weather, to passers by the front of houses to which they are attached. In sultry climates, the necessity of shade from the sun to health and comfort has universally introduced the custom of balconies or verandas which, in this respect, are equally beneficial to the inmates of the houses and to wayfarers." *Durant v. Riddell*, 12 La. Ann. 747.

In a much later case, the foregoing expression of opinion is referred to with approval, and applied to the case of trees whose limbs overhang a sidewalk; the court saying: "To those who live in this climate, particularly during the hot summer months, when the thermometer points to about 100, when not more, it would be needless to argue that

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the overhanging branches of magnolia trees on such sidewalks are no nuisance, but, on the contrary, actually prove of great relief, not only against the heat, but also, sometimes, even against the rain."

And the defendant (company), the agents of which entered plaintiff's premises and cut branches overhanging the sidewalk from the trees on the premises, was condemned in damages. *Tissot v. Great Southern Teleph. & Teleg. Co.* 39 La. Ann. 1001, 4 Am. St. Rep. 248, 3 So. 261.

In the still later case of *New Orleans v. Kaufman*, 138 La. 897, 70 So. 874, defendant was convicted of violating a city ordinance prohibiting the building of sheds over sidewalks, but *excepting from its operation existing balconies of dwelling houses* and marquises or awnings to protect show windows, provided no signs, advertisements, appeared thereon, from which it might be inferred that, while the city authorities were not disposed to legislate against existing balconies, they were not favorably inclined towards the building of new ones. We are not, however, informed that they have enacted any ordinance prohibiting the building of such balconies, and it is yet to be ascertained that such action can be made effective, if taken; the quoted decision being apparently unfavorable to that view. But supposing that such an ordinance had been passed, and might be enforced, the case against defendant loses nothing of its strength, since plaintiff, through the negligence of defendant's agent (if it be so found), had an existing veranda which, by express legislation, he was to be allowed to keep, and, it having been thus destroyed, he is denied the right, or must litigate in order to enjoy the right, to replace it.

We therefore conclude that defendant's first stated proposition is not well founded.

2. The second proposition, as applied to this case, is equally without merit. Apart from the question of

"latent defect," etc., therein presented, the evidence is conclusive that defendant's chauffeur ran his 40-

Highway—use of trailer—injury to gallery supports.

horse power machine for 250 or 800 feet, at a fairly high speed, on and off of the street railroad track, with the trailer hanging on by one arm of its Y and zigzagging from one side to the other of a much-traveled thoroughfare, like the tail of a kite in a high wind, and that he not only did not look behind of his own accord, but was so engrossed in conversation with his companion (whose proper position, as we apprehend, was on the trailer) that he took no other notice of two attempts that were made to inform him of the situation than casually to turn his head, without really looking (if, indeed, it was he whose head is said to have turned, and not the other man), or certainly without seeing that which he should have seen. He neither saw the trailer in its gyrations, nor did he hear it scraping the curb both above and below St. Joseph street, and though apparently blind, deaf, and unobservant, he must have driven the machine at a fair speed or it would not have broken off and knocked down, one after another, three cast-iron posts, which, from the photographs in evidence, were hardly less than 8 inches in diameter, and know nothing about it until he had gone 80 or 100 feet further down the street.

3. Counsel further argue that the lower court erred in allowing recovery for a new gallery, when only an old one was destroyed. The obligation of defendant, however, is to indemnify plaintiff—to put him in the position that he would have occupied if the injury complained of had not been inflicted on him. It goes further than that of an insurer against loss by fire, who takes no risk against personal effort and inconvenience. And yet, so far as we know, those who are engaged in the insurance business do not undertake to build an old

Damages—destruction of gallery.

house, by way of indemnifying the assured for the loss of an old house, and no suggestion is here made as to the manner in which that can be done. According to the evidence of plaintiff's contractor, the broken material of which the gallery in question was constructed, and which, at the time of the trial, was lying in a confused heap on plaintiff's premises, could not again be utilized in the construction of a gallery and it is not pretended that it could be so utilized, save by matching and welding the broken bits of iron, patching the flooring, and supplying missing parts of both with new material, all of which, when done at an expense not estimated, would result in the production of

a gallery composed of matched, patched, and welded material, which would not be the gallery that was destroyed, and which plaintiff is not bound to accept by way of indemnity for that which was destroyed. Defendant alleges in its answer that it had declined to have anything to do with the debris in question, sets up no claim for salvage, and has offered no evidence that the debris is of any value, or would compensate plaintiff for its occupancy of his premises. We therefore find no reason for making any change in the judgment appealed from on account of any possible salvage that he may realize.

The judgment appealed from is therefore affirmed.

### ANNOTATION.

#### Liability for damages by vehicle trailers.

It will be observed that in the reported case (*LAMBERT v. AMERICAN BOX Co.* ante, 612), the defendant was held guilty of negligence where the chauffeur of its 40-horse-power truck, which had a trailer attached, drove at a rapid pace through a much-frequented thoroughfare of a city after one side of the tongue of the trailer had become detached from it, and the trailer for several hundred feet zigzagged across the roadway, scraped the curb, and finally mounted the banquette, and knocked down three cast-iron posts supporting a gallery, it appearing that neither the chauffeur, nor another servant of the defendant who was on the truck with him, looked behind of his own accord, or noticed two attempts made by others to inform them of the danger.

In view of the fact that trailers are coming into common use, and that such use will undoubtedly give rise to considerable litigation, this case is of particular value. The question as to what constitutes negligence in using these vehicles is affected by considerations not incident to the use of ordinary vehicles, such, for example, as the additional allowance which must be made in turning the two vehicles; the

duty to look behind, as well as ahead; the duty to see that the couplings between the vehicles are sufficient, and in good condition, and possibly, under certain conditions, the duty to have a person on the trailer for the purpose of warning other travelers, watching the load, fastenings, lights, etc. There is at present little authority on the question under consideration, but one other case having been disclosed.

In *Quinlivan v. Ready & C. Coal Co.* (1916) 202 Ill. App. 224, in an action for the death of a child four years old, who was run over by a dump wagon which was attached to a sprinkling wagon, where it appeared that the driver of the sprinkling wagon was seated upon a high seat in such a position that he might have seen, had he looked, what a crowd of children were doing at the time of and just before the accident, that the horses were walking, and that the driver did in fact see these children as he approached them, it was held that it was a question for the jury whether he might have anticipated that one of the children would, under the circumstances, do as the deceased did, and could by the exercise of reasonable care have avoided the accident. The

only report of this case is an abstract of the decision.

Obviously different considerations

enter into the question of liability for injuries from street car "trailers," operating on fixed tracks. J. T. W.

W. & S. JOB & COMPANY, Plff. in Err.,

v.

HEIDRITTER LUMBER COMPANY.

*United States Circuit Court of Appeals, Second Circuit — November 13, 1918.*

(255 Fed. 311.)

**Sale — vessel — implied warranty.**

1. No implied warranty arises upon sale of a vessel after her examination by a surveyor for the buyer if, although she had some cargo in her, there was ample opportunity for examination, since the doctrine of caveat emptor applies.

[See note on this question beginning on page 622.]

**Appeal — finding of facts — binding effect.**

2. A finding of facts by the jury, approved by the district judge, is binding on the United States circuit court of appeals unless error was committed during the trial.

[See 2 R. C. L. 193 et seq.]

— admission of hearsay evidence.

3. In an action for breach of warranty of the seaworthiness of a vessel, it is reversible error to permit the buyer to be asked on cross-examination if he had not heard that it had made a successful trip across the ocean after trivial repairs.

[See 2 R. C. L. 247 et seq.]

**Sale — warranty — vessel.**

4. A statement by the seller of a vessel as to its seaworthiness after the contract of sale has been executed does not constitute an express warranty.

**Contract — warranty — consideration.**

5. A contract of warranty requires a consideration.

[See 6 R. C. L. 649 et seq.]

**Broker — authority to warrant vessel.**

6. An independent broker negotiating the sale of a vessel cannot commit the owner to an express warranty, without implied or apparent authority to do so.

[See 4 R. C. L. 255 et seq.]

**Sale — right to rely on statute.**

7. The purchaser of a vessel who makes an independent examination as to her seaworthiness cannot rely on the provisions of a statute that where the buyer makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies upon the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose.

**ERROR** to the District Court of the United States for the Southern District of New York to review a judgment in favor of defendant in an action brought to recover for breach of warranty of the seaworthiness of a vessel. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Ward, Rogers, and Manton, circuit judges.

Mr. Robert B. Honeyman for plaintiff in error.

Messrs. Harrington, Bigham, & Englar for defendant in error.

Manton, Circuit Judge, delivered the opinion of the court:

The defendant in error, owner of the Florence M. Belding, sold her



to the plaintiff in error on March 4, 1916. The latter now sues, claiming the schooner was not sound or seaworthy or in good condition when sold, and seeks to recover \$7,600, the difference between the purchase price and the price at which the plaintiff in error sold the boat subsequently, plus 5 per cent brokerage commissions, because, as it says, the schooner was not as warranted.

At the trial, both parties moved for judgment after the proof was submitted. The district judge, however, submitted specific questions to the jury, for it to determine the seaworthiness of the vessel, and this without objection from either litigant. The jury found the vessel seaworthy and fitted for a voyage upon the Atlantic at the time the agreement of sale was made. The

court thereafter, in a written opinion, approved the verdict and gave judgment for the defendant in error. This finding of fact, both of the jury and the district judge, is binding upon us, unless error was committed during the trial.

Mr. Job, called by the plaintiff in error, was cross-examined as to whether or not he heard that the Florence M. Belding made a trip from Nova Scotia across the Atlantic, and this after trifling repairs were made. This testimony was

duly objected to, but admitted, and exception taken to its admission. This error would require a reversal, for such evidence was hearsay and harmful, and might well influence the jury, if there was an expressed or implied warranty in the contract of sale. Was there an expressed or implied warranty? We think not.

One Stoddard, a shipbroker, was informed that the defendant had this vessel for sale, and approached the plaintiff and offered her for sale, which negotiations resulted in the following correspondence:

March 4, 1916.

Mr. R. F. Clark, Agent,  
New York,

Dear Sir:—

We understand from your agent, Mr. Stoddard, that you sell us the Florence M. Belding for the sum of \$38,000, and beg to inclose herewith check for \$5,000 on account of same.

We shall take delivery of the ship as soon as you can supply us with the bill of sale. Kindly acknowledge receipt of check and oblige.

Yours truly,  
W. & S. Job & Co., Inc.

Elizabeth, N. J., March 4, 1916.  
Messrs. Job & Company,  
No. 29 Broadway, New York City,  
Gentlemen:—

We beg to acknowledge receipt of your check for five thousand (\$5,000) dollars, account of purchase price for schooner Florence M. Belding, as per your letter of the 4th inst.

Yours very truly,  
The Heidritter Lumber Company,  
By F. R. Clarke.

Thereafter, and on March 13th, Mr. Wolff, vice president of the defendant in error, delivered a bill of sale for the schooner to Mr. Job, an officer of the plaintiff in error, and received the balance due on the purchase. Job testified as follows: "Mr. Wolff brought the bill of sale in and asked us for the balance of the money. Mr. Wolff told us he thought we had a bargain in the vessel, and I told him I was very glad to hear that, and he said she had been a very useful vessel to them, and that she was sound and seaworthy in every way. I told him we had only seen the top of the vessel. We had not been able to see her bottom, because she was full of lumber. We had not been able to see what was inside. Mr. Wolff said she was sound and seaworthy all over."

This was not denied by Mr. Wolff. However, whatever was said by Mr. Wolff on this occasion could not be considered an expressed warranty,

for the sale was consummated by the exchange of the above letters, and the parties were obligated to the contract there made.

**Sale—  
warranty—  
vessel.**

No representations made after that date as to the soundness or seaworthiness of the vessel would constitute an expressed warranty, for there was no new consideration. A contract of warranty requires a consideration. The consideration which

**Contract—  
warranty—  
consideration.**

supports this contract of sale was determined and agreed upon by the parties on March 4th.

**Broker—  
authority to  
warrant vessel.**

Any further or new warranty would require a separate and sufficient consideration. Nor could Mr. Stoddard, an independent broker, by anything that he said, commit the defendant to an expressed warranty, for he had no such implied or apparent authority. *Smith v. Tracy*, 36 N. Y. 79; *Crist v. Turner*, 175 App. Div. 664, 161 N. Y. Supp. 856.

But the plaintiff in error contends that there was an implied warranty. Although this contention is not pleaded, we will examine it. The plaintiff in error pleads an expressed representation. A surveyor, at the request of the plaintiff in error, examined the vessel and made a formal report of her condition before its purchase. He pronounced her seaworthy, and, although the vessel still had lumber in her hold, ample opportunity was afforded, either for further examination or some insistence upon a warranty. This was not done, and, after the report of the surveyor, the contract of sale

**Sale—vessel—  
implied  
warranty.**

was made. The rule of caveat emptor applies to the sale of a vessel under these circumstances and in the absence of an expressed warranty.

In *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987, the court said: "No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales

of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of caveat emptor applies. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because, if the purchaser distrusts his judgment, he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect, and declines to do it, he takes upon himself the risk that the article is merchantable; and he cannot relieve himself and charge the seller, on the ground that the examination will occupy time and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent. Of such universal acceptance is the doctrine of caveat emptor in this country that the courts of all the states in the Union where the common law prevails, with one exception (South Carolina), sanction it."

In *Barr v. Gibson*, 3 Mees. & W. 390, 150 Eng. Reprint, 1196, 7 L. J. Exch. N. S. 124, 24 Eng. Rul. Cas. 188, where a ship was sold without an expressed warranty, it was held that there was no implied warranty. There the court said: "The simple bargain and sale, therefore, of the ship, does not imply any contract that it is then seaworthy or in a serviceable condition."

In *Sanford & B. Co. v. Columbia Dredging Co.* 101 C. C. A. 96, 177 Fed. 882, the court said: "If the scows had been sold outright on May

23, 1904, after the respondents had full opportunity to discover their condition, it could scarcely be contended that the respondents would not be bound to pay the purchase price agreed upon, whatever defects might have been subsequently discovered therein. The rule of caveat emptor applies to the sales of ships as in the sales of other personal property. 1 Parsons, Admiralty, 86."

Nor is this result changed by reason of chapter 571 of the Laws of 1911 (New York State Personal Property Law). Section 96 thereof provides that, where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment

(whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

It is doubted whether a boat can be classified within the term "goods" as used in the statute, but here the buyer did not rely on the seller's skill or judgment, but, as above stated, made an independent examination of the boat. We think it was unnecessary for the district judge to submit the questions to the jury, as there was neither expressed nor implied warranty in this contract of sale. Therefore the error in the admission of testimony was harmless.

The result below is right, and the judgment is affirmed.

## ANNOTATION.

### Implied warranty on sale of vessel.

Upon the sale of a vessel to be manufactured for the buyer, an implied warranty arises that the vessel is fit for the use intended. In other words, that it is seaworthy, and this includes structural defects and defects in material used, which are not subject to observation by the buyer. *Cunningham v. Hall* (1862) 4 Allen (Mass.) 268; *Cram v. Gas Engine & Power Co.* (1894) 75 Hun, 316, 26 N. Y. Supp. 1069; *Chambers v. Crawford* (1793) Addison (Pa.) 150; *Shepherd v. Pybus* (1842) 4 Scott, N. R. 434, 3 Mann. & G. 868, 133 Eng. Reprint, 1390, 11 L. J. C. P. N. S. 101.

In *Cunningham v. Hall* (1862) (Mass.) supra, the rule is said to be that if the seller simply agrees to complete a vessel and deliver it at a stipulated price, there is an implied warranty that it shall be, both as to workmanship and as to materials used in its construction, fit for the service for which it was sold, or for the service to which vessels of that class were known by him to be commonly and usually appropriated. It is, however, pointed out that the contract under consideration "was in fact modified by the

clause that it 'should be finished in the style of the Polynesia,' or, in other words, by a stipulation that it should be planked with pine plank. Under this modification of what would otherwise have created a general liability, the defendant was bound only to use reasonable care and skill in the selection and preparation of that kind of plank, and in applying and fastening them to the frame and body of the vessel; for the plaintiffs, in consenting to the use of such materials, acted upon their own judgment, and assumed upon themselves the risk and hazard of the sufficiency of such kind of plank for the purpose for which they allowed it to be used; and they could afterwards only hold the defendant responsible for damages resulting from his failure to exercise reasonable skill and care in the selection of the planks which he used, or in the application of all known and proper tests to discover if there was unsoundness in any of them, or from the imperfection or unskilfulness of his work in covering the ship."

Where the parties agree upon the kind of materials of which a vessel

shall be completed, the duty rests upon the seller merely to exercise due care to prevent the use of unsound or defective materials and to cause the whole work to be done in a skilful and workmanlike manner. Reasonable care or skill is a relative phrase, and what this requires is always to be determined by consideration of the subject-matter to which it is applied. In its application as a rule or measure of duty to which a builder is subject in the building of a ship, and especially where it is constructed in part of materials known to be subject to defects which may essentially impair its strength or endanger its safety, it calls for the most vigilant inspection of every article used and the employment of every known test or means by which they may be detected. *Cunningham v. Hall* (1862) 4 Allen (Mass.) 268.

Applying the foregoing rule in *Cram v. Gas Engine & Power Co.* (1894) 75 Hun, 316, 26 N. Y. Supp. 1069, it is held that the manufacturer of a boat impliedly warrants that it is properly and skilfully made, and that good materials were used in its construction. Where a boat is ordered to be made with a cabin located in a designated position, the manufacturer, however, does not impliedly warrant that the cabin in such a position is not dangerous when naphtha is used for motive power, unless the manufacturer knows the danger and the purchaser is in ignorance thereof.

In *Shepherd v. Pybus* (1842) 4 Scott, N. R. 434, 3 Mann. & G. 873, 133 Eng. Reprint, 1392, 11 L. J. C. P. N. S. 101, it is held that, upon the sale of a barge by the builder, a warranty arises that it is reasonably fit for use. It is pointed out in this case that the boat was built by the seller, and the purchaser had had no opportunity to inspect it while it was being built, and the defects in it were not apparent upon inspection, and could only be detected upon trial.

In *Chambers v. Crawford* (1793) Addison (Pa.) 150, upon this point the court instructed the jury that "if a workman does work insufficiently, he is answerable for all consequences arising from this insufficiency, not-

withstanding an acceptance by the employer without objections; for the employer is not to be presumed acquainted with the execution of the work, and the workman must be. If the loss in this case happened through such carelessness or accident as, in the case of a sufficient boat, would have produced the same effect, you will find for the defendants. But if the loss happened through the insufficiency of the boat, measuring that insufficiency by the expressed intention of the parties, and the usage of the trade, you will find for the plaintiffs, with damage adequate to their loss."

But see upon this point the reported case (*W. & S. Job & Co. v. Heidritter Lumber Co.* ante, 619), holding that where the purchaser of a vessel bought it after employing a surveyor to examine it, and received a formal report from him as to her condition, the rule of caveat emptor applied, and no implied warranty arose as to the seaworthy condition of the vessel.

In *Burns v. Fletcher* (1850) 2 Ind. 372, it is held that no implied warranty of fitness arises from the sale of a flatboat, at the time sunk, and hence not subject to inspection, where the price paid was about one half the price of a good boat.

Under the Louisiana Code, which imposes the obligation of warranting an article sold against hidden defects, it has been held that the buyer of a vessel may recover damages for breach of the Code warranty as to the seaworthy condition of the vessel, such defect being hidden, within the meaning of the Code. *Bulkley v. Honold* (1856) 19 How. (U. S.) 390, 15 L. ed. 663.

It has been held that an agreement by the seller of a barge to construct bins therein raises an implied warranty of the fitness of the bins. *Excelsior Coal Co. v. Gildersleeve* (1908) 87 C. C. A. 202, 160 Fed. 47.

No warranty arises from the sale of a vessel to be taken with all faults, and without any allowance for deficiencies in length, weight, quantity, quality, or any defect or error whatever. *Taylor v. Bullen* (1850) 5 Exch. 779, 155 Eng. Reprint, 341, 20 L. J. Exch. N. S. 21.

In *Marmet Coal Co. v. People's Coal Co.* (1915) 141 C. C. A. 402, 226 Fed. 646, it is assumed for the purposes of the case that the sale of used barges without inspection raises an implied warranty of seaworthiness. It is, however, held that where the purchaser used the barges for some time after inspecting them, paid a portion of the barges' price, and renewed notes for the balance, he cannot recover on such implied warranty.

In *Sanford & B. Co. v. Columbia Dredging Co.* (1910) 101 C. C. A. 96, 177 Fed. 882, an implied warranty was said to arise from the loss of used scows, but it was held to have been waived by continued use of the scows after inspection by the lessee. The court said that the same rule of warranty applied to a rental of an article as would apply to the sale of such article.  
A. G. S.

A. L. MOLLER, Plff. in Err.,

v.

F. E. HERRING.

*United States Circuit Court of Appeals, Fifth Circuit — February 4, 1919.*

(255 Fed. 670.)

**Contract — breach — excuse — appointment of receiver.**

1. Damages will not be awarded against the owner for breach of contract where one who has contracted to salvage cotton which was washed away by a flood is prevented from performing by the appointment of a receiver for the distribution of salvaged cotton among all claimants to the lost property.

[See note on this question beginning on page 627.]

**Receiver — who represents.**

2. A receiver appointed by a court to take possession of cotton which had been washed away by a flood, for distribution among claimants, is a representative of the court, and not in any sense a representative of a claimant who had contracted for salvage of cotton he had lost.

[See 23 R. C. L. 7, 70.]

**— effect on rights of parties.**

3. The appointment of a receiver for cotton which has been washed away by a flood, in a suit to which one who lost cotton and one who had contracted with him to salvage it were both parties, prevents further performance of the salvage contract, even as to cotton which had been loaded on cars when the receiver was appointed, but of which he took possession since both

were under legal duty to attorn to the court and abide the judicial determination as to rightful claimants of the property.

[See 23 R. C. L. 53 et seq.]

**Contract — breach — act of God — liability.**

4. One is not liable in damages for failure to perform a contract where the performance is rendered impossible by act of God, the law, or the other party.

[See 6 R. C. L. 1000-1004, 1012.]

**Appeal — assignments of error by successful party.**

5. Assignments of error by a defendant on the record of a writ of error sued out by plaintiff to review a judgment for defendant cannot be considered.

[See 2 R. C. L. 161.]

**ERROR** to the District Court of the United States for the Southern District of Texas (Hutcheson, District Judge) to review a judgment in favor of plaintiff in part only, in an action brought to recover a balance alleged to be due for cotton salvaged by plaintiff at defendant's instance. *Affirmed.*

Statement by Sheppard, District Judge:

This case concerns a contract between the parties for the recovery and delivery by the plaintiff to the defendant of a lot of stranded cotton, carried away from the Moody & Company compress at Galveston, Texas, by the memorable storm of August 16, 1915, and scattered along the coast on the mainland opposite Galveston. The case was once before here, where the judgment below, dismissing plaintiff's action, was reversed, 161 C. C. A. 528, 249 Fed. 602. The defendant Herring claimed to have lost cotton which had been stored in the compress of Moody & Company, and authorized the plaintiff Moller in writing, on September 2, 1915, to "collect as much as possible, agreeing to pay salvage therefor at \$10 per bale for same, f.o.b. cars." Plaintiff proceeded on this authority, and picked up and assembled at Alta Loma, Texas, 578 bales of stranded cotton. Sixty-eight bales were actually delivered f.o.b. cars and received by the defendant September 3d. Fifty-two bales more were loaded on cars at Alta Loma September 4th, but this lot, as well as the residue, 458 bales, which had not been loaded on cars, were not delivered to defendant, because same were impounded by a receiver of the United States district court for the southern district of Texas in an equity cause therein begun on the 3d day of September, 1915, in which cause, on the same day, a receiver for all the stranded and lost cotton was appointed. It is admitted that the receiver, under orders of the court, took possession of all the cotton collected by the plaintiff and his agents under the agreement, except the sixty-eight bales admitted to have been received by the defendant. The defendant was impleaded in the equity cause for sixty-eight bales of cotton he had received from the plaintiff, and refused to pay the plaintiff for any cotton, including the sixty-eight bales which had been delivered by the plaintiff.

3 A.L.R.—40.

The plaintiff, also impleaded in the equity cause, answered, asserting his lien for salvage, and was awarded in due course, by the court, \$2.50 per bale for 510 bales which the receiver had taken over. Subsequently plaintiff brought this action against the defendant for \$4,505, claimed as a balance due him for 578 bales of the cotton salvaged by him at the instance of the defendant, less the salvage award of \$1,020 on 510 bales seized by the receiver.

The substantial facts are not controverted, except that plaintiff claims actual delivery to the defendant of 120 bales, while the defendant insists that fifty-two bales of this lot were not loaded "f.o.b. cars" as required by the contract, and besides were seized by the receiver before shipment. The plaintiff's action, therefore, is based on the theory that he had a subsisting contract with defendant for the salvage of as many as 1,000 bales of cotton; that he recovered 578 bales and made delivery of the same to the defendant, or to the receiver, whom plaintiff characterizes as defendant's agent. The defendant insists that the agreement was wholly abrogated by the court's intervention and rightful possession of the cotton through its receiver. The parties, by stipulation, waived a jury, and, after adducing much testimony, submitted the cause on final proofs, and the court found that the plaintiff had delivered to the defendant 120 bales of cotton under the contract, for which he was entitled to \$10 per bale for that amount, less an award of \$2.50 per bale for the fifty-two bales loaded on cars which were seized by the receiver before shipment, thereupon rendering a general judgment in favor of the plaintiff for \$1,070, with interest from September 4, 1915, at 6 per cent per annum. The plaintiff, dissatisfied with this judgment, sued out his writ of error to this court, and assigns as error, generally, the judgment in his favor for \$1,070, which was less than what he claimed under the contract.

for the amount of cotton recovered and delivered to defendant or the receiver, to wit, 578 bales. Defendant filed cross assignments, and cites as error the judgment against him, and particularly the sum of \$7.50 per bale allowed the plaintiff for the fifty-two bales loaded on cars, and which the receiver seized before shipment. But these assignments cannot be considered for reasons stated hereafter.

Argued before Walker and Batts, Circuit Judges, and Sheppard, District Judge.

Messrs. Maco Stewart and Albert J. De Lange, for plaintiff in error:

Placing the 578 bales of cotton f. o. b. cars by plaintiff was a substantial compliance with that part of the contract, and a substantial compliance should be considered as a full compliance of a condition of any contract.

Moller v. Herring, 161 C. C. A. 528, 249 Fed. 602; Smith v. Lipscomb, 13 Tex. 532.

Delivery to the receiver was delivery to him as trustee for Herring, and constitutes full performance of the contract.

Union Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1018; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787; Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Texas & P. R. Co. v. Gay, 86 Tex. 585, 25 L.R.A. 52, 26 S. W. 599; Booth v. Clark, 17 How. 331, 15 L. ed. 168; Kokernot v. Roos, — Tex. Civ. App. —, 189 S. W. 508.

Whenever the unlawful part of a contract can be separated from the rest it will be rejected, and the rest established.

McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; United States v. Bradley, 10 Pet. 343, 9 L. ed. 448.

Whenever a party by his own act renders performance of a contract impossible, the opposite party is excused from performance thereof.

Williams v. Bank of United States, 2 Pet. 102, 7 L. ed. 362; District of Columbia v. Camden Iron Works, 181 U. S. 461, 45 L. ed. 953, 21 Sup. Ct. Rep. 680; United States v. Peck, 102 U. S. 65, 26 L. ed. 47; Cheney v. Libby, 134 U. S. 80, 33 L. ed. 823, 10 Sup. Ct. Rep. 498; Chicago, M. & St. P. R. Co. v.

Hoyt, 149 U. S. 14, 37 L. ed. 629, 13 Sup. Ct. Rep. 779.

Mr. Elliott Cage, for defendant in error:

The greater part of the cotton for which plaintiff is claiming \$10 per bale had not even been delivered to him at the time the receiver took charge.

Thornton v. Daniel, — Tex. Civ. App. —, 185 S. W. 589; Chandler Lumber Co. v. Radke, 136 Wis. 495, 22 L.R.A. (N.S.) 713, 118 N. W. 185.

Moller and Herring were not made parties to the receivership case until December 11, 1915.

34 Cyc. 237, 238; Texas & P. R. Co. v. Bledsoe, 2 Tex. Civ. App. 88, 20 S. W. 1135; Brown v. Warner, 78 Tex. 543, 11 L.R.A. 394, 22 Am. St. Rep. 67, 14 S. W. 1032.

A party cannot be held liable for a breach of a voluntary contract when the law intervenes to prevent its performance.

Northern Irrig. Co. v. Dodd, — Tex. Civ. App. —, 162 S. W. 949; Northern Irrig. Co. v. Watkins, — Tex. Civ. App. —, 183 S. W. 436.

After the appointment of a receiver the property to which the receivership relates is to be deemed in the custody of the law.

Texas Trunk R. Co. v. Lewis, 81 Tex. 1, 26 Am. St. Rep. 776, 16 S. W. 647; Riesner v. Gulf, C. & S. F. R. Co. 89 Tex. 656, 33 L.R.A. 171, 59 Am. St. Rep. 84, 36 S. W. 53; Guaranty State Bank & T. Co. v. Thompson, — Tex. Civ. App. —, 195 S. W. 962.

Sheppard, District Judge, delivered the opinion of the court:

The plaintiff complains by his general assignment that the court erred in giving judgment in his favor for only \$1,070, and allowing him only \$7.50 per bale for fifty-two bales loaded on cars, and disallowing his claim in toto on 458 bales delivered to the receiver.

It has been seen that plaintiff claims damages for a breach of contract, but the contract required a delivery of the cotton "f.o.b. cars," and it is plain that there was delivery of only sixty-eight bales in the manner specified in the contract. That further delivery, as contemplated by the parties, was prevented, does not appear to have been due to any fault of the defendant. The law

(855 Fed. 670.)

intervened at the instance of other parties, and the court took jurisdiction of the subject-matter, and possession, by its receiver, of the cotton collected by plaintiff. The receiver, of course, was the representative of the court, and could not be in any

**Receiver—who represents.** sense the representative of the defendant. *Wiswall v. Sampson*, 14 How. 64, 65, 14 L. ed. 327, 328; *Metcalf v. Barker*, 187 U. S. 175, 47 L. ed. 127, 23 Sup. Ct. Rep. 67. The plaintiff and defendant were both impleaded in the equity cause, which sought to impound the cotton, and both were under the legal duty to attend to the court and abide the judicial determination as to rightful claimants to the property. The lot of fifty-two bales, which was loaded on cars the same day as the appointment of the receiver and by him intercepted, as well as the other cotton assembled by plaintiff for shipment, from that time on was in custodia legis, and the performance of the contract rendered impossible. The appointment of the receiver was impliedly an injunction against any interference with the custody of the cotton.

**—effect on rights of parties.** A distinction, it has been said, must be taken between cases for specific performance of a contract and those in which damages are sought for the nonperformance of a contract. The bare fact that the court can decree and enforce the specific performance of the contract shows that its performance is not impossible. But when the contract cannot be specifically performed, and the only remedy is by way of damages, the court will not inflict

damages, if the breach for which damages are sought has been occasioned by the law. In such cases it appears the doctrine of *damnum absque injuria* applies. It is a very well settled rule of law that, if performance is rendered impossible by act of God, the law, or the other party, it is a sufficient excuse. *Der-*

**Contract—breach—excuse—appointment of receiver.**

**—breach—act of God—liability.**

*mott v. Jones* (*Ingle v. Jones*) 2 Wall. 1, 17 L. ed. 762; *Malcomson v. Wappoo Mills* (C. C.) 88 Fed. 680; *Kansas Union L. Ins. Co. v. Burman*, 73 C. C. A. 69, 141 Fed. 848.

Defendant's assignments are not predicated on a writ of error sued out at his instance. It is settled law that on a writ of error sued out on appeal taken by plaintiff to review a judgment rendered by successful

**Appeal—assignments of error by successful party.** for defendant assignments by the latter in the same record cannot be considered. The rule was early announced in *The Maria Martin*, 12 Wall. 40, 20 L. ed. 251: "Both parties in a civil action may sue out a writ of error to a final judgment, but where one party only exercises the right the other cannot assign error in the appellate court." *Pauly Jail Bldg. & Mfg. Co. v. Hemphill County*, 10 C. C. A. 595, 23 U. S. App. 481, 62 Fed. 698; *Building & L. Asso. v. Logan*, 14 C. C. A. 133, 30 U. S. App. 163, 66 Fed. 827.

While the defendant's errors may not be considered, the plaintiff has no ground to complain of the judgment.

For the reasons indicated, the judgment must be affirmed; and it is so ordered.

## ANNOTATION.

### Appointment of receiver as excuse for nonperformance of contract.

I. Introduction; general rules, 628.

II. Application of general rules:

a. Contracts of sale or purchase, 630.

II.—continued.

b. Contracts for services, 633.

c. Contracts of employment, 634.

III. Miscellaneous, 636.



*I. Introduction; general rules.*

The scope of this annotation is limited, so far as the nature of the cases will permit, to the question stated in its title, to the exclusion of the question of the effect of the insolvency of the party in default, and of the question, where such party is a corporation, of its dissolution.

The courts have complicated the question in some instances by failing to consider it apart from the question (which this annotation does not purport to cover) whether a claim for damages arising from the nonperformance of the contract is properly allowable in the receivership proceedings. The discerning reader will need only to have the fact pointed out to him to recognize (albeit the courts have, in some instances, failed to do so) that the view that such a claim is not properly allowable as a debt incurred in the course of administration, or as a claim ranking *pari passu* with the claims of creditors existing at the time the receiver was appointed, is not necessarily based upon absence of liability on the part of the corporation for failure to perform its contract.

It is a general rule that what a party is bound by contract to perform, he must perform, or pay damages upon his failure to do so. To this rule, however, there have been admitted certain exceptions. The first is where the contract is one for personal services, in which case there is, generally, the implied condition that the person who is to render the service shall be alive and not incapacitated by illness. The second exception is where the specific thing which is essential to performance is destroyed. The third exception is where the performance of the contract has become unlawful; and the fourth is where the conditions with reference to which the parties must be deemed to have contracted do not in fact exist, or where, without fault of either party, there has been such a change in conditions that to enforce performance under the changed conditions is in effect to substitute a different contract.

If the appointment of a receiver will

constitute an excuse for nonperformance of a contract, the case must be referable either to the third or the fourth of these exceptions; and in some instances has been referred to the former, in others to the latter.

Where the view is taken that the case is one falling within the third exception, it is immaterial whether the receivership has been brought about by the act or omission of the party for whom the receiver has been appointed; but where the case is regarded as referable to the fourth exception, the question whether or not the inability of the contracting party to perform, occasioned by the fact that his (or its) hands were tied by the appointment of a receiver, will constitute an excuse for nonperformance, will depend upon (a) whether the parties must be deemed to have contracted subject to the implied conditions that each should continue in control of his (or its) business, and (b) whether the receivership was brought about by the act or omission of the party for whom the receiver was appointed, in which case the rule applies that impossibility of performance, brought about by the act or omission of the contracting party, is no excuse.

So far as a majority view can be extracted from a mass of decisions turning on such varying factors, and speaking with reference to contracts other than of employment, it is that the appointment of a receiver is ordinarily no excuse for the nonperformance of a contract, and will not exonerate the promisor from liability for failure to perform. See

**United States.**—*Pennsylvania Steel Co. v. New York City R. Co.* (1912) 117 C. C. A. 517, 198 Fed. 735; *Isaac McLean Sons Co. v. William S. Butler & Co.* (1914) 227 Fed. 325; *Curtis v. Walpole Tire & Rubber Co.* (1915) 227 Fed. 698.

**California.**—*Klauber v. San Diego Street Car Co.* (1892) 95 Cal. 353, 30 Pac. 555.

**Connecticut.**—*Wells v. Hartford Manila Co.* (1903) 76 Conn. 37, 55 Atl. 599.

**Delaware.**—*Re D. Ross & Son* (1915) 10 Del. Ch. 484, 95 Atl. 311.

**Illinois.**—*Wolf v. National Bank* (1899) 178 Ill. 85, 53 N. E. 896.

**Louisiana.**—*Peck v. Southwestern Lumber & Exporting Co.* (1912) 131 La. Ann. 177, 59 So. 113.

**New York.**—*Commercial Pub. Co. v. Beckwith* (1901) 167 N. Y. 329, 60 N. E. 642; *Stannard v. Robert H. Reid & Co.* (1907) 118 App. Div. 304, 103 N. Y. Supp. 521, affirmed without opinion in (1909) 195 N. Y. 530, 88 N. E. 1132.

**Texas.**—*Brown v. Warner* (1890) 78 Tex. 543, 11 L.R.A. 394, 22 Am. St. Rep. 67, 14 S. W. 1032; *Diamond State Iron Co. v. San Antonio & A. P. R. Co.* (1895) 11 Tex. Civ. App. 587, 33 S. W. 987; *Arlington Heights Realty Co. v. Citizens' R. & Light Co.* (1913) — Tex. Civ. App. —, 160 S. W. 1109.

**Canada.**—*Sovereign Bank v. Parsons* (1910) 24 Ont. L. Rep. 387, s. c. on appeal to Privy Council (1912) 107 L. T. N. S. 572, 29 Times L. R. 38.

**Contra:** *Malcomson v. Wappoo Mills* (1898) 88 Fed. 680; *Welch v. San Cristobal Central* (1914) 7 Porto Rico Fed. Rep. 311.

It should be noted that the above generalizations are based upon cases in most of which the contract involved (unlike the reported case, *MOLLER v. HERRING*, ante, 624) did not relate to a specific subject-matter. Where the contract relates to specific property, of which the receiver takes possession, it would seem entirely proper, and consistent with the rule followed in the majority of the foregoing cases, to hold that the continuance of existing conditions is an implied term of the contract, and accordingly that a change in such conditions operates to dissolve the contract and to exonerate either party from liability for damages for its breach.

As remarked in *Du Pont v. Standard Arms Co.* (1912) 9 Del. Ch. 315, 81 Atl. 1089, whether the receiver's termination of unfulfilled contracts gives a right to damages for the breach against the assets of the corporation which have come into the hands of the receiver may depend on the character of the subject of the contract.

In the case of contracts of employment, there is perhaps more reason than in the case of other contracts for

supposing them to be subject to an implied condition that they should terminate in case the employer's business is put in the hands of a receiver; especially in the case of contracts between corporations and their officers: That such a condition may be implied, see *Du Pont v. Standard Arms Co.* (Del.) supra; *McElheney v. Jasper Trading Co.* (1913) 12 Ga. App. 790, 78 S. E. 727; *Com. v. Eagle F. Ins. Co.* (1867) 14 Allen (Mass.) 344 (president of corporation); *Lenoir v. Linville Improv. Co.* (1900) 126 N. C. 922, 51 L.R.A. 146, 36 S. E. 185 (officers of corporation); *Law v. Waldron* (1911) 230 Pa. 458, 79 Atl. 647, Ann. Cas. 1912A, 467; *Reber v. Keystone Wagon Works* (1908) 19 Pa. Dist. R. 806; *Williamson County Bkg. & T. Co. v. Roberts-Buford Dry Goods Co.* (1907) 118 Tenn. 345, 9 L.R.A. (N.S.) 644, 101 S. W. 421, 12 Ann. Cas. 579 (president of corporation). A contrary view is taken in *Isaac McLean Sons Co. v. William S. Butler & Co.* (1914) 227 Fed. 325; *Spader v. Mural Decoration Mfg. Co.* (1890) 47 N. J. Eq. 18, 20 Atl. 378; *Eddy v. Co-operative Dress Asso.* (1883) 3 N. Y. Civ. Proc. Rep. 442; *Reid v. Explosives Co.* (1887) L. R. 19 Q. B. Div. (Eng.) 264, 56 L. J. Q. B. N. S. 388, 57 L. T. N. S. 439, 85 Week. Rep. 509.

#### **Distinction between voluntary and forced receiverships.**

The potential significance of the fact that a receivership is voluntary has already been remarked upon. Some judicial discussion of the point may be found in the subjoined decisions.

In *Peck v. Southwestern Lumber & Exporting Co.* (1912) 131 La. Ann. 177, 59 So. 113, it is said: "Between a voluntary and a forced receivership, a broad distinction must be recognized in the present connection, even though the forced receivership should have been unopposed, as in the present case. In a voluntary receivership the corporation is clearly not in a position to say that its not carrying out the contract was not due to its own voluntary act; whereas, in a forced receivership, it may with plausibility say that its default was due to the action of the

law or to the act of the court; merely with plausibility, however, and not in reality, because in such a case the corporation is responsible for the interference of the court, so that in reality, or in final analysis, the act of the court is the act of the corporation itself. The corporation is responsible for the interference of the court because its own acts of commission or omission, its own conduct, its mismanagement, intentional or unintentional, of its own affairs, has rendered the interference of the court necessary."

In *Welch v. San Cristobal Central* (1914) 7 Porto Rico Fed. Rep. 311, it was held that while the action of the receiver of a corporation in declining to proceed with the performance of a contract, which action was approved by the court, does not amount to the infraction of the contract by either party, but is *damnum absque injuria*, and that there are, therefore, no damages accruing from the receivership as such, the corporation may be liable if, by becoming insolvent, it occasioned the receivership, and so put it out of its own power to carry out the contract.

The view is taken in *Re D. Ross & Son* (1915) 10 Del. Ch. 484, 95 Atl. 311, that it is immaterial whether the corporation acquiesces or participates in the proceeding to have a receiver appointed, the court saying: "Inasmuch as the purpose of a receivership based on insolvency is the protection of all creditors of the company and to prevent the inequitable consequences of a scramble for advantage by suits, it is not the duty of the officers of the company to oppose or delay a suit for the purpose of a receivership, where insolvency clearly exists, but rather to promote an early adjudication and the taking of possession of the affairs of the company by the receiver. The participation by the officers of the company in the suit of creditors to obtain the receiver should not affect the right to obtain from the assets of the company payment for damages sustained for breach of a contract with the company made. I do not agree to the limitation of the beneficial rule above referred to."

See also, in this connection, *Stanford v. Robert H. Reid & Co.* (1906) 114 App. Div. 185, 99 N. Y. Supp. 567; *Reber v. Keystone Wagon Works* (1908) 19 Pa. Dist. R. 806, as set forth *infra*.

## *II. Application of general rules.*

### *a. Contracts of sale or purchase.*

In *Wolf v. National Bank* (1899) 178 Ill. 85, 52 N. E. 896, it was held that the assets of a national bank in the hands of a receiver were liable for damages for breach of the bank's contract to repurchase bonds sold by it, for the price paid, should the seller so desire.

In *Peck v. Southwestern Lumber & Exporting Co.* (1912) 131 La. Ann. 177, 59 So. 113, it was held that a corporation was not exonerated from liability for nonperformance of a contract to buy lumber by the fact that it had been, at the suit of a creditor, without opposition on its part, put in the hands of a receiver, who refused to carry out the contract. In response to the defendant's contention that any loss of profit which the other party to the contract had suffered by reason of the receiver's failure to adopt such contract was *damnum absque injuria*, the court said: "No doubt the receiver is not bound to adopt the contracts of the corporation in the sense of making them his own in such a way that any debt that might accrue from them would be a debt of the receivership (as contradistinguished from a debt of the corporation), and as such entitled to preferred payment out of the assets of the receivership, and it is also true that by the appointment of a receiver a situation may be created wherein enforcement of specific performance may become impossible; but it does not follow from this that the obligation of a contract may be destroyed by the appointment of a receiver. Under the operation of familiar principles, the obligation of the contract resolves itself into a money debt, or so-called damages; that is all. And such a debt is a perfectly valid, binding debt, as much so as any promissory note or bond; and it would be as reasonable to contend that by the ap-

pointment of a receiver the promissory notes or bonds of a corporation were vacated, converted into *damnum absque injuria*, as to contend that such a debt for damages was thus nullified. True, the amount of such debt is not yet fixed or certain; but in law, 'Id certum est quod certum reddi potest.' The familiar principles here alluded to are embodied in our Code, but are of universal jurisprudence, and hence would be practically of the same authority, even though not so embodied. They are (art. 433) that 'corporations may make valid contracts, obligate others and obligate themselves towards others;' that (art. 8182) 'whoever has bound himself personally is obliged to fulfil his engagements out of all his property, movable and immovable, present and future;' that (art. 8183) 'the property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful cause of preference;' that (art. 1908) 'there is a right implied in all obligations, to wit: that the property of the debtor shall be liable for all consequences attending their nonperformance;' that (art. 1930) the party who violates his contract 'is liable as one of the incidents of his obligation, to the payment of the damages which the other party has sustained by his default;' that (art. 1901) 'agreements legally entered into have the effect of laws on those who have formed them, and cannot be revoked, unless by the mutual consent of parties, or for cause acknowledged by law.' From these principles the forced conclusion is that the property of the corporation continues to be bound after the corporation has been incapacitated by the appointment of a receiver from carrying out its contract; and we know of no law, statutory or other, that stays the operation of these principles. To that effect are the English decisions. 51 L.R.A. 146, note. It has to be admitted, however, that the weight of authority at common law in this country is the other way. *Malcomson v. Wap-poo Mills* (1898; C. C.) 88 Fed. 680;

*Eddy v. Co-operative Dress Asso.* (1888) 3 N. Y. Civ. Proc. Rep. 442; *People v. Globe Mut. L. Ins. Co.* (1883) 91 N. Y. 174; *Tennis Bros. Co. v. Wetzel & T. R. Co.* (1905; C. C.) 140 Fed. 193; *Lenoir v. Linville Improv. Co.* (1900) 126 N. C. 922, 51 L.R.A. 146, 36 S. E. 185. Contra: *Bolles v. Crescent Drug & Chemical Co.* (1895) 53 N. J. Eq. 614, 82 Atl. 1061." And, after a quotation from *People v. Globe Mut. L. Ins. Co.* (1883) 91 N. Y. 174, illustrative of the reasoning by which the doctrine of nonliability is sustained, the Louisiana court continues: "This reasoning, in so far as based upon the statement that 'this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement,' assumes a promise which, if granted, puts an end to all discussion, namely, that the parties contemplated that the appointment of a receiver should put an end to their contract. But we do not see why it should be said that they so contemplated. True, they knew that a receiver might be appointed; but they did not know that such appointment would have the effect of destroying the obligation of the contract. There was no law providing that it should; and there was no reason why it should, since the property of the corporation would still remain to answer in damages for the nonexecution of the contract. The courts of England have not found any reason why the obligation of the contract should not continue in full force. Of course, if the law provided that, upon the appointment of a receiver, all contracts of the corporation should be terminated, the legal situation would be different. Such a law would be read into the contract as one of its conditions. The statutes in this state which forbid insurance companies from doing any further business after the appointment of a receiver or liquidation might, perhaps, have such an operation. The argument that the intervention of the court, or, in other words, of the 'sovereign power,' operates as *vis major*, loses sight of the fact that such intervention is the necessary consequence of the acts of the

corporation itself in provoking the appointment of a receiver by the mismanagement of its affairs. A court of justice cannot act until the party to be affected by its action has given it cause. The intervention of the court in such a case is the mere effect of the cause for which the corporation is responsible. It stands to reason that a corporation cannot, as an effect of its own acts of omission or commission, its own mismanagement, secure a release from the obligation of its contracts. If corporations could be thus relieved from their contracts, they would stand, with reference to the obligation of their contracts, in a much more favored position than ordinary persons."

In *Pennsylvania Steel Co. v. New York City R. Co.* (1912) 117 C. C. A. 517, 198 Fed. 735, it was held that a claim for damages for loss of profits, arising from the failure of a receiver of an insolvent railway company to adopt and continue the performance of its contract with an express company, might be proved as against other creditors, whose claims were, at the date of the appointment of the receiver, absolute. The court said: "It is possible that the appointment of a receiver of an objecting corporation, although preventing it from carrying out its executory contracts, might be considered to be the act of the law, and not such an act of the party as would constitute an anticipatory breach of such contracts within the rule. It is probable, too, that bankruptcy and insolvency do not break contracts when they do not in fact prevent performance. Thus, the bankruptcy of a lessee does not terminate the lease, and the lessee may be holden upon the rent covenant if he be permitted to continue his occupation. But when bankruptcy and insolvency do put it out of the power of the bankrupt or insolvent to perform his executory contracts, and when he does participate in bringing on the proceedings, they constitute the breach of such contract. How can it be otherwise? The situation is the equivalent either of an out-and-out repudiation, or of a complete disablement, and in

either case the contract is broken. . . . In the present case the appointment of the receivers for the Metropolitan and City Companies completely disabled those corporations from carrying out the contract with the Metropolitan Express Company. That contract granted the right to do the 'express, freight, and delivery business' on the roads of the Metropolitan system. The receivers took possession of the roads and excluded the Express Company and its assignee. Certainly there was absolute 'disablement of performance.' The railway companies also practically admitted their insolvency when the receivers were appointed, and joined in the prayers for their appointment. It is clear, then, upon the authorities cited, that the contract in question was broken by the insolvency of the railway companies and the appointment of the receivers, unless the contention of the appellees be well founded that a receivership cannot operate to break an executory contract because the receivers are allowed a period in which to act upon it. As we have seen in the termination-of-lease proceeding, a receiver is entitled to a reasonable time in which to determine whether to adopt or renounce the contracts of the corporation for which he is appointed. During this trial period the operations under the contract may go on and the legal consequences flowing from the fact of the receivership may be suspended in their operation. If the receiver elect to adopt the contract, his adoption relates back to the beginning of the receivership, and the contract continues as if nothing had taken place. That which would otherwise have amounted to a breach of the contract does not have that effect on account of the receiver's acceptance of it. On the other hand, it necessarily follows that when a receiver rejects a contract, his rejection relates back to the beginning of the receivership, and the breach of the contract takes place as of that time. Any other rule would be altogether inequitable and one-sided."

In *Curtis v. Walpole Tire & Rubber Co.* (1915) 227 Fed. 698, the court, in

holding a corporation liable for breach of a contract occasioned by the refusal of its receiver to carry out an executory contract of purchase, said: "The case is not one of which it can be said, as in *Malcomson v. Wappoo Mills* (1898) 88 Fed. 680, or in *Re Inman* (1910) 175 Fed. 312, that the prevention of performance was the act of the law, not of the insolvent or bankrupt. Both these decisions were based upon *People v. Globe Ins. Co.* (1883) 91 N. Y. 174, in which the receiver's appointment was at the instance of the state, and for the purpose of dissolving the corporation and winding up its affairs."

In *Wells v. Hartford Manilla Co.* (1903) 76 Conn. 27, 55 Atl. 599, the court, although holding that a claim for damages arising from the breach of an executory contract to purchase, caused by the failure of a receiver appointed upon complaint of a creditor to adopt the contract, was not allowable as a general claim against the estate, conceded that it might be such as against a balance remaining in the hands of a receiver after the expenses of settlement and claims of other creditors were paid.

In *Re D. Ross & Son* (1915) 10 Del. Ch. 434, 95 Atl. 311, it was held that the appointment of a receiver for an insolvent corporation, by which its corporate activity was paralyzed and it was prevented by the court from performing its obligations, did not prevent the enforcement of a right to damages for the breach of an executory contract to purchase made by the insolvent company.

That performance of a contract of sale is not excused by the appointment of a receiver for the seller in a debenture holder's action is assumed in *Parsons v. Sovereign Bank* (1912) 107 L. T. N. S. (Eng.) 572, 29 Times L. R. 38.

On the other hand, in *Malcomson v. Wappoo Mills* (Fed.) *supra*, it was held that when a corporation has contracted to sell and deliver merchandise upon a future day, and, before the time of delivery arrives, is enjoined from in any wise interfering with its property, and a receiver is

appointed of all its assets, performance of its contract is rendered impossible by judicial action, and the buyer has no claim for damages. The report of this case does not show whether the appointment of the receiver was voluntary or involuntary, or whether or not the corporation was dissolved.

#### *b. Contracts for services.*

In *Klauber v. San Diego Street Car Co.* (1892) 95 Cal. 853, 80 Pac. 555, it was held that the performance by a street railway company of a contract to operate three regular trains each day for a period of ten years, over an extension of its road, under penalty of forfeiting such extension, to be conveyed upon demand, was not excused as having been prevented by operation of law by the fact that a receiver had been appointed in a suit brought by a mortgagee to foreclose a mortgage upon the street railway, the court saying: "No case has been cited in which it has been held that interference by a writ sued out by a private litigant will excuse performance of a contract, although it may deprive the contractor of the means of performance. It is not prevention by operation of law. It is the act of an individual, and not of the government. In a certain sense, the property so taken may be in the custody of the law, and yet the seizure may be wrongful, and the suitor held responsible, as for a trespass, in damages. The law recognizes the fact that these private remedies may be wrongfully, that is illegally, used, and the litigant is required to give security for any damage that may be caused if it should be finally decided that the writ was improperly issued. This cannot be called the operation of law within the meaning of the Civil Code. The obligor contracts that he can and will control the acts of third parties, so far as necessary to enable him to perform his contract. *People v. Bartlett* (1842) 3 Hill (N. Y.) 570. Nor would it be a defense that the law has rendered it difficult or very expensive to perform. The rule is, if performance is in itself possible, there is a breach, although the

obligor himself may have become wholly unable to perform. The suit to foreclose the mortgage against the property of defendant did not render performance impossible; defendant could have paid the claim or given security, and have had the receiver discharged."

The attempt is sometimes made to distinguish this case, by courts inclined to take the opposite view, on the ground that although one alternative open to the company under the contract in question, viz., the operation of its cars over the extension, was rendered impossible by the receivership, the other, viz., the conveyance of the extension, was not, and hence that the company might be compelled to perform.

A street railway corporation is liable for breach of contract to operate a certain line, notwithstanding its abandonment was the act of its receiver, since no act of the receiver whether done under the orders of the court or otherwise, can relieve the company from the obligations arising from a contract entered into prior to said receivership. *Arlington Heights Realty Co. v. Citizens' R. & Light Co.* (1918) — *Tex. Civ. App.* —, 160 S. W. 1109.

In *Brown v. Warner* (1890) 78 *Tex.* 543, 11 L.R.A. 394, 22 *Am. St. Rep.* 67, 14 S. W. 1082, the court, in considering the question of the liability of a receiver for an act constituting a breach of the company's obligation to maintain a switch at a certain place, said that when, in the management of the road, the receiver deemed it proper to remove the switch and did remove it, the contract of the company was broken, and it was liable in damages for its breach.

In *Stannard v. Robert H. Reid & Co.* (1906) 114 *App. Div.* 135, 99 N. Y. *Supp.* 567, and also upon a subsequent appeal of the same case in (1907) 118 *App. Div.* 304, 103 N. Y. *Supp.* 521, which was affirmed without opinion in (1909) 195 N. Y. 530, 88 N. E. 1132, in which the defense was made in an action against a corporation for non-performance of a construction contract that, while such contract was wholly unexecuted, the court, on the

application of a stockholder, in proceedings for its voluntary dissolution which were not instituted by the defendant corporation, appointed receivers of the defendant, and that by operation of law it became unable to and did not continue in business until the discharge of said receivers, it was held that the corporation was not, as a matter of law, prevented or excused from performing the contract in question by the appointment of the receivers, or relieved from liability for damages for its breach, but that its liability depended upon whether the receivership was necessitated by the insolvency of the company, in which event the view was expressed that it would not be liable, or whether it was brought about by it with a view to avoiding its obligations. And the jury having found that the company was not insolvent, a verdict for the plaintiff was sustained.

#### *c. Contracts of employment.*

In *Du Pont v. Standard Arms Co.* (1912) 9 *Del. Ch.* 315, 81 *Atl.* 1089, it was held that the possibility of the termination of service between a corporation and its employees by the appointment of a receiver, and his refusal to adopt such contract, was contemplated by the parties to the contract, and was made an unexpressed but implied condition of it, and accordingly that a claim for damages therefor was not allowable against the estate.

Contracts for wages are discharged by operation of law where the corporate employer has been placed in the hands of a receiver under a bill filed by the stockholder, its business stopped by injunction, and no provision made for the continuance thereof by the receiver. *McElheney v. Jasper Trading Co.* (1913) 12 *Ga. App.* 790, 78 S. E. 727.

In *Com. v. Eagle F. Ins. Co.* (1867) 14 *Allen (Mass.)* 344, it was held that the president of a corporation for which a receiver was appointed, the corporation being permitted to do all necessary acts to continue its corporate existence until its concerns should be fully and finally closed, is

not entitled to a salary during the period of the receivership, the exercise of his office having been suspended by legal authority.

In *Law v. Waldron* (1911) 280 Pa. 458, 79 Atl. 647, Ann. Cas. 1912A, 467, it was held that the contract of a general agent with an insurance company was subject to the implied condition that it should terminate in case the insurance company should go into the hands of a receiver, the business being one which could not be conducted by receivers; and this notwithstanding the agency contract contained a clause providing for its termination upon ninety days' notice, such clause being held applicable only to a discontinuance of the contract during the natural business life of the company.

In *Reber v. Keystone Wagon Works* (1908) 19 Pa. Dist. R. 806, it was held that an employee of a corporation is ordinarily not entitled to damages for breach of contract occasioned by his discharge by the receiver, either against the company or against the receiver, the court saying: "Implied by force of logical and no less practical necessity in the firmly established rule that a receivership takes away the company's control over its affairs and transfers it to the receiver, and for that purpose involves an injunction restraining the company's agents and officers from intermeddling with them (*Treat v. Pennsylvania Mut. L. Ins. Co.* (1901) 199 Pa. 326, 85 Am. St. Rep. 788; *Jones v. Weir* (1907) 217 Pa. 321, 66 Atl. 550, 10 Ann. Cas. 692), it is the generally accepted doctrine that it is the receiver's right to refuse to carry out contracts of the company unfulfilled at the time of his appointment (*United States Trust Co. v. Wabash Western R. Co.* (1893) 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86); and this doctrine has virtually been held applicable to the specific case here presented of a contract between a company and its general agent for services to be rendered by him at a stipulated salary, over a period running beyond the inception of the receivership (*People v. Globe Mut. L.*

*Ins. Co.* (1883) 91 N. Y. 174). There are respectable authorities to the contrary. But our own cases, in so far as they throw light upon this subject, are in entire harmony with the principle stated. See *Dean's Appeal* (1881) 98 Pa. 101; *Com. ex rel. Atty. Gen. v. American L. Ins. Co.* (1894) 162 Pa. 586; *Cowan v. Pennsylvania Plate Glass Co.* (1898) 184 Pa. 1, 38 Atl. 1075. The case of *Sweatman's Appeal* (1892) 150 Pa. 369, 24 Atl. 617, which was not one of a receivership, but of a voluntary assignment for benefit of creditors, stands, though perhaps not for that reason, upon an altogether different plane." It was also held to be immaterial that the corporation did not contest the application for the appointment of a receiver, but filed an answer admitting its insolvency, so long as there was no conspiracy between the company's directors and the plaintiff in the bill to bring about a receivership, without adequate grounds therefor, and for the purpose of avoiding the obligations of their contract with the plaintiff.

In *Lenoir v. Linville Improv. Co.* (1900) 126 N. C. 922, 51 L.R.A. 146, 86 S. E. 185, it was held that the right of officers of a corporation to their salaries was terminated, although their terms of office had not expired, by the appointment of a receiver for the company on account of its insolvency, since the appointment of a receiver operates as a dissolution of any contract between the parties for such services, by the sovereign power of the state.

A like decision was made in *Williamson County Bkg. & T. Co. v. Roberts-Buford Dry Goods Co.* (1907) 118 Tenn. 345, 9 L.R.A. (N.S.) 644, 101 S. W. 421, 12 Ann. Cas. 579, in which the court said: "It should be remembered that petitioner Roberts was a stockholder and director, as well as president and treasurer, of the defendant corporation, whose assets and affairs are being administered. He was charged in law as a director and officer with notice of its condition, financially and otherwise, and accepted his election to office with such notice.



He knew and contracted, necessarily, in respect of that knowledge, that, upon the happening of the contingency that arose within less than a month of his election, creditors might invoke the aid of the courts of the country, and through that channel secure an administration of the affairs of the corporation, just as has been done. He knew—was charged with the knowledge—that, upon the happening of such contingency, the corporation could not carry out its contract with him, and he could not carry out his contract with it. The petitioner did not deal with the corporation, in accepting office at the compensation fixed and for the period elected, at arm's length, as would a stranger have done; but he dealt as one charged with the knowledge of and privity with all of the facts, circumstances, and conditions surrounding the corporation and involving its life tenure."

On the other hand, in *Reid v. Explosives Co.* (1887) L. R. 19 Q. B. Div. (Eng.) 264, 56 L. J. Q. B. N. S. 388, 57 L. T. N. S. 439, 35 Week. Rep. 509, it was held that the result of an appointment of a receiver for a corporation at the instance of the debenture holders was to discharge its servants from their service to their original employer, and that in such case there is a wrongful dismissal for which an action will lie.

And in *Isaac McLean Sons Co. v. William S. Butler & Co.* (1914) 227 Fed. 325, it was held that the claim of an employee whose services had been dispensed with by the receiver of an insolvent corporation, for damages arising from nonperformance of its contract on the part of the corporation, was allowable against the estate.

In *Eddy v. Co-operative Dress Asso.* (1883) 3 N. Y. Civ. Proc. Rep. 442, in which one who had been employed by a corporation as its superintendent sought to have his claim for damages for breach of contract, occasioned by his discharge by its receiver appointed in a sequestration action, allowed as a claim against its assets, the court, while holding that as the claimant was not, at the time of appointing the receiver, a creditor of the corporation,

he could not claim to share in the funds in court to the detriment of other creditors, stated that, "if the company continues in existence, he may have a valid claim against it."

In *Commercial Pub. Co. v. Beckwith* (1901) 167 N. Y. 329, 60 N. E. 642, which involved a contract between a corporation publishing a newspaper and an advertising agent, it was said that the receiver of a corporation may refuse to carry out or execute a contract made between the corporation and another party, and by so doing leave him with his claim for damages for a breach of the contract; or that, if he sees fit, he may carry out and perform the contract of the corporation, and thus prevent any claim for damages.

That the insolvency of a corporate employer and the consequent proceedings for the winding up of its business constitute a breach of the contract of employment, for which the employee is entitled to be compensated, is recognized in *Spader v. Mural Decoration Mfg. Co.* (1890) 47 N. J. Eq. 18, 20 Atl. 378.

### III. Miscellaneous.

Under this head will be found some cases which, although not strictly in point upon the question discussed in this note, are of collateral interest.

In *Burton v. Bay State Gas Co.* (1911) 110 C. C. A. 197, 188 Fed. 161, it was held that the appointment of a receiver had the effect to terminate an employment at will, as such a contract can subsist only so long as each party is of ability to contract.

In *Commonwealth Roofing Co. v. North American Trust Co.* (1905) 68 C. C. A. 418, 135 Fed. 984, it was said that upon the appointment of a receiver in an action to foreclose a mortgage against a corporation, the effect of which was so far to put into his control the assets of the corporation as to disenable it from making payments on contracts entered into by it for the construction of buildings for its use, the other contracting party was entitled to treat the contract as abandoned as of the date of the appointment of the receiver, with, how-

ever, a right to delay a reasonable time before declaring an abandonment, for the purpose of ascertaining what would ultimately be determined on as to the resumption of work.

It has been said that the fact of a receivership is not per se a breach; but that it is not until the receivers refuse or fail to recognize and observe the contract that a breach thereof takes place. *Diamond State Iron Co. v. San Antonio & A. P. R. Co.* (1895) 11 Tex. Civ. App. 587, 38 S. W. 987. But compare *Pennsylvania Steel Co. v. New York City R. Co.* (1912) 117 C. C. A. 517, 198 Fed. 735; and *Reid v. Explosives Co.* (1887) L. R. 19 Q. B. Div. (Eng.) 264, 56 L. J. Q. B. N. S. 388, 57 L. T. N. S. 439, 35 Week. Rep. 509, set forth supra.

It has been held that the damages for failure on the part of a corporation to perform its contract to sell goods may be set off against a receiver's claim for goods delivered by him while he had under advisement the question whether he would assume the contract. *Parsons v. Sovereign Bank* (1912) 107 L. T. N. S. (Eng.) 572, 29 Times L. R. 38, reversing (1910) 24 Ont. L. Rep. 387.

A contrary view was taken by the court of appeals in *Butterworth v. Degnon Contracting Co.* (1914) 131 C. C. A. 184, 214 Fed. 772, reversing (1913) 208 Fed. 381, the court saying: "On taking possession as receiver he found a contract which might develop into an exceedingly valuable asset. Had he repudiated it, without investigation, he would have been guilty of a clear dereliction of duty. He was

in duty bound to proceed with the contract if it were beneficial to the estate administered by him, and to abandon it if not beneficial. He had a reasonable time to investigate before deciding this problem. He concluded to try the experiment of transporting some of the stone, and soon found that he could not continue without loss to the estate. This being so, it was his duty to discontinue. He had no right to go on with a contract which was certain to subject the creditors whose interests he was bound to protect, to additional loss. How could the question whether or not the contract was a valuable asset be determined more satisfactorily than by trying the experiment of proceeding under the contract long enough to ascertain whether it was of any value to the creditors? If the receiver had a right to make this experiment, and of this we think there can be no doubt, he is entitled to be paid on a quantum meruit for the value of the material furnished. The service was not rendered by the Transportation Company, but by Butterworth, as a receiver, and as receiver he is entitled to be paid. The defendant received services worth over \$8,000; if these had been furnished by a new contractor the defendant would have had to pay for them in full. Why should it not pay the receiver? Why should the claim for damages against the Transportation Company be set off against the Degnon Company's debt to the receiver for stone transported by him after the failure of the company?" E. S. O.

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E. W. HAWKINS, Appt.,

v.

LOUISVILLE & NASHVILLE RAILWAY COMPANY, et al.

*Kentucky Court of Appeals—April 26, 1918.*

(180 Ky. 295, 202 S. W. 632.)

**Carriers — cuspidor on floor — negligence.**

1. It is not negligence to maintain a cuspidor on the floor of the smoking compartment of a Pullman car so as to render the carrier liable in case a

passenger, in attempting to pass through the curtained doorway, stumbles over the cuspidor and is injured, if there is nothing to show by whom or when it was placed in the doorway.

[See note on this question beginning on page 640.]

**Trial — direction of verdict — absence of evidence.**

2. A verdict should be directed for defendant in an action by a passenger to recover damages for injuries by falling over a cuspidor on the floor of

the smoking compartment of a passenger coach, in the absence of evidence showing negligence on the part of the carrier.

[See 4 R. C. L. 1186 et seq.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Kenton County sustaining a motion for direction of a verdict in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. H. M. Benton and H. M. Healy, Jr., for appellant.

Mr. Martin M. Durrett for appellee Pullman Company:

In order to sustain the cause of action set up in the petition, plaintiff was bound to prove that defendants had actual knowledge of the position of the cuspidor complained of. There was no such proof.

Selleck v. Selleck, 19 Conn. 501; Wilson v. State, 19 Ind. App. 389, 46 N. E. 1050; Gregory v. United States, 17 Blatchf. 325, Fed. Cas. No. 5,803; Collinsville v. Scanland, 58 Ill. 221; Duncan v. Landis, 45 C. C. A. 666, 106 Fed. 839; McHenry v. Winston, 105 Ky. 307, 49 S. W. 971; Cowley v. People, 88 N. Y. 464, 38 Am. Rep. 464; Board of Education v. Board of Education, 3 Ohio S. & C. P. Dec. 70; Stuart v. State, — Tex. Crim. Rep. —, 60 S. W. 554; Gray v. Stienes, 69 Iowa, 124, 28 N. W. 475; State v. Pierce, — Me. —, 15 Atl. 68; State v. Cure, 7 Iowa, 479; Loosey v. Orser, 4 Bosw. 301; United States v. San Francisco Bridge Co. 88 Fed. 891; Thomas Adams & Co. v. Albert, 87 Hun, 471, 34 N. Y. Supp. 328; Ball v. Campbell, 6 Idaho, 754, 59 Pac. 559.

Messrs. S. D. Rouse and Benjamin D. Warfield, for appellee Railroad Company:

Defendants were required by regulation 23 of the state board of health of Kentucky to have the cuspidor in the compartment.

Beiser v. Cincinnati, N. O. & T. P. R. Co. 152 Ky. 522, 43 L.R.A. (N.S.) 1050, 153 S. W. 742; Louisville & N. R. Co. v. O'Brien, 163 Ky. 545, 174 S. W. 31, Ann. Cas. 1916E, 1084.

Miller, J., delivered the opinion of the court:

On May 13, 1916, the appellant Hawkins, who was the plaintiff below, boarded the appellee's train at Newport about 8 o'clock in the morning to go to Louisville. He entered the Pullman or chair car, and, having deposited his raincoat upon a chair which he had reserved in advance, he went to the smoking compartment at the rear end of the car. Very soon after the train had left Latonia, and only a few minutes after Hawkins had entered the smoking compartment, a friend having asked him for a deck of cards which was in a pocket of his raincoat, Hawkins arose and started to leave the smoking compartment to get the cards. As he passed through the door of the smoking compartment into the aisle which leads to the main body of the car, Hawkins struck his foot against a heavy cuspidor and fell against the side of the car, cutting a large gash in his forehead. He suffered considerable pain and was confined to his house for several days of the ensuing week. Hawkins did not see the cuspidor, because it was concealed by a heavy curtain, which hung over the entrance to the smoking compartment and had been pushed back about half the distance of the opening. The curtain extended to within about 6 inches of the floor.

Hawkins brought this suit against the Louisville & Nashville Railway

Company and the Pullman Company, alleging negligence on the part of both companies in suffering and permitting the cuspidor to be and remain in the door of the smoking compartment of the car, thereby causing the plaintiff to stumble over the cuspidor, to his injury as above indicated. The answers traversed the petition and interposed pleas of contributory negligence on the part of Hawkins. At the end of the plaintiff's proof the trial court sustained the motion of the defendants for a directed verdict, and Hawkins appeals.

The plaintiff necessarily rests his case upon the alleged negligence of the defendants, and in support of that theory he contends that the defendants were negligent in placing or permitting the cuspidor to remain in the doorway and concealed by the curtain, and that the rule requiring notice to the carrier of objects taken aboard by other passengers does not apply in this case, because the cuspidor which caused the injury was a part of the carrier's equipment, which had been placed on the car by the defendants. In support of this contention the appellant relies upon *Beiser v. Cincinnati, N. O. & T. P. R. Co.* 152 Ky. 522, 43 L.R.A. (N.S.) 1050, 153 S. W. 742, and *Cincinnati, N. O. & T. P. R. Co. v. Lorton*, 83 Ky. L. Rep. 689, 110 S. W. 857. But, in our opinion, neither of these cases sustains the plaintiff's contention. In *Beiser v. Cincinnati, N. O. & T. P. R. Co.* supra, a passenger deposited a valise in the aisle of a car that was so poorly lighted that Mrs. Beiser could not see the obstruction when she entered the car; consequently she stumbled over it, injuring herself. In holding that she was entitled to recover, this court rested her right solely upon the fact that the company was negligent in not lighting the car so that Mrs. Beiser might see the way when she entered it, and expressly disavowed the plaintiff's right to recover on account of the other passenger having deposit-

ed his valise in the aisle, where it remained without notice to any of the servants or employees of the company. Upon that point the court said: "We are not prepared to hold that the evidence will allow the appellant to recover on the ground that appellee was guilty of negligence in allowing the valise to remain in the aisle until she was injured by falling over it, for according to Gooth, who alone testified on that point, the valise did not remain in the aisle where it was placed by the owner more than five minutes before the accident occurred, and, as shown by all the testimony, during that interval the conductor and brakeman of the train were not in the car at all, but were on the outside of the train, directing and assisting passengers to get thereon. Being thus engaged in the performance of their necessary duties, it is manifest that they did not know, and by the exercise of ordinary care could not have known, of the obstruction of the aisle by the valise."

Really the *Beiser Case* sustains the ruling of the circuit court, since in this case the plaintiff's injury was caused by an obstruction of the doorway, not shown to have been caused by the defendants, and of which they had no notice.

In the *Lorton Case*, supra, Mrs. Lorton's hand was injured by a window of the coach falling upon it, and the case turned upon the question whether the railway company had in that case provided and maintained its passenger coach, including the window, in a reasonably safe condition for the safety, convenience, and comfort of passengers, and the liability of the company was rested upon the fact that it had failed to perform its duty in that respect. But in the case at bar there is no contention that the defendant failed to furnish Hawkins a safe car; on the contrary, plaintiff rests his claim to a recovery upon the ground that the company is responsible for the obstruction of the doorway by the hidden cuspidor over

which he stumbled. But the carrier's liability in such a case depends upon whether its servants or employees created the obstruction, or failed to remove it after actual or imputed notice of its existence.

Appellant insists, however, that the rule requiring notice to the carrier of objects taken aboard by other passengers does not apply to articles which have been placed in the car by the carrier and are not a part of the carrier's necessary equipment. We cannot agree, however, that a cuspidor is not a proper or even a necessary part of the equipment of a smoking compartment, which is set aside for the use of smokers. In principle, this case is quite like *Louisville & N. R. Co. v. O'Brien*, 163 Ky. 538, 174 S. W. 31, Ann. Cas. 1916E, 1084, where the plaintiff stepped upon a banana peel and fell from the steps of a car; but as there was no evidence as to when, where, or by whom the banana peel was thrown or placed on the step, or that defendant had any notice thereof, either actual or imputed, this court said the plain-

tiff had not shown a right to a recovery. The cuspidor being a useful and necessary appliance, there was no negligence upon the part of the appellees in having it in the <sup>Carriers—  
cuspidor on floor  
—negligence.</sup> smoking compartment; and Hawkins offered no evidence to show any negligence on the part of the servants or employees of the defendant by reason of the fact that the cuspidor was at the place where Hawkins stumbled over it.

It is elementary that, in order for the plaintiff to recover in a case of this character, he must show some negligence on the part of the defendant; and in the absence of some proof showing a <sup>Trial—direc-  
tion of verdict—  
absence of  
evidence.</sup> breach of duty a directed verdict for the defendant is proper. *Huntington Contract Co. v. Bush*, 179 Ky. 433, 200 S. W. 618. Under the proof in this case the cuspidor may have been placed in the doorway by a passenger only a moment before Hawkins stumbled over it.

Judgment affirmed.

### ANNOTATION.

#### Liability of carrier for injury to passenger by articles belonging to carrier on the floor or in the aisles.

The reported case (*HAWKINS v. LOUISVILLE & N. R. Co.* ante, 637) is a close case on the facts, and leaves a doubt whether the jury should not have been given an opportunity to pass upon the question of the carrier's negligence.

In *Sherman v. Delaware, L. & W. R. Co.* (1887) 106 N. Y. 542, 11 N. Y. S. R. 818, 13 N. E. 616, the plaintiff had recovered a judgment against the railway company for injuries in tripping over a board. He testified that he heard a whistle which he supposed was meant for his station, and got up from the seat in which he was sitting and walked to the other end of the car to get some of his baggage, and was returning to his former seat, when he tripped and fell over a board stretching across the aisle, about 15 inches from the floor, from under one

seat to under the one immediately opposite, which had been placed there by a brakeman in order to reach and light one of the lamps in the car. There was a dispute as to the time when the board was placed there by the brakeman; the plaintiff alleging it was between the time he passed down the aisle for his baggage and his return to his seat, while the brakeman alleged that he was standing, or just preparing to stand, on the board when the plaintiff came up and asked him to let him pass, which he did, and in doing so cautioned him to be careful about or look out for the board. The court of appeals reversed the judgment because the trial court permitted the plaintiff to testify to a conversation after the accident, with the brakeman, who then admitted that it was his fault that the board was "left there,"

on the ground that the conversation was no part of the *res gestæ*. The court said: "It is also said that the evidence in the case is so plain as to the happening and the cause of the accident that the testimony under consideration could not have possibly harmed the defendant. This we cannot clearly see. The case may have been fully proved, and yet the responsibility of defendant therefor not necessarily follow."

The doctrine of *res ipsa loquitur* applies where a street car company leaves one end of the trolley rope lying on the car floor, partially coiled, in such a way that a passenger attempting to alight from the car becomes entangled in it, and is thrown and injured by the starting of the car; and the fact that the rope was fastened in the proper place when the conductor last changed the trolley at the end of the route does not free the company from liability; nor may the company show that no similar accident had ever been reported to it. *Denver City Tramway Co. v. Hills* (1911) 50 Colo. 328, 36 L.R.A.(N.S.) 213, 116 Pac. 125, where it was also held that there was no prejudicial error in admitting evidence in rebuttal as to the manner of fastening the rope some time after the accident, where the company had offered evidence as to the custom of fastening ropes, which extended over a long period of time.

The only other cases directly in point which have been found relate to mats.

In *Geisenberger v. Pennsylvania R. Co.* (1917) 65 Pa. Super. Ct. 376, the court sustained a verdict for the plaintiffs, husband and wife, who both tripped upon a curled and doubled-up mat lying on the floor of the passageway of the dining car early in the morning as they were leaving the car, no other passengers having yet entered it, and the wife was injured.

In *The North Star* (1909) 169 Fed. 711, a steamship was held liable for injuries to a child four years old who stumbled over a mat in an exit from a passageway leading from the saloon to the promenade deck, by reason of insufficient lights. It was shown that

a man who went to assist the child also stumbled over the mat.

In *Mohns v. Netherlands-American Steam Nav. Co.* (1910) 104 C. C. A. 551, 182 Fed. 323, a steamship company was held liable for injuries to a passenger where she stepped upon a mat at the head of a stairway, which caused her to fall, the mat being too small to fit the place, both in length and width.

Where a passenger while being conducted on an errand by the ship's captain, in a violent storm, was thrown by a sudden lurch of the ship against bolts and projections of a door, and she testified that there was a loose mat or "jute runner" which slipped when the lurch came and threw her off her feet, the court declined to disturb a verdict in her favor. *Compagnie Générale Transatlantique v. Bump* (1916) 148 C. C. A. 68, 234 Fed. 52, writ of certiorari denied in (1916) 242 U. S. 642, 61 L. ed. 542, 37 Sup. Ct. Rep. 114.

It may be noted that in *Cahn v. Manhattan R. Co.* (1902) 37 Misc. 824, 76 N. Y. Supp. 893, the court reversed a judgment in favor of a passenger who stepped on a nail, the point of which entered his shoe and stuck there, injuring him, saying: "It seems quite improbable that the nail should have come from the floor of defendant's car, in view of the fact that the point entered plaintiff's shoe and remained in his shoe, until it was pulled out on the platform by an employee of defendant. There was a matting on the floor, and the happening of the accident would be more consistent with the theory that a loose nail had been dropped by someone in the car."

Injuries from ropes on vessels are not included: see, for example, *The Annie L. Vansciver* (1908) 161 Fed. 640; *Kohn v. International Mercantile Marine Co.* (1910) 180 Fed. 495; *Re Keansburg S. B. Co.* (1918) 161 C. C. A. 430, 249 Fed. 472. For a case of injury from exposed rudder chains see *Garoni v. Compagnie Nationale de Navigation* (1891) 39 N. Y. S. R. 63, 14 N. Y. Supp. 797, affirmed in (1892) 131 N. Y. 614, 30 N. E. 865. B. B. B.

CLIFFORD GRAU et al., Appts.,

v.

ALBERT FORGE.

*Kentucky Court of Appeals — March 7, 1919.*

(183 Ky. 521, 209 S. W. 369.)

**Arrest — liability of officer.**

1. A subordinate police officer participating in a wrongful arrest is not absolved from liability therefor by the fact that he was acting under orders of his superior officer.

[See note on this question beginning on page 647.]

**— without warrant — liability of private citizen.**

2. A private citizen called to the assistance of a police officer in making an arrest is not liable in damages to the person arrested, although the arrest was without authority.

[See 2 R. C. L. 491, 492.]

**— duty of citizen.**

3. When a citizen is called upon to assist an officer in making an arrest, the law makes it his duty to obey and act at once.

[See 2 R. C. L. 491.]

**Police — duty of officer.**

4. A police officer is conclusively presumed to know his duty and to refrain from acting outside of such duty.

[See 10 R. C. L. 880.]

**Trial — jury — grounds for arrest.**

5. The jury must pass upon the question of reasonable grounds for belief on the part of a police officer of the commission of a felony, authorizing an arrest without warrant, if the facts constituting such grounds are in dispute.

[See 2 R. C. L. 446, 447.]

**Robbery — attempt as felony.**

6. An attempt to commit robbery is a felony.

[See 23 R. C. L. 1162 et seq.]

**Trial — question of law — probable cause for prosecution.**

7. In actions for malicious prosecution, if the facts alleged to constitute probable cause are undisputed, the question is one of law for the court.

[See 18 R. C. L. 58.]

**Arrest — without warrant — justification.**

8. If the facts are such that a reasonably prudent man would have believed accused guilty, and would have acted upon that belief, a police officer

is justified in making an arrest without warrant, although subsequent events prove that no offense had been committed, or, if committed, that accused had no connection with it, where the statute authorizes arrest without warrant when the officer has reasonable grounds for believing that the person arrested had committed a felony, although not in his presence.

[See 2 R. C. L. 450, 451.]

**— reasonable grounds for arrest.**

9. A police officer is justified in arresting without warrant, under a statute authorizing such arrest if he had reasonable grounds for believing that a felony had been committed, if he was informed by a fifteen-year-old boy who is apparently sincere and creditable, that accused, whom he pointed out, had attempted to rob him.

[See 2 R. C. L. 450, 451.]

**Trial — instruction — absence of evidence.**

10. Instructions should not be given which there is no evidence to sustain.

[See 14 R. C. L. 786.]

**Assault — justification — insult — attempt at assault.**

11. Neither insulting language nor an unsuccessful attempt by one under arrest to assault the officer in charge of him justifies an assault upon him by the officer, if no reasonably prudent person could conclude that the attempted assault could have been successful.

[See 2 R. C. L. 470, 471, 539.]

**— to prevent escape.**

12. A police officer cannot justify an assault upon a prisoner in his charge on the theory that it was necessary to prevent an escape, if no attempt was being made to effect an escape.

[See 2 R. C. L. 40, 471, 539.]

**APPEAL** by defendants from a judgment of the Circuit Court for Campbell County in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to recover damages for wrongful arrest and for alleged assault and battery committed on plaintiff after he was put under arrest. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Barbour & Bassmann, for appellants:

A policeman arresting pursuant to order of his superior officer is justified. Certainly so, if the order on its face be not unreasonable nor unlawful.

State v. Evans, 161 Mo. 95, 84 Am. St. Rep. 669, 61 S. W. 590; McMahan v. Green, 34 Vt. 69, 80 Am. Dec. 665; Hamlin v. Com. 11 Ky. L. Rep. 348, 12 S. W. 146; Cincinnati, N. O. & T. P. R. Co. v. Cundiff, 166 Ky. 594, 179 S. W. 615, Ann. Cas. 1916C, 513; Franks v. Smith, 142 Ky. 282, L.R.A.1915A, 1141, 134 S. W. 484, Ann. Cas. 1912D, 319.

A policeman may lawfully assault one in his lawful custody, where he has reasonable grounds to believe that such assault is necessary in order to retain the custody of his prisoner.

Renfro v. Barlow, 181 Ky. 812, 115 S. W. 225; Connelly v. American Bonding & T. Co. 113 Ky. 903, 69 S. W. 959; Forestal v. National Surety Co. 168 Ky. 552, 182 S. W. 614; Fulton v. Staats, 41 N. Y. 498.

In an action of assault by a prisoner against an arresting officer, where the defendant pleads self-defense and where there is a scintilla of evidence to support it, it is error to refuse an instruction on self-defense.

Forestal v. National Surety Co. 168 Ky. 552, 182 S. W. 614.

Messrs. William A. Burkamp and Phil J. Ryan for appellee.

Thomas, J., delivered the opinion of the court:

The appellant Clifford Grau was a policeman in the city of Newport, and had executed bond as required by law, with his codefendant and coappellant, National Surety Company, as surety thereon. This suit was brought by appellee, plaintiff below, Albert Forge, against the policeman and his surety, to recover damages for alleged false arrest and for damages resulting from an injury inflicted upon plaintiff by the policeman, because of an alleged malicious assault and battery committed by him upon plaintiff after he was put under arrest.

The answer admitted the arrest, but justified it upon the ground that the defendant policeman had reasonable grounds to believe when it was made, that plaintiff had committed a felony, and the assault and battery was attempted to be justified because it was alleged that plaintiff tried to make his escape and first made an assault upon the officer, and that no more force was used than was necessary to prevent the escape, or appeared in the exercise of a reasonable discretion to be necessary to save defendant from bodily harm threatened and about to be inflicted upon him by plaintiff. These defenses were put in issue, and upon trial there was a verdict and judgment in favor of plaintiff for the full amount sued for, \$1,000, and, defendants' motion for a new trial having been overruled, they prosecute this appeal.

A number of grounds are relied upon as constituting prejudicial error sufficient to authorize a reversal of the judgment, but we deem none of them of such importance or materiality as to deserve our consideration, except such as may be referred to during the progress of this opinion. Before taking up any of the grounds urged, we think it necessary to make a substantial statement of the facts.

Plaintiff is about thirty years of age, a printer by trade, and resided in the city of Newport. On the Saturday night in question he went to the home of a friend, where others had met, and the crowd consumed a pitcher of beer, which, according to the proof, was but one glass each. They remained there and talked from about 7:30 until after 10, when plaintiff and a companion started to the former's boarding house for the purpose of spending the night. On the way they stopped at a saloon, and went in for the purpose of ob-



taining another glass of beer. While plaintiff was drinking it, defendant and another policeman arrested him. They had no warrant, and he had not committed any offense in their presence. They started with him to police headquarters, and, according to plaintiff's testimony, when they had gone something like a square, defendant struck plaintiff in the mouth with such force as to loosen some of his teeth and bruise his lips and gums, causing them to bleed quite freely. The force of this lick, according to plaintiff's testimony and that of his witness, was sufficient to cause him to fall to the walk, but for the support of the defendant and a fellow policeman, between whom he was walking. A short distance further along on the route, according to plaintiff's proof, defendant struck him another blow by the side of the head, and it was as severe as the first one. When they arrived at police headquarters, the officer in charge, after questioning plaintiff and his witness and others professing to have any knowledge upon the subject, released plaintiff, which ended the matter; there being no further prosecution.

But a short while before the arrest, one Harvey Sipple, a boy about fifteen years of age who lived at Newport, stated to the officer in charge of the police headquarters (and who was superior to defendant) that someone had attempted to rob him on Fifth street. He went in to detail about the supposed felon, who, as he stated, inquired of him if he had any money, stating that he, the felon, wanted it, and made an effort to get to his pockets; but the witness escaped and ran up the street, with the supposed robber pursuing him. Witness eluded the robber, but related his story to a policeman by the name of Armstrong, who advised witness to look around and see if he could locate the man who had attempted to rob him, which he did, and pointed out plaintiff, who was in the saloon referred to, as being the guilty person. Witness and Armstrong immediately

went to police headquarters, where, after making his statement, defendant and another policeman were detailed to make the arrest, and they went with the witness Sipple to the saloon, where plaintiff was pointed out to defendant as the guilty person, whereupon he was arrested, as hereinbefore stated. On that occasion Sipple was not only positive of plaintiff's guilt, but upon the trial of this case he was firmly of the opinion that plaintiff was the man who tried to rob him.

It is first insisted that a peremptory instruction should have been given to find for defendants upon that branch of the case complaining of the false arrest, upon the two grounds: (a) That defendant, in making the arrest, was acting under the direct orders of a superior officer; and (b) that the uncontradicted facts show that he had reasonable grounds to believe plaintiff guilty of a felony.

In support of the contention (a) it is urged that an inferior police officer is bound to obey the orders and directions of his superior, and that in doing so he is not amenable to the person arrested, although the arrest was wrongful and without warrant of law; and this conclusion is sought to be drawn by analogy from that principle of the law which excuses an individual from liability when called upon by an officer to assist in making an arrest, although the officer was proceeding without authority; and some cases in other states, as well as those of Cincinnati, N. O. & T. P. R. Co. v. Cundiff, 166 Ky. 594, 179 S. W. 615, Ann. Cas. 1916C, 513, and Franks v. Smith, 142 Ky. 232, L.R.A.1915A, 1141, 184 S. W. 484, Ann. Cas. 1912D, 319, from this court, are relied upon. We do not doubt the principle of law which, under the circumstances mentioned, excuses a private citizen from liability, however wrongful the arrest might have been; but that principle cannot be extended so as to protect an officer, although subordinate to another,

Arrest—without  
warrant—  
liability of  
private citizen.

who directed the arrest. The precise point was determined contrary to the contention

—liability of officer.

here made in the case of Leger v. Warren, 62 Ohio St. 500, 51 L.R.A. 193, 78 Am. St. Rep. 738, 57 N. E. 506, and substantially so by this court in the case of Franks v. Smith, supra. Aside from these express determinations of the question, the two situations are by no means analogous. When a citizen is called upon to assist an officer in making an arrest, the law makes it his duty

—duty of citizen.

to obey and act at once, and he is justified in assuming that the officer is acting within his official duties and under authority duly conferred by the law. To permit a citizen in such cases to delay the arrest by withholding his assistance until he can satisfy himself of the legality of the officer's proceeding would frequently result in the escape of criminals, and would seriously retard the enforcement of the law. Not so with an officer. He is conclusively presumed to know his

Police—duty of officer.

duty, and to refrain from acting outside of such duty. The announcement of such a principle of law as contended for would greatly imperil the liberties of the citizen, and would in almost every case render the arresting officer immune from the consequences of his unlawful arrest, since it could be easily shown that some officer other than the one making the arrest had given the defendant orders to make it. We therefore conclude that the court did not err in declining to give the instruction based upon this contention.

Briefly considering ground (b) insisted upon, § 36 of the Criminal Code of Practice authorizes an officer to make an arrest (1) in all cases where he has a warrant of arrest duly issued by a proper officer; (2) without a warrant when a public offense has been committed in his presence; and (3) without a warrant when he has reasonable

grounds for believing that the person arrested has committed a felony, although not in his presence.

In this case, as we have seen, the defendant had no warrant, nor had the plaintiff committed any offense in his presence, and so, if there was any authority for the arrest, it was upon the third ground stated, i. e., that defendant had reasonable grounds to believe that plaintiff had committed a felony. If the facts constituting the reasonable grounds for belief upon which the defendant acted in making the arrest were in dispute, there could be

Trial—jury—grounds for arrest.

no doubt but that the jury should pass upon that question under proper instructions. But there is no dispute in the testimony about the facts constituting such grounds for believing the plaintiff guilty. Nobody denies but that the witness Sipple made the report to defendant and to police headquarters which we have hereinbefore set out. It was apparently both sincere and credible. No fact or circumstance appears which would cause a reasonable person to doubt the correctness of his story. It was not only plausible, but he actually pointed out to the officer the man who, he said, attempted to commit the robbery, which attempt, as is well known, is itself a felony.

Robbery—attempt as felony.

The case of Johnson v. Collins, 28 Ky. L. Rep. 375, 89 S. W. 253, is one very similar to this in its facts. A negro girl was shot while standing in the door of the house occupied by the person afterward arrested, who, with another, was in the house at the time. They stated that the girl had accidentally shot herself while handling a pistol; but another person, who saw the girl killed, afterward stated to the officers that the girl did not shoot herself, accidentally or otherwise, but that the shot came from within the house, upon which information the arrest was made without a warrant. Upon trial the arrested person was acquitted, and afterward brought suit against

the policeman for false arrest and imprisonment. The jury returned a verdict for the defendant, and plaintiff prosecuted an appeal to this court, and the judgment was affirmed; the court, in the course of the opinion, saying: "We think the undisputed facts in this record show that the chief of police had probable cause to arrest the appellant on the charge of murder."

It is true that no peremptory instruction was given in that case, nor does it appear that any was asked, and the issue as to reasonable cause for defendant's belief that plaintiff had committed a felony was submitted to the jury under instructions which this court approved, and we have no doubt, from the quotation made from the opinion, that the court would have upheld the verdict, had it been returned under an instruction expressly directing it. Since, however, there was a verdict for the defendant, and he was not, in this court, making the question of the propriety of the peremptory instruction in his favor, that question was not passed upon.

In 11 R. C. L. p. 801, the rule which should apply to the arresting officer in cases like this is thus stated: "But since in such a case the person to be arrested is not specifically indicated by a written warrant, and the officer must necessarily act on his own reasonable judgment, and often in haste to prevent the escape of the criminal, he is protected if he acts in good faith and on reasonable grounds of suspicion, though the person arrested proves not to have been the felon, or no felony was in fact committed."

Suits for false arrest and imprisonment are very similar in their nature to those for malicious prosecution. The chief difference in the two cases consists in the persons proceeded against. In the one case the defendant is the person making the arrest, while in the other he is the one who sets the law in motion and causes the arrest to be made. In the latter class of cases this court has, without exception, held that,

where the facts constituting probable cause are in dispute, the issue should be submitted to the jury under an appropriate instruction; but, where the facts alleged as constituting probable cause are undisputed, it becomes a question of law for the court.

*Trial—question of law—probable cause for prosecution.*

Lancaster v. Langston, 18 Ky. L. Rep. 299, 36 S. W. 521; Moore v. Large, 20 Ky. L. Rep. 409, 46 S. W. 508; Metropolitan L. Ins. Co. v. Miller, 114 Ky. 754, 71 S. W. 921; Provident Sav. Life Assur. Soc. v. Johnson, 115 Ky. 84, 72 S. W. 754; Lancaster v. McKay, 103 Ky. 616, 45 S. W. 887; Bruce v. Scully, 162 Ky. 296, 172 S. W. 530. In the last case referred to, upon this precise point, the court said: "But where the facts are undisputed, and, as in this case, are admitted by the appellant herself, there can be nothing to submit to a jury upon the question of probable cause; but it becomes a matter exclusively for a decision of the court."

The court then refers to the case of Faris v. Starke, 3 B. Mon. 4, where the same rule is announced, and concludes that, since there was no dispute about the facts, the court properly directed a verdict for the defendant upon the ground that the undisputed facts constituted probable cause. Numerous other cases from this court might be cited in substantiation of the same proposition.

If in cases like this an officer, who must necessarily act with more or less haste in order to prevent a possible felon from making his escape, would have to satisfy himself beyond question that a felony had been committed, or must act at his peril, the great public necessity for a prompt and rigid enforcement of the law would be largely curtailed. In announcing this principle, we would not be understood as indorsing any rule that would license the officer under such circumstances to act upon unsubstantial appearances or unreasonable stories; but when the facts are such as that a reasonably

prudent man would have believed plaintiff guilty, and would have acted upon, we think the officer is authorized to make the arrest, although as a matter of fact it might subsequently turn out that no offense had been committed, or, if one, that the person arrested had no connection with it. We have no doubt that public policy is better served under such a rule than it would be to require the officer to act at his peril. We therefore conclude that the court should have directed the jury to find nothing for the alleged false arrest, and consequently it was in error in submitting to the jury the question of whether the defendant had reasonable grounds to believe that plaintiff had committed the felony.

This leaves in the case only the cause of action based upon the unlawful assault and battery committed upon plaintiff by the defendant. Upon this branch of the case it is insisted that the court erred in not giving to the jury an instruction upon the right of the defendant to defend himself against an assault committed upon him by plaintiff. The reason why the court refused to give that instruction to the jury is not stated in the record, but we think his declining to do so was au-

**Trial-instruction-absence of evidence.**

thorized upon the ground that there was no evidence to sustain it. It is true that defendant claims in his testimony that plaintiff used insulting language, and struck at but missed him, when defendant struck the blow about which com-

plaint is made. Neither of these reasons furnishes legitimate grounds for the assault and battery complained of. It is a well-known principle of

**Assault-justification-insult-attempt at assault.**

law that insulting words furnish no defense for an assault and battery, although such insulting words might mitigate the damages. Neither do any facts appear showing that defendant was in any danger of any character of bodily harm from anything which plaintiff did, even if it be admitted (which is strenuously denied) that plaintiff struck at defendant while under arrest. At that time there was a policeman on either side of him, holding both his arms, and no reasonably prudent person could conclude that he was in any danger of bodily harm at the hands of plaintiff, situated as he was at the time. Nor do we find any fact in the record which would in the least justify the assault upon the ground that it was necessary to retain the custody of plaintiff or to prevent his escape, since he was making

**-to prevent escape.**

no effort to escape. Upon another trial, if the evidence is substantially the same as upon this one, the court will submit to the jury only the amount of damages which plaintiff sustained, if any, by reason of any assault and battery committed by the defendant Grau; but if the evidence should justify it, of course the self-defense instruction should be given.

Wherefore the judgment is reversed, with directions to grant a new trial, and to proceed in accordance with this opinion.

## ANNOTATION.

**Advice or order from superior officers as defense to a police officer for making an unlawful arrest.**

This note, as its title indicates, is limited to a consideration of the question whether the advice or command of a superior officer constitutes a good defense in an action brought against

a police officer to recover damages for an unlawful arrest.

The holding in the reported case (GRAU v. FORGE, ante, 642), that the direct orders of a superior officer will

not excuse a policeman who makes a wrongful arrest, is in harmony with the few earlier decisions.

The question annotated was considered directly in *Leger v. Warren* (1900) 62 Ohio St. 500, 51 L.R.A. 193, 78 Am. St. Rep. 738, 57 N. E. 506, which holds that in an action for false imprisonment it is not a defense for the officer who made the arrest that he acted under orders from a superior officer. In this case the plaintiff was arrested without a warrant on a charge of receiving stolen property, but the failure of those detaining him to procure a warrant within a reasonable time rendered the arrest unlawful from the beginning, and the fact that it was made under orders from a superior officer was held not to relieve from liability.

In *Flinn v. Graham* (1870) 3 Pittsb. (Pa.) 195, where a person who followed the crowd to a police station after the arrest of one of a group dispersed by the police was himself wrongfully arrested on a charge of having been one of the group, it was held that the arrest was not justified because made by a police officer under the orders of his superiors. The court said: "It will not do to rest upon the position assumed by the learned counsel for defendants that, because these parties occupied subordinate positions and so were subject to be controlled and directed by the others, their superiors, that, therefore and necessarily they were justified in what they did, if done by orders. Such, we instruct you, is not the law. A moment's consideration should satisfy anyone of its impropriety. It would be, in effect, to permit one to do by another what he could not do himself. For violations of law, each is responsible for his individual acts and conduct. To say that a policeman who fails to obey orders would render himself obnoxious to removal, and that he ought to be removed, as is argued by the learned counsel of defendants, proves simply nothing. If the orders given are legal, they should be obeyed, but if not, not."

The doctrine of individual responsi-

bility for illegal acts, asserted in the preceding case, is recognized in the reported case (*GRAU v. FORGE*), holding that an officer is presumed conclusively to know his duty, and to refrain from acting outside of it.

Similarly, in *Linnen v. Banfield* (1897) 114 Mich. 93, 72 N. W. 1, where a police officer at the direction of the prosecuting attorney made an unlawful arrest, the court said that such direction, while bearing on the good faith of the officer's acts, did not enlarge his authority, and that such good faith would not excuse an unauthorized arrest.

The principle of law which excuses an individual from liability when called upon by an officer to assist in making an arrest, although the officer was proceeding without authority, cannot be extended so as to protect a police officer who, in making a wrongful arrest, acts under the direct orders of a superior officer. *GRAU v. FORGE*.

In the following cases a recovery was had against police officers guilty of false arrest or imprisonment, who acted under the order of a superior; but this fact does not appear to have been interposed as a defense: *Thompson v. Whipple* (1891) 54 Ark. 203, 15 S. W. 604; *Johnson v. Collins* (1905) 28 Ky. L. Rep. 375, 89 S. W. 253; *Bath v. Metcalf* (1887) 145 Mass. 274, 1 Am. St. Rep. 455, 14 N. E. 133; *Danovan v. Jones* (1858) 36 N. H. 246.

#### As affecting damages.

The fact that a wrongful arrest was made by a policeman at the instance of a superior officer has, however, been held admissible on the question of damages.

Thus, the fact that a policeman made an arrest under the direction of the prosecuting attorney may bear on the good faith of the officer's acts, and thus affect the question of damages. *Linnen v. Banfield* (Mich.) *supra*.

An instruction by the superior officers of a policeman to arrest women found on the street at an unusual hour and who failed to give a satisfactory account of themselves is admissible in evidence, in mitigation of damages in an action for false imprisonment,

brought against a police officer for an unlawful arrest, made while plaintiff was quietly walking along the street after coming at a late hour from a disreputable saloon conducted by her husband. *Klein v. Pollard* (1907) 149 Mich. 200, 10 L.R.A.(N.S.) 1008, 119 Am. St. Rep. 670, 112 N. W. 717.

But it is held that evidence that police officers who excluded an acceptable guest from a dance, and took her to police headquarters, where she

was detained for a time and then allowed to depart after being told that she would not be permitted to attend the dance, acted under the orders of a superior officer, while admissible upon the question of exemplary damages, cannot be considered on the question of actual damages, where no justification was pleaded in the answer. *Cullen v. Dickinson* (1913) 83 S. D. 27, 50 L.R.A.(N.S.) 987, 144 N. W. 656, Ann. Cas. 1916B, 115. A. W. R.

W. C. HAMMER, United States Attorney for the Western District of North Carolina, Appt.,

v.

ROLAND H. DAGENHART et al., by Next Friend.

*United States Supreme Court—June 3, 1918.*

(247 U. S. 251, 62 L. ed. 1101, 38 Sup. Ct. Rep. 529.)

**Commerce — Federal regulation — child-made goods.**

1. The authority of Congress may not be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to employ child labor has been more rigorously restrained than in the state of production.

[See note on this question beginning on page 658.]

— state police power.

2. The constitutional grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in the exercise of the police power over local trade and manufacture.

[See 5 R. C. L. 702-704; 6 R. C. L. 200.]

— Child Labor Law.

3. Congress exceeded its power under the commerce clause of the Federal Constitution in enacting the provisions of the Act of September 1, 1916, which prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to the removal of the goods, children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a

day, or more than six days in a week, or between 7 in the evening and 6 in the morning.

[See 5 R. C. L. 696 et seq.]

States — reserved rights — Federal Child Labor Law.

4. Powers over local matters reserved to the states by U. S. Const., 10th Amend., were invaded by the enactment by Congress of the Act of September 1, 1916, which prohibits the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to the removal of the goods, children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in a week, or between 7 in the evening and 6 in the morning.

[See 6 R. C. L. 136.]

(Mr. Justice Holmes, Mr. Justice McKenna, Mr. Justice Brandeis, and Mr. Justice Clarke dissent.)

**APPEAL** by the United States Attorney from a decree of the District Court of the United States for the Western District of North Carolina, enjoining the enforcement of the Federal Child Labor Law. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John W. Davis, Solicitor General, William L. Frierson, Assistant Attorney General, and Robert Szold, for appellant:

The act is both in terms and in fact a regulation of interstate and foreign commerce.

Gibbons v. Ogden, 9 Wheat. 1, 196, 222, 6 L. ed. 23, 70, 76; Brown v. Maryland, 12 Wheat. 419, 446, 6 L. ed. 678, 688; Welton v. Missouri, 91 U. S. 275, 280, 23 L. ed. 347, 349; Addystone Pipe & Steel Co. v. United States, 175 U. S. 211, 241, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 96; Southern R. Co. v. Reid, 222 U. S. 424, 434, 56 L. ed. 257, 259, 32 Sup. Ct. Rep. 140; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 47, 56 L. ed. 327, 345, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 58 L. ed. 658, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337; Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; Seven Cases v. United States, 239 U. S. 510, 60 L. ed. 411, L.R.A.1916D, 164, 36 Sup. Ct. Rep. 190.

The due process clause in the 5th Amendment limits Congress precisely as the same clause in the 14th Amendment limits the states.

Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 332, 61 L. ed. 326, 341, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; Inland Steel Co. v. Yedinak, 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229; Starnes v. Albion

Mfg. Co. 147 N. C. 556, 17 L.R.A.(N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470; Twining v. New Jersey, 211 U. S. 78, 100, 101, 53 L. ed. 97, 106, 107, 29 Sup. Ct. Rep. 14.

The law is a legitimate exercise of legislative power for the protection of the public health.

Hoke v. United States, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Seven Cases v. United States, 239 U. S. 510, 515, 60 L. ed. 411, 415, L.R.A.1916D, 164, 36 Sup. Ct. Rep. 190.

The extension of the prohibition to all products of the factory in which the child labors is a reasonable provision for the due enforcement of the act.

Crane v. Campbell, 245 U. S. 304, 307, 62 L. ed. 304, 309, 38 Sup. Ct. Rep. 98; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 201, 57 L. ed. 184, 187, 33 Sup. Ct. Rep. 44.

Assuming that the act does not contravene the 5th Amendment, there is no other clause of the Constitution to which it is obnoxious.

Lottery Case (Champion v. Ames) 188 U. S. 321, 356, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

The 9th and 10th Amendments to the Constitution are not violated.

Caminetti v. United States, 242 U. S. 470, 61 L. ed. 442, L.R.A.1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168; Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833; Standard Oil Co. v. United States, 221 U. S. 1, 68, 55 L. ed. 619, 648, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Seven Cases v. United States, 239 U. S. 510, 60 L. ed. 411, L.R.A.1916D, 164, 36 Sup. Ct. Rep. 190.

Messrs. Morgan J. O'Brien, W. M. Hendren, Clement Manly, W. P. Bynum, and Junius Parker, for appellees:

Interstate commerce, in persons or in goods, has come to touch so intimately every person in every state that if Congress may say that those persons whose conduct it does not approve, or their products, may not enter the channels of such commerce, there remains nothing

ing upon which it may not, for all practical purposes, impose its will, and the states have lost their police power.

*McCulloch v. Maryland*, 4 Wheat. 316, 431, 4 L. ed. 579, 607; *Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747; *Collins v. New Hampshire*, 171 U. S. 30, 33, 34, 43 L. ed. 60, 62, 18 Sup. Ct. Rep. 768; *Kidd v. Pearson*, 128 U. S. 1, 21, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Pipe Line Case* (*United States v. Ohio Oil Co.*) 234 U. S. 548, 560, 58 L. ed. 1459, 1470, 34 Sup. Ct. Rep. 956.

Any valid statute passed by Congress under its power to regulate commerce that restricts or prohibits commerce must be predicated on a real evil or injury involved in, or attendant upon, the commerce itself.

*Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A. (N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; *Caminetti v. United States*, 242 U. S. 470, 61 L. ed. 442, L.R.A. 1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168; *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A. (N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39.

The view that Congress may, by the form of the statute, thus impose its will on processes of manufacture or other local affairs in the various states for what it conceives to be the good of the people of the state of manufacture, when there is no real evil accomplished by the commerce itself, is unsound.

*Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A. (N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 502, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; *Adair v. United States*, 208 U. S. 176, 52 L. ed. 443, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *Collector v. Day* (*Buffington v. Day*) 11 Wall. 118, 20 L. ed. 122; *Dobbin v. Erie County*, 16 Pet. 435, 10 L. ed. 1022.

The statute is not one of ordinary regulation of commerce or its instrumentalities, but is a use of the power

to regulate in order to prohibit, and the court should be astute to see that such prohibition invades none of the rights of the state under its reserved power, and none of the rights of a citizen secured to him by the 5th Amendment.

*Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342, 351, 352, 58 L. ed. 1341, 1348, 1349, 34 Sup. Ct. Rep. 833; *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618, 55 L. ed. 878, 882, 31 Sup. Ct. Rep. 621; *United States v. Delaware & H. Co.* 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

Mr. Justice Day delivered the opinion of the court:

A bill was filed in the United States district court for the western district of North Carolina by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employees in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor. 39 Stat. at L. 675, chap. 432.

The district court held the act unconstitutional and entered a decree enjoining its enforcement. This appeal brings the case here. The 1st section of the act is in the margin.<sup>1</sup>

Other sections of the act contain provisions for its enforcement and prescribe penalties for its violation.

The attack upon the act rests upon three propositions: First. It is not a regulation of interstate and foreign commerce. Second. It contravenes the 10th Amendment to the Constitution. Third. It conflicts with the 5th Amendment to the Constitution.

<sup>1</sup> That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of



The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock P. M. or before the hour of 6 o'clock A. M.?

The power essential to the passage of this act, the government contends, is found in the commerce clause of the Constitution, which authorizes Congress to regulate commerce with foreign nations and among the states.

In *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said: "It is the power to regulate,—that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities, and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the

scope of governmental authority, state or national, possessed over them, is such that the authority to prohibit is, as to them, but the exertion of the power to regulate.

The first of these cases is *Champion v. Ames*, 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561, the so-called Lottery Case, in which it was held that Congress might pass a law having the effect to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes. In *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364, this court sustained the power of Congress to pass the Pure Food and Drug Act, which prohibited the introduction into the states by means of interstate commerce of impure foods and drugs. In *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A. (N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905, this court sustained the constitutionality of the so-called "White Slave Traffic Act," whereby transportation of a woman in interstate commerce for the purpose of prostitution was forbidden. In that case we said, having reference to the authority of Congress, under the regulatory power, to protect the channels of interstate commerce: "If the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls."

In *Caminetti v. United States*, 242 U. S. 470, 61 L. ed. 442, L.R.A.

sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years

have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock postmeridian, or before the hour of 6 o'clock antemeridian.

1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168, we held that Congress might prohibit the transportation of women in interstate commerce for the purposes of debauchery and kindred purposes. In *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 61 L. ed. 326, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, the power of Congress over the transportation of intoxicating liquors was sustained. In the course of the opinion it was said:

"The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since, if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible."

And concluding the discussion which sustained the authority of the government to prohibit the transportation of liquor in interstate commerce, the court said:

"The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufac-

turers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power.

Commerce "consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production a part thereof. *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902.

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. "When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state." Mr. Justice Jackson in *Re Greene*, 52 Fed. 113. This principle has been recognized often in this court. *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299, and cases cited. If it were

otherwise, all manufactures intended for interstate shipment would be brought under Federal control to the practical exclusion of the authority of the states,—a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the states. *Kidd v. Pearson*, 128 U. S. 1, 21, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states

where the evil of this class of labor has been recognized by local legislation,

and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition thus engendered may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women; in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensa-

tion for women have not been fixed by a standard in use in other states and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable

it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. "This," said this court in *United States v. Dewitt*, 9 Wall. 1, 45, 19 L. ed. 593, 594, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." See *Keller v. United States*, 213 U. S. 138, 144-146, 53 L. ed. 737-740, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; *Cooley*, Const. Lim. 7th ed. p. 11.

In the judgment which established the broad power of Congress over interstate commerce, Chief Justice Marshall said (9 Wheat. 203, 6 L. ed. 72): "They [inspection laws] act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepared it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government,—all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads,

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ferries, etc., are component parts of this mass."

And in *Dartmouth College v. Woodward*, 4 Wheat. 518, 629, the same great judge said:

"That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every state in the Union has a law upon the subject, limiting the right to thus employ children. In North Carolina, the state wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our Federal government is one of enumerated powers; "this principle," declared Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, "is universally admitted."

A statute must be judged by its natural and reasonable effect. *Collins v. New Hampshire*, 171 U. S. 30, 33, 34, 43 L. ed. 60-62, 18 Sup. Ct. Rep. 768. The control by Congress over interstate commerce cannot authorize the exercise of authority not intrusted to it by the Constitution. *Pipe Line Cases (United States v. Ohio Oil Co.)* 234 U. S. 548, 560, 58 L. ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution.

In interpreting the Constitution it must never be forgotten that the na-

tion is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. ed. 101, 104. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. *New York v. Miln*, 11 Pet. 102, 139, 9 L. ed. 648, 662; *Slaughter-House Cases*, 16 Wall. 36, 63, 21 L. ed. 394, 404; *Kidd v. Pearson*, *supra*. To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states,—a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only

transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be affirmed.

Mr. Justice Holmes, dissenting:

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of a cotton mill situated in the United States, in which, within thirty days before the removal of the product, children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in any week, or between 7 in the evening and 6 in the morning. The objection urged against the power is that the states have exclusive control over their methods of production and that Congress cannot meddle with them; and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects; and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute,—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects, and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued to-day that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulations may prohibit any part of such commerce that Congress sees fit to forbid. At all events it is established by the Lottery Case and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out. *Champion v. Ames*, 188 U. S. 321, 355, 359, et seq., 47 L. ed. 492, 500, 502, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561. So I repeat that this statute in its immediate operation is clearly within the Congress's constitutional power.

The question, then, is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the states in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state.

The manufacture of oleomargarin is as much a matter of state regula-

—Child Labor Law.

States—  
reserved rights  
—Federal Child  
Labor Law.

tion as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which, apart from that purpose, was within the power of Congress. *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561. As to foreign commerce, see *Weber v. Freed*, 239 U. S. 325, 329, 60 L. ed. 308, 310, 36 Sup. Ct. Rep. 131, Ann. Cas. 1916C, 317; *Brolan v. United States*, 236 U. S. 216, 217, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349. Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. The court made short work of the argument as to the purpose of the act. "The judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers." *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482. So it well might have been argued that the corporation tax was intended, under the guise of a revenue measure, to secure a control not otherwise belonging to Congress, but the tax was sustained, and the objection, so far as noticed, was disposed of by citing *McCray v. United States*; *Flint v. Stone Tracy Co.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. And to come to cases upon interstate commerce, notwithstanding *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, the Sherman Act has been made an instrument for the breaking up of combinations in restraint of trade and monopolies, using the power to regulate commerce as a foothold, but not proceeding

because that commerce was the end actually in mind. The objection that the control of the states over production was interfered with was urged again and again, but always in vain. *Standard Oil Co. v. United States*, 221 U. S. 1, 68, 69, 55 L. ed. 619, 648, 649, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.* 221 U. S. 106, 184, 55 L. ed. 663, 695, 31 Sup. Ct. Rep. 632; *Hoke v. United States*, 227 U. S. 308, 321, 322, 57 L. ed. 523, 526, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905. See finally and especially *Seven Cases v. United States*, 239 U. S. 510, 514, 515, 60 L. ed. 411, 415, 416, L.R.A.1916D, 164, 36 Sup. Ct. Rep. 190.

The Pure Food and Drug Act was sustained in *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364, with the intimation that "no trade can be carried on between the states to which it [the power of Congress to regulate commerce] does not extend," (p. 57) applies not merely to articles that the changing opinions of the time condemn as intrinsically harmful, but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. *Weeks v. United States*, 245 U. S. 618, 62 L. ed. 513, 38 Sup. Ct. Rep. 219. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that, in the opinion of Congress, the transportation encourages the evil. I may add that in the cases on the so-called White Slave Act it was established that the means adopted by Congress as convenient to the exercise of its power might have the character of police regulations. *Hoke v. United States*, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; *Caminetti v. United States*, 242 U. S. 470, 492, 61 L. ed. 442, 455, L.R.A. 1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168. In *Clark*

*Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 328, 61 L. ed. 326, 339, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, *Leisy v. Hardin*, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, is quoted with seeming approval to the effect that "a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state unless placed there by congressional action." I see no reason for that proposition not applying here.

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed,—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused,—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where, in my opinion, they do not belong, this was pre-eminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone, and that this court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this court to pronounce when prohibition is necessary to regulation, if it ever may be necessary,—to say that it is permissible as against strong drink, but not as against the product of ruined lives.

The act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states, but to Congress, to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her boundaries, the state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a state should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the state's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

Mr. Justice McKenna, Mr. Justice Brandeis, and Mr. Justice Clarke concur in this opinion.

### ANNOTATION.

**Power of Congress to exclude commodities from transportation in interstate commerce because of the conditions under which they are produced.**

The power conferred upon Congress by the Federal Constitution to regulate commerce with foreign nations and among the states does not, accord-

ing to the majority view in the reported case (*HAMMER v. DAGENHART*, ante, 649), authorize the prohibition of the transportation of goods that are manu-

factured under circumstances which, while not affecting the goods themselves, may be against the public good.

In *United States ex rel. Atty. Gen. v. Delaware & H. Co.* (1909) 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527, it was held that Congress could properly enact, as a regulation of commerce, so much of the Hepburn Act of June 29, 1906, as forbids a railway carrier from transporting articles or commodities in interstate commerce, when such article or commodity has been manufactured, mined, or produced by the carrier, or under its authority, and at the time of transportation such carrier has not in good faith, before the act of transportation, disassociated itself therefrom, or when the carrier owns the article or commodity to be transported in whole or in part, or when the carrier at the time of transportation has an interest therein, direct or indirect, in a legal or equitable sense, although by existing state legislation such carrier may have a lawful right of ownership of or association with the articles or commodities upon which these provisions operate.

The statute involved in *The Abby Dodge* (1912) 228 U. S. 166, 56 L. ed. 390, 32 Sup. Ct. Rep. 310, made it unlawful to land, deliver, cure, or offer for sale at any port or place in the United States, any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or the Straits of Florida, but contained a proviso that the sponges taken or gathered by such process between October 1st and May 1st of each year, in a greater depth of water than 50 feet, should not be subject to the provisions of the act, and a further proviso that no sponges taken from said waters should be landed, delivered, cured, or offered for sale at any port or place in the United States, of a smaller size than 4 inches in diameter. One Constitutional objection urged to this statute was that it dealt with a matter exclusively within the authority of the states. With reference to this argument, the court assumes for the purpose of the argument that the statute, when rightly con-

strued, applied to sponges taken or gathered from land under water within the territorial limits of a state, and, upon this assumption, states that the "repugnancy of the act to the Constitution would plainly be established by the decisions of this court." Having reached this conclusion, the court construes the statute as not applicable to sponges gathered within the territorial limits of a state, under the well-known rule that where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which makes the statute harmonize with the Constitution must be adopted. The court then considers the validity of the statute as confined to sponges taken outside of the state territorial limits, and says that even though the vessel bringing in the sponges be conceded to have been solely engaged in taking or gathering sponges in the waters which, by the law of nations, would be regarded as the common property of all, and transporting them to the United States, "the vessel was engaged in foreign commerce, and was, therefore, amenable to the regulating power of Congress over that subject. This being not open to discussion, the want of merit of the contention is shown, since the practices from the beginning, sanctioned by the decisions of this court, establish that Congress, by an exertion of its power to regulate foreign commerce, has the authority to forbid merchandise carried in such commerce from entering the United States.

. . . So complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States."

In *Buttfield v. Stranahan* (1903) 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349, it is held that no individual has such a vested right to trade with foreign nations as precludes Congress, in the exercise of its plenary power to regulate foreign commerce, from prohibiting by the Tea Inspection Act of March 2, 1897 (29 Stat. at L. 604, chap.



358, Comp. Stat. 1916, § 8786, 3 Fed. Stat. Anno. 2d ed. p. 716), on considerations of public policy, the importation of teas inferior to the government

standard, on the theory that the importer is thereby deprived of his property without due process of law.

W. A. E.

**CLARKSBURG CASKET COMPANY**  
v.  
**VALLEY UNDERTAKING COMPANY et al.**  
and  
**J. N. PHARES, Appt.**

*West Virginia Supreme Court of Appeals — December 4, 1917.*

(81 W. Va. 212, 94 S. E. 549.)

**Lien — livery-stable keeper — vehicle out of possession.**

1. A livery-stable keeper has no lien either for storage or rent, for the care and keeping in his own buildings on his own premises, of vehicles of an undertaker, which the latter periodically takes out and uses in his business.

*[See note on this question beginning on page 664.]*

**Mortgage — corporate — certificate of authority.**

2. A certificate of acknowledgment of a deed of trust by a corporation, which omits from the affidavit constituting a part of it the clause, "and that said writing was signed and sealed by him in behalf of said corporation," is fatally defective, and the instrument to which it is appended is not legally recordable.

*[See 19 R. C. L. 281-283.]*

**Records — copying of unrecordable instrument.**

3. The copying of an unrecordable deed of trust in the book kept in the clerk's office of a county court, for recordation of such instruments, is not constructive notice thereof to subsequent purchasers for value and without notice, nor is the instrument so copied valid as against lien creditors, but it is valid and binding between the parties to it, and gives right of preference over general creditors of the grantor, unless it is void or voidable for some other reason.

*[See 1 R. C. L. 257, 258; 19 R. C. L. 281.]*

**Lien — unrecordable deed of trust.**

4. Whether a deed of trust is recordable or not, or the paper relied upon as a deed of trust is technically one or not, it creates an equitable lien upon

the property it purports to convey for the security of a debt, valid and enforceable against a person subsequently purchasing the property or taking a lien thereon by a deed of trust to secure a debt, with actual notice of the existence thereof.

*[See 19 R. C. L. 281, 282.]*

**Notice — to president of corporation.**

5. The president of a corporation taking a deed of trust on its property to secure a debt due to him, after it has executed another deed of trust on certain parts of its property to secure the purchase money thereof, is presumed to have had actual knowledge of the existence of such prior deed of trust, in the absence of proof of lack thereof.

*[See 19 R. C. L. 421 et seq.]*

**Lien — sale free from.**

6. A sale of personal property may properly be decreed, in advance of the ascertainment and adjustment of the liens thereon and their priorities.

**Receiver — allowance to lien creditor for use of property.**

7. A creditor holding a first lien on a piece of personal property constituting a part of the assets of a corporation whose business and property are in the hands of a receiver, and having insufficient security for payment of his debt, by virtue of such lien or otherwise, may properly be allowed reason-

(81 W. Va. 212, 94 S. E. 549.)

ble compensation for the use of such property by the receiver, in the conduct of the business of the corporation, by the court in which its business is wound up and its assets distributed.

[See 23 R. C. L. 70-73.]

Records — deed — necessity of certificate of acknowledgment.

8. A sufficient certificate of acknowledgment is essential to the recordation of a deed or deed of trust.

[See 19 R. C. L. 274, 275.]

**APPEAL** by defendant Phares from a decree of the Circuit Court for Randolph County, disallowing his lien and placing him among the general creditors, in a suit to set aside a deed of trust executed by the defendant undertaking company, and to wind up the affairs of said company. *Modified.*

The facts are stated in the opinion of the court.

Messrs. Samuel T. Spears and James A. Bent for appellant.

Messrs. C. O. Strieby and Arnold & Arnold, for appellees Clarksburg Casket Co. et al.:

A deed of trust or mortgage on personal property requires no seal.

Rauch v. Blennerhassett Oil Co. 8 W. Va. 36.

A corporation can make a contract without the use of a seal in all cases where this may be done by an individual.

Cook, Corp. § 721; Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227; Grubbs v. National L. Maturity Ins. Co. 94 Va. 589, 27 S. E. 464.

Any paper writing showing an intent to charge a debt on property, though not a formal mortgage, is an equitable mortgage or lien.

Feely v. Bryan, 55 W. Va. 586, 47 S. E. 307; Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co. 33 W. Va. 762, 11 S. E. 58.

Even though a seal is necessary, the omission thereof does not render the lien invalid, but creates an equitable lien superior to the rights of creditors or subsequent purchasers.

Atkinson v. Miller, 34 W. Va. 115, 9 L.R.A. 544, 11 S. E. 1007.

Phares, being president of the undertaking company, had constructive knowledge of the affairs thereof, and will not be heard to say that he did not know of the lien to the hearse company.

Whitehead v. Whitehead, 85 Va. 870, 9 S. E. 10; Arnold v. Knapp, 75 W. Va. 814, 84 S. E. 895.

Messrs. R. S. Irons and W. E. Baker for appellees Weimer et al.

Poffenbarger, J., delivered the opinion of the court:

The principal grounds of complaint against the decree under review on this appeal are the disallow-

ance of appellant's claim of a lien on personal property, consisting of hearses, an ambulance wagon, a lot of undertakers' supplies, a safe and a roll top desk, by virtue of a deed of trust executed by the Valley Undertaking Company, a corporation, to secure a note for the sum of \$1,500, and allowance of a claim of a lien on one of the hearses, described as being an eight-column mosque top silver-gray funeral car, to the Riddle Coach & Hearse Company, by virtue of a deed of trust executed to secure purchase money of the hearse. The assets of the company consisted of personal property only, and, at the date of the filing of the bill by an execution creditor, there were execution liens on the property, amounting to about \$1,800. The debts due general creditors claiming no liens amounted to something more than \$4,000. Disallowing the appellant's claim of a lien, the court placed him among the general creditors, by its final decree.

His deed of trust was assailed on two grounds: (1) Lack of a sufficient certificate of acknowledgment to make it a recordable instrument; and (2) partial invalidity by reason of the statute against preferences. The alleged defect in the certificate of acknowledgment was the omission from the affidavit, which constitutes a part of it, of the clause, "and that said writing was signed and sealed by him in behalf of said corporation." This clause is part of the form prescribed by § 5 of chapter 73 of the Code (§ 3808). At the date of the execution of the deed of

trust, the corporation was hopelessly insolvent, and the appellant was its president. The bill did not attack it for invalidity under the statute against preferences, but did charge unrecordability thereof on account of the defect in the acknowledgment, and invalidity because it included a stock of goods used in trade. On the 17th day of May, 1915, more than one year after its date and more than four months after it was recorded, the Riddle Coach & Hearse Company filed an answer, attacking it as being preferential and partially void for that reason. Though there was no process against the appellant, on that answer, he filed an answer with the commissioner, in June, 1915, in which he responded to the charge therein made, neither admitting nor denying the insolvency of the Valley Undertaking Company, but claiming the benefit of an exception in the statute against preferences, on the ground that the deed of trust was executed to secure a note for money he had loaned to the company, at the date thereof, and it had afterwards used in its business. He also relied upon the Statute of Limitation.

Though literal compliance with the form of acknowledgment prescribed for corporations is not essential, there must be a substantial compliance with it. The statute itself says a certificate may be in form or effect as therein prescribed. The clause omitted is obviously a substantial one, and lack thereof is not supplied by any equivalent words. The executing officer is required to swear "that said writing was signed and sealed by him in behalf of said corporation." It is not enough that he has authority generally to execute deeds and other instruments for and on behalf of the corporation. He must swear that he had authority to execute the particular instrument he acknowledges. He is not the corporation, nor has he power to do all the things it might do. Whether the corporation itself authorized the execution of the particular instrument is a vital matter, and he is required

to swear that it did. Though the deed says he executed it by authority of the corporation duly given, that statement is not in the affidavit, nor was it made on oath as the statute requires it to be.

The omission of this clause manifestly vitiates the certificate. *Abney v. Ohio Lumber & Min. Co.* 45 W. Va. 446, 32 S. E. 256; *Isham v. Bennington Iron Co.* 19 Vt. 230; *Warvelle, Vend. & P.* 519; *Devlin, Deeds*, § 508.

A sufficient certificate of acknowledgment is essential to the recordation of a deed or deed of trust, and, without it, the copying of the instrument on the record book does not constitute constructive notice. As to creditors and purchasers without notice, it is void.

*Abney v. Ohio Lumber & Min. Co.* supra; *Cox v. Wayt*, 26 W. Va. 807; *Ihrig v. Ihrig*, 78 W. Va. 360, 88 S. E. 1010. If it has no other infirmity, it is good as between the parties, and it is void as to creditors and purchasers without notice only because the statute makes it so. The creditors so protected by the statute are lien creditors only. *Moore v. Tearney*, 62 W. Va. 72, 57 S. E. 263.

Appellant's most active antagonist, the Riddle Coach & Hearse Company, having two deeds of trust older than his, both of which were attacked for alleged defects in the certificates of acknowledgment and for lack of the corporate seal, makes no complaint on account of the disallowance of the small amount due under one of them, but stoutly defends its claim of right under the other. Though it may not have been recordable, for want of a good certificate, and may not have constituted a technical deed of trust, it certainly created an equitable or chattel mortgage valid and binding between the parties to it and enforceable in equity. *Atkinson v. Miller*, 34 W. Va. 115, 9 L.R.A. 544,

Mortgage—  
corporate—  
certificate of  
authority.

Records—deed  
—necessity of  
certificate of  
acknowledg-  
ment.

—copying of  
unrecordable  
instrument.

Lien—un-  
recordable deed  
of trust.

11 S. E. 1007; Triumph Electric Co. v. Empire Furniture Co. 70 W. Va. 164, 73 S. E. 325. If unrecordable, it would be void as to subsequent purchasers for value without notice, but the appellant's claim of right under the Registry Statute cannot be sustained, for he was the president of the corporation by which both instruments were executed, and there-

Notice to  
president of  
corporation.

fore must be deemed to have had notice of the contract in

question. Arnold v. Knapp, 75 W. Va. 804, 814, 84 S. E. 895; Whitehead v. Whitehead, 85 Va. 870, 9 S. E. 10. There is at least a presumption of knowledge, for rebuttal of which he introduced no evidence at all. The authorities cited say a president of a corporation will not be heard to say he was not informed as to its financial condition. Whether the Riddle Coach & Hearse Company deed of trust was recordable or not, therefore the trial court properly gave the claims under it and the execution liens preference over that of the appellant.

But it was wrong to place him among the general creditors, for his deed of trust, though not legally recorded, created a lien in his favor, good against everybody except subsequent purchasers for value and without notice, lien creditors and such unsecured creditors as successfully assailed it, in due time, for violation of the statute against preferences, § 2 of chapter 74 of the Code (§ 3830). Nobody assailed it on the ground within the period of limitation, one year from its date or four months after it was recorded, it having been recorded within eight months from its date. The presumption of fraud in the transaction is repelled by proof of bona fide indebtedness for which the note and deed of trust were given.

There was no error in the allowance to the Riddle Coach & Hearse Company of rent for the use of the hearse on which it held its lien, by the receiver, while he conducted the business of the corporation. Such use obviously impaired the Riddle Com-

pany's security, and it was not equitably bound to make a contribution to the assets of the insolvent corporation, for the benefit of its other creditors, by sufferance of such impairment. Only a small portion of the purchase money had been paid, and it was apparent that the hearse was insufficient security for the balance. In such cases, the rents and profits accruing from the use of property on which a debt is secured may be sequestrated for the benefit of the lien creditor. Grantham v. Lucas, 15 W. Va. 425, 432; Clarke v. Curtis, 1 Gratt. 289; Ross v. Colville, 3 Call. (Va.) 382.

Receiver—  
allowance to  
lien creditor for  
use of property.

So much of the decree as allows to Weimar and Reynolds a lien for a meritorious claim amounting to \$120 will have to be reversed, for they have no shadow of a lien for the claim. It is for storage of the vehicles of the corporation, while used by it in its business. Necessarily the company had possession and control of them when used in the conduct of funerals, wherefore they were frequently out of the possession of the claim-

Lien—livery-  
stable keeper—  
vehicle out of  
possession.

ants of the lien. In such cases the common law gave no lien. Jackson v. Cummins, 5 Mees. & W. 342, 8 L. J. Exch. N. S. 265, 3 Jur. 436, 2 Eng. Rul. Cas. 548; Grinnell v. Cook, 3 Hill, 491, 38 Am. Dec. 663; McFarland v. Wheeler, 26 Wend. 474. A garage keeper has no lien on an automobile for storage, if the owner is permitted periodically to take it out and use it. Smith v. O'Brien, 46 Misc. 325, 94 N. Y. Supp. 673. The statute giving a livery-stable keeper a lien extends only to live stock (Code, chap. 100, § 15 [§ 4392]), and there is no statute creating a lien in cases of this class. The rule requiring continuous and unbroken possession in the establishment of a common-law lien, such as that of a warehouseman, is very strict. Without it, such a lien is impossible, and, where there is one, it is lost the moment the possession is broken.

Lambert v. Nicklass, 45 W. Va. 527, 44 L.R.A.561, 72 Am. St. Rep. 828, 31 S. E. 951. Nor is the existence of a landlord's lien for rent possible under the circumstances. The vehicles were merely stored, in a qualified sense, in buildings owned, possessed, and controlled by the claimants. They were not leased nor occupied by the undertaking company.

As the subject-matter of the decree was personal property, complete ascertainment and adjustment of the liens thereon were not conditions precedent to right and power in the court properly to decree a sale thereof. It is essential in proceedings for the sale of real estate, but none of our decisions require it in proceedings against personal property, and there is a manifest distinction in the characters of the two classes of property, which forbids its application in the latter case. Preservation and care of personal property always involve expense and risk of loss, even though it is often not perishable in the legal sense of the term. Besides, its legal inferiority to real estate is clearly indicated by many provisions of the law, both adjective and substantive. Their obviousness to legal minds excuses enumeration thereof.

— sale free  
from.

In so far as the decree adjudicates a storage lien in favor of Weimar and Reynolds for \$120, and denies to the appellant Phares a lien for the debt secured by his deed of trust, next in order after the liens decreed in favor of the execution creditors, and accords to the general creditors pro rata participation with him, the final decree complained of will be reversed, and the appellant's third exception to the commissioner's report will be sustained. His second exception thereto will be sustained only in so far as the report denies him preference over the general or unsecured creditors of the Valley Undertaking Company. The decrees of May 17 and November 9, 1915, will be affirmed, and that of February 23, 1916, will be modified, by striking out the lien for \$120 therein accorded to Weimar and Reynolds, and by adjudicating a lien in favor of the appellant for \$1,630.50, with interest from October 12, 1915, next after those decreed in favor of the Clarksburg Casket Company, and, as so modified, it will be affirmed, and the cause remanded. Costs in this court will be decreed against the appellant and in favor of the appellees, Clarksburg Casket Company, Gallion Metallic Vault Company, and Weimar and Reynolds.

### ANNOTATION.

**Periodical use of vehicle or horse by owner as defeating lien for storage, repairs, or board.**

#### **Motor vehicles.**

Other decisions concur with the reported case (CLARKSBURG CASKET CO. v. VALLEY UNDERTAKING CO. ante, 660), in holding the lien of a stable or garage keeper on motor vehicles to be defeated, where the owner is allowed the periodical use of the vehicles, the reasoning of the cases being that in order to successfully assert a right to such a lien there must be a continuous and unbroken possession of the property by the one lien claimant.

In *Hatton v. Car Maintenance Co.*

[1915] 1 Ch. (Eng.) 621, 84 L. J. Ch. N. S. 847, 110 L. T. N. S. 765, 30 Times L. R. 275, 58 Sol. Jo. 361, where the owner of an automobile entered into an agreement for a certain consideration with a company, by which the latter undertook to maintain the car, furnish supplies for its operation, and provide a driver, who was to drive in accordance with the owner's directions, and the owner had the right to take the machine when and as she liked, it was held that any lien which the company had on the car was lost by virtue of the agreement under

which the owner was at liberty to, and did, take it away as she pleased.

And in *Smith v. O'Brien* (1905) 46 Misc. 325, 94 N. Y. Supp. 673, affirmed in (1905) 108 App. Div. 596, 92 N. Y. Supp. 1146, where the owner of an automobile, kept at the plaintiff's garage, removed it and enjoyed its use from time to time at his pleasure, the garage keeper was held to have no lien under a statute providing that a person who makes, alters, repairs, or in any way enhances the value of an article of personal property at the request or with the consent of the owner, has a lien on such article while lawfully in possession thereof for his reasonable charges for the work done and materials furnished, and may retain possession thereof until such charges are paid, the court holding that such statute was declaratory of the common law, and that a lien at common law was dependent on possession. And the garage keeper in this case was held not entitled to a lien for storage as a warehouseman, the court holding that the automobile was not stored within the meaning of the Lien Law, as it was continuously, or occasionally, upon the road at the owner's pleasure, and that the right so to use it destroyed the possession of the garage keeper. It was further held in the *Smith Case* that the garage keeper was not within the language of a statute giving a lien to "a person keeping a livery stable, or boarding stable for animals, or pasturing or boarding one or more animals, or who in connection therewith keeps or stores any wagon, truck," etc., which was passed to protect the lien of livery-stable keepers so that it would not be lost by interruption of possession.

And in *Grand Garage v. Pacific Bank* (1918) 170 N. Y. Supp. 2, it was held that, although a garage keeper's lien has been extended by statute, it still depends on possession, and that the lien in the case at bar was lost where the owner (a sales company) took the car without objection and allowed another to take it to sell, and the latter placed it in another garage, where it remained until the insolvency of the owner.

And in *Vaught v. Knue* (1917) — Ind. App. —, 115 N. E. 108, a statute providing that every person engaged in the storing of, or furnishing supplies for, or repairing automobiles, or maintaining automobile garages should have a lien upon such automobiles for storage charges, supplies, or repairs, was held declaratory of the common law and the court was apparently of the opinion that a garage keeper could assert no lien against an automobile for repairs, supplies, etc., where there was a running account kept with the conditional vendee of the machine, and he was allowed to use it at all times without objection. The court, however, was not called upon to decide this question, as the conditional vendor, upon default by his vendee, had taken possession of the machine.

In *Olson v. Orr* (1915) 94 Kan. 38, 145 Pac. 900, where a truck, after an engine had been installed in it, was tested a number of times, apparently by the owner, but delivery was refused without full payment for the work, the repairman was held not to have lost his statutory lien, although he had not complied with the statute providing for a continuance of the lien after delivery, by filing a statement with the register of deeds.

In *Winton Co. v. Meister* (1918) — Md. —, 105 Atl. 301, the common-law lien of a repairman for repairs on an automobile was held not lost by allowing the temporary removal of the machine from the shop to take measurements for upholstering, where it was returned to the repairman's possession in an hour or so, and no rights of innocent parties had intervened.

#### Horses.

A conflict exists among the decisions as to the right of a stable keeper to assert a lien on horses, wagons, etc., where the owner is periodically allowed to use them. Some courts have adopted the view that the stable keeper under such circumstances does not have the continuous possession necessary to entitle him to a lien. *Perkins v. Boardman* (1860) 14 Gray (Mass.) 481; *Vinal v. Spofford* (1885) 139 Mass. 126, 29 N. E. 288; *Papineau v. Wentworth* (1884) 136 Mass. 543;

Cardinal v. Edwards (1869) 5 Nev. 37; Estey v. Cooke (1877) 12 Nev. 276; Grinnell v. Cook (1842) 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

In Grinnell v. Cook (N. Y.) *supra*, where a common-law lien on horses was claimed by a stable keeper, it was held that if a lien existed it continued only so long as the stable keeper retained uninterrupted possession of the horses, and that there was no such possession where the owner was at liberty to take and use the horses at pleasure, and that the claimant was accordingly not entitled to a lien on the animals, which the owner had taken away according to his daily custom.

And in Cardinal v. Edwards (1869) 5 Nev. 37, where a lien was claimed by a stable keeper on horses, under a statute providing that any livery-stable keeper boarding horses should have a lien upon, and retain possession of, the animals until reasonable charges were paid, it was held that the stable keeper was not entitled to a lien where he had always allowed the horses to be taken away every day, and interposed no objection when they were last taken out, and made no claim to a lien until he learned that the person keeping them at the stable had absconded.

And, following this case, in Esty v. Cooke (1877) 12 Nev. 276, it was held that a stable keeper's lien under Comp. Laws §§ 144-146, the provisions of which do not appear, was lost where the owner of horses, harnesses, etc., had control of the property, and took it out and returned it at will.

And in Vinal v. Spofford (1885) 139 Mass. 126, 29 N. E. 288, where a stable keeper allowed the owner of a horse which was kept at his stable to use it in his business, he was held to have lost his lien on the horse by reason of a bona fide sale of the property by the owner while in his possession, and it was held that the lien was not revived by a seizure of the horse by the stable keeper. The lien claimed in this case was a statutory one, but the terms of the act do not appear.

The court in that case relied upon Papineau v. Wentworth (1884) 136 Mass. 543, in which it was held com-

petent for the court to find a waiver of a stable keeper's lien under Pub. Stat. 192, § 32, the provisions of which do not appear, where there was testimony that the owner kept his horse at the defendant's stable, and used it in his business as often as he wished; that on a certain date, on which there was an unpaid amount due for board, the owner took the horse as usual, but failed to return it; that the defendant subsequently found it in the owner's possession, and without the latter's objection took it; that the defendant then agreed that one of his employees should remain with the owner at the place where the horse was found, and on the next day drive the owner to the place where he lived; that the horse was left at another stable where the owner had kept it; that the next morning the owner told the plaintiff's employee he had concluded not to take the horse to the plaintiff, and he and the employee returned to the plaintiff's place of residence without the horse; that defendant subsequently concealed the horse, but that the plaintiff found it and took possession of it by force.

In Perkins v. Boardman (Mass.) *supra*, it was held that a mortgagee of a horse acquired title subject to an existing lien of a stable keeper, but that there was a relinquishment of possession which extinguished and discharged the lien, where, after the execution and recording of the mortgage, the stable keeper repeatedly allowed the mortgagor to take the horse and use it in his business. Apparently the lien claimed in this case was a common-law lien.

In Bevan v. Waters (1828) 3 Car. & P. (Eng.) 520, Best, Ch. J., in considering the right of one to a lien for training a horse, said that in the case of a livery-stable keeper there was no lien because the horse was subject to the control of the owner, and might be taken out by him, and that the first time it was taken away there was, of course, an end of the lien.

In some cases, however, the fact that the owner of horses periodically used them has been held not to defeat the stable keeper's right to a lien for board. Walls v. Long (1891) 2 Ind.

App. 202, 28 N. E. 101; State use of Vette v. Shelvin (1886) 23 Mo. App. 598; Welsh v. Barnes (1895) 5 N. D. 277, 65 N. W. 675; Young v. Kimball (1854) 23 Pa. 193; Caldwell v. Tutt (1882) 10 Lea (Tenn.) 258, 43 Am. Rep. 307.

In *Welsh v. Barnes* (1895) 5 N. D. 277, 65 N. W. 675, where a statute provided that any livery-stable keeper to whom any horses were intrusted for feeding, herding, pasturing, or ranching should have a lien upon them for the amount due for feeding, and should be authorized to retain possession of them until the amount was paid, it was held that a stable keeper's lien was not lost, as against an attaching creditor, by allowing the owner periodically to take the horse to drive. The court said: "It is obvious that this statute must be construed in the light of the usages of business, and the customs of people who place horses in stables to be cared for by the proprietor of such stables. It is always understood that the owner will, from time to time, take temporary possession of the horse, returning it to the stable after his temporary use of the animal has ceased. If the owner, with the consent of the stable keeper, removes the horse permanently from his possession, the lien is gone. Such was the case of *Ferriss v. Schreiner* (1890) 43 Minn. 148, 44 N. W. 1083. If the circumstances of the case warrant the inference that the owner in the case cited had come to take his horse for good, then, if the plaintiff had assented to this, his lien would have been gone. But the mare, in the case at bar, when she was taken out for a drive, was being boarded at plaintiff's stable by the month, and it was not the intention of either party to terminate this arrangement at the time she was attached. Under the facts of the case at bar, it is obvious that the plaintiff's lien was not lost or impaired at the time the defendant, as sheriff, seized the mare under attachment against the owner."

And in *Walls v. Long* (Ind.) supra, where a statute provided that the keepers of livery stables should have a lien upon horses for feed and care

bestowed upon them, and should have the same rights and remedies as were provided for persons having a lien under an act to which the statute was supplemental, which gave to persons named a right to sell specified property at public auction for their liens, it was held that a livery-stable keeper did not lose or waive his lien on a horse by permitting the owner to use him in his business, and that he might rely upon the lien where the owner took the horse as usual, but failed to return him to the stable. The court said: "When it is considered to what extent livery stables are made use of by the public as places most suitable, in many respects and instances, for the boarding of horses in daily use, it is difficult to believe that the legislative intent or meaning is that which is contended for by the appellant's counsel. If the keepers of such stables were intended to be benefited by the statute only where the animal being fed and cared for was not taken from the stable and used by the owner or his family at all, the benefits both to the keepers and owners would be slight, for few persons would consider such an arrangement either convenient or economical. It is obvious, in our opinion, that such is not the meaning of the statute. The appellees had no knowledge or reason to believe or suspect that the horse would not be returned as usual to the stable when last taken out. While the horse was being boarded by the appellees, the appellant was at their stable and expressed himself as pleased with the care the horse was receiving. The appellees were not required to announce on each occasion that the horse went out that they had a lien upon him, and that therefore he must be returned. There was nothing in the contract between them and Beal inconsistent with the existence of the lien, nor had it been terminated by the payment of the board. There is nothing in the record from which it can be inferred that the appellees intended to waive their lien, nor does the evidence furnish any ground whatever for the belief, if it exists, by either



the appellant or Beal, that there was any such intent."

And in *Caldwell v. Tutt* (Tenn.) supra, where one section of a statute provided that whenever any horse was received to pasture for a consideration there should be a lien on the animal for charges, the same as an innkeeper's lien at common law, and another section provided that livery-stable keepers should be entitled to the same lien provided for in the above section on all stock received by him for board and feed until all reasonable charges were paid, it was held that a livery-stable keeper did not lose his lien on a horse because the owner was allowed to take it and use it occasionally with the stable keeper's consent, and that he was entitled to assert the lien against a creditor of the owner who levied on the horse while it was temporarily in the owner's possession.

And in *State use of Vette v. Shelvin* (1886) 23 Mo. App. 598, where a statute provided that every person who should keep or board a horse should, for the amount due therefor, have a lien on the animal or vehicle coming into his possession, and that no owner or claimant should have the right to take any such property out of the custody of the person having such lien, except with his consent, or on the payment of such debt, and that such lien should be valid against the property in the possession of any person receiving or purchasing it with notice of such claim, it was held that the lien of a stable keeper for board was not lost, even as to a mortgagee without notice, by reason of the owner's being allowed to use the horse during the day in his business. The court said: "In the view we take of the meaning of the statute, the lien thereby conferred is not dependent upon an actual physical custody by the stable keeper at every moment of time. We think that the lien conferred by the statute subsists, even as against third persons without notice, while the horse is boarded in the stable of the lienor, although it may, with his consent, be used during the day by the owner in his business. To hold otherwise would be to construe the statute so as

to deprive stable keepers of the protection which the legislature probably intended to give them; since, as is well known, in most cases where horses are boarded, the owner is allowed to use them in his business during the day. This being so, the statute could not have intended to allow the owner to destroy the lien of the stable keeper while having the possession of the horse on the street during the day, by selling or mortgaging it to a stranger without notice of the lien. On the contrary, we are of opinion that every person is bound so far to take notice of the statute that when he is about to become the purchaser or mortgagee of a horse found upon the street in the custody of its owner, it is incumbent upon him to make inquiry as to the place where the horse is boarded, and whether anything is due for its keeping. There is no greater hardship in this rule than there is in the general rule in respect of purchases of personal property, that the purchaser gets no better title than the seller has."

And in *Young v. Kimball* (1854) 23 Pa. 193, where the statute gave livery-stable keepers a lien for the expenses of keeping horses, and a mail carrier kept two teams of horses at the plaintiff's inn, at which place he changed teams, and it appeared that each team was away twice a week, it was held that the plaintiff's lien as livery-stable keeper for previous charges was not lost because he allowed the horses to be taken away for use, since this was a necessary part of the arrangement between the parties that the horses should be delivered as they were needed.

And in *McGlasson v. Hennessy* (1911) 161 Ill. App. 387, where a statute provided that livery-stable keepers should have a lien upon the horses, carriages, and harnesses kept by them for the proper charges due for the keeping thereof, and expenses bestowed thereon at the request of the owner, or the person having the possession thereof, the court was of the opinion that a stable keeper's lien for keeping a horse and wagon was not

destroyed by reason of the owner's possession for business purposes during the day, and his act in selling the property to a purchaser without notice. It was not necessary in this case to decide the question, however, as the evidence showed that the purchaser had

notice of the facts, and also that the horse and wagon, after the transfer, were returned to the stable keeper's possession, through the horse of his own volition going to the stable when he was left standing in the street during the delivery of goods. J. T. W.

J. B. HILL COMPANY, Reapt.,

v.

MARY E. PINQUE, Appt.

*California Supreme Court (In Banc) — February 17, 1910.*

(— Cal. —, 178 Pac. 952.)

**Landlord and tenant — waste.**

1. The commission of waste by a tenant is not a ground for forfeiture of the leasehold.

[See note on this question beginning on page 672.]

**— forfeiture — failure to repair.**

2. Failure of a tenant to repair is not ground of forfeiture of the lease, if he was under no obligation to make repairs.

[See 16 R. C. L. 1148.]

**— nonpayment of rent.**

3. To justify forfeiture of a lease for nonpayment by the tenant of rent, demand must be made for the payment of the exact sum due.

[See 16 R. C. L. 1146, 1147.]

**— demand for rent — sufficiency.**

4. A mere demand for rent is not sufficient to sustain a forfeiture of the leasehold, where a reduction of contract rates has been made and paid for several months prior to the demand, in consideration of a more quiet use of the premises.

[See 16 R. C. L. 1127, 1128.]

**— refusal to pay — effect.**

5. Refusal of a tenant to pay rent does not justify a forfeiture of the lease in the absence of proper demand for rent due.

[See 16 R. C. L. 1126 et seq.]

**— damages — right to.**

6. No damages can be recovered from a tenant for withholding the leased premises after an alleged forfeiture of the leasehold, if the alleged grounds of forfeiture failed.

[See 16 R. C. L. 1137.]

**Appeal — damages for lawful and unlawful act — separation.**

7. An allowance of damages against a tenant for making a specified use of the building, and making alterations in it, cannot be sustained on appeal if the use was not unlawful and there is no way of determining what portion of the damages were allowed on that account.

[See 8 R. C. L. 668.]

**Landlord and tenant — damages for use of building.**

8. A tenant is not liable in damages for putting the leased premises to a certain use, if such use is not forbidden by the lease.

[See 16 R. C. L. 729.]

**APPEAL** by defendant from a judgment of the Superior Court for Fresno County in favor of plaintiff in an action brought to recover possession of certain premises, together with damages. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Everts & Ewing, South & Ross, and W. E. Simpson for appellant.

Messrs. Harris & Hayhurst and Drew & Drew for respondent.

Sloss, J., delivered the opinion of the court:

This action was brought to recover the possession of certain premises, together with damages. The

complaint was in two counts. The first set up, in ordinary form, a cause of action in ejectment. The second alleged that the premises, consisting of a storeroom, had been held by the defendant Pinque under a written lease from one Keosheyman, and that the plaintiff, who had acquired the interest of Keosheyman, had elected, under the terms of the lease, to terminate it and forfeit the rights of the defendant.

Judgment went in favor of the plaintiff for the recovery of the premises, for \$300, the value of the use and occupation, and for damages in the further sum of \$509. The defendant Pinque appeals.

The lease from Keosheyman to Pinque was dated February 1, 1915, and ran for a term of nine years at a monthly rental of \$100. It contained the following provisions material to this appeal: "That said storeroom is to be used by lessee for the wholesale, retail, and commission fruit and vegetable business in all its branches. . . .

"It is further agreed that in the event lessee desires to make changes or improvement for the convenience of any business she desires to conduct, that she has the right so to do at her own expense, except lessee agrees not to change or conduct any business, like in kind to business in lessor's property at time of change, or conflicts with any lease in force at date hereof, between lessor and other persons, or open up shoe or clothing store within three months from March 1, 1915.

"It is further understood and agreed in the event lessee shall make default in the payment of rent or refuse to comply with the terms, covenants, and conditions of this lease on her part to be kept and performed, then said lessor reserves the right to terminate this lease and oust and eject lessee therefrom and that all moneys theretofore paid shall be retained by lessor as damages and rental on said premises."

The second count sets up a forfeiture of the lease on the ground of nonpayment of rent. It also alleges that plaintiff has been damaged in

the sum of \$2,000 by the defendant's failure to keep the premises in good repair, by her occupation of them as an automobile garage, and by her removal of a portion of the foundation of the building, thereby causing the floor to settle, and injuring and damaging the premises. The only ground of forfeiture asserted in the complaint is the nonpayment of rent. The other acts charged against the tenant are set up merely as a basis for the recovery of damages. They could not, in any event, justify a forfeiture. There is neither allegation, proof, nor finding that the tenant was under any obligation to repair. The defendant had the right, as we shall show hereafter, to use the premises as a garage. The commission of waste is not a ground of forfeiture, the landlord's remedy being an action for damages. *Chipman v. Emeric*, 3 Cal. 273.

The findings follow the allegations of the complaint, except that they assess the damage for failure to repair, for use as a garage, and for injury to the building, at \$509.

It was the settled rule at common law that a demand for payment of the exact sum due was a necessary prerequisite to a forfeiture of a lease for nonpayment of rent. 24 Cyc. 1355. The same rule was laid down in this state at an early date (*Gage v. Bates*, 40 Cal. 384; *O'Connor v. Kelly*, 41 Cal. 484), and these decisions have never been questioned (*Mossi v. Fairbanks*, 19 Cal. App. 355, 125 Pac. 1071). The finding of the court is, "that there came due as rent, August 1, 1916, . . . the sum of \$100, and said plaintiff did on August 1, 1916, demand payment thereof; that said defendant wholly failed, neglected, and refused to pay said rent."

The appellant contends that the evidence does not sustain the finding that such a demand was made, and the record, we think, requires that this contention be upheld. It

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to repair.

—waste.

—nonpayment  
of rent.

appears without conflict that some months prior to August, 1916, the defendant had begun to use the premises as a garage. The portion of the building above the leased store was occupied as a lodging house, and its tenants were disturbed by the noise resulting from operations in the garage at night. The plaintiff agreed with the defendant that, if she would maintain quiet in the garage during the night hours, a reduction of \$15 monthly in the rent would be made, and for three or four months prior to August the sum of \$85 per month had been paid and received as the rent of the premises. On August 1 the vice president of the plaintiff corporation called to collect the rent. According to his own testimony, he did not demand any specified amount, but "just asked for the rent." Under the

— demand for  
rent—  
sumiciency.

strict rules governing attempts to enforce forfeitures, this was not the specific demand required by the law. It was at least doubtful whether the plaintiff was demanding the payment of \$100 a month, as specified in the lease, or of the lesser sum fixed by the subsequent agreement of modification. At any rate, it certainly cannot be interpreted as a precise and specific demand for \$100 per month, and this is the demand which the court found to have been made. Cases holding that a demand is not necessary where the defendant denies the relation of landlord and tenant (Smith v. Ogg Shaw, 16 Cal. 88; Simpson v. Applegate, 75 Cal. 342, 17 Pac. 237) have no application here. The defendant did not at any time deny the tenancy. On the contrary, she alleged in her answer a tender of the rent due, and repeated the tender at the trial. The respondent argues that any defect in the demand became inconsequential because, as the court finds, the defendant refused to pay the rent. The plaintiff's own evidence shows that the refusal was not absolute, but that the tenant merely declined

to pay pending an adjustment of a dispute concerning the plaintiff's right to make certain changes in the premises. But, even if the defendant had flatly refused to pay the rent, this would not

authorize a forfeiture of her lease, in the absence of a proper demand.

"Nor, for the purpose of forfeiture, will a waiver of the demand ever be implied, because a forfeiture, from its very nature, cannot take place by consent, and it is not favored by the rules of law." Gaskill v. Trainer, 3 Cal. 334, 340.

The plaintiff therefore failed to establish a ground for the forfeiture of the lease and recovery of the premises for non-payment of rent.

— damages—  
right to.

The judgment for damages for withholding the premises must fall, of course, with the judgment for restitution.

We find ourselves unable, likewise, to sustain the part of the judgment awarding damages in the sum of \$509. By the lease the premises were let to be used for the fruit and vegetable business. If the instrument had stopped with this provision, it might well be claimed that any other use by the lessee would render her liable in damages, or authorize the lessor to rescind the lease. Civ. Code, § 1930. But the lease contains the further clause, above quoted, that the lessee may change the premises or conduct any other business, except certain specified kinds. The prohibited occupations thus excepted do not include the maintenance of a garage (in the absence, at least, of any claim that such business "conflicted with any lease" to other persons), and it is perfectly clear, therefore, that the lessee was not precluded from using the premises as a garage.

If the defendant was liable for waste in removing a portion of the foundation of the building, there is no separate finding of damage resulting from this act. The court finds that the plaintiff has been damaged in the sum of \$509 by the de-

pendant's occupation of the premises as a garage and her removal of a portion of the foundation. There is

**Appeal—damages for lawful and unlawful act—separation.**

no way in which we can determine what portion of this damage the court attributed to one or the other of the supposed wrongful acts. Since, as we have seen, the defendant did not vio-

**Landlord and tenant—damages for use of building.**

late the terms of the lease by using the premises as a garage, the award of damages based in part on that ground cannot stand.

A number of other points are

raised by the appellant, but the views we have expressed render any extended discussion of them unnecessary. The question of the sufficiency of the complaint may be obviated by an application to the court below for leave to amend. Any error that may have been committed in admitting in evidence the assignment of the lease from Keosheyan to the plaintiff without laying the proper foundation is not likely to recur upon a second trial.

The judgment is reversed.

We concur: Angellotti, Ch. J.; Shaw, J.; Wilbur, J.; Melvin, J.; Lawlor, J.

## ANNOTATION.

### Commission of waste as ground for forfeiture of lease.

I. In general, 672.

II. Extent of forfeiture, 674.

III. Right of forfeiture as affected by character of waste:

a. In general, 674.

#### I. In general.

At common law there was no forfeiture of an estate for years for the commission of waste. It was only by the Statute of Gloucester, 6 Edw. I. chap. 5, that the remedy of forfeiture was given therefor. *Chipman v. Emeric* (1853) 3 Cal. 273; *Crowe v. Wilson* (1886) 65 Md. 479, 57 Am. Rep. 343, 5 Atl. 427; *Smith v. Sharpe* (1852) 44 N. C. (Busbee, L.) 91, 57 Am. Dec. 574.

The Statute of Gloucester, 6 Edw. I. chap. 5, is declared in *Parrott v. Barney* (1868) Deady, 405, Fed. Cas. No. 10,773a, to form part of the common law brought to this country by the colonists from England. And this statute is said to be the law of Maryland, in *Thurston v. Mustin* (1828) 3 Cranch, C. C. 385, Fed. Cas. No. 14,013.

It is stated in *Reeve's History of English Law*, vol. 2, p. 438, which is quoted in *Moss Point Lumber Co. v. Harrison County* (1906) 89 Miss. 448, 42 So. 290, 873, that "the provision in the Statute of Gloucester, giving, by way of penalty, the forfeiture of the place wasted and treble damages, was

III.—continued.

b. Quality of husbandry, 675.

c. Cutting timber, 676.

d. Alteration of buildings, 677.

e. Repairs 679.

re-enacted in New York, New Jersey, and Virginia." In the case last cited the court declined to hold that the statute had any intrinsic force as a statute in Mississippi.

It is said in *Currier v. Perley* (1851) 24 N. H. 219, that an estate from year to year may be determined by the commission of waste by the tenant.

Waste is held a sufficient cause for the rescission of a lease, in *Denis v. Burray* (1810) 1 Rev. de Leg. L. C. 505 (abstract), especially where the parties have covenanted that the tenant shall not commit waste.

The right of a lessor to forfeit the lease for breach of a covenant not to excavate clay to more than a specified depth is recognized in *Kerr v. Hastings* (1875) 25 U. C. C. P. 429.

The reported case (*J. B. Hill Co. v. Pinque*, ante, 669), in holding that the commission of waste is not ground of forfeiture, the landlord's remedy being an action for damages, follows the earlier decision of *Chipman v. Emeric* (1853) 3 Cal. 273, which refused to declare a lease forfeited for the commission of waste by cutting trees

for making charcoal, on the ground that the California statute confines the remedy for waste to the recovery of treble damages.

A tenancy at will has been held to be legally determined by the commission of waste. *Daniels v. Pond* (1838) 21 Pick. (Mass.) 367, 32 Am. Dec. 269; *Perry v. Carr* (1862) 44 N. H. 120 (where the waste consisted in the sale and removal of manure from leased farming lands); *Philips v. Covert* (1810) 7 Johns. (N. Y.) 1 (where there was voluntary waste by cutting timber).

But a tenancy at will, existing under the statutes of Maine, is held not destroyed by the commission of waste by the tenant, in *Young v. Young* (1853) 36 Me. 133; since the statute gives to the tenant at will rights for a period, after a written notice to quit, of equal validity with those acquired under a written lease for a like period.

In addition to the preceding cases, the right to forfeit a lease for the commission of waste is recognized, either expressly or impliedly, in the following decisions:

**United States.**—*Kann v. King* (1907) 204 U. S. 43, 51 L. ed. 360, 27 Sup. Ct. Rep. 213; *Coy v. Title Guarantee & T. Co.* (1912) 198 Fed. 275; *Semidey v. Central Aguirre Co.* (1917) 152 C. C. A. 444, 239 Fed. 610.

**Alabama.**—*Brooks v. Rogers* (1892) 99 Ala. 433, 12 So. 61; *O'Byrne v. Jebbles & C. Confectionery Co.* (1910) 165 Ala. 183, 51 So. 633.

**Arkansas.**—*Yarborough v. Hurt* (1917) 131 Ark. 593, 199 S. W. 911.

**California.**—*Randol v. Scott* (1895) 110 Cal. 590, 42 Pac. 976; *Isom v. Rex Crude Oil Co.* (1905) 147 Cal. 659, 82 Pac. 317.

**District of Columbia.**—*Webb v. King* (1903) 21 App. D. C. 141.

**Hawaii.**—*Paris v. Vasconcellos* (1903) 14 Haw. 590.

**Illinois.**—*Moses v. Loomis* (1895) 156 Ill. 392, 47 Am. St. Rep. 194, 40 N. E. 952, affirming (1894) 55 Ill. App. 342; *Crandall v. Sorg* (1901) 99 Ill. App. 22, reversed on other grounds in (1902) 198 Ill. 48, 64 N. E. 769.

**Indiana.**—*Ricketts v. Richardson* 3 A.L.R.—43.

(1882) 85 Ind. 508; *Bollenbacker v. Fritts* (1884) 98 Ind. 50; *Sullivan v. O'Hara* (1890) 1 Ind. App. 259, 27 N. E. 590.

**Iowa.**—*Patton v. Bond* (1879) 50 Iowa, 508; *Heiple v. Reed* (1895) — Iowa, —, 65 N. W. 331; *Schultz v. Lidtka* (1917) 179 Iowa, 652, 161 N. W. 682.

**Kansas.**—*Burnes v. McCubbin* (1865) 3 Kan. 221, 87 Am. Dec. 468.

**Kentucky.**—*Kentucky River Nav. Co. v. Com.* (1877) 13 Bush, 435; *Smith v. Mattingly* (1894) 96 Ky. 228, 28 S. W. 503; *Abel v. Wuesten* (1911) 141 Ky. 766, 133 S. W. 774, Ann. Cas. 1912C, 389, on rehearing in (1911) 143 Ky. 513, 136 S. W. 867, Ann. Cas. 1912C, 391; *Continental Fuel Co. v. Haden* (1918) 182 Ky. 8, 206 S. W. 8.

**Louisiana.**—*Seward v. Denechaud* (1908) 120 La. 720, 45 So. 561.

**Maine.**—*Hasty v. Wheeler* (1835) 12 Me. 434.

**Maryland.**—*Moyer v. Mitchell* (1880) 53 Md. 171.

**Massachusetts.**—*Atkins v. Chilson* (1845) 9 Met. 52; *Gordon v. Richardson* (1904) 185 Mass. 492, 69 L.R.A. 867, 70 N. E. 1027.

**Missouri.**—*Metropolitan Land Co. v. Manning* (1903) 98 Mo. App. 248, 71 S. W. 696.

**Nebraska.**—*Catlin v. Wright* (1882) 13 Neb. 558, 14 N. W. 530.

**New Jersey.**—*Morehouse v. Cotheal* (1850) 22 N. J. L. 521.

**New York.**—*Jackson ex dem. Weldon v. Harrison* (1819) 17 Johns. 66; *Jackson ex dem. Van Rensselaer v. Andrews* (1821) 18 Johns. 431; *Jackson ex dem. Thomas v. Tibbits* (1829) 3 Wend. 341; *Winship v. Pitts* (1832) 3 Paige, 259; *Baxter v. Lansing* (1838) 7 Paige, 350; *Verplanck v. Wright* (1840) 23 Wend. 506; *Clarke v. Cummings* (1849) 5 Barb. 339.

**Oregon.**—*Anderson v. Hammon* (1890) 19 Or. 446, 20 Am. St. Rep. 832, 24 Pac. 228.

**Pennsylvania.**—*Hand v. Suravitz* (1892) 148 Pa. 202, 23 Atl. 1117, reversing (1891) 10 Pa. Co. Ct. 302.

**Rhode Island.**—*Clemence v. Steere* (1850) 1 R. I. 272, 53 Am. Dec. 621; *Perkins v. Kirby* (1913) 35 R. I. 84, 85 Atl. 648.

Utah.—Bacon v. Park (1899) 19 Utah, 246, 57 Pac. 28.

Vermont.—Houghton v. Cook (1917) 91 Vt. 197, 100 Atl. 115.

Washington.—Pettygrove v. Rothschild (1891) 2 Wash. 6, 25 Pac. 907; Northcraft v. Blumauer (1909) 53 Wash. 243, 132 Am. St. Rep. 1071, 101 Pac. 871; Moore v. Twin City Ice & Cold Storage Co. (1916) 92 Wash. 608, 159 Pac. 779, Ann. Cas. 1918D, 540.

English.—Paston v. Utber (1630) Hutton, 103, 123 Eng. Reprint, 1131; Richards v. Noble (1807) 3 Meriv. 673, 36 Eng. Reprint, 258; Doe ex dem. Darlington v. Bond (1826) 5 Barn. & C. 855, 108 Eng. Reprint, 318, 8 Dowl. & R. 738; 5 L. J. K. B. 68, 29 Revised Rep. 436; Doe ex dem. Dalton v. Jones (1832) 4 Barn. & Ad. 126, 110 Eng. Reprint, 403, 1 Nev. & M. 6, 2 L. J. K. B. N. S. 11; Rose v. Spicer [1911] 2 K. B. 234, 30 L. J. K. B. N. S. 1011, 104 L. T. N. S. 619, 55 Sol. Jo. 405, 27 Times L. R. 367.

## II. Extent of forfeiture.

By the Statute of Gloucester, 6 Edw. I. chap. 5, the remedy of forfeiture was expressly confined to the place where the waste was committed. Chipman v. Emeric (1853) 3 Cal. 273. This principle was recognized in *Hasty v. Wheeler* (1835) 12 Me. 434, where it was said: "If a tenant for years committed waste he forfeited the place wasted." And in *Morehouse v. Cotheal* (1850) 22 N. J. L. 521, it is stated: "Unless the waste be sparsim, disposed over the whole tract, only those portions of the tract actually wasted are forfeited." So it is declared in *Smith v. Sharpe* (1852) 44 N. C. (Busbee, L.) 91, 57 Am. Dec. 574, that where waste is "done sparsim, or all over a wood, the whole wood shall be recovered." In *Clemence v. Steere* (1850) 1 R. I. 272, 55 Am. Dec. 621, it is remarked: "Waste in any particular place forfeits the place; as waste in a woods forfeits the woods; in the meadow, forfeits the meadow; a destruction of the dwelling house forfeits the whole place." But it seems that if waste be committed in a dwelling house, part of the property demised, only such parts of

the dwelling house are forfeited as the waste is committed in. *Jackson ex dem. Thomas v. Tibbits* (1829) 3 Wend. (N. Y.) 341.

In *Smith v. Mattingly* (1894) 96 Ky. 228, 28 S. W. 503, it is said that, in case of voluntary waste of a portion of the land in which a tenant may have an estate for life or years, the entire tract is not forfeited under the Kentucky statute, which provides that only the particular thing wasted shall be forfeited, whether it be timber, fence, rails, and building, or other thing appertaining to the land.

## III. Right of forfeiture as affected by character of waste.

### a. In general.

The scope of this note necessarily confines the discussion of the question of the character of the waste committed, or as to what constitutes waste, to cases in which the right to forfeit a lease therefor was involved.

In the absence of injury to the reversion, it has been held that there can be no waste justifying a forfeiture of the lease. Thus, lack of good husbandry in getting in hay and grain crops, which resulted in injury to them, affords no basis for a judgment of forfeiture of the lease, where it does not appear that the farm was injured by the lessee's failure in this respect. *Houghton v. Cook* (1917) 91 Vt. 197, 100 Atl. 115.

Similarly, the use of a vacant lot, leased without specifying the purposes to which the property should be devoted, by temporarily depositing sand and gravel on it, does not constitute waste authorizing a forfeiture of the lease because lessening its value for agricultural purposes, where the lot is within the corporate limits of the city, and is not chiefly valuable for agricultural purposes. *Moore v. Twin City Ice & Cold Storage Co.* (1916) 92 Wash. 608, 159 Pac. 779, Ann. Cas. 1918D, 540.

So, digging clay for bricks is not a ground for a forfeiture of a lease, where it occurred a number of years previously, and the injury, if any, has long since ceased. *Jackson ex dem.*

Van Rensselaer v. Andrews (1821) 18 Johns. (N. Y.) 431.

If a tenant by turning the water of a creek, as an act of good husbandry, so that it will flow into a swamp, thereby kills timber which is growing there, it will not be deemed waste so as to produce a forfeiture of the lease, especially where the landlord has waited for twenty years before seeking to enforce the forfeiture, and, in the meantime, new trees have grown up of more value than the old. *Ibid.*

That the lessee of a right of way for a logging railroad graveled the right of way instead of timbering it, as agreed, is not such waste as authorizes a cancellation of the lease, where it is not shown that the graveling impaired the rental value of the land or materially affected the fee, and it is doubtful whether the drainage of the land by ditches constructed along the right of way has not benefited the property in excess of the damage sustained by the graveling. *Northcraft v. Blumauer* (1909) 53 Wash. 243, 182 Am. St. Rep. 1071, 101 Pac. 871.

Inclosure made by a hedge by a copyholder, which obstructs the lord's field course for sheep, was held not a ground for forfeiture in *Paston v. Utber* (1630) *Hutton*, 103, 123 Eng. Reprint, 1131, since forfeiture of a copyhold is by something done to the copyhold land itself, but the inclosure is better for the copyhold, and makes the land better.

Forfeiture of a mining lease will not be decreed in an equitable action, where the waste complained of is not only involuntary or permissive, but inconsequential. *Continental Fuel Co. v. Haden* (1918) 182 Ky. 8, 206 S. W. 8.

Injury to the demised premises, due to their occupancy for the purposes for which they were leased, is not ground for a forfeiture. Thus, one who leases premises for use as a bathhouse must be presumed to have anticipated the natural consequences to the building which would result from the stipulated use, and, whether such injury proves to be great or small, it could not afford justification for abrogation of the lease; especially where

the lessee, when his attention was called to the injury being done to the building, took immediate steps to prevent, as far as possible, the continuance of the injury. *Coy v. Title Guarantee & T. Co.* (1912) 198 Fed. 275.

But removal by a tenant from land which he had leased with the avowed purpose of erecting a tenement house thereon, of oil, of the existence of which the lessor had no knowledge at the time of the making of the lease, constitutes waste for which the lessor may, in accordance with the terms of the California Code, § 1930, treat the lease as rescinded because of the wrongful act of the tenant in using the property for a purpose foreign to that for which it was let. *Isom v. Rex Crude Oil Co.* (1905) 147 Cal. 659, 82 Pac. 317.

#### *b. Quality of husbandry.*

Alleged violations of stipulations in leases concerning the care and management of leased agricultural property were relied upon as grounds of forfeiture in the following cases: *Patton v. Bond* (1879) 50 Iowa, 508, which holds that noncompliance with a stipulation in a lease that the lessee shall plow the oat stubble at least 6 inches deep by a specified date, and that failure to do so shall work a forfeiture of the lease, justifies the lessor in treating the lease as forfeited.

But that a tenant of a farm kept hogs in the horse barn is not such waste as calls for a forfeiture of the lease, under a clause providing therefor in case of voluntary waste. *Schultz v. Lidtka* (1917) 179 Iowa, 652, 161 N. W. 682.

A provision in a lease of farm lands that the lessee shall work the farm in a good and workmanlike manner, and that, upon his failure to do so the lessor may have the work done at the cost of the lessee, does not entitle the lessor to claim a forfeiture by reason of the lessee's failure to fulfil his agreement, where the lease contains no stipulation as to forfeiture. *Hanaw v. Bailey* (1890) 83 Mich. 24, 9 L.R.A. 801, 46 N. W. 1039.

Equity will cancel a lease of land set out in orchards, which the lease



required the lessees to prune and cultivate according to the rules of good husbandry, where they permitted suckers and water sprouts to grow and overrun the apple orchard, and allowed both the apple and other orchards to become infected with insect pests, which seriously injured the healthful condition of the trees, killing some, and causing others to go into decay, which, if permitted to continue during the life of the lease, must result in the ruin and destruction of the orchards. *Anderson v. Hammon* (1890) 19 Or. 446, 20 Am. St. Rep. 832, 24 Pac. 228.

That the lessee permitted demised farming lands to become overgrown with lantana is not a breach of a covenant not to suffer any waste, and does not entitle the lessor to determine the lease, where lantana had been growing on the premises for ten years prior to the commencement of the lessee's term, and it does not appear that men of ordinary prudence and diligence would have cleared the land, which would have cost \$3,000 or \$4,000. *Paris v. Vasconcellos* (1903) 14 Haw. 590.

A covenant in a lease of land set out to fruit trees that the lessee may raise squash and pumpkins between the trees is not violated, so as to incur a forfeiture, by planting corn, beans, and nursery stock between the rows of fruit trees, over a small part of the farm, especially where the lessor had the right at all times to enter upon and inspect the demised premises, and made no objection to the corn or beans. *Randol v. Scott* (1895) 110 Cal. 590, 42 Pac. 976.

A covenant in a lease of farming lands that briars, weeds, and sprouts are to be kept down in the fence corners the same as in the fields means that this work shall be done during the term, and not at any time before its completion; but the breach of such a stipulation does not entitle the lessor to determine the tenancy by a ten days' notice to quit. *Ricketts v. Richardson* (1882) 85 Ind. 508.

A lease of farming lands will not be forfeited for an alleged failure to plant and replace apple trees, when it

does not appear but that the missing trees were torn up by the wind, or otherwise destroyed, after the suit to recover possession of the premises was instituted. *Clarke v. Cummings* (1849) 5 Barb. (N. Y.) 839.

A diversion of irrigating waters from the leased premises, in violation of the terms of the lease, will not work a forfeiture where, owing to the destruction of a canal, they could not be utilized, and their use upon other lands was permitted by the lessee in good faith, and in consideration of a repair of the canal by the user. *Semidey v. Central Aguirre Co.* (1917) 152 C. C. A. 444, 239 Fed. 610, writ of certiorari denied (1917) in 243 U. S. 652, 61 L. ed. 947, 37 Sup. Ct. Rep. 479.

It has been held, with reference to cattle included in a lease of a farm, that while a failure to properly feed and care for them during the fall and winter months justifies a termination of the lease, under a provision therein, authorizing its cancellation at the option of the lessor upon failure to care and provide for the stock, yet the right to insist upon a forfeiture is waived when not attempted to be exercised until the following June. *Catlin v. Wright* (1882). 13 Neb. 558, 14 N. W. 530.

#### *c. Cutting timber.*

The act of a tenant in cutting timber not for the use or profit of the property, but for the purpose of selling it, constitutes waste, authorizing a judgment of forfeiture. *Morehouse v. Cotheal* (1850) 22 N. J. L. 521. This principle is recognized in *Thurston v. Mustin* (1828) 3 Cranch, C. C. 335, Fed. Cas. No. 14,013; *Richards v. Noble* (1807) 3 Meriv. 673, 36 Eng. Reprint, 258.

In the following cases the violation of provisions in leases concerning the cutting of wood on the demised premises was urged as a ground of forfeiture: *Yarborough v. Hurt* (1917) 131 Ark. 593, 199 S. W. 911, which holds that cutting timber without the written permission of the lessor, in violation of the terms of the lease, renders it subject to forfeiture, where such

penalty is provided by its express terms.

A lease providing for a re-entry upon notice by the lessor, and in case the lessee violates a condition that he will not cut down or destroy any of the wood or timber on the premises, is not rendered absolutely void by a breach of the condition, but may be terminated upon the election of the lessor. *Brooks v. Rogers* (1892) 99 Ala. 433, 12 So. 61.

A breach of a condition in a lease not to sell or dispose of any wood or timber off and from the demised premises, without permission in writing from the landlord, works a forfeiture of the estate, although there is a reservation of 30 acres of woodland, out of the 180 acres comprising the farm, from which no timber is to be cut. *Verplanck v. Wright* (1840) 23 Wend. (N. Y.) 506.

Under a lease requiring one sixth of the farming lands demised to be set apart for woodland from which no timber or wood shall be taken except for building, repairing fences, or fuel, the fact of cutting or clearing off the wood so that but two thirds of the required area is left creates a forfeiture by the very terms of the covenant. *Clarke v. Cummings* (1849) 5 Barb. (N. Y.) 339.

That a tenant procured firewood and fencing timber from other lands does not justify him in cutting and selling, in violation of a covenant in the lease, valuable timber on the demised lands, which good husbandry would dictate should not be used for either of these purposes. *Ibid.*

In *Baxter v. Lansing* (1838) 7 Paige (N. Y.) 350, the right of a lessor to enforce a forfeiture of the lessee's estate for the breach of a covenant against cutting timber or trees is recognized, although the injury to the reversion be comparatively trifling.

That a tenant of a farm cut down trees to build a fence, and removed willows which interfered with a tile drain, does not show such waste as calls for a forfeiture of the lease, under a clause providing therefor, in case of voluntary waste. *Schultz v.*

*Lidtka* (1917) 179 Iowa, 652, 161 N. W. 682.

A judgment in general form awarding to the landlord the possession of lands demised, because of waste committed by the tenant by cutting timber, does not work a forfeiture of the tenant's rights under the lease so as to entitle the landlord to a crop growing on the lands, where it is not adjudged in conformity with the Indiana statute that the injury to the estate in reversion is equal to the value of the tenant's estate or unexpired term. *Sullivan v. O'Hara* (1890) 1 Ind. App. 259, 27 N. E. 590.

#### *d. Alteration of buildings.*

By the common law it is waste, and a forfeiture of the lease is incurred, when a tenant converts one species of edifice into another, even though its value is improved. *Crowe v. Wilson* (1866) 65 Md. 479, 57 Am. Rep. 343, 5 Atl. 427.

While it was for a time questionable whether a tenant could erect a new building upon the leased premises without subjecting himself to a loss of the property, it is now understood that it is not waste for the tenant to erect a new edifice upon the demised premises, provided it can be done without destroying or materially injuring the buildings or other improvements already existing thereon. *Winship v. Pitts* (1832) 3 Paige (N. Y.) 259.

The court should not instruct that the acts of a tenant in cutting, without the landlord's permission, a doorway through a partition and putting in a window, work a forfeiture of his interest, but the question should be submitted to the jury, to determine whether the acts done were in fact prejudicial to the property. *Jackson ex dem. Thomas v. Tibbits* (1829) 3 Wend. (N. Y.) 341.

The estate of a tenant for a fixed period of less than one year cannot be adjudged forfeited for voluntary waste committed by the tenant in making changes and alterations in the buildings, where it is not shown, in conformity with statutory requirement, that the injury to the property by the commission of the waste com-

plained of was equal to the value of the tenant's unexpired term as the lessee of the property. *Bollenbacker v. Fritts* (1884) 98 Ind. 50.

Whether alterations in leased buildings, made by a tenant, will incur a forfeiture of the lease, under its provisions, was considered in the following cases: *Jackson ex dem. Weldon v. Harrison* (1819) 17 Johns. (N. Y.) 66, holding that a stipulation in a lease that the lessee shall not make alterations in the buildings, without the lessor's consent, rests in covenant, and is not a condition for which the lease may be forfeited.

The change by a tenant of the name of a hotel, which he had theretofore designated by his family name, to a more general title, is not an alteration of the property leased which would justify an annulment of the lease. *Seward v. Denechaud* (1908) 120 La. 720, 45 So. 561.

No breach of a stipulation in a lease not to make alterations, such as will sustain the lessor's right of entry for forfeiture, is shown by the lessee's erection of a building upon the adjacent lot of another person, and which, it is alleged, has affected the light and air in reference to the building leased. *Atkins v. Chilson* (1845) 9 Met. (Mass.) 52.

Alterations made by a tenant in leased buildings used for business purposes, and which consist in putting in a new floor in place of one which was insecure, and removing rotten partitions and an old stairway, and building a new front further back from the walk than the old one, do not constitute waste for which the lease should be declared forfeited, under a clause that the lessee will not commit any waste, where the building has not been so changed or altered that it cannot be restored. *Abel v. Wuesten* (1911) 141 Ky. 766, 133 S. W. 774, Ann. Cas. 1912C, 389, on rehearing in (1911) 143 Ky. 513, 136 S. W. 867, Ann. Cas. 1912C, 391.

But, on rehearing in 143 Ky. 513, the court held that the alterations were so radical as substantially to change the character of the building, and that in making them the tenant committed

waste, working a forfeiture of the lease. In this case the tenant had the oral consent of the landlord to make the alterations, which was held not to protect him in view of the requirement of the statute that the landlord must consent in writing to the commission of the waste.

A lease containing a covenant to repair and to keep in repair the leased premises, together with such buildings, improvements, or additions as might be made during the term, is not forfeited by the acts of the lessee in changing the lower part of the house into a shop, enlarging windows and in making a new door in a partition and stopping up an old one. *Doe ex dem. Dalton v. Jones* (1832) 4 Barn. & Ad. 126, 110 Eng. Reprint, 403, 1 Nev. & M. 6, 2 L. J. K. B. N. S. 11.

Relief from forfeiture of a lease will not be granted, when the lessees have committed waste by opening a doorway and removing a wall, in violation of a covenant to keep in good repair the buildings, walls, and fences, where, instead of offering to make good the waste if it be possible to do so, they claim the right to maintain the alterations, which were made to convert the property into a theater. *Rose v. Spicer* [1911] 2 K. B. (Eng.) 234, 80 L. J. K. B. N. S. 1011, 104 L. T. N. S. 619, 55 Sol. Jo. 405, 27 Times L. R. 367.

Under a lease containing a proviso for re-entry if the lessee committed waste to the value of 10 shillings, the question whether waste was committed to that extent should be submitted to the jury, where the act complained of consisted in pulling down an old building, and it is possible that the value of the reversion might be increased by the alteration. *Doe ex dem. Darlington v. Bond* (1826) 5 Barn. & C. 855, 108 Eng. Reprint, 318, 8 Dowl. & R. 738, 5 L. J. K. B. 68, 29 Revised Rep. 436.

Breach of a covenant not to make any alterations in leased premises without the written consent of the lessor, under penalty of forfeiture, is held waived where the lessees requested the lessor to put in some stairs to give access to the basement of the de-

mised premises, and the lessor told them they might use old stairs in the basement for that purpose, which they did, making the necessary opening in the floor. *Moses v. Loomis* (1895) 156 Ill. 392, 47 Am. St. Rep. 194, 40 N. E. 952, affirming (1894) 55 Ill. App. 342.

And in an action of forcible entry and detainer brought upon the ground of a forfeiture of a lease by making alterations in the building without the lessor's consent, and contrary to the terms of the lease, it is error to strike from the answer averments that the alterations were made with the full knowledge of the lessor, who continued to receive rent under the lease without notifying the lessee, until some time subsequently, that she intended to claim a forfeiture. *Pettygrove v. Rothschild* (1891) 2 Wash. 6, 25 Pac. 907.

*c. Repairs.*

Failure of a tenant to repair the demised property, in accordance with the terms of the lease, was considered a ground of forfeiture in *O'Byrne v. Jebeles & C. Confectionery Co.* (1910) 165 Ala. 183, 51 So. 633, holding that forfeiture of a lease in accordance with its terms, for the lessee's failure to keep in repair and in good sanitary condition, a building which he had erected thereon, in part consideration of the rent, will not be relieved against in equity, where the lessee had permitted the floors to sink 2 inches, and portions of the roof and floors to become rotten, and had failed to keep the plumbing in repair.

So, a lease by the state of river im-

provements to a navigation company will be rescinded, according to its terms, where the lessee permitted the improvements to become and remain out of repair to such an extent that one or more locks and dams were in danger of being washed out and destroyed, and the lessee was making no attempt to repair and preserve the improvements, and was unable to do so because of insolvency. *Kentucky River Nav. Co. v. Com.* (1877) 13 Bush. (Ky.) 435.

Such neglect of a tenant to repair the leased premises as will lead to a forfeiture of the lease is not shown by failure to replace forthwith a wooden conductor, the absence of which occasioned no injury to the leased buildings. *Atkins v. Chilson* (1845) 9 Met. (Mass.) 52.

A covenant in a lease of a cottage at a watering and bathing place, which provides that all rights of the lessee shall cease if he suffers the cottage to be out of repair for any one bathing season during the continuance of the term, is absolute, and not contingent upon any covenant on the part of the lessor to keep the adjacent hotel and grounds in good order and repair. *Moyer v. Mitchell* (1880) 53 Md. 171.

But a lessee's failure to repair buildings is waived where he prepared to make extensive improvements which would have covered the necessary repairs, but was instructed to wait awhile, by the lessor, who never directed him to proceed. *Houghton v. Cook* (1917) 91 Vt. 197, 100 Atl. 115.

A. W. R.

AUGUST JOHNSON, Respt.,

v.

ROUCHLEAU-RAY IRON LAND COMPANY.

DEAN IRON COMPANY et al., Appts.

*Minnesota Supreme Court—June 7, 1918.*

(140 Minn. 289, 168 N. W. 1.)

**Action — prematurity — injury to property.**

1. To recover damages for injury to real property, resulting from negli-

Headnotes by QUINN, J.

gence, the owner must wait until the injury or damage has actually happened.

[See note on this question beginning on page 682.]

— anticipated injury.

2. Damages based upon apprehension of future injury to real property

by an act yet to happen are too remote and speculative.

[See 8 R. C. L. 542, 543, 545-548.]

**APPEAL** by defendants Dean Iron Company et al., from a judgment of the District Court for St. Louis County in favor of plaintiff in an action brought to recover damages for injuries to certain real property. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Abbott, MacPherran, Lewis, & Gilbert and Baldwin, Baldwin, & Holmes, for appellants:

Plaintiff has not sustained any damage in consequence of the acts of defendants, either proximate or natural, and if any damage whatever has been sustained, it must be and is remote and speculative.

Worcester v. Great Falls Mfg. Co. 41 Me. 159, 66 Am. Dec. 217; 4 Sutherland, Damages, § 1048; West Leigh Colliery Co. v. Tunncliffe & Hampson [1908] A. C. 27, 5 B. R. C. 916, 77 L. J. Ch. N. S. 102, 98 L. T. N. S. 4, 24 Times L. R. 146, 10 Ann. Cas. 74; McGill v. Pintsch Compressing Co. 140 Iowa, 429, 20 L.R.A.(N.S.) 466, 118 N. W. 786; San Antonio v. Mackey, 22 Tex. Civ. App. 145, 54 S. W. 33; Robb v. Carnegie Bros. 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 694, 22 Atl. 649; 13 Cyc. 138; Pullen v. Wright, 34 Minn. 314, 26 N. W. 394.

Messrs. Archer & Pickering, for respondent:

Defendants were not using their property in such a manner as to not injure the plaintiff.

Barnes v. Masterson, 38 App. Div. 612, 56 N. Y. Supp. 939, 6 Am. Neg. Rep. 143; Hutchinson v. Schimmelfeder, 40 Pa. 396, 80 Am. Dec. 582; Abrey v. Detroit, 127 Mich. 374, 86 N. W. 785; Everett v. Paschall, 61 Wash. 47, 31 L.R.A.(N.S.) 827, 111 Pac. 879, Ann. Cas. 1912B, 1128.

Damage may be done even before an actual invasion of the property takes place.

Everett v. Paschall, *supra*; Cooley, Torts, 1880 ed. p. 607; Berger v. Minneapolis Gaslight Co. 60 Minn. 296, 62 N. W. 336.

Quinn, J., delivered the opinion of the court:

Action to recover damages for in-

jury to real property. Plaintiff recovered a verdict of \$400 against the defendants Arthur Mining Company and Dean Iron Mining Company. From a judgment entered thereon this appeal was taken.

The village of Spina is situated on the Mesaba range, which is one of the principal iron mining districts of northern Minnesota. A large part of the iron mining in this region is done by the system known as open pit mining. This system necessitates a stripping of the earth and other material overlaying the ore, and depositing the same in dump piles in convenient localities. The defendant Arthur Iron Mining Company held a mining lease upon the southeast quarter of the northeast quarter of section 15, township 58 north, range 19 west, from the owners thereof. During the summer of 1912, that company entered into a contract with Butler Brothers, for the stripping of a certain mine near by, and, accordingly, thereafter, and prior to the month of December, 1915, the strippings therefrom were placed by Butler Brothers in a dump upon the tract of land above described, which lies immediately across the highway on the west line of the village of Spina. Thereafter the defendant Dean Iron Mining Company became the owner of such lease by assignment. The plaintiff owns lots 6 and 7 in block 5 in the village of Spina, upon which is situated, at a distance of 206 feet from the toe or base of the dump in question, an eleven-room two-story dwelling, in which he resides with

(140 Minn. 289, 168 N. W. 1.)

his family. On June 13, 1916, near the northerly part of the east end of the dump a large mass of soft wet mortar-like material gushed out from the bottom of the dump, across the highway, and a distance of over 200 feet down one of the streets of said village, carrying with it for about 50 feet several houses with which it came in contact. The property of the plaintiff was not located upon this street, and was in no manner whatever reached by the material which was thus forced out from the bottom of the dump. The basis of plaintiff's claim to a right of recovery, as appears from the complaint, is that the ground where the dump was constructed is low, spongy, and slopes toward his premises; that the material constituting the dump was deposited thereon in a careless and negligent manner, by making the dump too high, the incline too steep, and by depositing thereon soft earth, quicksand, and gravel in such manner as to cause the same to give way and slide in large quantities; that a large portion thereof did give way and slide onto the streets in masses, and that another like slide is liable to occur, and strike and injure his premises, and that by reason thereof the market value of his property has been greatly diminished.

At the trial the issues were fully litigated. The controlling question here for consideration is whether the evidence sustains the verdict. Appellants contend that it is not sufficient to sustain the verdict, either as to negligence or damages. We are of the opinion that, even though there is sufficient showing to warrant a finding of negligence in the construction and maintenance of the dump, yet there is a fatal lack of evidence in support of the question of damages. Plaintiff contends, in both his pleading and proofs, that

the reasonable market value of his property, immediately prior to the occurrence of the slide in June, 1916, was \$4,000, and that immediately thereafter, because of the apprehension of another slide, it had no market value whatever. He rests his claim for damages squarely upon fear or apprehension that, because one slide has occurred, another is likely to happen at any time, which might strike his property, and that as the result of such apprehension the market value of his property has been greatly diminished. Respondent's contention cannot be sustained.

To recover damages for injury to real property, resulting from negligence, the owner must wait until the injury or damage has actually happened. It is the damage, and not the anticipation thereof, that gives rise to the cause of action. The following cases are analogous: *West Leigh Colliery Co. v. Tunncliffe & Hampson* [1908] A. C. 27, 5 B. R. C. 916, 77 L. J. Ch. N. S. 102, 98 L. T. N. S. 4, 24 Times L. R. 146, 10 Ann. Cas. 74; *McGill v. Pintsch Compressing Co.* 140 Iowa, 429, 20 L.R.A. (N.S.) 466, 118 N. W. 786; *Robb v. Carnegie Bros.* 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 694, 22 Atl. 649.

In the instant case, apprehension of a future slide, though founded on the known fact of a former one, does not give rise to a cause of action for damages. To hold otherwise would be to allow damages for depreciation in the market value, due to the apprehension of future injury by negligence, for an act which has not and may never happen. Such a rule of damages would be too remote and speculative. The judgment appealed from must be set aside.

Reversed.

Action—pre-maturity—  
injury to  
property.

—anticipated  
injury.

## ANNOTATION.

**Depreciation in market value of land as affecting the general rule that cause of action arises when injury is inflicted, and not when cause is created.**

There are some cases, *infra*, in which it was held that the cause of action, under certain particular circumstances arises as soon as the cause of injury is created, even though there is no actual physical injury inflicted at that time; since the creation of the cause depreciates the market value of the plaintiff's property, by reason of the fixed conclusion, from obvious facts, that injury must follow.

In none of these cases, however, was negligence the cause of the injury, so they can be distinguished readily from the holding in the reported case (*JOHNSON v. ROUCHLEAU-RAY IRON LAND CO.* ante, 679). The principle is not applicable to cases in which there is a right to successive actions, since it assumes that all consequences are obvious as soon as the cause is created, and the principle as to depreciation in market value of land, as a measure of damages, is not, as a rule, applied where there is a right to successive actions. Depreciation in market value, as a measure of damages, is not within the scope of this annotation, except to the extent that it affects the question of time when cause of action arises.

In *Kansas City, Ft. S. & M. R. Co. v. Cook* (1893) 57 Ark. 387, 21 S. W. 1066, it was held that the depreciation in the salable value of the land, apart from actual injuries to the land, can form no part of the estimate of damages where there is a right to successive actions, the court saying: "In the case of *Pinney v. Berry* (1875) 61 Mo. 359, the court considered the correctness of the rule announced in the instruction under consideration, as applicable to this class of cases; and Judge Napton, for the court, says: 'It is obvious that this rule has no application to such nuisances as may be removed the day after the verdict, or for the continuance of which a second or third action may be maintained, or which may be abated at the instance of the injured party, by the order of a competent court. The plaintiff is only

entitled to compensation for the loss actually sustained prior to the suit, by the nuisance.' The rule approved was that the damages were the loss to the rental value of the land, not to its salable value as an absolute estate, caused by the nuisance. To the same effect are a number of authorities. *Battishill v. Reed* (1856) 18 C. B. 696, 139 Eng. Reprint, 1544, 25 L. J. C. P. N. S. 290, 4 Week. Rep. 603; *Troy v. Cheshire R. Co.* (1851) 23 N. H. 83, 55 Am. Dec. 177; *Uline v. New York C. & H. R. R. Co.* (1885) 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536; *Joseph Schlitz Brewing Co. v. Compton* (1892) 142 Ill. 511, 18 L.R.A. 390, 34 Am. St. Rep. 92, 32 N. E. 693; *Bare v. Hoffman* (1875) 79 Pa. 71, 21 Am. Rep. 42; 3 *Sutherland, Damages*, § 1039; 5 *Am. & Eng. Enc. Law*, pp. 16, 17 and note."

And where the injury is due to the negligent construction of a thing or structure, there is a right to successive actions, even though the thing or structure would be legal or nonabatable if it had been properly constructed. In *Turner v. J. M. Brooks & Sons* (1912) 151 Ky. 310, L.R.A.1916E, 958, 151 S. W. 948, the court said: "Defendants insist that as the blasting was all done, and the property permanently injured, prior to the time of its purchase by plaintiffs, the right of action for such injury was in Huff alone, and that, as plaintiffs purchased the property in its depreciated condition, they are not entitled to recover. If this were the case of a permanent structure, lawfully and properly built, the contention of the defendants would be sound, for in that event there could be only one recovery for all damages, past, present, and future, and the vendor Huff alone would be entitled to recover. *Louisville & N. R. Co. v. Lambert* (1908) 33 Ky. L. Rep. 199, 110 S. W. 305; *Louisville & N. R. Co. v. Orr* (1891) 91 Ky. 109, 15 S. W. 8; *Hay v. Lexington* (1903) 114 Ky. 669, 71 S. W. 867; *Richmond*

*v. Gentry* (1910) 136 Ky. 319, 136 Am. St. Rep. 255, 124 S. W. 337; *Stickley v. Chesapeake & O. R. Co.* (1892) 93 Ky. 323, 20 S. W. 261. But even in the case of a permanent structure, if the structure be unlawfully or negligently built, and by reason thereof injury is inflicted from time to time, there may be recurring recoveries. *Louisville v. Coleburne* (1900) 108 Ky. 420, 56 S. W. 681; *Klosterman v. Chesapeake & O. R. Co.* (1900) 22 Ky. L. Rep. 192, 56 S. W. 820; *Finley v. Williamsburg* (1903) 24 Ky. L. Rep. 1338, 71 S. W. 502; *Madisonville, H. & E. R. Co. v. Graham* (1912) 147 Ky. 604, 144 S. W. 737. This is not a case of a structure. The act of the defendants in blasting the stone into the river, and permitting it to remain there to the injury of others, was not based on any semblance of right. Being unlawful and wrongful from the very outset, we see no way in which it may become rightful as to the owners of the land, so long as any recurring injury occurs, unless by release, or grant, or the payment of a sum covering all damages, past, present, and future. Until this be done, or the nuisance be abated, recoveries may be had for each recurring injury. As recoveries may be had for each recurring injury, it follows that the right of action for each recurring injury is in the owner of the premises at the time the injury results, and a payment to a former owner after he has parted with title, for injuries resulting to the property while owned by him, is no defense to an action by a subsequent owner, for injuries to the premises occurring after his purchase. As there was evidence tending to show an injury to the property after its purchase by the plaintiffs, and that this injury resulted from an unlawful act of the defendants in blasting the stones into the river and diverting its flow, it follows that the trial court erred in giving a peremptory instruction in favor of defendants." A number of cases supporting this collateral point are cited in L.R.A.1916E, 1027, note 85.

It may also be said that the overwhelming weight of authority, both English and American, sustains the

proposition that, unless there is an invasion of plaintiff's property such as to make an action on case or trespass an appropriate action, even though the injury is not caused by negligence, but by a nuisance, the right of action does not arise until some injury to plaintiff's property has accrued. See cases cited in L.R.A. 1916E, 999 and 1006, notes 13 and 16.

But in a few cases the courts have pointed out the fact that permanent depreciation in the value of plaintiff's property, caused by the certainty that injury must result from the cause, is in itself the real injury. *Kansas City, Ft. S. & M. R. Co. v. Cook* (1893) 57 Ark. 387, 21 S. W. 1066 (converse holding; see same case, *supra*); *Louisville & N. R. Co. v. Lambert* (1908) 33 Ky. L. Rep. 199, 110 S. W. 305; *Heard v. Middlesex Canal* (1842) 5 Met. (Mass.) 81; *Chicago, R. I. & P. R. Co. v. Davis* (1910) 26 Okla. 434, 109 Pac. 214; *St. Louis & S. F. R. Co. v. Stephenson* (1914) 43 Okla. 676, L.R.A.1916E, 966, 144 Pac. 387.

In none of these cases, however, did the case arise in consequence of the plaintiff having brought his action before there was any physical injury to his property. This fact may, or it may not, be important, depending upon whether or not the cause of action might be held to arise for one purpose, where it would not arise until a later time for another.

In *Louisville & N. R. Co. v. Lambert* (1908) 33 Ky. L. Rep. 199, 110 S. W. 305, *supra*, the court said: "In this case appellant not only had the right to construct the wall, but was actually engaged in its construction at the time a portion of the property was sold. The work had progressed to such an extent as to make the construction of the wall reasonably certain. While the injury to the two lots first sold was not complete, the effect was practically the same, for every person desiring to purchase the lot in question had the right to assume, and would assume, that the wall would be completed, and as a matter of fact it was completed. The appellee being the owner of the lots when thus injured, we think he was entitled to recover



such damages as his property sustained. Appellant next complains of the instructions given by the court. In order to find for appellee, the jury were told in effect that they must believe that the lots were damaged or impaired in their market value by the construction of said wall or the operation of trains thereon, by reason of obstructions to the view or to the ingress and egress to and from the same; that as to the lot that was sold after the completion of the wall, the measure of damage was the difference in the market value of the property just before it became generally known that the work would be done, and its market value just after the work was done; while in the case of the lots that were sold during the construction of the wall, the measure of damage was the difference in the market value before it became generally known that the work would be done, and the market value at the date of the sale of the property. This instruction, we think, is in accord with the rule laid down in *Louisville & N. R. Co. v. Cumnock* (1903) 25 Ky. L. Rep. 1330, 77 S. W. 933, and *Henderson v. Crowder* (1906) 28 Ky. L. Rep. 1255, 91 S. W. 1120, the only difference being that the instruction was changed so as to conform to the facts of this case. The next question is: When did the Statute of Limitations begin to run? The work was begun in April, 1901. A portion of it had been finished at the time of the sale of the first two lots. The wall was completed at the time of the sale of the third lot. The law is well settled that, where an injury to real estate results from the construction of a permanent structure, the cause of action accrues upon the completion of the structure. *Louisville & N. R. Co. v. Orr* (1891) 91 Ky. 109, 15 S. W. 8; *Hay v. Lexington* (1908) 114 Ky. 665, 71 S. W. 867; *Johnson v. Owensboro & N. R. Co.* (1896) 18 Ky. L. Rep. 276, 36 S. W. 8; *Oliver v. Illinois C. R. Co.* (1903) 25 Ky. L. Rep. 235, 74 S. W. 1078. It may be contended, however, that as the cause of action does not accrue until after the completion of the permanent structure, and that as appellee sold

two lots before the structure was complete, he thereby parted with his right of action. But this is not the case, for the purchaser did not purchase the right of action unless he paid what the land was worth before it became generally known that the structure would be erected. By buying the property at a reduced price because of the permanent injury, he left the right of action in him who owned the property when the injury to all intents and purposes was done. To hold otherwise would be to deprive the seller of a right of action for damages which he alone sustained, and to transfer the right of action to another who in fact suffered no damage. Of this rule the party causing the damage cannot complain, for he responds but once for all damages resulting from the construction of the elevated tracks and the lawful operation of the trains thereon."

So, in *Heard v. Middlesex Canal* (1842) 5 Met. (Mass.) 81, *supra*, where the action was under a statute giving a right of recovery for land flooded by a dam, similar to compensation for land taken by eminent domain, and the question was whether the action had been brought within one year after "the damage was done," the court said: "Upon this question, the court are of opinion that the application for damages, and the legal proceedings consequent thereon, must be commenced within one year from the time of the damage done, and that, within the meaning and true construction of this act, the damage is done to the proprietor of adjacent meadows, whose land will be flowed, when the permanent dam is erected, the natural and necessary effect and operation, as well as the obvious and avowed purpose, of which are, to raise a head of water for the permanent supply of a canal. This conclusion, we think, results as well from the terms, as from the manifest objects and policy of the act."

In *St. Louis & S. F. R. Co. v. Stephenson* (1914) 43 Okla. 676, L.R.A.1916E, 966, 144 Pac. 387, *supra*, damages were claimed for injury to plaintiff's farm land and crops, caused by obstructing the flow of surface water therefrom by the defendant constructing a rail-

road embankment before plaintiff secured title to the land, the embankment having no culvert. It was held that the right of action arose when the embankment was constructed, for the reason that it was obvious that the embankment would stop the free flow of the water from the time that it was constructed, and plaintiff must have considered that issue when buying the land. The court said: "It will be observed that the petition alleges, and the uncontroverted testimony shows, that the only damage to the land of the plaintiff was occasioned by the act of the defendant in constructing the embankment and failing to provide proper and sufficient culverts to enable the surface water to run off as it had done before the construction of the embankment. There is neither allegation nor proof that plaintiff suffered damage by reason of the use and maintenance of the embankment by defendant, nor is it alleged or attempted to be shown by the evidence that said embankment was carelessly or negligently constructed or maintained. While the rule is well established that there may be as many successive recoveries as there are successive injuries caused by a permanent structure, when its construction and continuance are not in themselves necessarily injurious, yet, where the pleadings and evidence, as in the instant

case, show conclusively that the permanent character of a railroad embankment, and its continuance as originally constructed, necessarily produced the injury to the freehold and caused the depreciation in the value thereof complained of at the time of construction, and that such injury had wholly occurred when plaintiff acquired the land, it must be held that she took it in its then known condition; and the issuance of a patent conveying to her such land did not confer upon her a right of action for the recovery of damages for injuries thereto, occurring prior to her acquisition of title."

In *St. Louis, I. M. & S. R. Co. v. Anderson* (1896) 62 Ark. 360, 35 S. W. 791, citing *St. Louis, I. M. & S. R. Co. v. Morris* (1880) 35 Ark. 622, and *Little Rock & Ft. S. R. Co. v. Chapman* (1882) 39 Ark. 463, 43 Am. Rep. 280, it was held that where a railroad embankment was constructed solidly across a drain, causing damage to the land drained, so that the result was obvious and the damage capable of being estimated, the right of action arose when the embankment was constructed, that there could be but one recovery, and that the measure of damage would be the difference between the value of the land "as it would have been with the ditch open, and its value with the ditch closed." J. W. M.

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HENRY D. QUINBY, Individually and as Comptroller of the City of Rochester, et al., Appts.,

v.

PUBLIC SERVICE COMMISSION of the State of New York for the Second District et al., Respts.

*New York Court of Appeals—April 5, 1918.*

(223 N. Y. 244, P.U.R.1918D, 30, 119 N. E. 433.)

#### **Public Service Commission — alteration of contract rates.**

1. Power conferred upon a Public Service Commission to regulate rates fixed by statute does not include power to regulate those fixed by contract between a municipal corporation and a street railway occupying its streets, as embodied in the railway company's franchise, which, under the Constitution, can be granted only on consent of the local authorities.

[See note on this question beginning on page 730.]

**Prohibition — preventing action of Public Service Commission.**

2. Prohibition will not lie to prevent action of the Public Service Commission in undertaking to change the fare fixed for a street car company by a franchise ordinance, if the Commission has jurisdiction of the subject-matter, and the only question is that of power to grant the particular relief prayed for.

[See 22 R. C. L. 9, 17, 19, et seq.]

**Public Service Commission — power to increase rate.**

3. A Public Service Commission has power to deal with the regulation of rates of fare charged by railroad companies, without limitation or restriction, and may increase as well as decrease such rates.

**— power to raise street car fares.**

4. A provision in a city charter fixing the maximum rate to be charged by street railways operating within the city limits does not prevent an increase of fare by the Public Service

Commission, which is granted authority, when it finds a maximum rate insufficient, to determine and fix a just rate, where the general railroad law fixes a maximum rate for street railways, but reserves the right to regulate the rates of any road operated under its provisions.

[See 19 R. C. L. 1159.]

**Contract — rates of street car company — power of municipality.**

5. Power in a municipal corporation irrevocably to establish rates for a street car company is not essential to its consent to the use of its streets by the company and will not be implied, but the legislature is at all times supreme in the matter.

[See 19 R. C. L. 1159.]

**Prohibition — when lies.**

6. Prohibition is the proper remedy to prevent action by a Public Service Commission in matters over which it has no jurisdiction.

[See 22 R. C. L. 20.]

(Hiscock, Ch. J., and Collin, J., dissent.)

**APPEAL** by applicants from an order of the Appellate Division of the Supreme Court, Third Department, affirming an order of a Special Term for Rensselaer County, denying an application for an alternative writ of prohibition to restrain the respondent Commission from proceeding upon a petition of the respondent railway for permission to increase its rate of fare to 6 cents. *Reversed.*

The facts sufficiently appear in the opinion of the court.

Mr. B. B. Cunningham, for appellants:

The legislature by a special act, passed after the Public Service Commissions Law, has definitely and conclusively fixed the rate of fare in the city of Rochester at 5 cents.

Willis v. Rochester, 219 N. Y. 427, 114 N. E. 851; People ex rel. Woodward v. Draper, 142 App. Div. 102, 127 N. Y. Supp. 14, affirmed in 202 N. Y. 612, 96 N. E. 1128; Young v. Dake, 5 N. Y. 463, 55 Am. Dec. 356; McDermott v. Nassau Electric R. Co. 85 Hun, 422, 32 N. Y. Supp. 884, affirmed in 147 N. Y. 700, 42 N. E. 724; People ex rel. Heinrich v. Travis, 175 App. Div. 721, 161 N. Y. Supp. 860; Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422; Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054; Brooklyn Union Gas Co. v. New York, 188 N. Y. 334, 15 L.R.A.(N.S.) 763, 117 Am. St. Rep. 868, 81 N. E. 141; Richman v. Con-

solidated Gas Co. 114 App. Div. 216, 100 N. Y. Supp. 81, affirmed in 186 N. Y. 209, 78 N. E. 871; Pond v. New Rochelle Water Co. 183 N. Y. 330, 1 L.R.A.(N.S.) 958, 76 N. E. 211, 5 Ann. Cas. 504; Farnsworth v. Boro Oil & Gas Co. 216 N. Y. 40, 109 N. E. 860; Columbus v. Mercantile Trust & D. Co. 218 U. S. 645, 54 L. ed. 1193, 31 Sup. Ct. Rep. 105.

The railway company has agreed with the city of Rochester to limit to 5 cents its rate of fare within the city limits, and as a consideration therefor the city, under its constitutional powers, has granted consent to the street railway company to construct and operate its street railway lines.

Kittinger v. Buffalo Traction Co. 160 N. Y. 377, 54 N. E. 1081; People ex rel. West Side Street R. Co. v. Barnard, 110 N. Y. 548, 18 N. E. 354; Willcox v. Richmond Light & R. Co. 142 App. Div. 44, 128 N. Y. Supp. 266, affirmed in 202 N. Y. 515, 95 N. E. 1141; Public

Service Commission v. Westchester Street R. Co. 206 N. Y. 209, 99 N. E. 536; Willis v. Rochester, 219 N. Y. 427, 114 N. E. 851; Allegheny v. Millville, B. & S. Street R. Co. 159 Pa. 411, 28 Atl. 202; Plymouth Twp. v. Chestnut Hill & N. R. Co. 168 Pa. 181, 32 Atl. 19; Minersville v. Schuylkill Electric R. Co. 205 Pa. 401, 54 Atl. 1050; McKeesport v. Pittsburg, M. & C. R. Co. 213 Pa. 544, 62 Atl. 1075.

The street railway company is estopped from attacking the rate as unreasonable.

Pond v. New Rochelle Water Co. 183 N. Y. 330, 1 L.R.A. (N.S.) 958, 76 N. E. 211, 5 Ann. Cas. 504; Farnsworth v. Boro Oil & Gas Co. 216 N. Y. 40, 109 N. E. 860.

The legislature, in granting power to the Public Service Commission to increase rates of fare, did not intend that such power should apply to rates fixed by contract or in franchises.

Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054; People ex rel. Ulster & D. R. Co. v. Public Service Commission, 171 App. Div. 607, P.U.R.1916E, 243, 156 N. Y. Supp. 1065, affirmed in 218 N. Y. 643, 112 N. E. 1071.

Prohibition is the proper remedy when the tribunal sought to be prohibited has assumed jurisdiction not conferred upon it, or is attempting to exercise authority in excess of the jurisdiction conferred.

McIntyre v. Sawyer, 179 App. Div. 535, 166 N. Y. Supp. 631; People ex rel. Jones v. Sherman, 66 App. Div. 231, 72 N. Y. Supp. 718; People ex rel. Metz v. Dayton, 120 App. Div. 814, 105 N. Y. Supp. 809, affirmed in 189 N. Y. 460, 121 Am. St. Rep. 909, 82 N. E. 507; Sweet v. Hulbert, 51 Barb. 312; People ex rel. Higgins v. McAdam, 22 Hun, 559; People ex rel. Bal-lin v. Smith, 184 N. Y. 96, 76 N. E. 925; People ex rel. Toy v. Mayer, 71 Hun, 182, 24 N. Y. Supp. 621; People ex rel. Sprague v. Fitzgerald, 15 App. Div. 539, 44 N. Y. Supp. 556.

Messrs. Terence Farley and Edgar J. Kohler, with Mr. William P. Burr, for New York City, intervenor.

Messrs. Richard C. S. Drummond, Stewart F. Hancock, Boyd S. McDowell, Thomas H. Guy, and August Merrill for various cities of the state.

Mr. Ledyard P. Hale for respondent Public Service Commission.

Mr. Daniel M. Beach, with Messrs. Kernan & Kernan, for respondent rail-ways:

The power to regulate the rate of fare of a railroad corporation, whether by increasing or reducing the same, is at all times reserved to the state, and, in its discretion, the power may be de-veloped by the legislature upon a proper body organized and formed for such purpose.

People ex rel. Kimball v. Boston & A. R. Co. 70 N. Y. 569; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 18 L.R.A. (N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; People ex rel. Central Park, N. & E. River R. Co. v. Wilcox, 194 N. Y. 383, 87 N. E. 517; People ex rel. West-chester Street R. Co. v. Public Service Commission, 158 App. Div. 256, 143 N. Y. Supp. 148; People ex rel. Cohoes R. Co. v. Public Service Commission, 143 App. Div. 769, 128 N. Y. Supp. 384; People ex rel. New York, N. H. & H. R. Co. v. Public Service Commission, 159 App. Div. 542, 145 N. Y. Supp. 503.

By § 49 of the Public Service Com-missions Law, as amended by the Laws of 1910, chapter 480, and by the Laws of 1910, chapter 481 (Railroad Law, § 181), the power of regulating the rate of fares of street railroad cor-porations, embracing the right to in-crease as well as to reduce the same, has been devolved upon the Public Service Commission.

People ex rel. Ulster & D. R. Co. v. Public Service Commission, 171 App. Div. 607, P.U.R.1916E, 243, 156 N. Y. Supp. 1065, affirmed in 218 N. Y. 642, 112 N. E. 1071; Re Huntington R. Co. 14 N. Y. Off. Dept. R. 305, P.U.R. 1918A, 249; People ex rel. Mason v. McClave, 99 N. Y. 89, 1 N. E. 235; State ex rel. Missouri Southern R. Co. v. Public Service Commission, 259 Mo. 704, 168 S. W. 1156; State ex rel. Rhodes v. Public Service Commission, 270 Mo. 547, P.U.R.1917E, 315, 194 S. W. 287; Board of Survey v. Bay State Street R. Co. 224 Mass. 463, 113 N. E. 273; State ex rel. Public Service Com-mission v. Baltimore & O. R. Co. 76 W. Va. 399, P.U.R.1915D, 558, 85 S. E. 714; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 611, L.R.A.1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911.

In its exercise of the police power, in which class of power is included the power to regulate the fares of railroad

corporations, the legislature cannot be controlled either by the action of a previous legislature or by the provisions of contracts between individuals or corporations.

*Buffalo East Side R. Co. v. Buffalo Street R. Co.* 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63; *People ex rel. Cohoes R. Co. v. Public Service Commission*, 143 App. Div. 769, 128 N. Y. Supp. 384; *Rochester v. Rochester R. Co.* 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953; *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820, affirming 153 Wis. 592, L.R.A.1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911; *People ex rel. Wood v. Draper*, 15 N. Y. 532; *People ex rel. Starkweather v. Gaul*, 44 Barb. 98; *People ex rel. Gilmour v. Hyde*, 89 N. Y. 11; *Gillin v. Canary*, 19 Misc. 594, 44 N. Y. Supp. 313.

The consent of the municipal authorities, required by article 3, § 18, of the state Constitution, as a condition to the construction and operation of a street surface railroad, is not legislative in character, and the sole and exclusive right of the legislature to regulate fares is in no wise affected or impaired thereby.

*Re Thirty-fourth Street R. Co.* 102 N. Y. 343, 7 N. E. 172; *New York v. Dry Dock, E. B. & B. R. Co.* 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563; *Adamson v. Nassau Electric R. Co.* 89 Hun, 261, 34 N. Y. Supp. 1073; *Beekman v. Third Ave. R. Co.* 13 App. Div. 279, 43 N. Y. Supp. 174, affirmed in 153 N. Y. 144, 47 N. E. 277; *People ex rel. New York & N. S. Traction Co. v. Public Service Commission*, 175 App. Div. 869, P.U.R.1917B, 957, 162 N. Y. Supp. 405; *Re Huntington R. Co.* 14 N. Y. Off. Dept. R. 305, P.U.R.1918A, 249; *Rochester v. Rochester R. Co.* 182 N. Y. 115, 70 L.R.A. 773, 74 N. E. 953, affirmed in 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469; *Re Kings County Elev. R. Co.* 105 N. Y. 97, 59 Am. Rep. 478, 13 N. E. 18.

The reserved power of the legislature to regulate fares, acting through itself or by the Public Service Commission, is not affected by the contract between the city of Rochester

and the Rochester City & Brighton Railroad Company, of Rochester, New York, or by the Laws of 1908, chapter 475, referring to such contract.

*Beekman v. Third Ave. R. Co.* 13 App. Div. 279, 43 N. Y. Supp. 174, affirmed in 153 N. Y. 144, 47 N. E. 277; *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 174, 180, 59 L. ed. 1254, 1260, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820, affirming 153 Wis. 592, L.R.A.1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911; *People ex rel. Wood v. Draper*, 15 N. Y. 532; *People ex rel. Starkweather v. Gaul*, 44 Barb. 98; *People ex rel. Gilmour v. Hyde*, 89 N. Y. 11; *Gillin v. Canary*, 19 Misc. 594, 44 N. Y. Supp. 313.

Neither is the reserved power of the legislature to regulate fares in the city of Rochester, acting through itself or by the Public Service Commission, affected by the Laws of 1915, chapter 359.

*Braffett v. Brooklyn, Q. C. & Suburban R. Co.* 204 N. Y. 440, 97 N. E. 888; *Senior v. New York City R. Co.* 111 App. Div. 39, 97 N. Y. Supp. 645, affirmed in 187 N. Y. 559, 80 N. E. 1120; *Holmes v. Carley*, 31 N. Y. 289; *People ex rel. Wood v. Lacombe*, 99 N. Y. 49, 1 N. E. 599; *Schlegel v. American Beer & Ale Bottling Co.* 12 Abb. N. C. 280; *Re Curser*, 89 N. Y. 403; *New York v. Buel*, 12 Daly, 494; *Walsh v. Buffalo*, 92 Hun, 438, 36 N. Y. Supp. 997; *Bowen v. Lease*, 5 Hill, 221.

*Messrs. James L. Quackenbush and Louis S. Carpenter for New York Railways Company, intervenor:*

Under existing statutes, the Public Service Commission has been given plenary power to exercise the legislative function of determining and fixing just and reasonable fares to be charged upon street surface railroads, and in the performance of this function the Commission may authorize rates in excess of maximum rates of fare prescribed by other statutes.

*People ex rel. Bridge Operating Co. v. Public Service Commission*, 153 App. Div. 129, 138 N. Y. Supp. 434; *People ex rel. Ulster & D. R. Co. v. Public Service Commission*, 171 App. Div. 607, P.U.R.1916E, 243, 156 N. Y. Supp. 1065, affirmed in 218 N. Y. 643, 112 N. E. 1071; *People ex rel. Westchester Street R. Co. v. Public Service Commission*, 158 App. Div. 251, 143 N. Y. Supp. 148; *People ex rel. Delaware & H. Co. v. Public Service Commission*, 140 App. Div. 839, 125 N. Y. Supp.

1000; State ex rel. Missouri Southern R. Co. v. Public Service Commission, 259 Mo. 704, 168 S. W. 1156; State ex rel. Rhodes v. Public Service Commission, 270 Mo. 547, P.U.R.1917E, 315, 194 S. W. 287; Board of Survey v. Bay State Street R. Co. 224 Mass. 463, 113 N. E. 273; State ex rel. Public Service Commission v. Baltimore & O. R. Co. 76 W. Va. 399, P.U.R.1915D, 558, 85 S. E. 714.

The Public Service Commission is also empowered, under the statute, to fix a rate of fare to be charged upon a street surface railroad in excess of the rate stipulated in the consent of the local authorities, authorizing construction and operation of such railroad, when, after investigation, the Commission determines such increased fare to be just and reasonable.

People ex rel. New York & N. S. Traction Co. v. Public Service Commission, 175 App. Div. 869, P.U.R. 1917B, 957, 162 N. Y. Supp. 405; People ex rel. Simon v. Bradley, 207 N. Y. 592, 101 N. E. 766; Sherrill v. O'Brien, 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124; People ex rel. Central Trust Co. v. Prendergast, 202 N. Y. 188, 95 N. E. 715; Re Thirty-fourth Street R. Co. 102 N. Y. 343, 7 N. E. 172; Adamson v. Nassau Electric R. Co. 89 Hun, 261, 34 N. Y. Supp. 1073; Rochester v. Rochester R. Co. 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953, affirmed in 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469; Milwaukee Electric R. & Light Co. v. Railroad Commission, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; Puget Sound Traction Light & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325, P.U.R. 1917F, 57, 37 Sup. Ct. Rep. 705; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Portland R. Light & P. Co. v. Portland, 201 Fed. 119; Denver & S. P. R. Co. v. Englewood, 62 Colo. 229, — A.L.R. —, P.U.R.1916E, 134, 161 Pac. 151; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; Woodburn v. Public Service Commission, 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996.

Mr. Charles E. Hotchkiss also for New York Railways Company.

Mr. Harry M. Chamberlain, with Mr. William L. Ransom, for Public Service Commission, First District:

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the second district clearly has general jurisdiction of all street railroads within that district, including the railroad here in question, and general jurisdiction of the subject-matter here involved.

People ex rel. New York & N. S. Traction Co. v. Public Service Commission, 175 App. Div. 869, P.U.R. 1917B, 957, 162 N. Y. Supp. 405; People ex rel. Ulster & D. R. Co. v. Public Service Commission, 171 App. Div. 607, P.U.R.1916E, 243, 156 N. Y. Supp. 1065, affirmed in 218 N. Y. 643, 112 N. E. 1071; People ex rel. Westchester Street R. Co. v. Public Service Commission, 158 App. Div. 251, 143 N. Y. Supp. 148, affirmed in 210 N. Y. 456, 104 N. E. 952.

As the Public Service Commission has jurisdiction of the railroad and the subject-matter, the writ of prohibition will not lie.

People ex rel. Karr v. Seward, 7 Wend. 518; People ex rel. Bean v. Russell, 49 Barb. 351; People ex rel. Ballin v. Smith, 184 N. Y. 96, 76 N. E. 925; People ex rel. Patrick v. Fitzgerald, 73 App. Div. 339, 76 N. Y. Supp. 865; People ex rel. Oakley v. Petty, 32 Hun, 443.

Prohibition will not lie where there is any other remedy.

People ex rel. Bean v. Russell, 49 Barb. 351; People ex rel. Jones v. Sherman, 66 App. Div. 231, 72 N. Y. Supp. 718; People ex rel. Patrick v. Fitzgerald, 73 App. Div. 339, 76 N. Y. Supp. 865; People ex rel. Ballin v. Smith, 184 N. Y. 96, 76 N. E. 925; People ex rel. Hummel v. Trial Term, 184 N. Y. 30, 76 N. E. 732; People ex rel. Woodbury v. Hendrick, 215 N. Y. 339, 109 N. E. 486.

The Public Service Commission has no power, in the absence of the city's consent, or modification of the franchise contract, to make effective a fare in excess of that by which the company agreed, at the city's option, to remain bound, as one of the terms and part of the consideration which led the city to grant its consent to the construction of a street railroad along city streets; and the company should be left to reapply to the city for a modification of the franchise contract on suitable terms, if the Commission and the company feel that a higher rate of fare is necessary.

Adamson v. Nassau Electric R. Co. 89 Hun, 261, 34 N. Y. Supp. 1073; People ex rel. Frontier Electric R. Co. v.

North Tonawanda, 70 Misc. 91, 126 N. Y. Supp. 186; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Re Thirty-fourth Street R. Co. 102 N. Y. 343, 7 N. E. 172; Re New York Dist. R. Co. 107 N. Y. 42, 14 N. E. 187; People ex rel. South Shore Traction Co. v. Willcox, 133 App. Div. 561, 118 N. Y. Supp. 248; Allegheny v. Millville, E. & S. Street R. Co. 159 Pa. 411, 28 Atl. 202; Willis v. Rochester, 95 Misc. 686, 159 N. Y. Supp. 882; Gaedeke v. Staten Island Midland R. Co. 43 App. Div. 514, 60 N. Y. Supp. 598, 46 App. Div. 219, 61 N. Y. Supp. 290.

The special act annexing certain territory to the city of Rochester did not repeal the general law which reserves to the legislature and to the Public Service Commission the power to regulate fares, and did not oust the Commission for the second district from any jurisdiction or power it would otherwise have as to fares on street railroads in Rochester.

Braffett v. Brooklyn, Q. C. & Suburban R. Co. 204 N. Y. 440, 97 N. E. 888; Hogan v. Long Island R. Co. 206 N. Y. 440, 100 N. E. 47; Willis v. Rochester, 219 N. Y. 427, 114 N. E. 851.

Pound, J., delivered the opinion of the court:

The facts upon which the application for a writ of prohibition is based are as follows: The New York State Railways presented a petition to the Public Service Commission of the second district, praying that it be permitted to raise to 6 cents its rate of fare on street surface railways in the city of Rochester and a number of other cities. The city of Rochester filed objections to the jurisdiction of the Public Service Commission to entertain such application. Its objections were based, first, on chapter 359, Laws of 1915, amending the charter of the city of Rochester, and fixing a 5-cent rate for one ride over the road of any corporation operating a street surface railroad in such city; and, secondly, upon the like terms and conditions contained in the franchise of the street railroad company as a condition of the consent of the local authorities thereto. Briefs were filed with the Commis-

sion on behalf of the city of Rochester, in support of its claim that the Public Service Commission was without jurisdiction to entertain said petition of the New York State Railways, and oral argument was also made before the Commission by the corporation counsel of the city.

In November, 1917, the Public Service Commission made a decision in one of the cases (Re Huntington R. Co. 14 N. Y. Off. Dept. R. 305, P.U.R.1918A, 249; Re New York & N. S. Traction Co. 15 N. Y. Off. Dept. R. 70, P.U.R.1918A, 893), in which a petition for permission to increase rate of fare was presented to it, and held that the Commission had the power to permit fares to be increased to an amount beyond 5 cents, notwithstanding the provision of § 181 of the Railroad Law, and also that it had power to permit fares to be increased beyond the rate fixed in a franchise granted by a municipality to a street railway company, and beyond the rate fixed in a contract existing between a municipality and a street railway company. After such decision the Public Service Commission decided to hear the Rochester case on the merits. The Public Service Commission has thus assumed jurisdiction of the matter of the application of the New York State Railways for permission to increase its rate of fare in the city of Rochester to 6 cents.

In order to present the case before the Public Service Commission it would be necessary for the city to have a valuation made of the property of the New York State Railways, and it would cost the city of Rochester not less than \$25,000 to present its evidence before the Commission.

A writ of prohibition will not lie in anticipation of the action of the Commission if the Commission has *jurisdiction* of the subject-matter, and the only question is that of *power to grant the particular relief prayed for*. It is an ex-

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Commission.

traordinary remedy for unusual cases. *People ex rel. Karr v. Seward*, 7 Wend. 518; *People ex rel. Bean v. Russell*, 49 Barb. 351; *People ex rel. Ballin v. Smith*, 184 N. Y. 96, 76 N. E. 925; *People ex rel. Patrick v. Fitzgerald*, 73 App. Div. 339, 76 N. E. 865; *People ex rel. Oakley v. Petty*, 32 Hun, 443. In *Metz v. Maddox*, 189 N. Y. 460, 121 Am. St. Rep. 90, 82 N. E. 507, the sole question before this court was the constitutionality of chapter 538, Laws of 1907, providing for a recount of ballots cast in the McClellan-Hearst mayoralty contest of the year 1905, and the suitability of the procedure was not passed upon. The point that prohibition is not the proper remedy here is raised only by the intervening Public Service Commission of the first district, and the real parties are content to have this appeal disposed of on the merits.

We are therefore led to the inquiry, What is the jurisdiction of the Commission over rate regulation? The New York State Railways operates in the second public service district, which comprises all counties except those in Greater New York. Public Service Commissions Law (Consol. Laws, chap. 48), § 3. It is a street railroad corporation, within the meaning of that term as used in the Public Service Commissions Law (Public Service Commissions Law, § 2, subd. 7). The term "common carrier" includes street railroad corporations. Public Service Commissions Law, § 2, subd. 9. Section 5 of the Public Service Commissions Law, after providing that the Public Service Commission for the first district (Greater New York) shall have jurisdiction over common carriers operating within that district, provides as follows (Public Service Commissions Law, § 5, subd. 3): "3. All jurisdiction, supervision, powers and duties under this chapter not specifically granted to the Public Service Commission of the first district shall be vested in, and be exercised by, the Public Service

Commission of the second district, including the regulation and control of all transportation of persons or property, and the instrumentalities connected with such transportation, on any railroad other than a street railroad from a point within either district to a point within the other district."

Section 181 of the Railroad Law (Consol. Laws, chap. 49 [Laws 1910, chap. 481]), so far as material here, is as follows: "No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village.

"... The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and the Public Service Commission shall possess the same power, to be exercised as prescribed in the Public Service Commissions Law."

Subdivision 1 of § 49 of the Public Service Commissions Law, as amended by Laws 1911, chap. 546, is in part as follows: "§ 49. Rates and Service to be Fixed by the Commission. 1. Whenever either Commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, un-



reasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the Commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed."

It is clear that the New York State Railways, which operates in the city of Rochester and other cities of the state of New York outside the first district, is within the jurisdiction of the Public Service Commission for the second district, and that such Commission possesses some general jurisdiction to deal with the subject of regulating the rate of fare to be charged by the street railroads in the second district.

We must next consider whether this jurisdiction is limited.

1. By the charter amendment (Laws 1915, chap. 359, § 7), fixing a 5-cent fare in the city of Rochester, which reads as follows: "A corporation operating a street surface railroad must not charge any passenger more than 5 cents for one continuous ride from any point on its road to any other point thereon, within the limits of the city of Rochester. In case two corporations

operate separate street surface railroads which connect or intersect in the city of Rochester, such corporations must not charge any passenger more than 5 cents for one continuous ride from any point on one road to any point on the other road, within the limits of the city of Rochester. In either of the above cases a transfer must be issued to a passenger when necessary for such passenger to transfer from one car to another, in order to complete one continuous ride. If two corporations affected by the provisions hereof cannot agree as to the method of division between them of fares collected, such method of division must be settled by the Public Service Commission of the second district of the state of New York. The word 'road' as used in this section includes all street surface railroads, lines and branches operated by one corporation, those leased by it and those under its control."

The policy of the state is said to be that the Public Service Commission should deal with the regulation of rates of fare charged by railroad

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Commission—  
power to in-  
crease rate.

corporations without limitation or restraint, and with the power to increase as well as decrease such rates. *People ex rel. New York & N. S. Traction Co. v. Public Service Commission*, 175 App. Div. 869, 162 N. Y. Supp. 405; *People ex rel. Ulster & D. R. Co. v. Public Service Commission*, 171 App. Div. 607, 611, P.U.R.1916E, 243, 156 N. Y. Supp. 1065, affirmed in 218 N. Y. 643, 112 N. E. 1071.

The case last cited had to do exclusively with statutory mileage book rates, and it has not been held by this court that the Commission has power to raise ordinary rates of fare above the rate fixed by statute. The point was expressly saved for future consideration. "We are now simply dealing with the question of reduced rates to which those words [notwithstanding that a higher rate, fare, or charge had been heretofore authorized by statute] clearly do not

apply," said Cochrane, J., in *People ex rel. Ulster & D. R. Co. Case*, supra, and his opinion was adopted by this court. But he also said that maximum statutory charges were to be considered, and raised if insufficient; and the only reasonable construction of § 49, subd. 1, is that, when the maximum

charges fixed by statute do not yield —power to raise street car fares. reasonable compen-

sation for the service rendered, the Commission may raise the rate. The words, "notwithstanding that a higher rate, charge, or fare has heretofore been authorized by statute," are not entirely apt; but the section, read as a whole, is susceptible of no other natural interpretation than that the legislature has, for greater certainty, expressly included in its general delegation of powers the power of the Commission to reduce a maximum rate *fixed by the legislature*. The purpose of the legislature was to provide for the regulation of statutory fares by a board which may be expected to pass equitably upon conflicting claims, with its single purpose the common good, even where a maximum rate had been fixed by the legislature.

The case of *Willis v. Rochester*, 219 N. Y. 427, 114 N. E. 851, merely upheld the charter amendment as a constitutional exercise of the legislative power to fix rates. Rates so fixed by special statute are still subject to regulation by the Public Service Commission. The jurisdiction of that body over such rates is not to be reduced by implication. The legislature merely fixed the rate pro tempore.

We have still to consider whether jurisdiction is limited.

2. By the fact that the consent of the local authorities was given on condition as to rates of fare.

The Constitution, art. 3, § 18, as it was amended in the year 1875, provides: "But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of

the owners of one half in value of the property bounded on, *and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained*, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

The power of the local authorities to impose, as a condition to giving consent to the construction and operation of a street railroad, that a stipulated rate of fare should be charged, has been repeatedly upheld. *People ex rel. West Side Street R. Co. v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *Kittinger v. Buffalo Traction Co.* 160 N. Y. 377, 391, 392, 54 N. E. 1081; *Public Service Commission v. Westchester Street R. Co.* 206 N. Y. 209, 99 N. E. 536; *People ex rel. Frontier Electric R. Co. v. North Tonawanda*, 70 Misc. 91, 126 N. Y. Supp. 186; *Allegheny v. Millville, E. & S. Street R. Co.* 159 Pa. 411, 28 Atl. 202. But these cases dealt with the question of local power over the corporation, and not with the question of general legislative power over the municipality. The question presented is this: The consent of the local authorities being obtained, what jurisdiction has the legislature conferred upon the Public Service Commission to regulate rates by increasing the rate agreed upon without such consent? Again, it is urged that its jurisdiction is plenary; that "a municipal corporation is simply a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department; . . . the city is the creature of the state"

(*Worcester v. Worcester Consol. Street R. Co.* 196 U. S. 539, 548, 49 L. ed. 591, 595, 25 Sup. Ct. Rep. 327, 329); that rate regulation is a matter of the police power of the state, and therefore contracts may be affected by its exercise without impairing their obligation (*Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 485, 55 L. ed. 297, 304, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, 414, 55 L. ed. 789, 795, 31 Sup. Ct. Rep. 534; *Buffalo East Side R. Co. v. Buffalo Street R. Co.* 111 N. Y. 132, 2 L.R.A. 284, 19 N. E. 63); that the power to regulate rates has not been irrevocably surrendered to the local authorities by the constitutional requirement that the consent of such authorities is requisite; that no immunity from the exercise of governmental power has been transferred to the municipalities, save only that their naked consent is requisite; that if conditions may validly be imposed upon such consent by the localities in the beginning, they are subject to alteration or repeal at the legislative will; that, as the state cannot be fully sovereign without full legislative power, such power is not deemed to be abridged (*Rochester v. Rochester R. Co.* 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953, affirmed in 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469; *Portland R. Light & P. Co. v. Portland (D. C.)* 201 Fed. 119, 125). It has been held that the legislature may, by virtue of its general power over municipalities, regulate the mode and manner in which the consent of the local authorities to the construction and operation of street railroads shall be given, and may regulate and limit by statute the conditions upon which it may be given. *Re Thirty-fourth Street R. Co.* 102 N. Y. 343, 7 N. E. 172; *Beekman v. Third Ave. R. Co.* 153 N. Y. 144, 152, 47 N. E. 277; *People ex rel. South Shore Traction Co. v. Willcox*, 196 N. Y. 212, 89 N. E. 459. Regulations are so made in certain cases by the Railroad Law, § 173, but that sec-

tion expressly provides that nothing therein contained shall be construed as modifying or affecting the terms of the contract between the city of Rochester and the street railroad, and it looks to the future and does not attempt to regulate consents already granted. The Constitution does not expressly provide that the municipality may irrevocably establish rates for the entire period of a franchise, and it has been held invariably and in a legion of cases that such power to establish rates is not essential to the consent of local authorities, and will not be implied, and that the legislature is at all times supreme in the matter. *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *Board of Survey v. Bay State Street R. Co.* 224 Mass. 463, 113 N. E. 273; *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; *State ex rel. Missouri Southern R. Co. v. Public Service Commission*, 259 Mo. 704, 168 S. W. 1156; *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; *Dawson v. Dawson Teleph. Co.* 137 Ga. 62, 72 S. E. 508; *Woodburn v. Public Service Commission*, 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996; *Collingswood Sewerage Co. v. Collingswood*, — N. J. L. —, P.U.R.1918C, 261, 102 Atl. 901. In all such cases, the question was one of unrestricted legislative power, policy, and discretion over a city or town, where the local authorities were held to be mere instrumentalities through which the state exercised its sovereign power. The paramount power of the legislature over the subject of fares was upheld in the absence of a constitutional limitation. But our Constitution, by requiring the consent of the local authorities, recognizes that our municipalities are, pro tanto, independent of legislative control, exercising some fragment of power, oth-

Contract—  
rates of street  
car company—  
power of  
municipality.

erwise legislative in character, which has been thus irrevocably transferred by the fundamental law from the legislature to the locality. The grant by the municipality of authority to use the streets is not a mere privilege or gratuity. Once accepted, it becomes a contract, which neither the state nor its agencies can impair. *People v. O'Brien*, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692. And it is urged by the appellant that the franchise and the conditions upon which the consent of the local authorities are obtained are inseparable; that the very right of the railroad to operate depends upon its compliance with the obligation to keep such conditions (*New York Electric Lines Co. v. Empire City Subway Co.* 201 N. Y. 321, 329, 94 N. E. 1056, affirmed in 235 U. S. 179, 59 L. ed. 184, L.R.A. 1918E, 874, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 906); that it would be a vain thing if the consent were placed under the protection of the Constitution, and the conditions which induced such consent were immediately subject to extinguishment by the legislature, for that would mock the very purpose of the constitutional provision, and permit almost any interference by the legislature; that the local authorities in this matter are supreme over the Public Service Commission by virtue of the Constitution; that the obligation of a street surface railroad to carry passengers for an agreed fare may, in a constitutional sense, be neither a contract nor private property, but it is imposed by virtue of a delegated power, delegated by the people—not by the legislature—to the local authorities, and is thus beyond legislative recall; that, when any right is expressly protected by the Constitution, the police power may not be exercised to impair its validity (*People v. Gillson*, 109 N. Y. 389, 400, 4 Am. St. Rep. 465, 17 N. E. 343); and that the Public Service Commission, therefore, has no jurisdiction over the subject-matter of

rate regulations in the city of Rochester, because the legislature has no power to alter the rates fixed by consent of the company and the local authorities.

It is, however, unnecessary, and therefore improper, to decide at this time what the limits of legislative power are in this connection. The delegation of legislative power to commissions and other administrative officers and boards need not be assumed, if the general words from which such delegation may be inferred are not reasonably so construed.

In the absence of clear and definite language, conferring, without ambiguity, jurisdiction upon the Public Service Commission to increase rates of fare agreed upon by the street railroad and the local authorities, we should not unnecessarily hold that the legislature has intended to delegate any of its powers in the matter, whatever its powers may be. The Public Service Commissions Law (§§ 26, 49, subd. 1) and the Railroad Law (§ 181) deal with maximum rates of fare established by statute, but make no reference, in terms, to rates established by agreement with local authorities.

In regulating rates three courses were open to the legislature: (1) To prescribe rates itself; (2) to delegate the power to the Commission; (3) to leave the matter to agreement between the street railroad company and the local authorities. It has constitutionally conferred on the Public Service Commission certain functions (*Saratoga Springs v. Saratoga Gas, E. L. & P. Co.* 191 N. Y. 123, 18 L.R.A.(N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606), which plainly include the power to regulate rates fixed by statute; and while it may be said that it has undertaken to delegate to the Public Service Commission *the same power* that it has to regulate rates of fare (Railroad Law, § 181), it is impossible to find a word in the statutes which discloses the legislative intent to deal with the

matter of rates fixed by agreement with local authorities. As it has often been held, in connections other than that of legislative power over them, that such agreements are valid, it may well be inferred that the legislature excluded them from consideration by failure to mention them, and that it

**Public Service Commission—alteration of contract rates.**

has made no attempt to turn them over to the Public Service Commission for revision. Statutes should be read according to the natural and most obvious import of the language, without resorting to artificial or forced constructions, for the purpose of either limiting or extending their operation." *Re New York & B. Bridge*, 72 N. Y. 527, 529; *Heerwagen v. Crosstown Street R. Co.* 179 N. Y. 99, 71 N. E. 729. "A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." *Riggs v. Palmer*, 115 N. Y. 506, 509, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188, 189; *McDowall v. Sheehan*, 129 N. Y. 200, 206, 29 N. E. 299. The authority of the Commission to regulate rates in such cases, and thus to extinguish an undoubted power of the local authorities, should fairly appear before it is assumed to exist.

It follows that the Public Service Commission is without jurisdiction; that prohibition is the proper remedy; that the order appealed from should be reversed; and that an absolute writ of prohibition

be awarded to relators, with costs to appellants in all courts.

**Crane, J., concurring:**

I concur. I am of the opinion that the reserve police power of the legislature has not been contracted away. I concur in the above opinion in so far as it states that the legislature has not in this instance given to the Public Service Commission the power of regulation.

**Cuddeback, Cardozo, and Andrews, JJ.,** concur with **Pound, J.,** and **Crane, J.,** concurs in memorandum.

**Hiscock, Ch. J., and Collin, J.,** dissent.

#### NOTE.

Whether or not public service commissions have power to increase franchise rates is discussed in an annotation to *SALT LAKE CITY v. UTAH LIGHT & TRACTION Co.* post, 715. As is pointed out in that annotation, the question of whether or not public service commissions have power to increase franchise rates is, in reality, twofold. That is, it must be determined whether or not the state itself has power to increase franchise rates, and if so, whether this power has been delegated to the public service commissions. The decision in *QUINBY v. PUBLIC SERVICE COMMISSION*, ante, 685, passes merely upon the question whether the power of the state, whatever it may be, has been delegated to the public service commissions, and this phase of the question will be found in subdivision III. on page 744, of the annotation referred to.

## INTERURBAN RAILWAY & TERMINAL COMPANY et al., Plffs. in Err., v.

### PUBLIC UTILITIES COMMISSION.

*Ohio Supreme Court—June 21, 1918.*

(98 Ohio St. 287, P.U.R.1919B, 212, 120 N. E. 831.)

**Public Service Commission — power to change contract rates.**

1. The statutes of Ohio which create the Public Utilities Commission

Headnotes by the COURT.

and define its powers do not confer authority on the Commission to change rates fixed by the terms of valid contracts, made by a public utility with a municipality, in the exercise of powers clearly conferred upon it.

[See note on this question beginning on page 730.]

**Contract — franchise — impairment.**

2. When the terms of a valid ordinance granting a franchise to a street or interurban railway company are accepted by the grantee, such action constitutes a contract between the parties. As long as the company retains its franchise and operates its road thereunder, its terms must control.

[See 19 R. C. L. 1159.]

**— against exercise of police power.**

3. The state cannot be deprived of its right to the proper exercise of the police power, and none of its subdivi-

sions can bind itself by contracts which are or which may become deleterious to the peace, order, health, or morals of the people.

[See 6 R. C. L. 191; 19 R. C. L. 859.]

**Constitutional law — impairment of municipal contract.**

4. A contract concerning proprietary rights, and harmless in itself, made by a municipality in the exercise of power clearly conferred, is protected by the Constitution, and the police power cannot be invoked to abrogate or impair it.

[See 6 R. C. L. 347-350.]

**ERROR** to the Public Utilities Commission to review its order sustaining a demurrer to a complaint filed for the investigation of rates of fare in existence on complainant's road, and for an increase thereof. *Affirmed.*

Statement by Johnson, J.:

Plaintiff in error filed its complaint with the Public Utilities Commission, praying that the Commission enter into an investigation of rates of fare then in existence on the road of plaintiff in error, and praying for an increase thereof.

It appears from the complaint that certain grants have been made by different subdivisions of the state through which the complainant's line runs, which have been accepted by the company. These grants provide for certain rates of fare over the line.

The city of Cincinnati, one of the parties mentioned in the complaint, filed its demurrer to the complaint on the following grounds:

"(1) That the complaint does not state facts sufficient to constitute a cause of action.

"(2) That the Public Utilities Commission of Ohio has no jurisdiction over the subject-matter of said complaint.

"(3) That said Commission has no jurisdiction over the city of Cincinnati."

This demurrer was sustained, and the complaint dismissed. To that order of the Commission error is prosecuted to this court.

Messrs. Dinsmore & Shohl, for plaintiffs in error:

The police power of the state authorizes the fixing of rates to be charged by railroads.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Milwaukee Electric R. & Light Co. v. Railroad Commission, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820, affirming 153 Wis. 592, L.R.A.1915F, 744, 144 N. W. 491, Ann. Cas. 1915A, 911; Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, L.R.A.1917C, 574, P.U.R. 1916F, 437, 159 Pac. 133; State ex rel. Webster v. Superior Ct. 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; Shields v. State, 26 Ohio St. 86; Iron R. Co. v. Lawrence Furnace Co. 29 Ohio St. 208.

Contracts entered into between individuals cannot be held to limit the right of a state to pass laws under its police power. All such contracts are entered into in view of the continuing power of the state to exercise its police power in reference to the subject-matter of the contract.

Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; Raymond Lumber Co. v. Raymond

Light & Water Co. 92 Wash. 330, L.R.A.1917C, 574, P.U.R.1916F, 437, 159 Pac. 133; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327; Board of Survey v. Bay State Street R. Co. 224 Mass. 463, 113 N. E. 273.

Rate legislation under the police power is not restricted by contract rights.

Minneapolis, St. P. & S. Ste. M. R. Co. v. Menasha Wooden Ware Co. 159 Wis. 130, L.R.A.1915F, 732, 150 N. W. 411; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892; Pinney & B. Co. v. Los Angeles Gas & E. Corp. 168 Cal. 12, L.R.A.1915C, 282, 141 Pac. 620, Ann. Cas. 1915D, 471; Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 397, 57 L. ed. 1248, 33 Sup. Ct. Rep. 820; Buffalo East Side R. Co. v. Buffalo Street R. Co. 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

The establishment of rates by the Commission under the Act of 1906 supersedes all contracts.

People ex rel. New York & N. S. Traction Co. v. Public Service Commission, 175 App. Div. 869, P.U.R. 1917B, 967, 162 N. Y. Supp. 405; Board of Survey v. Bay State Street R. Co. 224 Mass. 463, 113 N. E. 273; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; Duluth Street R. Co. v. Railroad Commission, 161 Wis. 245, P.U.R. 1915D, 192, 152 N. W. 887; Milwaukee Electric R. & Light Co. v. Railroad Commission, 238 U. S. 175, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; State ex rel. Webster v. Superior Ct. 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; Woodburn v. Public Service Commission, 82 Or. 114, L.R.A. 1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996; Dawson v. Dawson Teleph. Co. 137 Ga. 62, 72 S. E. 508; Benwood v. Public Service Commission, 75 W. Va. 127, L.R.A. 1915C, 261, 83 S. E. 295; Denver & S. P. R. Co. v. Englewood, 62 Colo. 229, — A.L.R. —, P.U.R.1916E, 134, 161

Pac. 151; Pioneer Teleph. & Teleg. Co. v. State, 33 Okla. 724, 127 Pac. 1073.

The obligation of contracts is not impaired within the provision of the Federal Constitution.

Home Teleg. & Teleph. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Milwaukee Electric R. & Light Co. v. Railroad Commission, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; Puget Sound Traction, Light & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705; State ex rel. Webster v. Superior Ct. 67 Wash. 37, L.R.A. 1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, L.R.A. 1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911.

Messrs. Joseph McGhee, Attorney General, and C. A. Radcliffe for defendant in error.

Messrs. Saul Zielonka, William Jerome Kuertz, and Charles E. Weber for city of Cincinnati.

Johnson, J., delivered the opinion of the court:

The grant involved in this case, in so far as it relates to the city of Cincinnati and Pleasant Ridge, was under investigation by this court in Interurban R. & Terminal Co. v. Cincinnati, 93 Ohio St. 108, 112 N. E. 186. The syllabus of that case is as follows: "An ordinance passed by a village council, granting a franchise to an interurban railway company to construct its line through the village, contained the following provision: 'Should the village of Pleasant Ridge be annexed to the city of Cincinnati, the rate of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed 5 cents.' The company thereafter duly accepted the franchise and constructed, maintained, and operated its line thereunder. Subsequently, the village was annexed to the city. Held: The acceptance of the grant by the company constituted a binding contract between the parties. As long as the company retains the franchise and operates its

Contract—  
franchise—  
impairment.

road thereunder, its terms must control."

The other portions of the plaintiff in error's line were constructed, maintained, and operated under similar grants of franchises, which were accepted by the company.

The provisions of the General Code with reference to the power to fix the terms and conditions of such grants apply both to councils of municipalities and the commissioners of counties through which the lines run.

Section 3443, Revised Statutes, which was in effect at the time of the making of these grants (and which is now § 9113, General Code), provides that the "council, or the commissioners, as the case may be, may fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated."

In the case above referred to it is said (93 Ohio St. at page 122): "It is a familiar law that, when the terms of a valid ordinance are accepted by a grantee, such action constitutes a contract, and the rights of the parties are to be determined by the terms of the contract itself. *Columbus v. Columbus Street R. Co.* 45 Ohio St. 98, 12 N. E. 651; *Cincinnati & S. R. Co. v. Carthage*, 36 Ohio St. 631; *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 26 L.R.A. (N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756."

In *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, at page 533, 48 L. ed. 1102, 1107, 24 Sup. Ct. Rep. 756, 761, the court says:

"The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated; the only limitation upon the power being that in case of an extension or con-

solidation no increase in the rate of fare should be allowed.

"That in passing ordinances, based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the state, as an agency of the state, cannot in reason be disputed. If, therefore, the ordinances passed after August, 1879, and referred to previously, which ordinances were accepted by the predecessors of the complainant, with whom it is in privity, constituted contracts in respect to the rates of fare to be thereafter charged upon the consolidated and extended lines (affected by the ordinances) as an entirety, it necessarily follows that the ordinance of October, 1898, impaired these contracts.

"The question for decision then is: Did the consolidated ordinance of February, 1885, and the ordinances thereafter passed and accepted, already referred to, constitute binding contracts in respect to the rates of fare to be thereafter exacted upon the consolidated and extended lines of the complainant?

"That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. *Cincinnati & S. R. Co. v. Carthage*, 36 Ohio St. 631, 634; *Columbus v. Columbus Street R. Co.* 45 Ohio St. 98, 12 N. E. 651. But let us consider the question without treating the Ohio decisions as conclusive."

The Federal Supreme Court then proceeds, in keeping with its rule, to determine for itself the existence or nonexistence of the asserted contract, and whether its obligation had been impaired. After this independent inquiry, the court arrived at the conclusion that there was a binding contract.

In this proceeding, the Public Utilities Commission is a party. Plaintiff in error rests on the proposition that authority has been conferred upon the Commission to fix the rates to be charged by the com-



plainant, notwithstanding, and in disregard of, the contract. It is contended that this may be done in the exercise of the police power of the state.

Many authorities are cited in support of the proposition, which is familiar and well settled, that the state itself cannot, by contract, deprive itself of the proper exercise of the police power.

Its elastic and undefined nature is everywhere recognized, as well as the limitations upon its exercise as against rights guaranteed and protected by the Constitution.

In *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, the grant of the right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets, upon the conditions named in the grant, was held to be a contract protected by the Federal Constitution against state legislation to impair it. In the opinion it is said (172 U. S. at page 15):

"The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed, or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself, nor its successors, to contracts prejudicial to the peace, good order, health, or morals of its inhabitants; but it is to cases of this class that these rulings have been confined.

"If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it cannot bind itself to any course of action which

shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the Constitution is ineffectual. Thus, in *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036, an act of the general assembly of Illinois authorized the Fertilizing Company to establish and maintain for fifty years certain chemical works for the purpose of converting dead animals into agricultural fertilizers, and to maintain depots in Chicago for the purpose of receiving and carrying out of the city dead animals and other animal matter which it might buy or own. Subsequently the charter of the village of Hyde Park was revised, and power given it to define or abate nuisances injurious to the public health. It was held that under this power the village had the right to prohibit the carrying of dead animals, or offensive matter, through the streets; that the charter of the company was a sufficient license until revoked, but was not a contract guaranteeing that the company might continue to carry on a business which had become a nuisance by the growth of population around its works, or that it should be exempt for fifty years from an exercise of the police power of the state, citing *Coates v. New York*, 7 Cow. 585.

"Substantially the same ruling was made in *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652, wherein an act of the legislature of Louisiana, granting exclusive privileges for maintaining slaughterhouses, was held to be subject to subsequent ordinances of the city of New Orleans opening to general competition the right to build slaughterhouses.

"The same principle has been applied to charters for the maintenance of lotteries, which, upon grounds of public policy, have been held to be mere licenses, and subject to abrogation in the exercise of

the police power of the government: *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199, as well as to laws regulating the liquor traffic; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 657, and even laws regulating the inspection of coal oil; *United States v. De Witt*, 9 Wall. 41, 19 L. ed. 593; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115. In the latter case it was held that a person holding a patent under the laws of the United States for an invention was not protected by such patent in selling oil condemned by a state inspector as unsafe for illuminating purposes.

"Under this power and the analogous power of taxation we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. *New York ex rel. New York Electric Lines v. Squire*, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *Missouri ex rel. Laclede Gaslight Co. v. Murphy*, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. Rep. 505. But where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

And in *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762, it was held that a state may, in matters of proprietary rights, exclude itself, and authorize its municipal

corporations to exclude themselves, from the right of regulation of such matters as water rates. At page 508 of the opinion in 206 U. S. it is said: "That a state may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt" (citing authorities).

In *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, at page 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50, 52, it is said: "It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 382, 46 L. ed. 592, 605, 22 Sup. Ct. Rep. 410; *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 508, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762. But for the very reason that such a contract has the effect of extinguishing, pro tanto, an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

Plaintiff in error cites *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, L.R.A. 1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78, and *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 574, 61 L. ed. 1825, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705, in support of its view. Both cases arose in the state of Washington. In the *Puget Sound Traction Case* the Federal Supreme Court shows that the Constitution of Washington specifically limits the powers of cities touching the subjects here involved. Mr. Justice

Pitney says (244 U. S. at page 579): "The Constitution of Washington (article 12, § 18) requires the legislature to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination in rates by railroads and other common carriers, and provides that 'a railroad and transportation commission may be established, and its powers and duties fully defined by law.' By article 11, § 10, any city containing a population of 20,000 inhabitants or more is permitted to frame a charter for its own government, 'consistent with and subject to the Constitution and laws of this state.' This Constitution was adopted in 1889, long previous to the date of the earliest of plaintiff's franchise ordinances. The supreme court of Washington has held that the provisions of municipal charters are subject to the legislative authority of the state, that the Public Utilities Act superseded any conflicting ordinance or charter provision of any city, and that contractual provisions in franchises conferred by municipal corporations without express legislative authority are subject to be set aside by the exercise of the sovereign power of the state. *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259; *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, 43-50, L.R.A. 1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78."

It will be observed that the Constitution of the state of Washington itself determined the question, and that the Ohio Constitution contains no such provisions.

The Federal Supreme Court points out that the Washington cases are very clearly distinguishable from another recent case, *Detroit United R. Co. v. Michigan*, 242 U. S. 238, 248, 61 L. ed. 268, 273, P.U.R.1917B, 1010, 37 Sup. Ct. Rep. 87. In that case franchises for city lines had been given by ordinances of Detroit. Franchises for suburban lines had been given by vil-

lage and township ordinances, which fixed the fares on a basis more favorable to grantees. Thereafter the limits of the city were extended, so as to embrace parts of the outlying railways. The state courts held that the outlying lines, which were embraced within the extended limits, came also within the fares fixed by the city ordinances. At page 253 of 242 U. S., the Federal Supreme Court says: "Because of the provision of § 10 of article 1 of the Constitution of the United States, it was not within the power of the state of Michigan by any subsequent legislation to impair the obligations of those contracts, and since the judgments of the supreme court of that state gave such an effect to the Annexation Acts of 1905 and 1907, in conjunction with the ordinances of 1889, as to impair those obligations, the judgments must be reversed."

The two recent cases from the United States Supreme Court, just cited, fairly comprehend and dispose of the questions here suggested.

The contract in this case is of harmless character, "innocuous in itself," and is entitled to the constitutional protection.

As we have seen, it has been conclusively determined that in Ohio full authority had been conferred for the making of the contract. In addition to this the people, by an amendment to the Constitution, have invested the municipalities of the state with plenary power to deal with the subject by binding contracts. Section 4 of article 18 provides that "any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service."

Therefore the municipality does not now get its authority from the legislature, but from the Constitution. The legislature cannot deprive it of that power.

The constitutional provision referred to was not adopted until after the making of the contract involved in this case, and the validity of that contract is, of course, to be determined by the law in effect at the time it was made. But in as much as, under the authorities already cited, the contract was valid and binding when made, we see no **Constitutional law—impairment of municipal contract.** reason to deny to the municipality authority to insist upon its rights under the contract, now that its power to deal with the subject is sanctioned by the organic law.

Moreover, we are not able to find that the legislature has attempted to confer upon the Public Utilities Commission the authority to change rates fixed by contract between the company and local authorities.

It is contended that such authority has been conferred upon the Commission by §§ 524 et seq., Page & A. General Code. Section 524 provides for the filing of a complaint before the Commission of rates, fares, etc., that are alleged to be unreasonable or unjustly discriminatory. The succeeding sections provide that upon an investigation, if the rate or rates are found to be unreasonable or unjustly discriminatory, the Commission may fix, and order substituted therefor, such rate or rates as it shall have determined to be just and reasonable. There is no provision in any of these sections which expressly authorizes the Commission to change rates fixed by contract.

In the very recent case of *Quinby v. Public Service Commission* (decided April 5, 1918, by the court of appeals of New York) 223 N. Y. 244, ante, 685, P.U.R.1918D, 30, 119 N. E. 433, the power of the Public Utilities Commission of New York to change rates of a street railroad constructed under consent of the property owners and local authorities, where such consent was based upon a stipulated maximum fare, was attacked. Subdivision 1 of § 49 of the Public Service Commissions

Law of that state (Consol. Laws, chap. 48) provides that whenever the Commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, etc., charged for the transportation of persons or property by any common carrier, street railroad, etc., subject to its jurisdiction, are unjust, discriminatory, or unduly preferential, it may determine the just and reasonable rates and fares thereafter to be observed. The Constitution of New York (article 3, § 18) provides that "no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained."

The section further provides that, if consent cannot be obtained, a proceeding may be conducted in court for the determination of the subject.

The extent of the authority of the Commission, where a railroad was operated by the consent of the local authorities, as stated, was considered in that case, and it was held in ¶ 4 of the syllabus in 119 N. E. 433, that "under Const. art. 3, § 18, providing for consent of property owners and local authorities to the construction and operation of street railroads, where such consent was based upon a stipulated maximum fare, the Public Service Commission is without jurisdiction over the subject-matter of changing such rate, and the law does not attempt to give it such authority."

It will be observed that the provisions of subdivision 1 of § 49 of the New York statute are similar to those of the Ohio statute.

The court, at page 263 of the opinion in 223 N. Y., says:

"In the absence of clear and definite language, conferring, without ambiguity, jurisdiction upon the

Public Service Commission to increase rates of fare agreed upon by the street railroad and the local authorities, we should not unnecessarily hold that the legislature has intended to delegate any of its powers in the matter, whatever its powers may be. The Public Service Commissions Law (§§ 26, 49, subd. 1) and the Railroad Law (§ 181) deal with maximum rates of fare established by statute, but make no reference in terms to rates established by agreement with local authorities.

"In regulating rates three courses were open to the legislature: 1. To prescribe rates itself. 2. To delegate the power to the Commission. 3. To leave the matter to agreement between the street railroad company and the local authorities. It has constitutionally conferred on the Public Service Commission certain functions [citing authorities] which plainly include the power to regulate rates fixed by statute; and while it may be said that it has undertaken to delegate to the Public Service Commission 'the same power' that it has to regulate rates of fare (Railroad Law, § 181), it is impossible to find a word in the statutes which discloses the legislative intent to deal with the matter of rates fixed by agreement with local authorities. As it has often been held, in connections other than that of legislative power over them, that such agreements are valid, it may well be inferred that the legislature excluded them from consideration by failure to mention them, and that it has made no attempt to turn them over to the Public Service Commission for revision."

This reasoning applies with singular force to the situation in Ohio and to the question we have here.

The Public Utilities Commission of Ohio is created, and its duties defined, by statute. In the recent case of *Cincinnati v. Public Utilities Commission*, 96 Ohio St. 270, 117 N. E. 381, it is declared in the syllabus: "The powers of the Public Utilities Commission are conferred

by statute, and it possesses no authority other than that thus vested in it."

The general assembly not having provided that the Commission may interfere with valid and binding contracts, we may well conclude that it excluded them from consideration.

Public Service Commission—power to change contract rates.

In cases such as we have here, it is a prerequisite of the grant to the company that a certain proportion of the abutting property owners shall first consent; and the statute requires that a municipality shall award the franchise to the bidder who proposes to carry passengers on the route for the lowest rate of fare, after public advertisement. The presumption is that such consents are given in consideration of the terms of the grant, to be complied with by the company, including the rate of fare agreed on. It would not only be a vain and empty arrangement, but a deceptive one, if these provisions could be disregarded, and the company nevertheless retain and exercise all of the valuable rights and privileges granted to it in consideration thereof.

The order of the Commission will be affirmed.

Nichols, Ch. J., and Wanamaker, Newman, Matthias, and Donahue, JJ., concur.

#### NOTE.

The question of the power of public service commissions to increase franchise rates is discussed in the annotation attached to *SALT LAKE CITY v. UTAH LIGHT & TRACTION Co.* post, 715. The decision in *INTERURBAN R. & TERMINAL Co. v. PUBLIC UTILITIES COMMISSION*, ante, 704, follows the Ohio rule, which, as is shown in subdivision II. a, 5, of the annotation referred to, differs from the rule prevailing in the majority of jurisdictions, and is that the municipalities in Ohio have been delegated, by the Constitution and statutes of the state, the power to make inviolable contracts as to rates.

CITY OF CINCINNATI, Plff. in Err.,  
v.  
PUBLIC UTILITIES COMMISSION.

Ohio Supreme Court—June 21, 1918.

(98 Ohio St. 320, P.U.R.1919C, 119, 121 N. E. 688.)

**Contract — franchise — binding effect.**

1. Where an ordinance is passed by a municipal corporation, granting to a gas company the right for the term of twenty-five years to furnish natural gas for heating, lighting, and power purposes, through its mains and appliances in the streets and public places, on terms and conditions contained in the ordinance, which include a provision that the grant is subject to the right of the city to regulate the price of natural gas from time to time, as provided by law, the acceptance of the ordinance by the company constitutes a valid contract, and the rights of the parties are to be determined by the contract itself.

[See note on this question beginning on page 730.]

**Public service corporation — rates — reserved power.**

2. In such case the grant to the company is subject to and dependent on the right reserved to the city to fix the price of gas from time to time, as provided by law.

[See 12 R. C. L. 898 et seq.]

**Contract — statutes as part.**

3. Statutes in force at the time a contract is made by a municipality enter into and become part of the contract. Its obligation is to be measured, and performance is to be regulated, by the terms and rules which they prescribe.

[See 6 R. C. L. 325.]

**Gas — price fixing — statute.**

4. By the provisions of §§ 3982 and 3983, General Code (§§ 2478 and 2479, Rev. Stat.), two entirely different situations are contemplated and provided for: (a) By § 3982, the city is given power to regulate the price of gas from time to time; (b) by § 3983, it is provided that if the city fixes the price for a period not exceeding ten years, and the gas company assents thereto, the city shall not require it to furnish gas at a less rate during the period agreed on, not exceeding such ten years.

[See 12 R. C. L. 898.]

**— power to regulate.**

5. In such case, if the company does not assent to the rate fixed by the city for the period not exceeding ten years, the power of the city to regu-

late the price is as ample as if the ordinance contained no such provision.

[See 12 R. C. L. 898 et seq.]

**Constitutional law — impairment of contract — change of rate for gas.**

6. The fixing of a rate for the first ten years of a franchise granted for twenty-five years by a city, which reserves to the city the right to regulate rates from time to time, as provided by law, does not change the franchise contract nor exhaust the power of the city thereunder. The original agreement constitutes one entire contract, and such action conforms to and carries out its provisions.

[See 6 R. C. L. 340; 12 R. C. L. 898.]

**Statute — construction — application.**

7. The provisions of § 614-44, Page & A. General Code, were not intended to and do not apply to a contract made prior to the passage of that section, and which, by its terms, does not expire for more than one year.

[See 6 R. C. L. 326.]

**Constitutional law — franchise contract — impairment.**

8. A contract such as above described, which is passed in full compliance with authority expressly conferred, is protected by the provisions of § 10, article 1, of the Federal Constitution, that no state shall pass any law impairing the obligation of contracts.

[See 6 R. C. L. 340.]

**Contract — accepted ordinance.**

9. When a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality and lay down its pipes therein, and furnish gas to consumers upon terms and conditions imposed by the ordinance which is accepted in writing by the corporation, such action by both parties constitutes a contract, and the rights of the parties therein are to be determined by the contract itself.

[See 6 R. C. L. 340.]

**Constitutional law — resort to courts for protection of rights.**

10. Notwithstanding reserved power in a municipal corporation to regulate the price to be charged for gas, by a corporation authorized to occupy its streets with mains, if the city fixes a rate which is so unjust and unreasonable and beneath a proper compensatory return as to amount to a taking of the property of the corporation without just compensation, it has recourse to the courts for protection of its rights and property.

[See 12 R. C. L. 900.]

(Jones, J., dissents.)

**ERROR** to the Public Utilities Commission to review its order overruling motions to dismiss the complaint and for a rehearing, in a proceeding to have a rate for gas fixed by ordinance suspended, and to fix and determine a just and reasonable rate, to be charged and collected by complainants. *Reversed.*

**Statement by Johnson, J.:**

The Union Gas & Electric Company and the Cincinnati Gas & Electric Company in September, 1917, filed their complaint with the Public Utilities Commission, in which it is set forth that the council of the city of Cincinnati on August 20, 1917, passed an ordinance regulating the price to be charged for natural gas consumed. A copy of the ordinance was attached to the complaint. The companies complained that the price fixed by the ordinance for natural gas to be furnished for a period of ten years from and after the date thereof, to the city of Cincinnati for street lighting and all other purposes, and to private consumers, at the rate of 35 cents per 1,000 cubic feet, with a discount of 5 cents per 1,000 cubic feet, making a net rate of 30 cents per 1,000 cubic feet, if paid at the office of the company within five days after the delivery of bill, is unreasonable and insufficient to yield reasonable compensation for the service, having due regard to the value thereof and of all the property of complainants actually used and useful for the convenience of the public. They state that they have not accepted the ordinance, but do consent to continue to furnish gas

to the city and its inhabitants and to devote their property to such public use during the term fixed by said ordinance, or by the provisions of law. They prayed that the rate fixed by the ordinance be suspended; and the complainants, electing to charge the rate in force immediately prior to the taking effect of the ordinance, and offering to give an undertaking in such an amount as the Commission may determine, prayed further that the Commission proceed to fix and determine the just and reasonable rate to be charged and collected by the complainants.

In 1905, the city of Cincinnati passed an ordinance granting a franchise to the Cincinnati Gas & Electric Company to furnish natural gas for heat, light, and power purposes, to public and private consumers, through its system of gas mains, pipes, fixtures, and appliances in the streets and public ways of the city, and to occupy such streets and public places for the purposes stated. Paragraph 6 of the franchise ordinance contained the provision: "The grant herein made shall continue for twenty-five (25) years from and after the passage and acceptance of this ordinance, subject, however, to the right of the

city to regulate the price of natural gas from time to time, as provided by law, and to purchase the plant and works of the gas company, as reserved in its contract with said city in that behalf."

The company duly accepted the franchise ordinance, and thereafter leased its plant, pipes, contracts, and franchise to the Union Gas & Electric Company, which has since been operating the same. On the 20th of August, 1917, the council of the city passed the ordinance referred to in the complaint, regulating the price to be charged for natural gas by the companies for ten years, and said ordinance was approved by the mayor on the 29th of August, 1917. Thereafter the companies filed the complaint as above stated with the Commission.

The city on the 5th of October filed its motion with the Commission to dismiss the complaint, on the ground that the Commission was without jurisdiction, for the reasons stated in the motion. This motion was overruled by the Commission, and on the application of the company it made its order directing the company to give an undertaking in the sum of \$250,000, without additional surety, upon their election to charge the rate in force immediately preceding the effective date of the ordinance. Motions for rehearing having been overruled, this proceeding in error was brought to reverse the orders of the Commission.

Plaintiff in error contends that the Commission is without jurisdiction, for the reason that §§ 614-44, to and including 614-47, Page & A. General Code, are unconstitutional and void, in violation of § 1f of article 2 of the Constitution, and have been repealed by the adoption of that section and of §§ 4227-1, to and including 4227-13, General Code (§§ 4227-1 to 4227-5 amended, and §§ 4227-6 to 4227-13 added by 104 Ohio Laws, p. 238); that its order permitting an undertaking without surety is unreasonable and unlawful; and that its refusal to

dismiss the petition is unlawful, because §§ 614-44 et seq., Page & A. General Code, referred to, are in violation of §§ 4 and 5, article 18 of the Constitution, and impair the obligation of a contract, in violation of § 10, article 1, of the Constitution of the United States.

Messrs. Charles A. Groom, Saul Zielonka, William Jerome Kuertz, Charles E. Weber, and Powell Croasley for plaintiff in error.

Messrs. Joseph McGhee, Attorney General, C. A. Radcliffe, Lawrence Maxwell, Miller Outcalt, and Lawrence K. Langdon for defendant in error.

Johnson, J., delivered the opinion of the court:

It is familiar law, not questioned, that when a municipal corporation by ordinance gives its consent that a natural gas company may enter the municipality, lay down its pipes therein, and furnish gas to consumers, upon terms and conditions imposed by the ordinance, which are accepted in writing by the company, such action by both

Contract-  
accepted  
ordinance.

parties constitutes a contract, and the rights of the parties thereunder are to be determined by the contract itself. *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 26 L.R.A. (N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332; *State ex rel. Atty. Gen. v. Cincinnati Gas-light & Coke Co.* 18 Ohio St. 263, 7th Syl.; *Circleville Light & P. Co. v. Buckeye Gas Co.* 69 Ohio St. 259, 69 N. E. 436; *Columbus v. Columbus Gas Co.* 76 Ohio St. 309, 81 N. E. 440; *Interurban R. & Terminal Co. v. Cincinnati*, 93 Ohio St. 108, 112 N. E. 186; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756.

The passage of the ordinance in December, 1905, granting the right, for the term of twenty-five years, to the company to furnish gas for heating, lighting, and power purposes to public and private consumers, through its mains and appliances in the streets, and with the right to occupy the streets and public places with such appliances, and



the acceptance of that ordinance by the company, constituted a valid and binding contract between the parties. The power of the city to make the grant, and its validity, are amply shown by the above-cited authorities. That contract will, by its terms, expire in 1930.

The rights of the parties "are to be determined by the contract itself."

As shown in the foregoing statement, § 6 of the contract provides that "the grant herein made shall continue for twenty-five (25) years from and after the passage and acceptance of this ordinance, subject, however, to the right of the city to regulate the price of natural gas from time to time, as provided by law."

The parties themselves stipulated that the grant to the company was dependent on and subject to that right of the city. The law then in force provided that the city might regulate the price of gas from time to time. At the time of the making of the contract in 1905, §§ 2478 and 2479, Revised Statutes, which are now §§ 3982 and 3983, General Code, were in effect. The pertinent portions of those sections are as follows:

Section 3982: "The council of a municipality in which . . . natural or artificial gas companies . . . are established . . . may regulate from time to time the price which such companies may charge for . . . gas for lighting or fuel purposes, . . . for public or private consumption, furnished by such companies. . . . Such companies shall in no event charge more for . . . natural or artificial gas . . . than the price specified by ordinance of council."

Section 3983: "If council fixes the price at which it shall require a company to furnish . . . either natural or artificial gas to the citizens, or public buildings or for the purpose of lighting the streets, . . . or for other purposes, for a

period not exceeding ten years, and the company or person so to furnish such . . . gas assents thereto, by written acceptance, . . . the council shall not require such company to furnish . . . gas . . . at a less price during the period of time agreed on, not exceeding such ten years."

These statutory provisions by operation of law entered into and became part of the contract. *Queen Ins. Co. v. Leslie*, 47

Ohio St. 409, 9 Contract-statutes as part. L.R.A. 45, 24 N. E.

1072; *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 230, 255, 56 L.R.A. 159, 62 N. W. 338, 19 Cyc. 659. The obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and rules which they prescribe. 6 R. C. L. 325.

It will be observed that, by the sections quoted, two entirely different Gas-price fixing-statute. situations are contemplated and provided for, viz:

First. By § 3982 the city is given power to regulate the price of gas from time to time.

Second. By § 3983 it is provided that if the city fixes the price of gas for a period of ten years, and the company assents thereto, the city shall not require it to furnish gas at a less price during the period agreed on, not exceeding such ten years.

In this case the parties themselves provided that the grant of the franchises and privileges to the gas company was dependent on the right of the city to regulate the price of gas from time to time, as provided by law; that is, the city could, under § 3982, at any time during the twenty-five years, the life of the franchise, fix the price generally without fixing any definite period for which the rate should be in force, or it could, under § 3983, at any time during the twenty-five years, fix a rate for a definite period not exceeding ten years, and, if the company assented thereto, the city

could not reduce the price during that ten-year period. That procedure was followed in the present case. After the contract was made in 1905, the city fixed a rate for a ten-year period. This was assented to by the company, and after the expiration of that period the city, pursuant to the terms of the franchise contract, fixed a price for another ten-year period. Thereupon the gas company filed its complaint with the Public Utilities Commission. The fixing of the first ten-year rate, and its acceptance by the company, did not annul or change the franchise contract by which the grant of privileges was made to the company, nor did it exhaust the power reserved to the city to fix rates. Such action was in conformity to that contract, and carried out its express terms. To give exclusive attention to the action of the parties in fixing the rate for the first ten years of the franchise period of twenty-five years is to disregard the provisions of the agreement upon which the grant of privileges to the company is made to depend.

Section 3982, General Code, is the section which confers the regulatory powers on the city. The only place in the statute in which the words "regulate from time to time" are found is in § 3982, General Code (§ 2478, Rev. Stat.). Section 3983, General Code (§ 2479, Rev. Stat.), is not a regulatory statute. It simply limits the term for which the city can fix the rate with the assent of the company. As above shown, both sections entered into and became part of the franchise contract itself. And §§ 3982 and 3983 are entirely consistent with each other.

In *State ex rel. Atty. Gen. v. Iron-ton Gas Co.* 37 Ohio St. 45, it was decided that a provision in an ordinance fixing the price of gas for a certain period, if accepted by the gas company, precludes the city from lowering the price for the period named, but, "if not thus accepted, the power of the

council to regulate the price is as ample as if the ordinance contained no such provision."

Notwithstanding this, if the city at any time should fix a rate which is so unjust or unreasonable, and beneath a proper compensatory re-  
turn, as to amount to a taking of the property of the company without just compensation, it would have recourse to the courts for the protection of its rights and property. *Missouri P. R. Co. v. Tucker*, 230 U. S. 340, 347, 57 L. ed. 1507, 1509, 33 Sup. Ct. Rep. 961; *Newark Natural Gas & Fuel Co. v. Newark*, 92 Ohio St. 393, 111 N. E. 150; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081.

Suppose the company had not assented to the rate fixed by the city for the first ten-year period, in that event the power of the city would have been as ample as if no period had been fixed; and when the company did not assent to the rate fixed by the city for the second ten-year period, the power is equally ample. *State ex rel. Atty. Gen. v. Iron-ton Gas Co. supra.*

In *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493, the water company was given the exclusive right to supply the city with water for thirty years, subject to certain terms and conditions named in the ordinance, which also contained provisions for the payment of water rates by consumers. In discussing the power of the municipality to make regulations the court say at page 599 of 180 U. S.:

"An example is afforded by the Act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company, or corporation to supply water, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water

Constitutional law—resort to courts for protection of rights.

—impairment of contract—change of rate for gas.

—power to regulate.

gas company, precludes the city from lowering the price

furnished by such individual, company, or corporation.' . . . There is no explicit provision for repetitions of the power—none declaring the power conferred a continuing one. Who now doubts that it is? If rights were claimed and were pleading for a different interpretation, we might have to listen to them; but now, undisturbed by them, we yield without resistance to that meaning which the subject-matter demands in the absence of negating words.

"Our conclusion is that the powers conferred by the Statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterworks '*at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.*' The words, '*fixed by ordinance,*' may be construed to mean by ordinance once for all, to endure during the whole period of thirty years, or by ordinance from time to time as might be deemed necessary. Of the two constructions, that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time."

Some years after the making of the contract, to wit, in May, 1911, §§ 614-44 to and including 614-47, Page & A. General Code, were enacted. These sections permit an appeal to the Public Utilities Commission from ordinances of municipalities fixing rates for any commodity, utility, or service.

It is contended that, as this law was in effect in August, 1917, when the council passed the ordinance fixing the 80-cent rate, the Commission was authorized to entertain the complaint filed by the companies. The pertinent part of § 614-44, Page & A. General Code, is as follows: "Any municipal corporation in which any public utility is established, may, by ordinance, at any

time within one year before the expiration of any contract entered into under the provisions of §§ 3644, 3982 and 3983 of the General Code between the municipality and such public utility with respect to the rate, . . . to be made . . . for any commodity . . . by such public utility, . . . proceed to fix the price . . . that such public utility may charge . . . for an ensuing period, as provided in §§ 3644, 3982 and 3983 of the General Code."

Then follow the provisions for the filing of a complaint with the Commission by dissatisfied parties. The ordinance complained of in this case was not passed "at any time within one year before the expiration of any contract . . . between the municipality and such public utility with respect to the rate."

We think it clear that a contract, made between a municipality and a public utility, in full compliance with express statutory provisions, before the passage of § 614-44, Page & A. General Code, is not affected by the provisions of that section, and that no steps can be taken Statute—  
construction—  
application. under §§ 614-44 et

seq. until within one year of the expiration of the contract. A different construction would violate the express terms of the contract between the parties in 1905, in which the company agreed that the city should have the power to fix the rates. For by the provisions of §§ 614-44 et seq., it is provided that the Commission may fix the rates to be charged, on a hearing of the complaint permitted to be filed with it.

There is not only nothing in §§ 614-44 et seq. to indicate that the legislature intended to interfere with or abrogate valid contracts already in existence, but there is the express language we have quoted which demonstrates that there was no such intention. The purpose was that the new law should be put into operation as to contracts about to expire and those thereafter made.

Section 614-44 not only confers upon the public utility the right to invoke the jurisdiction of the Public Utilities Commission, when not satisfied with the price fixed by the municipality, but it also enables electors of the municipality (even if the public utility accepts the rate) to invoke the same jurisdiction, and the Commission on the hearing may lower the rate paid to the company.

The parties had the right to make the contract and to rely on the enforcement of it as they made it. Who can say that the city or the company would have entered into the contract if they had realized that a board or commission not then contemplated might, without their consent, be afterwards created, by which an essential element might be altered? As was said by Judge Spear in *Wellston v. Morgan*, 59 Ohio St. 147, 157, 52 N. E. 130: "The paper presented undertakes to stipulate for the furnishing of light, and an agreed price therefor, for . . . ninety-nine years. The proposition is that we now treat it as a contract for ten years; that is, that the court shall make a new contract for the parties for ten years, and then enforce it. How can we say that the company would have incurred the great expense and outlay of money and labor, which the petition declares was incurred, for the period of ten years only? And if the court were of opinion that probably the company would have been willing to so contract, where is there any authority in the court to now alter the terms that they did agree upon, and then enforce them as changed?"

In that case the court say in the syllabus: "The only semblance of a contract between the city and the electric light company was in the form of an ordinance passed by the council, which undertook to grant to the company the exclusive use of the streets for the erection of its poles, et cetera, for the period of ninety-nine years, and to bind the city to purchase light of the company during that time at a stated sum per month."

The contract of 1905, in the present case, having been entered into by the city in the exercise of contractual capacity and authority expressly conferred upon it, and having conferred upon the company valuable privileges and rights in the public streets and places of the city on the conditions named therein, is protected by the provisions of § 10, article 1, of the Federal Constitution, <sup>Constitutional law—franchise contract—impairment.</sup> that no state shall pass any law impairing the obligation of contracts. A franchise is included within the broader term "grant," and the same general principles are applicable to it in reference to the constitutional inhibition as to the impairment of the obligation of contracts. 6 R. C. L. 340; 12 C. J. 1009; *Cleveland v. Cleveland City R. Co.* 194 U. S. 534, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756.

It is urged that the creation of the Public Utilities Commission is expressly authorized by § 2, article 13, of the Constitution, as adopted in 1912. This court, in the exercise of its revisory jurisdiction under § 2, article 4, of the Constitution, has given full recognition to the power and jurisdiction of the Public Utilities Commission, and to the efficient aid it has given as an administrative agency of the government, but it is neither advisable nor possible to confer upon it power in disregard of rights protected by the guarantees of the Constitution.

In *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212, it was held that a state can no more impair an existing contract by a constitutional provision than by a legislative act. Both are within the prohibition of the national Constitution.

Counsel also urge that the right to establish rates by compulsion is distinguished from the power to contract for a rate; that the power of a municipality to regulate is a police power, and rests upon legislative grant, which may be modified by the legislature at will.

We are mindful that the police

power is an essential and vital attribute of government to be exercised in the interest of the public health, safety, and welfare. Government cannot, even if it would, divest itself of this inherent incident of sovereignty. The duty of its watchful exercise is a continuing one. But here is a matter of contract. It expresses a meeting of minds on a subject which the parties were competent to contract about. The situation is one in which the city had been expressly given full power by the state to enter into an agreement touching all the matters covered by the terms of the contract, and, conceding that the grant of power to the city was subject to repeal or modification at the will of the legislature, no such modification had been made at the time the contract became binding on the parties.

As was said by the Supreme Court of the United States in *Cleveland v. Cleveland City R. Co.*, *supra*:

"That in passing ordinances, based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the state, as an agency of the state, cannot in reason be disputed. If, therefore, the ordinances passed after August, 1879, and referred to previously, which ordinances were accepted by the predecessors of the complainant, with whom it is in privity, constituted contracts in respect to the rates of fare to be thereafter charged upon the consolidated and extended lines (affected by the ordinances) as an entirety, it necessarily follows that the ordinance of October, 1898, impaired these contracts.

"The question for decision then is: Did the consolidated ordinance of February, 1885, and the ordinances thereafter passed and accepted, already referred to, constitute binding contracts in respect to the rates of fare to be thereafter exacted upon the consolidated and extended lines of the complainant?

"That in the courts of Ohio the acceptance of an ordinance of the

character of those just referred to is deemed to create a binding contract is settled."

It was held in the above case that a consolidated ordinance of February, 1885, of the city, and ordinances thereafter passed by the municipality and accepted by the companies, constituted such binding contracts in respect to the rate of fare to be exacted on the lines of the company as to deprive the city of its right to exercise the reservations in the original ordinances as to changing rates of fare, and that the ordinance of October, 1898, reducing fare to be charged, was void and unconstitutional within the impairment clause of the Federal Constitution. In the cases of *Cincinnati v. Public Utilities Commission*, 96 Ohio St. 554, P.U.R.1918B, 257, 118 N. E. 97, and 96 Ohio St. 270, 117 N. E. 381, the questions determined in this case were not presented to the court.

Counsel for defendant in error cite *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78, in which case it was held that a city which granted a franchise to a telephone company, fixing rates, could not attack the constitutionality of a Public Utilities Act passed thereafter, under which the rates were raised, on the ground that the contract in the franchise was impaired thereby. In that case, the case of *Cleveland v. Cleveland City R. Co.* *supra*, was relied on by counsel for the city. But the supreme court of Washington points out that in the *Cleveland City R. Co.* case express authority had been conferred on the city by the Ohio statute, while in the Washington case the power to fix rates was a right reserved to the legislature of the state by the Constitution of that state, and so was not incident to a freehold charter. See also *Woodburn v. Public Service Commission*, 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996, which is likewise cited by the defendant in error where it was also

held that the right was reserved to the state.

As we have seen, the state and Federal courts have held that, in Ohio, "express and unmistakable authority" was conferred on the city to make a contract, such as is involved here, and during the life of the contract the parties operating under it are bound by its terms.

These views as to the contractual relations of the parties, whose interests are concerned in the proceeding, are conclusive of the case, and it is not necessary to decide the other questions suggested.

The order of the Commission will be reversed.

Nichols, Ch. J., and Wanamaker and Newman, JJ., concur.

Jones, J., dissenting:

I find it impossible to concur in the judgment. The municipality seeks to avoid the jurisdiction of the Public Utilities Commission of the state, because the original franchise ordinance contained a stipulation subjecting the utility "to the right of the city to regulate the price of natural gas from time to time, as provided by law."

This ordinance was passed December 26, 1905. The legislative grant to the municipality limited the contractual period to ten years. After the ten-year period the city, by ordinance, attempted to impose a reduced and compulsory rate of service upon the grantee, ignoring the ad interim legislation, which had in the meantime placed the control of rate regulation in the hands of the Public Utilities Commission.

1. The original ordinance of 1905, to which the grantee gave its statutory assent, reserved to the city the right to regulate the price of natural gas from time to time, *as provided by law*. This could only mean as provided by law in force at the time the regulation was to be made; otherwise, this provision would be meaningless. Before the new reducing-rate ordinance of August 20, 1917, was passed, the legislature had in the meantime provided by

law the method by which the price of natural gas should be established. When the city attempted to enforce its unilateral and compulsory rate provision in its new ordinance, it violated its original contract made with the utility.

2. If it is assumed that this contract was for a longer period than ten years, the answer to that contention is that the municipality had no legislative authority to make it.

Sections 3982 and 3983, General Code, which were in force at the time the original ordinance was adopted, granted the only power the municipality had touching rate regulation. The first section delegates the power to city councils to regulate, and the second section provides for the contractual relation between the city and company, which shall not extend beyond a period of ten years. Under these sections neither the city nor the utility had any authority to contract as to the price of gas for a longer period.

In construing a similar section relating to price regulation this court held, in the case of *Wellston v. Morgan*, 59 Ohio St. 147, 52 N. E. 127, as follows: "Where a statute gives power to a municipal corporation to contract for the lighting of its streets and other public grounds for a period not exceeding ten years, the conclusive implication is that such corporation is forbidden to contract for a longer period."

In construing the grant of legislative power in the two Code sections noted, in the case of *Logan Natural Gas & Fuel Co. v. Chilli-cothe*, 65 Ohio St. 186, 62 N. E. 122, the following proposition is stated in the syllabus: "A city council has no power under Revised Statutes, §§ 2478 and 2479 [now §§ 3982 and 3983, General Code], to compel a gas company, without its assent to the ordinance, to furnish gas in a manner and at a rate entirely at the option of the consumer."

And on page 206 of 65 Ohio St. the court say: "It is also provided that, if the gas company assents to

such limitation in writing, it then becomes a binding obligation on both the city and the company for ten years, and no more. This is the extent of the authority granted to the council, and no other or different power is either expressed or implied. When, therefore, the council undertakes, even in the absence of a prior ordinance, to compel the gas company, without its consent, to furnish gas in a manner and at a rate entirely at the option of the consumer, it not only transcends the power conferred by the legislature, but it also undertakes to seize private property without due process of law."

It must be remembered that the only power given to municipalities by § 3983, General Code, was regulation by contract, and not a compulsory regulation. In this connection the statement of the Oregon supreme court in the case of *Woodburn v. Public Service Commission*, 82 Or. 114, 127, L.R.A.1917C, 98, 105, P.U.R.1917B, 967, 161 Pac. 395, Ann. Cas. 1917E, 996, 1000, is peculiarly apt: "The right of the state to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with the public service company upon the terms of a franchise. The exercise of a power to fix rates by agreement does not include or embrace any portion of the power to fix rates by compulsion."

3. Since municipalities are political subdivisions of the state and mere agents of the latter, it is within the province of the state to change its rate regulation at will before the municipality has entered into a legal and effective contract with a public utility. Before the ten-year period of limitation had expired, and before the city had assumed to renew its status with the utility, and prior to municipal action fixing the new rate, the legislature had created a public utilities commission and vested it with sole control over coercive rate regulation. That the legislature had ample power to

do this is supported by overwhelming authority, especially in view of the provisions of § 2, article 13, of the Constitution, which reserved to the legislature the right to alter or repeal laws conferring corporate franchises. *People ex rel. Bridge Operating Co. v. Public Service Commission*, 153 App. Div. 131, 138 N. Y. Supp. 434; *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

4. The new rate ordinance was passed by the council of the city of Cincinnati on August 20, 1917. The city is now assuming an attitude wholly inconsistent with its former action. Prior to the passage of the new ordinance, the city had expressly recognized the jurisdiction of the Public Utilities Commission of the state to control the rate regulation of this public utility.

In the case of *Cincinnati v. Public Utilities Commission*, 96 Ohio St. 554, P.U.R.1918B, 257, 118 N. E. 97, the city itself invoked the jurisdiction of the Commission by adopting a resolution on February 10, 1914, requesting the Commission to investigate and ascertain the value of this public utility for rate-making purposes. This proceeding was brought under §§ 499-8 et seq. General Code, as added by Act May 5, 1913 (103 Ohio Laws, p. 807) which authorized the Commission to fix the valuation, "for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities," etc. In that case, at the instance of the city, this court rendered a judgment in its favor, modifying the order of the Commission in the matter of valuation, upon which rates are necessarily based.

Likewise, in the case of *Cincinnati v. Public Utilities Commission*, 96 Ohio St. 270, 117 N. E. 381, the city also recognized the authority of

the Commission to deal with rates of this utility during the noncontractual period, for, after the expiration of the ten-year gas rate contract in controversy, the city applied to the Commission, asking it to fix an emergency rate for this utility. It may not be amiss to say that in the opinion in the above case it is suggested that the ordinance of December 26, 1905, was not a twenty-five-year, but a ten-year, contract, expiring October 26, 1916, by virtue of § 3983, General Code, and that such rate contract becomes operative "upon its acceptance by the public utility."

**NOTE.**

The decision in CINCINNATI v. PUBLIC UTILITIES COMMISSION, ante, 705, is in line with other Ohio decisions in holding that the Constitution and statutes of Ohio have delegated to the municipalities of that state the power to make inviolable contracts as to rates. The power of public service commissions to increase franchise rates is discussed in the annotation to SALT LAKE CITY v. UTAH LIGHT & TRACTION Co. post, 730, and the Ohio rule is discussed in subdivision II. a, 5, of that annotation.

**SALT LAKE CITY et al.**

v.

**UTAH LIGHT & TRACTION COMPANY.***Utah Supreme Court — May 2, 1918.*

(— Utah, —, P.U.R.1918F, 377, 173 Pac. 556.)

**Public service corporation — contract for rates — power to change.**

1. Constitutional prohibition of the granting of a right to construct and operate street railways without the consent of the local authorities does not authorize the local authorities to contract for rates which cannot be changed by the legislature.

[See note on this question beginning on page 780.]

**Contract — acceptance of franchise ordinance.**

2. The acceptance by a street railway company of a franchise ordinance passed by a municipal corporation, granting rights in the city streets and fixing the fares to be charged for service, constitutes a contract between the street railway company and the municipality.

[See 19 R. C. L. 1159.]

**Constitutional law — impairing obligation of contract fixing rates.**

3. In the absence of express constitutional authority to a municipal corporation to contract for rates to be charged for street car service within its limits, a contract with the street car company fixing such rates is not protected against impairment by the contract clause of the Federal Constitution, so as to prevent the state, in its sovereign capacity, from altering the rates fixed.

[See 6 R. C. L. 340 et seq.]

**Statute — construction — protection of commutation rates.**

4. A provision in a statute authorizing a Commission to fix rates of public utilities, that nothing in the act shall be construed to prevent carrying out contracts for free or reduced rates for passenger transportation, founded upon adequate consideration and lawful when made, does not protect from alteration contracts between municipalities and street railway companies for commutation rates upon the railways.

[See 6 R. C. L. 840.]

**Estoppel — commutation rates — establishment of homes.**

5. No estoppel against the changing of commutation rates of a street car company exists because individuals have established homes in reliance upon them.

[See 10 R. C. L. 716.]



**Public Service Commission — opinion — effect.**

6. The opinion filed by the Public Service Commission with its findings, in fixing a rate for a public service corporation, may be considered in determining whether or not the findings are sufficient.

**Courts — power to review decision of Public Service Commission.**

7. The power of the court to review the decision of the Public Service Commission in fixing a rate for a public service corporation is, unless expressly increased by statute, limited to determining whether or not there is any evidence to sustain the finding, whether or not it has exceeded its authority according to law, and whether or not any constitutional rights of the

complaining party have been invaded or disregarded.

**Constitutional law — remedy — interfering with legislative powers.**

8. A constitutional provision that every person shall have a remedy for an injury done does not confer authority upon the courts to interfere with the powers of the legislature.

[See 7 R. C. L. 1049.]

**Public service corporation — right to adequate return — effect of war.**

9. A public utility need not be assured a fair and reasonable return on its investments over and above the actual cost of providing adequate, efficient, and safe service, when the conditions are grossly abnormal on account of a war, and are necessarily temporary.

ORIGINAL PROCEEDING for a writ of review to review an order of the Public Utilities Commission authorizing defendant to increase fares on its street railway system. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William H. Folland, Horace H. Smith, W. W. Little, D. W. Moffat, Walton & Walton, Richard Hartley, and D. A. Skeen, for plaintiffs:

The contracts were lawful when made.

3 Dill. Mun. Corp. 5th ed. § 1325; Tacoma R. & Power Co. v. Tacoma (Wash.) P.U.R.1917D, 905; Interurban R. & Terminal Co. v. Cincinnati, 93 Ohio St. 108, 112 N. E. 186; Public Service Commission v. Westchester Street R. Co. 206 N. Y. 209, 99 N. E. 537; People ex rel. Jackson v. Suburban R. Co. 178 Ill. 594, 49 L.R.A. 655, 53 N. E. 349; Dern v. Salt Lake City R. Co. 19 Utah, 46, 56 Pac. 556.

Municipalities have the right to make binding contracts until superseded.

Clinton v. Worcester Consolidated Street R. Co. 199 Mass. 279, 85 N. E. 510; Oklahoma City v. Oklahoma R. Co. 20 Okla. 1, 16 L.R.A. (N.S.) 651, 93 Pac. 48; Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; Allegheny v. Millville, E. & S. Street R. Co. 159 Pa. 411, 28 Atl. 202.

In those states where the Commission recognizes its right to disregard contracts made between a utility and a municipality, extreme caution is used in doing so.

Re Montgomery Gas Co. (W. Va.) P.U.R.1917C, 924; Re Chesapeake &

P. Teleph. Co. (W. Va.) P.U.R.1917E, 960.

Local authorities may impose reasonable conditions in giving consent to a franchise.

Allegheny v. Millville, E. & S. Street R. Co. supra.

The agreement and consent of the railway company to issue 4-cent commutation tickets may very properly be one of those conditions.

Shreveport Traction Co. v. Shreveport, 122 La. 1, 129 Am. St. Rep. 345, 47 So. 40.

Where a statute confers power upon municipalities to impose terms and conditions upon the granting of franchises, the franchise, when accepted, becomes a binding contract between the parties.

Interurban R. & Terminal Co. v. Cincinnati, 93 Ohio St. 108, 112 N. E. 186; Cleveland v. Cleveland City R. Co. 194 U. S. 516, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Re Mahoning & S. R. & Light Co. (Ohio) P.U.R.1918B, 69.

The right to occupy a street or operate a street railroad in a city in the state of Utah is lodged in the local authorities.

Re New York & N. S. Traction Co. 15 N. Y. Off. Dept. R. 70, P.U.R.1918A, 893; Adamson v. Nassau Electric R. Co. 89 Hun, 266, 34 N. Y. Supp. 1073; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67,

(— *Utah*, —, P.U.R.1918F, 377, 178 Pac. 566.)

18 Sup. Ct. Rep. 732; Public Service Commission v. Westchester Street R. Co. 206 N. Y. 209, 216, 99 N. E. 536; People ex rel. Frontier Electric R. Co. v. North Tonawanda, 70 Misc. 91, 126 N. Y. Supp. 186; Willis v. Rochester, 95 Misc. 686, 159 N. Y. Supp. 882; Roby v. Chicago, 215 Ill. 604, 74 N. E. 768; People ex rel. West Side Street R. Co. v. Barnard, 110 N. Y. 548, 18 N. E. 354; Gaedeke v. Staten Island Midland R. Co. 43 App. Div. 514, 60 N. Y. Supp. 598.

Messrs. John F. MacLane and Bismarck Snyder, for defendant:

The power and duty to fix rates for public utility service are governmental, and cannot be suspended or contracted away. Vested primarily in the state, they may be exercised by municipalities as to service within their limits so long as the state's sovereign right is held in abeyance, but can be asserted at any time by the state through the legislature, or a commission created by it.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Brummitt v. Ogden Waterworks Co. 83 Utah, 285, 93 Pac. 829; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Benwood v. Public Service Commission, 75 W. Va. 132, L.R.A.1915C, 261, 83 S. E. 295; State ex rel. Webster v. Superior Ct. 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; Puget Sound Traction, Light, & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1825, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, L.R.A.1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911; Milwaukee Electric R. & Light Co. v. Railroad Commission, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; Woodburn v. Public Service Commission, 82 Or. 114, L.R.A.1915C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996; Denver & S. P. R. Co. v. Englewood, 62 Colo. 229, — A.L.R. —, P.U.R.1916E, 134, 161 Pac. 151; Pawhuska v. Pawhuska Oil & Gas Co. — Okla. —, P.U.R.1917F, 226, 166 Pac. 1058; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; Collingswood Sewerage Co. v. Collingswood, 91 N. J. L. 20, 102 Atl. 901; People ex rel. New York & N. S. Traction Co. v. Public Service Commission, 175 App. Div. 869, P.U.R.1917B, 957,

162 N. Y. Supp. 405; Re Huntington R. Co. 14 N. Y. Off. Dept. R. 305, P.U.R. 1918A, 249; Beekman v. Third Avenue R. Co. 153 N. Y. 144, 47 N. E. 277; People ex rel. South Shore Traction Co. v. Willcox, 196 N. Y. 212, 89 N. E. 458; State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co. 275 Ill. 555, P.U.R.1917B, 1046, 114 N. E. 325, Ann. Cas. 1917C, 50; Chicago v. O'Connell, 278 Ill. 591, — A.L.R. —, P.U.R.1917E, 730, 116 N. E. 210; Winfield v. Public Service Commission, — Ind. —, P.U.R.1918B, 747, 118 N. E. 531; Idaho Power & Light Co. v. Blomquist, 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916E, 232.

The Public Utilities Act of 1917 vested in the Public Utilities Commission the right to regulate and control all public utility rates, whether prescribed by municipal franchise, private contract, or otherwise. The preserved exceptions of "free and reduced rate" service contracts are permissive to the utility, and not limitations upon the power of the Commission, nor are they applicable to a general commutation rate.

Denver & S. P. R. Co. v. Englewood, 62 Colo. 229, — A.L.R. —, P.U.R. 1916E, 134, 161 Pac. 151; Benwood v. Public Service Commission, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; Collingswood Sewerage Co. v. Collingswood, 91 N. J. L. 20, 102 Atl. 901; Winfield v. Public Service Commission, — Ind. —, P.U.R.1918B, 747, 118 N. E. 531; Pawhuska v. Pawhuska Oil & Gas Co. — Okla. —, P.U.R.1917F, 226, 166 Pac. 1058.

The Public Utilities Commission, in prescribing a rate, acts as an arm of the legislature, a co-ordinate branch of the government. The rate when prescribed is, in effect, a legislative rate, and there is no constitutional right of review of the facts on which the Commission's decision is based, if it has acted within its jurisdiction and authority, and has violated no constitutional right.

Reagan v. Farmers Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 389, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 18 L.R.A. (N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; Railroad Commission v. Central of Georgia R. Co. 95 C. C. A. 117, 170 Fed. 225; Idaho Power & Light Co. v.

Blomquist, 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916E, 282; State ex rel. Rhodes v. Public Service Commission, 270 Mo. 547, P.U.R.1917E, 315, 194 S. W. 287; Bluefield v. Bluefield Waterworks & Improv. Co. 81 W. Va. 201, P.U.R.1918B, 25, 94 S. E. 121; People ex rel. New York & Q. Gas Co. v. McCall, 219 N. Y. 84, P.U.R.1917A, 553, 113 N. E. 795; Interstate Commerce Commission v. Illinois, 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Brogger v. Chicago, St. P. M. & O. R. Co. 137 Minn. 338, 163 N. W. 663, 164 N. W. 368; Thompson v. Railroad Commission, 198 Fed. 694; Whitmore v. Candland, 47 Utah, 77, 151 Pac. 528.

The rate increase awarded in this case was properly and necessarily granted to enable the utility to discharge its duties as a public servant.

Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 18, 140 Am. St. Rep. 1058, 129 N. W. 925; Collingswood Sewerage Co. v. Collingswood, 91 N. J. L. 20, 102 Atl. 903; Northampton, E. & W. Traction Co. v. Public Utility Comrs. — N. J. L. —, 102 Atl. 930; Board of Survey v. Bay State Street R. Co. 224 Mass. 463, 113 N. E. 273; State ex rel. Webster v. Superior Ct. 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 59 L. ed. 1244, P.U.R.1915D, 577, 35 Sup. Ct. Rep. 811; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1184, 29 Sup. Ct. Rep. 492, 15 Ann. Cas. 1034; Omaha v. Omaha Water Co. 218 U. S. 180, 54 L. ed. 991, 48 L.R.A.(N.S.) 1084, 30 Sup. Ct. Rep. 615; Louisville & N. R. Co. v. Railroad Commission, 196 Fed. 800; Re Portland R. Light & P. Co. (Or.) P.U.R.1918A, 751; Re Colorado Springs Light, H. & P. Co. 2 Colo. P. U. C. 23, P.U.R.1916C, 464; Public Service Commission v. Puget Sound International R. & Power Co. (Wash.) P.U.R.1916B, 82; Re Potomac Electric Power Co. (D. C.) P.U.R. 1917F, 70.

Frick, Ch. J., delivered the opinion of the court:

The Utah Light & Traction Company, a corporation owning and operating a street railway system in Salt Lake City and suburbs, hereinafter called defendant, made application to the Public Utilities Commission of Utah, hereinafter

called Commission. The defendant made application to the Commission in due form to be permitted to increase or raise the fares for transportation on its street railway system, for the alleged purpose of meeting the increased costs and expenses incident to the maintenance and operation of its railway system in Salt Lake City and suburbs. The defendant's street railway system extends throughout Salt Lake City, which now has a population of approximately 115,000, and from thence to Murray City, which is located about 5 miles south of Salt Lake City, and from thence south and southwesterly in Salt Lake county to two other small towns. It also owns and operates a branch line running northwesterly from Salt Lake City to the town of Bountiful, which is about 14 miles from Salt Lake City. After the application was filed, Salt Lake City, Murray City, and the other plaintiffs named in the title appeared before the Commission and opposed the application. A hearing was had before the Commission, at which much evidence was produced, both for and against the application. After the hearing was concluded, the Commission in due time rendered an opinion and made findings, whereby it in effect found that, owing to the increase in the cost of labor and material, etc., the defendant was entitled to some relief, although not all of the relief prayed for. The Commission therefore made an order, authorizing the defendant to raise its fares in certain particulars, to which we shall make more specific reference hereinafter. The application of the defendant, the hearing, and the order of the Commission were had and made in pursuance of chapter 47, Utah Laws 1917, p. 128, popularly known as the Utilities Act, which hereinafter will be referred to by that name. The Utilities Act is too long for insertion here. We shall, however, refer to such portions as are deemed material in the course of the opinion. It may be stated here, however, that

the Utilities Act of this state does not differ materially from similar acts in force in many of the other states in the Union. The general jurisdiction of the Commission is defined in § 1, art. 4, of the act in the following words: "The Commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, as defined in this act, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction."

Section 3 of the same article also confers power on the Commission as follows: "Whenever the Commission shall find after hearing that the rates, fares, tolls, rentals, charges, or classifications, or any of them, demanded, observed, charged, or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices, or contracts, or any of them affecting such rates, fares, tolls, rentals, charges or classifications, or any of them are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provisions of law, or that such rates, fares, tolls, rentals, charges, or classifications, are insufficient, the Commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices, or contracts to be thereafter observed and in force, and shall fix the same by order, as hereinafter provided.

"The Commission shall have power to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, and practices, or any number

thereof of any public utility, and to establish, after hearing, new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, or practices, or schedule or schedules, in lieu thereof."

For the purpose of review the act provides for rehearings before the Commission in all cases. Section 15 of article 5, so far as material here, provides that, within thirty days after an application for a rehearing is granted or denied, an application may be made to this court "for a writ of certiorari or review." After specifying how and when the writ shall be issued and returned, that section provides: "The case shall be heard on the record of the Commission as certified to by it."

The section then proceeds: "The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of Utah. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review."

As before stated, the Commission found the facts and made an order in favor of the defendant, and the plaintiffs have applied for and obtained a writ of review as above stated, and the case has been presented to this court upon plaintiffs' objections to the findings and order of the Commission.

We remark that, while the attorney general appeared on behalf of the Commission, as he is required to do by the Utilities Act, yet he has filed no brief or argument in the case.

Twenty-three specific reasons are assigned by plaintiffs why the order made by the Commission should not prevail. It is not necessary to refer to all of those reasons in detail, and we shall now proceed to consider those which come within the powers conferred on this court by the

Utilities Act, and which we deem material to the controversy.

The first, and perhaps the principal, contention made by the plaintiffs is that the Commission, by its order, has set aside and annulled the contracts which were entered into between the defendant and Salt Lake City, and between the defendant and Murray City, wherein the rates of fare that the defendant was authorized to charge and collect were agreed upon and fixed. The contracts just referred to are in the form of ordinances which were duly adopted both by Salt Lake City and Murray City pursuant to article 12, § 8, of the Constitution of this state which was in force at the time the ordinances were passed. The constitutional provision just referred to reads as follows: "No law shall be passed granting the right to construct and operate a street railroad, . . . within any city or incorporated town, without the consent of the local authorities who have control of the street or highway proposed to be occupied for such purposes."

The ordinances or contracts will hereinafter be referred to as the franchise ordinances.

In this connection we at this time also desire to call attention to two other constitutional provisions that are deemed material, namely, article 12, § 12, which provides: "All railroad and other transportation companies are declared to be common carriers, and subject to legislative control;" and to § 15 of the same article which provides: "The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, for correcting abuses, and preventing discrimination and extortion in rates of freight and passenger tariffs by the different railroads, and other common carriers in the state, and shall enforce such laws by adequate penalties."

In view, therefore, that § 8 of the article of the Constitution referred to prohibits the legislature from

passing any law by which any street railway may be constructed or operated in the cities and towns of this state without the consent of the local authorities, plaintiffs contend that the authorities of the cities and towns have the exclusive right and power to impose the conditions upon which street railways may be constructed and operated in cities and towns, and that the right to determine and fix the rates of fare is necessarily implied in the foregoing section. In the franchise ordinances which were adopted by both Salt Lake City and Murray City, and the terms of which were accepted by the defendant, what is termed the "regular fare" was fixed at 5 cents for one continuous ride, and in addition to such fare the defendant also agreed as follows: "Said grantee further hereby agrees that it will issue commutation tickets of fifty fares for \$2, the holders of which tickets shall have the same transfer privileges accorded to passengers paying regular fare, and shall also issue to students of public schools commutation tickets of fifty fares for \$1.50 with transfer privileges as aforesaid, good only to and from school attended by such students, and good only on days when school is in regular session between the hours of 7:30 o'clock A. M. and 5:30 o'clock P. M. City policemen and firemen in uniform shall be entitled to free passage on regular cars."

Transfer rights were also provided for in the franchise ordinances.

The defendant, in connection with other privileges, accepted all of the provisions contained in the foregoing ordinances, and has operated its street car system in conformity therewith.

The Commission, in its order, relieved the defendant from issuing the so-called \$2 commutation tickets, and authorized it to charge and collect a fare of 5 cents for each continuous ride in Salt Lake City and to charge a 5-cent fare for each zone in certain zones outside of the city. The Commission also changed the

rate somewhat in other particulars on defendant's system operated outside of Salt Lake City and Murray City, all of which rates had been fixed in the franchise ordinances. In view, however, that a decision upon the so-called \$2 commutation tickets settles all questions affecting the increase of rates, it is not necessary to set forth the other changes that were made by the Commission.

The order of the Commission increasing the fares as aforesaid presents three questions: (1) Did the passing of the franchise ordinances fixing the fares, and their acceptance by the defendant, constitute a contract between Salt Lake City and the defendant, and between Murray City and the defendant? (2) If the franchise ordinances constituted contracts, was it within the power of the legislature to authorize the Commission to change the fares? (3) Does the constitutional provision by which the city authorities are given the exclusive right to permit or to refuse permission to street railway companies to construct and operate street cars within the cities of this state prevent the state, through its legislature, from exercising its sovereign prerogative to regulate and change the fares fixed in the franchise ordinances?

In view that the franchise ordinances, after acceptance by the defendant, possess all the elements of a contract, and that such ordinances are generally regarded by the courts as constituting contracts binding as between the parties, we, for the purposes of this decision, shall treat them as contracts binding alike on Salt Lake City and on Murray City and on the defendant, to the extent hereinafter stated.

Contract—  
acceptance of  
franchise  
ordinance.

The answer to the first question must therefore be in the affirmative.

The second proposition, for the reasons herein stated, in our judgment, must also be answered in the affirmative, while the answer to the

third question, under the great, the overwhelming, weight of authority, must be answered in the negative. The second and third questions, however, logically blend, and for that reason we shall treat them together.

We may as well, at this point, consider the contention of plaintiffs that by reason of the constitutional provision above referred to, which prohibits the legislature from interfering with the city authorities in authorizing the construction and operation of street railways, the legislature is likewise powerless to authorize the Commission to interfere with any rates that have been fixed by the franchise ordinances, as before stated. To do that, plaintiffs insist, is not only "impairing the obligation of contracts" (which is prohibited by both the Federal and state Constitutions), but amounts to a complete nullification of such contracts. This objection has often been made in cases where either the city or the street car company has sought relief from a rate fixed by franchise ordinances like those in question here. It should be observed, however, that where the controversy has arisen between the contracting parties merely, and in ordinary actions or proceedings, the courts have usually compelled compliance with the provisions of the franchise ordinances, treating them as contracts. Where, however, as here, the application was made to utilities commissions in pursuance of a legislative act, the courts have, with few exceptions, held that a constitutional or statutory provision prohibiting the legislature from passing laws authorizing the construction and operation of street railways in cities without the consent of the local authorities does not authorize such authorities to fix rates which may not be changed by the legislature or by a utilities commission created for that purpose. In other words, it is universally held that the regulation

Public service  
corporation—  
contract for  
rates—power  
to change.

and fixing of rates is a governmental function, that is, a legislative function, which will not be deemed to have been surrendered by the sovereign state unless it has been done in clear and unequivocal terms. A mere cursory reading of § 8 of the Constitution, which we have before quoted, shows that no express right is conferred upon the local authorities of this state to enter into any contract respecting the fixing of rates. True it is that, in determining the conditions upon which street railways may be constructed and operated within the cities, the local authorities may determine the fares that may be charged and collected. The authority to do that is, however, merely implied, and there is nothing in the Constitution which prohibits the legislature from exercising its prerogative in changing the rates of fare in case they are found to be unreasonable, unfair, or oppressive as against the public, on the one hand, and unfair, or unjust, or confiscatory as against the railway company, upon the other. Such right is an attribute of sovereignty, and is always reserved to the state unless expressly delegated or surrendered. Whether the right and corresponding duty of the state to regulate rates can be surrendered at all is not before us now, and as to that we express no opinion. It is manifest that the constitutional provision does not, in express terms, delegate or surrender such a power to the city authorities, and it is equally manifest that there is nothing in the provision from which such a power is necessarily implied.

In this connection it must also be remembered that by another constitutional provision, which we have also quoted above, the duty of passing laws by which maximum rates to be charged by all common carriers shall be established is especially imposed on the legislature. The right to regulate the rates or charges demanded by common carriers was, therefore, not only reserved to the state when acting in its governmental capacity, but the duty to reg-

ulate and fix maximum rates or charges is expressly imposed on the legislature without any exceptions. In passing the Utilities Act the legislature, therefore, merely complied with the constitutional mandate, and the Commission is the mere arm of the legislature, through which the constitutional mandate aforesaid is made effective.

All of the foregoing propositions are exhaustively considered, and are sustained by the following authorities: *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *Benwood v. Public Service Commission* (1914) 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; *State ex rel. Webster v. Superior Ct.* (1912) 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861; *Ann. Cas.* 1918D, 78, approved in *Puget Sound Traction Co. v. Reynolds* (1917) 244 U. S. 574, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705; *Milwaukee Electric R. & Light Co. v. Railroad Commission* (1913) 153 Wis. 592, L.R.A. 1915F, 744, 142 N. W. 491, *Ann. Cas.* 1915A, 911, affirmed in 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; *Woodburn v. Public Service Commission* (1916) 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, *Ann. Cas.* 1917E, 996; *Denver & S. P. R. Co. v. Englewood* (1916) 62 Colo. 229, — A.L.R. —, P.U.R. 1916E, 184, 161 Pac. 151; *Pawhuska v. Pawhuska Oil & Gas Co.* (1917) — Okla. —, 166 Pac. 1058; *Collingswood Sewerage Co. v. Collingswood* (1918) 91 N. J. L. 20, 102 Atl. 901; *Northampton E. & W. Traction Co. v. Public Utility Comrs.* (1918) — N. J. L. —, 102 Atl. 930; *People ex rel. New York & N. S. Traction Co. v. Public Service Commission* (1916) 175 App. Div. 869, P.U.R.1917B, 957, 162 N. Y. Supp. 405; *Re Huntington R. Co.* 14 N. Y. Off. Dept. R. 305, P.U.R. 1918A, 249; *State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co.* (1916) 275 Ill. 555-572, P.U.R.1917B, 1046, 114 N. E. 325, *Ann. Cas.* 1917C, 50; *Chi-*

(— *Utah*, —, *P.U.R.*1918F, 377, 178 *Pac.* 556.)

cago v. O'Connell (1917) 278 Ill. 591, — A.L.R. —, *P.U.R.*1917E, 730, 116 N. E. 210; Winfield v. Public Service Commission (1918) — Ind. —, *P.U.R.*1918B, 747, 118 N. E. 531.

In *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, *L.R.A.* 1915C, 287, 120 *Pac.* 861, *Ann. Cas.* 1913D, 78, in the course of the opinion, it is said: "The power to fix rates, if exercised by a city, unless that power is clearly expressed by legislative grant, is in the nature of a license, and is revocable at the will of the legislature when, in its judgment, the common good demands its reassertion. The state does not act by contract, but by grant, license, or reservation. It is not usually bound by the contracts of others when exercising its police power. So jealous is it of the sovereignty of its police power that, in the case of the Home Teleph. & Teleg. Co. v. Los Angeles, the Supreme Court of the United States held that a grant by the legislature of the state of the right 'to fix and determine charges for telephone, telephone service, and connections,' did not carry with it the right to agree upon rates. In other words, as that court and others have universally held, the delegation of power must be 'clear and unmistakable.' In dealing with the sovereign power of the people, nothing can be left to inference. The court accordingly said that, the power to fix and determine rates being within the police power, the city might establish rates, but that it could not, under the delegation quoted, contract so as to bind itself or the other party as against the exercise of the police power. In principle its holding could not have been otherwise, for the strength of the police power lies in the fact that it is not a subject of contract; that it cannot be bartered or bargained away."

In *Puget Sound Traction, Light, & P. Co. v. Reynolds*, 244 U. S. 574, 61 L. ed. 1325, *P.U.R.*1917F, 57, 37 *Sup. Ct. Rep.* 705, the court uses the following language: "Assuming

(what is not clear) that the provision in the franchise ordinance respecting the rates of fare and the transfer privilege are contractual in form, still it is well settled that a municipality cannot, by a contract of this nature, foreclose the exercise of the police power of the state unless clearly authorized to do so by the supreme legislative power."

In *Milwaukee E. R. & Light Co. v. Railroad Commission*, 153 Wis. 592, *L.R.A.*1915F, 744, 142 N. W. 491, *Ann. Cas.* 1915A, 911, the court, in the course of the opinion, says: "Assuming that under this language a city might make a contract with a public utility, fixing rates or tolls for a definite period, which would bind the city itself and prevent any change of rates by the city authorities during the contract period, the question still remains whether the section can be construed as giving the city authorities any power to bargain away the sovereign right of the state to regulate fares and tolls and lower them, if found to be excessive. If this question were a new one in this state, we should entertain no doubt that it should be answered in the negative, but we cannot regard it as new."

While it is true that two of the justices dissented from the majority opinion in the foregoing case, yet it is equally true that the case was taken to the Supreme Court of the United States, where the opinion of the majority was affirmed.

In the case of *Woodburn v. Public Service Commission*, 82 Or. 114, *L.R.A.*1917C, 98, *P.U.R.*1917B, 967, 161 *Pac.* 391, *Ann. Cas.* 1917E, 996, the supreme court of Oregon, in passing on the question here involved, in the course of the opinion, said: "The right of the state to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with a public service company upon the terms of a franchise. The exercise of a power to fix rates by agreement does not include or embrace any portion of the power to fix rates



by compulsion. When Woodburn granted the franchise to the telephone company, the city exercised its municipal right to contract, and it may be assumed that the franchise was valid and binding upon both parties until such time as the state chose to speak; but the city entered into the contract, subject to the reserved right of the state to employ its police power and compel a change of rates, and when the state did speak, the municipal power gave way to the sovereign power of the state."

In all of the cases we have cited similar language is used, and in nearly all of them constitutional or statutory provisions conferring the authority on the local authorities of cities to grant or refuse permission to construct and operate street railways in such cities, similar to our own, were construed and passed on, and in all of those cases it is held that those provisions do not foreclose the state from changing the rates of fare agreed upon in the franchise ordinances. We shall refrain from quoting further from the decided cases.

We desire to add, however, that this court, in the case of *Brummitt v. Ogden Waterworks Co.* 33 Utah, 289, 93 Pac. 829, which was decided in 1908 and before practically all of the foregoing cases were decided, and before the legislature of this state passed a law for the purpose of regulating rates, announced the doctrine laid down in all of the foregoing cases. In the *Brummitt* Case the constitutional provision in question here was, however, not applicable, and hence was not considered.

Against the foregoing array of authority plaintiffs have cited and rely upon the following cases: *Allegheny v. Millville, E. & S. Street R. Co.* 159 Pa. 411, 28 Atl. 202; *Pittsburgh's Appeal*, 115 Pa. 4, 7 Atl. 778; *Plymouth Twp. v. Chestnut Hill & N. R. Co.* 163 Pa. 181, 32 Atl. 19; *People ex rel. New York v. New York R. Co.* 217 N. Y. 310, 112 N. E. 49; *Adamson v. Nassau Electric R. Co.* 89 Hun, 261, 34 N. Y. Supp.

1073; *People ex rel. Frontier Electric R. Co. v. North Tonawanda*, 70 Misc. 91, 126 N. Y. Supp. 186; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Public Service Commission v. Westchester Street R. Co.* 206 N. Y. 209, 99 N. E. 536; *Gaedeke v. Staten Island Midland R. Co.* 43 App. Div. 514, 60 N. Y. Supp. 598; *People ex rel. South Shore Traction Co. v. Willcox*, 133 App. Div. 556, 118 N. Y. Supp. 248, and *Re New York & N. S. Traction Co.* 15 N. Y. Off. Dept. R. 70, P.U.R. 1918A, 893.

Every one of the cases last above cited, however, is clearly distinguishable from the cases we have first above referred to, except the last one. That case squarely supports plaintiffs' contention that the franchise ordinances constituted contracts which may not be altered in any material part except by the consent of the parties in interest. That case originated, however, before the Public Service Commission of the state of New York, and therefore merely represents the views of the Commission. While no doubt the decision is entitled to respectful consideration, yet it is not authority, since it does not emanate from a court of last resort. The case of *Re Huntington R. Co.* 14 N. Y. Off. Dept. R. 305, P.U.R. 1918A, 249, also originated before the Public Service Commission of the second district of the state of New York, and is a decision of that Commission. That decision is, however, squarely in opposition to the decision from the Commission of the first district, and is, therefore, in harmony with the great weight of authority. Many, if not all, of the cases relied on by plaintiffs are also cited and relied on in the opinion of the Public Service Commission of the first district of New York. In many of those cases it is held that franchise ordinances, like those in question in the case at bar, constitute contracts which are binding and enforceable between the parties. The further question was, however,

not decided, whether such contracts are also binding upon the state in its sovereign capacity. Indeed, in many of the cases it is clearly enough intimated that if that question had been presented for decision the result might have been different.

We have no difficulty in reconciling the decisions in those cases. It is now settled law that, so long as the state does not interfere, the rates agreed upon between the cities and the street railway companies in the franchise ordinances are binding and enforceable. Neither party, without the consent of the other, may disregard any rate that is agreed upon between them. Either party may, however, make application to the utilities commission, if one is created by legislative enactment, for the purpose of being relieved from the rates fixed in the franchise ordinance; and if it be made to appear that the rates under existing conditions have become unfair or unreasonable, in that they are either too high or too low, the Commission may establish a rate which will again respond to the existing conditions, and may so adjust it as to make it fair, just, and reasonable, both to the railway company and to the public. In doing that, the constitutional rights of the

**Constitutional law—impairing obligation of contract fixing rates.**

parties are neither invaded nor disregarded, for the simple reason that when the original

rate was fixed by agreement it was still subject to modification at any time by the sovereign power of the state, providing the fare as fixed is found to be unfair and unreasonable. Every contract fixing rates, entered into between the cities of this state and street railway companies, both under the Constitution and the statute, is always subject to change by the paramount power of the state, and the right of the state to so change the rates continues, unless and until the legislature has in express terms surrendered the power or delegated it to some other arm of the state.

Plaintiffs' contention, therefore, that the rates of fare fixed by the franchise ordinances should have been affirmed by the Commission, upon the ground that such rights were contractual, cannot prevail, and must be overruled.

Plaintiffs, however, also insist that the commutation tickets are not within the purview of the Utilities Act, but are excluded therefrom by a certain exception found in subdivision "c" of § 5 of article 3 of that act. It is there provided: "Nothing in this act contained shall be construed . . . to prevent the carrying out of contracts for free or reduced-rate passenger transportation or other public utility service heretofore made, founded upon adequate consideration and lawful when made."

The foregoing provision is found among the exceptions in favor of employees and respecting agreements with other utilities. While the language of the exception is not as clear as it could

have been made, yet it is manifest that it was not intended to refer to

**Statute—construction—protection of commutation rates.**

the rates fixed in franchise ordinances. In our opinion the manifest purpose of the legislature was to prevent an injustice like that in the case of Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265, in which case life passes were issued to Mottley and his wife upon a valuable consideration received by the railroad company. In that case the Supreme Court of the United States held that, under the act of Congress of February 4, 1887, chap. 104, 24 Stat. at L. 379, as subsequently amended (Comp. Stat. 1916, §§ 8563 et seq., 4 Fed. Stat. Anno. 2d ed. pp. 337, 359), common carriers were prohibited from transporting either freight or passengers except at the regular rates, which had to be paid in cash. Under that decision, therefore, the Mottleys were prohibited from riding on their passes, al-

though they had paid for them before the congressional act had been passed. Moreover, it sometimes happens that passes are issued in payment for right of way and other privileges granted by the owners of land to common carriers. Under the Mottley decision, however, all such passes would be void, regardless of the consideration that the owners had paid to the common carriers. The legislature, therefore, very properly and, as we think, wisely, excepted such cases from the operation of the Utilities Act in so far as intrastate business is concerned. That is all that was attempted, and all that was done, by the adoption of the exception aforesaid. This contention must, therefore, likewise fail.

It is, however, further contended that, because the franchise ordinances provided for the so-called commutation tickets, and in reliance on them many persons have built homes in the suburbs of Salt Lake City and along defendant's line of street railway outside of Salt Lake City, for that reason the defendant should be held to be estopped from increasing the rates of fare without the consent of those persons. It needs no argument to

**Estoppel—  
commutation  
rates—  
establishment  
of homes.**

show that the elements of estoppel are lacking in this case. A conclusive

answer to the contention, however, is that anyone who purchased commutation tickets and who built a home did so subject to the right of the state to change or alter the fares fixed in the franchise ordinances, in case it was found that such fares were unfair or unreasonable. Let us assume, however, that the rate fixed in the franchise ordinance passed by Salt Lake City (which, it seems, is for the term of fifty years) in the course of ten or fifteen years should become unreasonably high, would those same persons then consent that the defendant might continue to charge and collect a rate for the full period of fifty years, although

such rate, by reason of unforeseen conditions, had become grossly unfair and unjust? Moreover, the public, as well as the persons living along the line aforesaid, are directly interested in maintaining an adequate, efficient, and safe service on the part of the defendant. In order to maintain such a service the rates of fare must be sufficient to pay adequate wages to the defendant's employees and sufficient to defray the other incidental costs and expenses necessary to operate the street railway system. When the rates no longer are sufficient to produce adequate revenue to meet the costs of giving an adequate, efficient, and safe service and the service for that reason deteriorates, it is the man with limited means, and the wage-earner, neither of whom has the means to provide private transportation, who suffer first. They will be first affected, and will sustain the greatest inconvenience, if not loss. While it is true that under such circumstances all will suffer more or less, yet the class first named will necessarily suffer most. It is the duty of the state, therefore, to see that the rates continue to be fair and just both to the public and to the street railway company. If plaintiffs' contention, therefore, that the defendant be estopped, should prevail, it, in the long run, might result in far greater injury to the persons now insisting upon the estoppel than will the increased rate. In no event, however, can it be held that the state is estopped from regulating the rates, whenever it becomes necessary to do that so as to make them reasonable and fair, unless the state has surrendered that right, as before stated.

From what we have said we do not wish to be understood as either affirming the rate fixed by the Commission or disapproving it. For the reasons hereinafter stated it will appear that we do not possess the power to review the Commission's findings in respect of whether a certain rate is reasonable or otherwise.

The plaintiffs, however, also contend that the evidence is insufficient to sustain the findings and order of the Commission by which the rates were found to be inadequate and were increased, and, further, that the findings are in and of themselves insufficient. Referring to the last objection first, we are of the opinion that, in view of the elaborate opinion of the Commission, which was filed with the findings, the findings are sufficient. While it is true that the Utilities Act expressly requires the Commission to make findings, and while it is also true that the Commission should be careful to make proper findings respecting the material, ultimate facts upon which an order is based, yet we cannot see wherein the plaintiffs, or anyone else, could have been, or can be, benefited if the findings had been far more specific. When the findings and the opinion filed by the Commission are considered together, as in this case we think they should be, we are of the opinion that the objection that the findings are insufficient is not tenable, and hence that objection must fail.

It is, however, earnestly insisted that the evidence is insufficient to sustain the finding that the rates fixed by the franchise ordinances are unreasonably low, and are no longer sufficient to enable the defendant to furnish adequate and efficient service to meet the public necessities. Notwithstanding that it was suggested at the hearing that, in view of the limited powers that the Utilities Act has conferred on this court, and that for that reason we are prohibited from passing on the evidence or upon whether the Commission should have adopted some other rate, counsel have filed elaborate briefs on the subject. After a careful examination of the authorities we are more than ever confirmed in the opinion that all that we can review in cases of this kind is whether there is any evidence to sustain the findings of the

Commission, whether it has exercised its authority according to law, and whether any constitutional rights of the complaining party have been invaded or disregarded. In view that the Commission is merely an arm of the legislature through whom that body acts in matters of this kind, but a moment's reflection convinces anyone that this court may not interfere, except for the reasons just stated.

If interference were extended beyond those limits, it would, in effect, be an interference by this court with the lawmaking power of this state. It requires no argument to show why that may not be done. We have no more right to interfere with the duties and powers of the legislature than that body has to interfere with the powers and duties imposed upon us as a court. True, the legislature could, perhaps, have given us somewhat greater powers to pass upon the findings and orders of the Commission. Such has been done in some other jurisdictions. The legislature of this state has, however, not seen fit to clothe this court with greater powers of review, and we have neither the inclination nor the right to exercise a power which is neither inherent nor properly conferred. It is also true, as plaintiffs' counsel suggest, that the Constitution of this state provides that the courts shall always be open, and that "every person, for an injury done to him or in his person, property, or reputation, shall have remedy by due course of law which shall be administered without denial or unnecessary delay." Article 1, § 11.

That provision, however, applies only to judicial questions. It is not meant thereby that this court may reach out and usurp powers which belong to another independent and co-ordinate branch of the state government. The power conferred upon the legislature is su-

Courts—power to review decision of Public Service Commission.

Public Service Commission—opinion—effect.

Constitutional law—remedy—interfering with legislative powers.

preme respecting the regulation and establishing of rates. We may not interfere with or review any legislative act unless some judicial question is presented for review. Unless a rate established by the Commission is clearly oppressive on the one hand or confiscatory on the other, no judicial question is presented. So far, therefore, as the questions are judicial, the Utilities Act has conferred power upon this court, and in so far as the acts of the Commission are properly administrative, or in their nature legislative, the power has been wisely and properly withheld from us. Whether there is any substantial evidence to support any finding of fact that the Commission may make is a judicial question, and may be determined by this court. A mere cursory reading of the record, however, discloses that there is, at least, some substantial evidence in support of every essential fact found by the Commission. While it is true that in this case plaintiffs contend that the rates, as fixed by the franchise ordinances, provide sufficient revenue to enable the defendant to provide an economical, adequate, and safe service, and to yield a fair return on its investments, yet it is equally true that the defendant insists to the contrary, and the Commission has so found. The evidence in support of both contentions was submitted to, considered by, and passed on by the Commission, and, as the act provides, its findings are conclusive upon us. The record, however, discloses that the defendant always has obtained an income over and above the cost of operation and maintenance of its railway system. The only matter, therefore, that now divides the parties is that, owing to the increased cost of labor and material, the present rates no longer yield to defendant a reasonable net return on its investments. The parties also differ with respect to the amount invested and what would amount to a reasonable return on the investments. The Commission has, however, fully considered and

passed on those questions. Since we are powerless to review the findings of the Commission in that respect, it is of no consequence what conclusion the writer, or, for that matter, this court, might arrive at upon those questions. It may, however, not be improper to suggest that, while the Commission in establishing and fixing rates is invested with great powers, it also assumes great responsibilities. It is, therefore, of the utmost importance that the Commission should proceed with great care in changing rates. While caution in that regard should always be exercised, yet, at this time, when the whole world is engaged in a most destructive war and every condition is grossly abnormal, to do so is of special importance. While, generally speaking, every utility that serves the public must be allowed a fair and reasonable return on its investments, over and above the actual cost and expense of providing adequate, efficient, and safe service when economically managed, yet it is not true that such a return must be assured to every utility when, as now, the conditions are grossly abnormal on account of the war, and while such conditions are necessarily temporary. At such a time and under such conditions every individual and every enterprise must bear his or its share of the burden incident to the great conflict, and while rates should be made adequate to permit every public utility to pay a reasonable wage to its employees and to provide adequate, safe, and efficient service, yet rates should not be so high as to become oppressive, and they should be so regulated as to be fair both to the utility and to the public. A careful reading of the opinion filed by the Commission has, however, convinced us that in allowing the moderate increase in the present instance the Commission has kept in mind the foregoing propositions. If the Commission has not done so to

Public service  
corporation—  
right to ade-  
quate return—  
effect of war.

the full extent herein outlined, yet it has not entirely overlooked the propositions.

After the foregoing was written counsel for defendant called our attention to the case of *Quinby v. Public Service Commission*, 223 N. Y. 244, ante, 685, P.U.R.1918D, 30, 119 N. E. 493. That case was decided on the 5th day of April, 1918, by the New York court of appeals. The decision is by a divided court, the chief justice and another justice dissenting, while another justice concurs specially. The decision is, however, based upon the narrow ground that, in the opinion of the majority, the New York Utilities Act (Consol. Laws, chap. 48) has not conferred the power upon the Public Service Commission of New York to raise the rates that were agreed to between cities and street railway corporations. That decision, therefore, can have but little if any effect upon what the decision should be in this case. At all events it can have no controlling influence. Indeed, in view that every proposition that we contend for herein, except the one stated, is expressly approved in the majority opinion, the decision is really in harmony with all that we have decided. We here call attention to the decision, however, for the express purpose of avoiding any misunderstanding respecting the two cases of *Re Huntington R. Co.* 14 N. Y. Off. Dept. R. 305, P.U.R.1918A, 249, and *Re New York & N. S. Traction Co.* 15 N. Y. Off. Dept. R. 70, P.U.R.1918A, 893, the first one being cited in this

opinion by us in support of our views, and the second one also being referred to herein in support of plaintiffs' contentions. While the decision in *Re Huntington R. Co.* is overruled upon the ground stated, yet none of the propositions decided in *Re New York & N. S. Traction Co.* is sustained. Upon the contrary, every proposition decided in that case is tacitly, at least, overruled. The late New York case is, therefore, an authority on the main propositions decided here. We make this statement for the reason that in our Utilities Act the very ground on which the New York decision is based is obviated, as will appear from an examination of the powers that are conferred by that act upon the Commission, a part of which we have quoted herein.

In concluding this opinion we desire to express our appreciation to counsel for both sides for the able and helpful briefs and arguments presented by them. We also desire to extend our thanks to counsel for defendant for having called our attention to the late New York case. We especially appreciate an act of that kind, since this court has but one purpose, and that is to decide every case in accordance with the declared law upon the questions presented for decision.

For the reasons stated, the findings and order of the Commission are affirmed at plaintiffs' costs.

McCarty, Corfman, Thurman, and Gideon, JJ., concur.

## ANNOTATION.

### Power of public service commission to increase franchise rates.

- I. Introductory, 730.
- II. Power of state itself to increase franchise rates:
  - a. As affected by power of city to make inviolable contracts as to rates:
    - 1. In general, 731.
    - 2. Power not to be implied, 732.
    - 3. Effect of control of municipality over streets, 734.
    - 4. Distinction between power of municipality to make rates for itself and power to make rates for its inhabitants, 735.

#### I. Introductory.

The question whether a public service commission has power to increase franchise rates is, in reality, twofold: First, has the state itself power to increase such rates; if so, has such power been delegated to the public service commission. The first of these questions is one of fundamental constitutional law. May rates fixed by a franchise be increased without impairing the obligation of contracts, contrary to the constitutional guaranty? The second is merely one of statutory construction, that is, conceding that the state itself has power to increase such rates, has such power been delegated to the public service commission, by the statute creating the commission.

As a matter of practice the answer to the constitutional question is immaterial, provided the second question be answered in the negative. That is, if the commission, being merely a creature of statute, has not, by the statute creating it, been given power to increase franchise rates, it is immaterial whether the state itself has such power or not. But as in many cases it is assumed that the commission has any power which the state itself possesses in the premises, the constitutional question will be discussed first.

It is perhaps needless to say that no question of impairment of contract obligations, because of action by a public service commission in increasing rates, can arise in any case un-

#### II. a—continued.

- 5. Rule in Ohio and Virginia, 736.
- b. Basis of power of state to increase franchise rates:
  - 1. In general, 738.
  - 2. Reserve and paramount police power of state, 738.
  - 3. Power of state, as principal, to waive rights of city, its agent, 742.
- III. Delegation of power of state to commission, 744.

less the franchise rates were established by a contract valid as between the parties.

Thus, if the franchise or ordinance fixing the rate was invalid in itself, no question of impairment of contract obligations could arise; as, for instance, in *Re Joplin Waterworks Co.* (1915) 2 Mo. P. S. C. 235, P.U.R.1915C, 125, the ordinance was not valid because it had not been properly passed.

And the rule has been laid down in Pennsylvania that a stipulation in a franchise as to rates is not binding, where it is for an unlimited time. *Turtle Creek v. Pennsylvania Water Co.* (1914) 243 Pa. 415, 90 Atl. 199; *Bellevue v. Ohio Valley Water Co.* (1914) 245 Pa. 114, 91 Atl. 236. In both of these cases the city sought to enjoin a proposed increase in rates by the utility. In its opinion in the *Bellevue Case*, the supreme court, at page 117, in referring to *Turtle Creek v. Pennsylvania Water Co.* (Pa.) *supra*, says: "We did decide in that case that a contract of this kind, unlimited by its terms, and hence indeterminate as to time, could not be enforced indefinitely, and must give way to the general policy of the law under which the legislature created a special tribunal to pass upon and determine questions relating to the reasonableness of rates charged by public service corporations. The learned court below in the present case very properly followed the decision in that case, and

held that the borough of Bellevue could not enforce, through the courts, a compliance with the rates thus established."

Following the above cases, the Pennsylvania Commission held that an advance of the rates of a public utility may be made although a franchise ordinance provides, among other things, that the municipality shall have the right to purchase the utility at specified times, and that the annual rates to private consumers shall not exceed those specified therein; since, in this form, the contract is indeterminate and uncertain in length of time, so that the company is not bound to maintain the rates therein provided for. *Mt. Union v. Mt. Union Water Co.* (1915; Pa.) P.U.R.1915D, 1.

Again, if the municipalities have no power whatever, either express or implied, to fix rates, franchise rates need not be considered by the commission. It has been so held in Maine: *Re Guilford Water Co.* (1918; Me.) P.U.R. 1918C, 916; *Re Cumberland County Power & Light Co.* (1918; Me.) P.U.R. 1918C, 937.

So, too, no question of impairment of contract obligations can be raised by the city, where the power of the state to modify the authority of the city is expressly reserved to the state.

Thus, the consent of a New Jersey municipality to the construction of a sewerage system by a public utility company, specifying maximum rates, does not interfere with the rate-making power of the commission, since such consent is not a contract nor even the conditional grant of a franchise, where the legislature itself has granted the right to construct a system, and merely suspended it until the consent of the municipality has been obtained. *Collingswood Sewerage Co. v. Collingswood* (1918) — N. J. —, P.U.R.1919B, 585, 105 Atl. 209.

So, too, no unconstitutional impairment of contract results, so far as the city is concerned, from a change by the state of rates fixed by a franchise granted by the municipality to a telephone company, if the municipal charter is, by its terms, subject to the general laws of the state. *State ex rel.*

*Webster v. Superior Ct.* (1912) 67 Wash. 37, L.R.A.1916C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78.

And even if the provision in the Missouri statute, requiring the consent of local authorities before granting permit for the construction of a street railway in any city, town, etc., is to be considered as a grant of power to impose or fix rates by agreement with the utility, such franchise contract was necessarily accepted, subject to the provisions of the Constitution reserving the rate-making power to the state and requiring the charter and ordinances of the city to conform always to the laws of the state. *Re United R. Co.* (1918; Mo.) P.U.R. 1918D, 392.

And a city, even if authorized so to contract as to prevent the state from exercising its power of regulation, does not exercise this right by granting a franchise fixing rates, subject, in terms, to all laws that may be enacted by the legislature for the regulation of such rates. *Winfield v. Public Service Commission* (1918) — Ind. —, P.U.R.1918B, 747, 118 N. E. 531.

## II. *Power of state itself to increase franchise rates.*

### a. *As affected by power of city to make inviolable contracts as to rates.*

#### 1. *In general.*

In a number of cases, a franchise rate contract has been held to be a valid contract which the utility of itself cannot ignore, but the power of the commission to increase the rates fixed thereby was not at issue. Cases of this character are not within the scope of this note, which deals merely with the power of the state, acting through a public service commission, to increase franchise rates.

Conceding that the franchise contract is valid as between the utility and the municipality, the next step in the reasoning is to determine whether the city has the power to make contracts as to rates which are beyond the power of the state itself to change.

It seems settled that it is not beyond the power of the state to grant to a municipality the power to make irrev-



ocable contracts as to rates. Thus, the United States Supreme Court in *Home Teleph. & Teleg. Co. v. Los Angeles* (1908) 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50, said: "The power to fix, subject to constitutional limits, the charges for such a business as the furnishing to the public of telephone service, is among the powers of government, legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation." The court further said: "It has been settled by this court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates."

So, in *Re Lincoln Water Co.* (1919; Me.) P.U.R.1919B, 752, the Maine Commission said that it is competent for the state not to abdicate or destroy the power to control subjects falling within its police power, but to delegate to one of its political subdivisions irrevocably the power to exercise it, for and to the exclusion of the entire state. The Commission said: "The power cannot be destroyed, but it can, by appropriate enactment, be lodged in other agencies, and if so lodged, the action of such agency may be binding upon the state."

It is possible, however, that the grant by the state of rate-making power to a municipality may be prohibited by the Constitution of the state. Thus, the Oklahoma supreme court has said that while it has been held that, in well-defined cases, a surrender by contract of the power of government may be made by legislative authority, such a surrender cannot be made where prohibited by the Constitution, and the Oklahoma Constitution expressly prohibits the surrender by the legislative branch of the state government, of the "power to regulate the charges for public service." *Pawhuska v. Pawhus-*

*ka Oil & Gas Co.* (1917) — Okla. —, P.U.R.1917F, 226, 166 Pac. 1058.

The Pennsylvania supreme court has also based the power of the state to increase contract rates upon the constitutional provision that the exercise of the police power of the state shall never be abridged. *Leiper v. Baltimore & P. R. Co.* (1918) 262 Pa. 328, P.U.R.1919C, 397, 106 Atl. 551.

Again, the Missouri supreme court, in *State ex rel. Sedalia v. Public Service Commission* (1918) — Mo. —, P.U.R.1919C, 507, 204 S. W. 497, in discussing the effect of the provision in the Constitution of Missouri, that the exercise of the police power of the state shall never be abridged, said: "Under it the sovereign police power of the state is preserved intact, irrespective of contracts with reference to rates for public service. Under it, no contract as to rates will stand as against the order of the Public Service Commission for reasonable rates, whether such reasonable rates be lower or higher than the contract rates."

## 2. Power not to be implied.

But the grant to a municipality of the power to make any inviolable contract as to rates must be made in clear and unequivocal terms, and the intent to make such a delegation of power must clearly and unmistakably appear, and will not be implied.

*United States.—Home Teleph. & Teleg. Co. v. Los Angeles* (1908) 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

*Colorado.—Denver & S. P. R. Co. v. Englewood* (1916) 62 Colo. 229, — A.L.R. —, P.U.R.1916E, 134, 161 Pac. 151.

*Idaho.—Sandpoint Water & Light Co. v. Sandpoint* (1918) 31 Idaho, 498, L.R.A.1918F, 1106, P.U.R.1918F, 737, 173 Pac. 972.

*Illinois.—Re Mississippi Valley Teleph. Co.* (1916) P.U.R.1917B, 368.

*Maine.—Re Lincoln Water Co.* (1919) P.U.R.1919B, 752.

*Montana.—State ex rel. Billings v. Billings Gas Co.* (1918) — Mont. —, P.U.R.1918F, 768, 173 Pac. 799.

*New York.—State ex rel. New York & N. S. Traction Co. v. Public Service*

Commission (1916) 175 App. Div. 869, P.U.R.1917B, 957, 162 N. Y. Supp. 405, overruled upon another point in *QUINBY v. PUBLIC SERVICE COMMISSION* (reported herewith) ante, 685.

**Oregon.**—*Woodburn v. Public Service Commission* (1916) 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996.

**Pennsylvania.**—*Oil City v. Petroleum Teleph. Co.* (1918) P.U.R.1918D, 743.

**Utah.**—*SALT LAKE CITY v. UTAH LIGHT & TRACTION CO.* (reported herewith) ante, 715; *Re Utah Light & Traction Co.* (1917) P.U.R.1918B, 497.

**Washington.**—*State ex rel. Webster v. Superior Ct.* (1912) 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78.

**West Virginia.**—*Benwood v. Public Service Commission* (1914) 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295.

Thus, in *State ex rel. Billings v. Billings Gas Co.* (1918) — Mont. —, P.U.R.1918F, 768, 178 Pac. 799, the Montana court said: "Though the state may confer upon a city authority to enter into a contract for specific rates for a given period, since the effect of such a grant is to extinguish, pro tanto, a governmental power of first importance, the courts will not indulge the presumption that such a surrender of power has been made, unless the legislative intention is expressed in clear and unmistakable language, or is necessarily implied from the powers expressly granted; and all doubts will be resolved in favor of the continuance of the power."

And "unless the right to exercise the police power of regulating rates is referable to an unmistakable grant, the prices specified in the franchise are not exempt from interference by the legislative assembly." *Woodburn v. Public Service Commission* (1916) 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996.

So, in *Sandpoint Water & Light Co. v. Sandpoint* (1918) 31 Idaho, 498, L.R.A.1918F, 1106, P.U.R.1918F, 737, 173 Pac. 972, the Idaho supreme court said: "When such abrogation [of the

rate-making power of the state] is based upon an alleged contract, made through the agency of a municipality of the state, the power of the municipality so to bind the state must appear in clear and unmistakable language."

And it is only where the right is very clearly conferred that the state will be held to have relinquished its power to enact laws regulating rates. *Manitowoc v. Manitowoc & N. Traction Co.* (1911) 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925.

The general law of Maine does not confer upon any municipality the right to regulate the rates which water companies may charge domestic consumers; nor can such power be implied from the power granted in the charter of a municipality to contract for water for "municipal and fire purposes." *Re Lincoln Water Co.* (1919; Me.) P.U.R. 1919B, 752.

A constitutional provision that a city of a certain class "may frame a charter for its own government" does not give it authority to include in its charter the power to fix rates, so as to take away from the commission such power. *Yuma Gaslight & Water Co. v. Yuma* (1919) — Ariz. —, 178 Pac. 26. To the same effect, see *State ex rel. United R. Co. v. Public Service Commission* (1917) 270 Mo. 429, P.U.R.1917E, 752, 192 S. W. 958, 198 S. W. 872.

And the power of a municipality to make a franchise contract, binding as against the state's power to regulate rates through a commission, is not to be inferred from a home rule feature of a Constitution giving cities the right to frame, adopt, and amend their charters, and pass all laws and ordinances relating to their municipal concerns. *Traverse City v. Michigan R. Commission* (1918) — Mich. —, P.U.R. 1918F, 752, 168 N. W. 481.

A statutory provision that no license or franchise shall be granted to a utility to operate within the streets or alleys of a city, in any other form or manner than by ordinance passed and published in a prescribed manner, does not limit or prohibit the assumption of rate-making power by the legis-

lature. *Denver & S. P. R. Co. v. Englewood* (1916) 62 Colo. 229, — A.L.R. —, P.U.R.1916E, 134, 161 Pac. 151, error from the United States Supreme Court dismissed for want of jurisdiction (U. S. Adv. Ops. 1918-19, p. 149) 248 U. S. 294, 63 L. ed. —, 39 Sup. Ct. Rep. 100.

*3. Effect of control of municipality over streets.*

And the power of a municipality to make an inviolable contract as to rates is not to be inferred or implied from the power granted to a municipality to control its streets and to regulate the use thereof by public utilities.

Arizona.—*Tempe v. Mountain States Teleph. & Teleg. Co.* (1915) P.U.R. 1915D, 716.

Illinois.—*State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co.* (1916) 275 Ill. 555, P.U.R.1917B, 1046, 114 N. E. 325, Ann. Cas. 1917C, 50.

Michigan.—*Traverse City v. Michigan Railroad Commission* (1918) — Mich. —, P.U.R.1918F, 752, 168 N. W. 481.

Missouri.—*St. Louis v. Public Service Commission* (1918) — Mo. —, P.U.R.1919C, 10, 270 S. W. 799; *Kansas City R. Co. v. Kansas City* (1918) P.U.R.1918E, 190; *Knight v. Harvey* (1917) P.U.R.1918B, 413; *Re United R. Co.* (1918) P.U.R.1918D, 392.

Montana.—*State ex rel. Billings v. Billings Gas Co.* (1918) — Mont. —, P.U.R.1918F, 765, 173 Pac. 799.

Pennsylvania.—*Wilkinsburg v. Pittsburgh R. Co.* (1918) P.U.R.1918F, 131; *Harbor Creek Twp. v. Buffalo & L. E. Traction Co.* (1918) P.U.R.1918F, 164; *Warren v. Warren Street R. Co.* (1918) P.U.R.1919B, 619; *Oil City v. Petroleum Teleph. Co.* (1918) P.U.R. 1918D, 743.

Utah.—*SALT LAKE CITY v. UTAH LIGHT & TRACTION CO.* (reported herewith) ante, 715.

Thus, in *SALT LAKE CITY v. UTAH LIGHT & TRACTION CO.* (reported herewith), in speaking of the constitutional provisions that no law shall be passed granting the right to construct and operate a street railroad within any city without the consent of the local authorities, it was said: "It is

universally held that the regulation and fixing of rates is a governmental function, that is, a legislative function, which will not be deemed to have been surrendered by the sovereign state unless it has been done in clear and unequivocal terms. A mere cursory reading of § 8 of the Constitution, which we have before quoted, shows that no express right is conferred upon the local authorities of this state to enter into any contract respecting the fixing of rates. True it is that, in determining the conditions upon which street railways may be constructed and operated within the cities, the local authorities may determine the fares that may be charged and collected. The authority to do that is, however, merely implied; and there is nothing in the Constitution which prohibits the legislature from exercising its prerogative in changing the rates of fare in case they are found to be unreasonable, unfair, or oppressive as against the public on the one hand, and unfair or unjust or confiscatory as against the railway company upon the other."

So, in *State ex rel. Billings v. Billings Gas Co.* (1918) — Mont. —, P.U.R.1918F, 768, 173 Pac. 799, in speaking of the provision giving the municipality power to control the use of the street, the Montana court said: "We do not believe that it was the purpose of the legislature, by the very general language in the paragraphs cited, to surrender fully the distinctively governmental function to regulate rates, but rather to permit municipalities to protect themselves and their inhabitants against extortionate rates until the state itself should act in the premises."

And in *State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co.* (1916) 275 Ill. 555, P.U.R. 1917B, 1046, 114 N. E. 325, Ann. Cas. 1917C, 50, in speaking of a similar provision in the Illinois Constitution, the court said: "That provision is simply a limitation of the general power of the legislature, and in one particular only. It provides, in substance, that the legislature may not grant the right to construct and operate a street

railroad within a municipality without requiring the consent of the local authorities having control of the streets or highways proposed to be occupied. That section of the Constitution does not, by implication or otherwise, . . . deprive the legislature of its power to fix rates for such companies."

So, the power of a municipality to regulate rates cannot be inferred from power "to have and exercise exclusive control over the streets and alleys, avenues and sidewalks, of the town." *Tempe v. Mountain States Teleph. & Teleg. Co.* (1915; Ariz.) P.U.R.1915D, 716.

The power of the Pennsylvania Commission to determine the reasonableness of street railway rates is not affected by a maximum rate provision in a municipal ordinance, attached as a condition to the grant of the right to occupy the street, under a constitutional provision that no "street passenger railway shall be constructed within the limits of any city, borough, or township, without the consent of the local authorities." *Wilkesburg v. Pittsburgh R Co.* (1918; Pa.) P.U.R.1918F, 131; *Harbor Creek Twp. v. Buffalo & L. E. Traction Co.* (1918; Pa.) P.U.R.1918F, 164.

The constitutional provision against granting the right to construct and operate a street railway within any city, town, or village, without acquiring the consent of the local authorities, is rather a limitation upon the power of the legislature than a grant of power to the city, and cannot be construed to be a grant of power to fix or regulate rates. *Re United R. Co.* (1918; Mo.) P.U.R.1918D, 392.

The power of a public service commission to increase franchise rates is not barred by a constitutional provision that the legislature shall not grant the right to construct and operate a street railway within a city without acquiring the consent of the local authorities, where the constitutional provision does not give the city any right to impose conditions upon granting the consent required; since, although the power to impose conditions upon granting admission must

be deemed to be included in the greater power to exclude absolutely the street railway, nevertheless, since the Constitution is silent upon the question and does not give the municipality the express power to prescribe such conditions as, for instance, the fixing of the fares to be charged, such rate-making power must be deemed to be left in the state, and consequently can be delegated by the state to the public service commission. *St. Louis v. Public Service Commission* (1918) — Mo. —, P.U.R.1919C, 10, 207 S. W. 799.

4. *Distinction between power of municipality to make rates for itself and power to make rates for its inhabitants.*

A distinction has been noted between cases in which the service for which the franchise fixes the rates is to be rendered to the city itself, and those in which the service is to be rendered to inhabitants of the city.

Thus, in *People ex rel. South Glens Falls v. Public Service Commission* (1919) 225 N. Y. 216, P.U.R.1919C, 374, 212 N. E. 777, the New York court of appeals, in holding that the Commission had power to increase rates for gas fixed in a municipal franchise, said: "In the first place, we must note the distinction between a contract made by a gas company to furnish the municipality 'itself' with light, and the terms and conditions upon which a municipality grants a franchise to furnish gas to its 'inhabitants.' In the first instance, the arrangement may be a contract pure and simple, protected by the Constitution, both Federal and state, from subsequent abrogation even by the legislature, unless such power is reserved."

And in *Re Lincoln Water Co.* (1919; Me.) P.U.R.1919B, 752, the same distinction was noted; but it was held that the general law of Maine does not confer upon any municipality the power to regulate the rates which water companies may charge domestic consumers, and such power cannot be implied from the power granted in the charter of a municipality to contract for water for "municipal and fire purposes;" nor does such power to contract constitute a delegation of the

power to fix rates for such water, beyond the power of the state to alter.

In the following cases the commission was, as a matter of fact, dealing with rates for service to be rendered to the city itself, but no distinction is noticed, and the decision is based upon general grounds which would be equally applicable if the rates fixed were to be paid by the inhabitants of the city: *Sausalito v. Marian Water & P. Co.* (1915; Cal.) P.U.R.1916A, 244; *Re City Water Co.* (1916) 4 Mo. P. S. C. 140, P.U.R.1917B, 624; *Ben Avon v. Ohio Valley Water Co.* (1917; Pa.) P.U.R.1917C, 390.

That the state, acting through a public service commission, may increase rates fixed in a franchise for service to be rendered to the city itself, was expressly held by the Federal circuit court of appeals in *Salem v. Salem Water, Light, & P. Co.* (1919) — C. C. A. —, 255 Fed. 295. It was here contended by the city that the right to obtain hydrant service, at rates not to exceed those specified in a franchise, was held by the city purely in its proprietary capacity. The court, however, in answer to this contention, said: "But as the municipal corporation is but a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department, it is our opinion that the city had no absolute property right to demand continued hydrant service at a given rate, as against the right of the state to modify such rates of service with the consent of the water company, notwithstanding the fact that as to the water company itself the contract might be unalterable except with its consent."

In many cases, of course, the city itself may be interested in the rates charged ordinary consumers; as, for instance, in the case of street railway rates where the city has to pay for the transportation of its employees, or in gas and electric cases where the ordinary rates for domestic or commercial service are applicable to the lighting of public buildings; there does not seem to be any distinction made in these cases, however.

In a number of cases it has been held that the commission has power to abolish requirements that service be given free to municipalities, although such requirements are provided for in franchises, but this view is usually based upon the theory that contracts for free service, being discriminatory, are illegal, and consequently invalid; if not void ab initio, they become illegal after the passage of the Public Service Act: *Tempe v. Mountain States Teleph. & Teleg. Co.* (1915; Ariz.) P.U.R.1915D, 716; *Landon v. Lawrence* (1915; Kan.) P.U.R.1915E, 763; *Re Augusta Water Dist.* (1916) 2 Am. Rep. Me. P. U. C. 183, P.U.R. 1916E, 31; *Public Service Electric Co. v. Public Utility Comrs.* (1915) 87 N. J. L. 128, P.U.R.1915C, 229, 98 Atl. 707, affirmed in (1916) 88 N. J. L. 603, P.U.R.1916D, 107, 96 Atl. 1015; *Kenosha v. Kenosha Home Teleph. Co.* (1912) 149 Wis. 338, 135 N. W. 848.

In *Sandpoint Water & Light Co. v. Sandpoint* (1918) 31 Idaho, 498, L.R.A. 1918F, 1106, P.U.R.1918F, 737, 173 Pac. 972, the court held that the commission had the right to eliminate discriminatory rates contained in the franchise in favor of the municipality; but the decision was not based upon the fact that such rates were illegal, but rather upon the general ground that the state, as principal, has power to waive any rights which the city, its agent, had in the contract.

##### 5. Rule in Ohio and Virginia.

The rule in Ohio seems to be definitely settled that the municipalities in that state have the power, both constitutional and statutory, to make inviolable contracts as to rates.

Article 18, § 4, of the Constitution, provides as follows: "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service."

Section 9113 of the General Code of the state, in speaking of the powers of the municipality councils and county

commissioners, provides that the "council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated."

The Ohio supreme court in *INTER-URBAN R. & TERMINAL CO. v. PUBLIC UTILITIES COMMISSION* (reported herewith) ante, 696, in passing upon the power of the Public Utilities Commission to authorize an increase in rates beyond the rates fixed in certain grants by municipalities in the state, held in the syllabus by the court, as follows: "A contract concerning proprietary rights and harmless in itself, made by a municipality in the exercise of powers clearly conferred, is protected by the Constitution, and the police power cannot be invoked to abrogate or impair it." Similar decisions were made at the same time in the cases of *Mahoning & S. R. & Light Co. v. Public Utilities Commission* (1918) — Ohio St. —, 120 N. E. 835, and *Toledo, B. G. & S. Traction Co. v. Public Utilities Commission* (1918) — Ohio St. —, 120 N. E. 835.

The Ohio Public Utilities Commission had previously taken the same position in *Re Mahoning & S. R. & Light Co.* (1918; Ohio) P.U.R.1918B, 69.

The same principle was enunciated in *CINCINNATI v. PUBLIC UTILITIES COMMISSION* (reported herewith) ante, 705, although an entirely different state of facts was presented. The city of Cincinnati had granted to a gas company the right for twenty-five years to operate in its streets, subject to the right of the city to regulate the price of gas from time to time, this right being also contained in statutes then in effect. After the grant had been accepted by the utility, the city fixed rates for a ten-year period. After the expiration of this time, the city again fixed the rate for ten years, and the utility, claiming that this new rate was unreasonable, appealed to the Commission to fix a reasonable rate, but the supreme court, in holding that the Commission had no power to regulate the rates, said: "As we have

seen, the state and Federal courts have held that, in Ohio, 'express and unmistakable authority' was conferred on the city to make a contract such as is involved here, and, during the life of the contract, the parties operating under it are bound by its terms."

In *Columbus R. Power & Light Co. v. Columbus* (1918) 253 Fed. 499, the United States district court, in construing the Ohio statute, said: "The law, as settled by these cases, is that the legislature has, by these sections, delegated to municipal corporations full power and authority to enter into contracts for the maintenance and operation of street railway lines; that whatever the city in fact does pursuant thereto is the act of the state, and is mutually binding upon the parties. Franchise grants for fixed terms not exceeding twenty-five years, and for a fixed rate of fare to continue during the term of such grants, may lawfully be made by the city under this legislative delegation of power. If the city passes an ordinance purporting to grant a franchise for a fixed term, with a rate of fare to endure during that term, and this ordinance is accepted, expressly or impliedly, a contract is engendered, mutually binding and unalterable, except by the consent of both parties, during the term thereof."

The decision in this case was affirmed by the United States Supreme Court in *Columbus R. Power & Light Co. v. Columbus* (U. S. Adv. Ops. 1918-19, p. 416) — U. S. —, 63 L. ed. —, P.U.R.1919D, 239, 39 Sup. Ct. Rep. 849. It should be noted that this case is not strictly in point, as it was an action in equity for an injunction to restrain the city from enforcing an ordinance which would compel the street railway company to operate in accordance with the provisions of the franchise.

A decision of the Virginia Commission is in line with these Ohio cases. Thus, in *Com. ex rel. Clifton Forge v. Virginia-Western Power Co.* (1918; Va.) P.U.R.1918F, 791, the Virginia Commission held that the constitutional and statutory provisions of the state constituted express authority to the councils of the cities and towns to en-

ter into contract with public service corporations, fixing the maximum rates of charge for services rendered within said cities and towns, and the Commission had no jurisdiction to authorize an increase above the maximum fixed by the ordinance.

*b. Basis of power of state to increase franchise rates.*

*1. In general.*

The great weight of authority is to the effect that while a municipality may, in the absence of any direct action by the state, enter into a contract with a public utility, whereby the rates to be charged by the latter are fixed, and such contract, as between the parties themselves, is binding, nevertheless the state has power which it may delegate to an administrative body, such as a public service commission, to increase such rates, when because of increased costs or any other reason such rates are no longer reasonable. In other words, franchise rate contracts are not such contracts as may not be increased by the state, without infringing the constitutional guaranty.

This rule apparently has not been expressly repudiated in any jurisdiction except Ohio and Virginia, where, as is shown above, the cities have been given express and definite power to make inviolable contracts as to rates.

In general terms it may be said that these decisions rest on two general grounds. First, franchise contracts must be deemed to have been entered into with knowledge of the inherent and reserved power of the state to alter such contracts when necessary so to do for the public welfare; second, municipalities being merely agents of the state, the state may, at any time, waive the rights of the municipality in the contract.

Not every case which passes upon the question makes the distinction between these two grounds, and frequently both reasons are given for the decision. The attempt has been made, however, to separate the decisions, according as they lay the greater emphasis upon the one or the other of the two doctrines.

*2. Reserve and paramount police power of state.*

That franchise rate contracts must be deemed to have been made subject to the governmental power of the state to alter for the public welfare has been held in a large number of cases in which it has been sought to have franchise rates increased.

**California.**—*Re San Jose R. Co.* (1918) P.U.R.1918F, 761. See also *Sausalito v. Marin Water & P. Co.* (1915) P.U.R.1916A, 244.

**Idaho.**—*Sandpoint Water & Light Co. v. Sandpoint* (1918) 81 Idaho, 498, L.R.A.1918F, 1106, P.U.R.1918F, 737, 173 Pac. 972.

**Illinois.**—*Re Polo Mutual Teleph. Co.* (1915) P.U.R.1916B, 318; *Re Chicago, N. S. & M. R. Co.* (1917) P.U.R.1918A, 388; *Re Kewanee Home Teleph. Co.* (1917) P.U.R.1918B, 172; *Re Central Illinois Public Service Co.* (1918) P.U.R.1918F, 820; *Re Rockford City Traction Co.* (1918) P.U.R.1918F, 840; *Chamber of Commerce v. Central State Gas Co.* (1918) P.U.R.1919A, 679.

**Indiana.**—*Winfield v. Public Service Commission* (1918) — Ind. —, P.U.R.1918B, 747, 118 N. E. 531; *State ex rel. Indianapolis Traction & T. Co. v. Lewis* (1918) — Ind. —, P.U.R.1918F, 111, 120 N. E. 129.

**Michigan.**—*Traverse City v. Michigan R. Commission* (1918) — Mich. —, P.U.R.1918F, 752, 168 N. W. 481.

**Missouri.**—*State ex rel. Sedalia v. Public Service Commission* (1918) — Mo. —, P.U.R.1919C, 507, 204 S. W. 497; *Fulton v. Public Service Commission* (1918) — Mo. —, 204 S. W. 386; *Kansas City Bolt & Nut Co. v. Kansas City Light & P. Co.* (1918) — Mo. —, 204 S. W. 1074; *St. Louis v. Public Service Commission* (1918) — Mo. —, P.U.R.1919C, 10, 207 S. W. 799; *Re City Water Co.* (1916) 4 Mo. P. S. C. 140, P.U.R.1917B, 624; *Louisiana v. Louisiana Water Co.* (1918) P.U.R.1918B, 774; *Re United R. Co.* (1918) P.U.R.1918D, 392; *Re City Light & Traction Co.* (1918) P.U.R.1918F, 938.

**Montana.**—*State ex rel. Billings v. Billings Gas Co.* (1918) — Mont. —, P.U.R.1918F, 768, 173 Pac. 799.

**Nebraska.**—*Re Platte County Independent Teleph. Co.* (1916) P.U.R.

1916D, 63; Re Lincoln Teleph. & Teleg. Co. cited and followed in Marquis v. Polk County Teleph. Co. (1915) P.U.R. 1915C, 140.

New York.—People ex rel. South Glens Falls v. Public Service Commission (1919) 225 N. Y. 216, P.U.R. 1919C, 374, 121 N. E. 777.

Oklahoma.—Pawhuska v. Pawhuska Oil & Gas Co. (1917) — Okla. —, P.U.R.1917F, 226, 166 Pac. 1058; Durrant v. Consumers Light & P. Co. (1918) — Okla. —, P.U.R.1919C, 46, 177 Pac. 361; Re Pawhuska Oil & Gas Co. (1917) P.U.R.1917D, 947; Re Consumers Gas Co. (1918) P.U.R.1918D, 201.

Oregon.—Woodburn v. Public Service Commission (1916) 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996; Re Portland R. Light & P. Co. (1917) P.U.R.1918A, 751.

Pennsylvania.—Ben Avon v. Ohio Valley Water Co. (1917) P.U.R.1917C, 390; Oil City v. Petroleum Teleph. Co. (1918) P.U.R.1918D, 743; New Castle v. New Castle Water Co. (1918) P.U.R. 1919A, 775.

Utah.—SALT LAKE CITY v. UTAH LIGHT & TRACTION Co. (reported herewith) ante, 715.

Washington.—State ex rel. Webster v. Superior Ct. (1912) 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78.

West Virginia.—Benwood v. Public Service Commission (1914) 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; Re Glenville Natural Gas Co. P.U.R. 1915F, 848; Re United Fuel Gas Co. (1916) P.U.R.1917A, 923; Re Chesapeake & P. Teleph. Co. (1917) P.U.R. 1917E, 955; Re West Virginia Central Gas Co. (1918) P.U.R.1918C, 453.

It is to be noted that the rule adopted by the above cases, that the power of the public service commission to increase rates fixed by franchise is based upon the reserve and paramount power of the state over rate regulation, is applicable, even if the attempt is made to reduce rates; the utilities cannot rely upon the franchise to protect a favorable rate any more than can the city. Both parties must yield to the paramount power of the state.

This double-edged effect of the rule is illustrated in a case coming before the Missouri Commission.

Thus, in Louisiana v. Louisiana Water Co. (1918; Mo.) P.U.R.1918B, 774, the city of Louisiana claimed that the rates of the utility were excessive, and asked that they be reduced notwithstanding the existence of the franchise fixing the rates. The company, in its original answer, denied that the rates were excessive, and further denied the power of the Commission to interfere in the contractual relation between the company and the city. Later, this objection was withdrawn, and the company acknowledged the jurisdiction of the Commission, and asked it to grant a more compensatory rate. The Commission said: "While the attitude of the parties in this proceeding is, in a sense, reversed by the above changes, the question of the Commission's jurisdiction over franchise rates is again in question." The Commission held that it had power to increase the rates notwithstanding the franchise terms.

A number of concise judicial statements of this rule will tend to give a better idea of its far-reaching effect.

Thus, a franchise contract, fixing rates which a telephone company may charge within a city, is permissive only, and although binding between the parties to it in the absence of governmental interposition, "is to be construed as having been entered into with reference to the right and power of the government to assert and exercise its inherent and paramount authority." *Traverse City v. Michigan R. Commission* (1918) — Mich. —, P.U.R.1918F, 752, 168 N. W. 481.

So, in *SALT LAKE CITY v. UTAH LIGHT & TRACTION Co.* (reported herewith) ante, 715, the court said: "Every contract fixing rates entered into between the cities of this state and street railway companies, both under the Constitution and the statute, is always subject to change by the paramount power of the state, and the right of the state to so change the rates continues unless and until the legislature has, in express terms, sur-



rendered the power or delegated it to some other arm of the state."

So, too, franchise rate contracts, "when entered into without express legislative authority, are permissive only, and subject to the exercise of the sovereign power of the state, and do not partake of the quality of contracts, as that term is employed in the contract clause of the Federal Constitution." *State ex rel. Webster v. Superior Ct.* (1912) 67 Wash. 37, L.R.A. 1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78.

Again, it cannot be said that the Public Utilities Act, conferring power upon the Commission to regulate rates, impairs the obligation of a franchise contract fixing the rates which a public utility may charge, since both parties to the contract "must have entered into it with full knowledge that in the state itself reposed the sovereign power of rate regulation." *State ex rel. Billings v. Billings Gas Co.* (1918) — Mont. —, P.U.R.1918F, 768, 173 Pac. 799.

The Missouri Public Service Commission in *Louisiana v. Louisiana Water Co.* (1918; Mo.) P.U.R.1918B, 774, very concisely states the principle in the following language: "Contracting parties to these franchise ordinances should not overlook the fact that there is yet another party at interest to these contracts, which is the state of Missouri, exercising its right of regulation of the subject-matter of these contracts by virtue of the sovereign police power of the state."

If the franchise granted by a city to a utility is to be deemed a contract, then the mere fact that it was made prior to the enactment of a public utility statute, and before the state had attempted to regulate the rates, does not debar the state from increasing the rates fixed in the contract, for the reason that the law wrote into it a stipulation by the city that the state could, at any time, exercise its police power and change the rates; and therefore, when the state does exercise its police power, it does not work an impairment of any obligation of the contract. *Woodburn v. Public Service Commission* (1916) 82 Or. 114, L.R.A.

1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996.

And in *People ex rel. South Glens Falls v. Public Service Commission* (1919) 225 N. Y. 216, P.U.R.1919C, 374, 121 N. E. 777, the New York court of appeals expressly held that regulations regarding rates which municipalities may impose in granting licenses or permission to use their streets to public service corporations cannot be said to form contracts beyond the police power of the legislature to modify for the public welfare. This decision was based upon the broad ground that changing conditions, improvements in the art, inventions, and growth in population might render such regulations detrimental to the public welfare and therefore, under the broad police powers of the state, such regulations might be modified.

A state is not deprived of the right to regulate the rates of a public utility by a franchise rate contract, granted under a statute giving the municipality exclusive power over its streets, since such contract, although valid and binding as between the city and the utility, is subject to the state's power to protect the public, reserved because not expressly waived. *Winfield v. Public Service Commission* (1918) — Ind. —, P.U.R.1918B, 747, 118 N. E. 531. The Indiana Commission at first held that it was not invested with power to regulate rates of a public utility, where a valid contractual rate had been established between the utility and the municipality. *Tipton Teleph. Co. v. Tipton* (1915; Ind.) P.U.R.1915C, 351; *Re Union Traction Co.* (1917; Ind.) P.U.R.1918B, 663. These decisions, however, have been overruled in effect by the supreme court of Indiana, in the *Winfield Case*.

The rule that franchise rates may be increased by public service commissions, exercising the paramount power of the state over rate regulations, has been adopted in the following cases, in which some unusual features either of law or fact were present:

Thus, any implied power to make a

rate contract which a city may possess, arising out of its charter power to "contract and be contracted with," or otherwise, is inferior to the reserve power of the state to regulate rates of public utilities. *Benwood v. Public Service Commission* (1914) 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295.

And notwithstanding Oklahoma statutes had conferred upon cities of the first class the express power to fix rates, such power, not being conferred by the Constitution, could be subsequently taken away by the legislature and conferred upon the Commission; and, the legislature having done so, the Commission had the power to increase rates fixed by franchise by such a city before its power had been taken away. *Pawhuska v. Pawhuska Oil & Gas Co.* (1917) — Okla. —, P.U.R.1917F, 226, 166 Pac. 1058.

The Missouri supreme court has held that, under a constitutional provision that the exercise of the police power of the state shall never be abridged, the legislature itself cannot abridge the police power of the state and has no power to delegate to a municipality the right to limit the police power in any way. Consequently, a provision in a franchise limiting the rate which a utility may charge within the city, although a valid contract as between the municipality and the utility themselves, cannot stand as against the order of the Public Service Commission for reasonable rates, whether such reasonable rates be lower or higher than the contract rates. *State ex rel. Sedalia v. Public Service Commission* (1918) — Mo. —, P.U.R. 1919C, 507, 204 S. W. 497. This decision was followed in *Fulton v. Public Service Commission* (1918) — Mo. —, 204 S. W. 386.

And in *Kansas City Bolt & Nut Co. v. Kansas City Light & P. Co.* (1918) — Mo. —, 204 S. W. 1074, in speaking of the *Sedalia* Case, the Missouri supreme court said: "It was there held (1) that the power to make rates for public service arises from the police power of the state; (2) that the instrumentality designated by statute to exercise such rate-making power is a public service commission: (3) that

under the provision of article 12, § 5, Constitution of Missouri, the police power cannot be abridged by contract; (4) that, therefore, when the Public Service Commission fixes a schedule of reasonable rates for public service, in conformity with the provisions of the Public Service Commission Act, such rates automatically supersede all contract rates coming in conflict therewith."

The case of *Leiper v. Baltimore & P. R. Co.* (1918) 262 Pa. 328, P.U.R. 1919C, 397, 105 Atl. 551, indicates the attitude of the Pennsylvania courts, although the case is not strictly in point, because dealing with a contract between an individual and a utility. In holding that that Commission had the power to increase the rates fixed in the contract, the court set out the provision of the Pennsylvania Constitution to the effect that the exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state. The court then said: "To permit the contract made between the appellee and the appellant to stand as against rates established in a legal and orderly method, in conformity with the provisions of the law, would be to nullify the purposes of the act. It would be impossible for the Commission to enforce an equality of reasonable rates except upon the basis that it is not bound by contract previously entered into between a public service company and either a municipality, another corporation, or a private individual." The court further said: "It therefore follows that when, as in this case, the parties enter into a contract with a public service corporation relating to rates, they are presumed to have done so with the knowledge that the right of the state to exercise the police power in the future is expressly reserved, and that, where the common weal and the interest of the public demand that the provisions of the contract thus entered into shall be modified, it can be done without any violation of the pro-

vision of the Constitution of the United States with reference to the impairment of the obligations of contracts."

In *Manitowoc v. Manitowoc & N. Traction Co.* (1911) 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925, which was an action to enjoin a street railway company from raising the rates fixed in a municipal franchise, the Wisconsin supreme court directed judgment to be entered, enjoining the defendant railroad company from raising the rates "until such time as such rates are changed by the legislature, or through a legislative agency, in the manner provided by law."

**3. Power of state, as principal, to waive rights of city, its agent.**

Again, the view is asserted that while franchise contracts as to rates may have been valid when made, the city, as one of the contracting parties, was acting only as the agent of the state, and the state, as principal, may at any time waive any of its rights therein.

**United States.**—*Salem v. Salem Water, Light & P. Co.* P.U.R.1919C, 956, — C. C. A. —, 255 Fed. 295.

**Delaware.**—*Robertson v. Wilmington & P. Traction Co.* (1918) — Del. —, P.U.R.1919B, 129, 104 Atl. 839.

**Idaho.**—*Sandpoint Water & Light Co. v. Sandpoint* (1918) 31 Idaho, 498, L.R.A.1918F, 1106, P.U.R.1918F, 737, 173 Pac. 972.

**Indiana.**—*Winfield v. Public Service Commission* (1918) — Ind. —, P.U.R.1918B, 747, 118 N. E. 531; *State ex rel. Indianapolis Traction & Terminal Co. v. Lewis* (1918) — Ind. —, P.U.R.1918F, 111, 120 N. E. 129.

**Maine.**—*Re Augusta Water Dist.* (1916) 2 Ann. Rep. Me. P. U. C. 188, P.U.R.1916E, 31; *Dorman v. Belfast Water Co.* (1917) P.U.R.1917F, 824; *Re Lincoln Water Co.* (1919) P.U.R.1919B, 752.

**Massachusetts.**—*Board of Survey v. Bay State Street R. Co.* (1916) 224 Mass. 468, 113 N. E. 273.

**New Jersey.**—*North Wildwood v. Public Utility Comrs.* (1915) 88 N. J. L. 81, P.U.R.1916B, 77, 95 Atl. 749; *Collingswood Sewerage Co. v. Cel-*

*lingswood* (1918) 91 N. J. L. 20, P.U.R.1918C, 261, 102 Atl. 901; *Re Burlington Sewerage Co.* (1916) P.U.R.1916C, 505; *O'Brien v. Public Utility Comrs.* (1918) — N. J. L. —, P.U.R.1919B, 865, 105 Atl. 132; *Re Public Service R. Co.* (1918) P.U.R.1918E, 910.

**New York.**—*People ex rel. South Glens Falls v. New York Public Service Commission* (1919) 225 N. Y. 216, P.U.R.1919C, 374, 121 N. E. 777.

**Oregon.**—*Portland v. Public Service Commission* (1918) 89 Or. 825, P.U.R.1919A, 127, 173 Pac. 1178.

**Washington.**—*State ex rel. Webster v. Superior Ct.* (1912) 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78.

Thus, in *Winfield v. Public Service Commission* (Ind.) *supra*, the Indiana supreme court said: "The municipality, so far as affects the public welfare, acts, in granting franchises to public service corporations, as the agent of the state."

And in *Salem v. Salem Water, Light & P. Co.* P.U.R.1919C, —, — C. C. A. —, 255 Fed. 295, which was an action by a water company against a city to recover for fire hydrant service furnished to the city, the charges for which service were based upon an order of the Public Service Commission, and not upon a lower maximum rate, named in the franchise granted by the city to the water company, the Federal circuit court of appeals held that as the municipal corporation was but a political subdivision of the state, and existed by virtue of the exercise of the power of the state through its legislative department, it had no absolute property right to demand continued hydrant service at the franchise rate, as against the right of the state to modify such rate with the consent of the water company, notwithstanding the fact that, as to the water company itself, the contract might be unalterable except with its consent.

So, too, a municipality has no vested right to the exercise of rate-making power, nor can it obtain a vested right in any contract entered into or property acquired through the exercise of such powers, as against the right of the state, its creator, to assume

complete control of its affairs. *Sandpoint Water & Light Co. v. Sandpoint* (1918) 31 Idaho, 498, L.R.A.1918F, 1106, P.U.R.1918F, 737, 173 Pac. 972.

And in *People ex rel. South Glens Falls v. New York Public Service Commission* (1919) 225 N. Y. 216, P.U.R.1919C, 374, 121 N. E. 777, the New York court of appeals said: "A municipal corporation is simply a political subdivision of the state and exists by virtue of legislative enactment. Rate regulation is a matter of the police power of the state and the terms and conditions, such as here in question, contained in a franchise to a service corporation, may be modified, without impairing the obligation of a contract within the provisions of the Constitution."

So, the Oregon Commission may increase street railway rates beyond the amount fixed by city ordinance, without impairing the contract or depriving the city of property without due process; since the city, in making the contract, acts as agent of the state, and the state, by the action of the Commission, consents to this change in the agreement. *Portland v. Public Service Commission* (1918) 89 Or. 325, P.U.R.1919A, 127, 173 Pac. 1178.

In granting locations to street railways, boards of selectmen and boards of aldermen are public officers, and not agents of their respective towns and cities, and the state exercises its sovereign power through them as its instruments. Therefore, the legislature has the power, so far as concerns these public officers and the municipality by which they were elected, to change or abrogate the terms of such location. *Board of Survey v. Bay State Street R. Co.* (1916) 224 Mass. 463, 113 N. E. 273. The court said: "Although phrased in the form of a contract and securing valuable financial obligations to the cities and towns, the power of the legislature to modify to their loss such locations has been settled, after great consideration and vigorous protest from the interested municipalities."

"The municipality, created by the state as an agency for the convenient administration of the state govern-

ment, holds rights acquired in that capacity for its principal, to be dealt with by the latter at its pleasure; and . . . while it may, if clothed with appropriate authority, vest in a public utility or other corporation certain inviolable property rights growing out of contracts, the benefits which it receives for itself are held subject to the will of the state." *Re Lincoln Water Co.* (1919; Me.) P.U.R.1919B, 752.

So, a contract between a municipality and a water company, fixing rates to private consumers, does not prevent the Board of Public Utility Commissioners from fixing a higher rate, as against the objection of the municipality and consumers, since the state, through the agency of the board, may waive the contract rights of the public, without improperly impairing the obligation of the contract. *North Wildwood v. Public Utility Comrs.* (1915) 88 N. J. L. 81, P.U.R.1916B, 77, 95 Atl. 749.

In *Atlantic Coast Electric R. Co. v. Public Utility Comrs.* (1916) 89 N. J. L. 407, P.U.R.1917B, 949, 99 Atl. 395, the supreme court of New Jersey held that a rate fixed in a franchise could not be reduced by the Commission. This was construed as authority by the Commission, in *Re Northampton, E. & W. Traction Co.* (1917; N. J.) P.U.R. 1917F, 123, for the ruling that the Commission could not increase the rates fixed in a franchise. But the order of the Commission was set aside by the supreme court, in *Northampton, E. & W. Traction Co. v. Public Utility Comrs.* (1918) — N. J. L. —, 102 Atl. 930. It should also be noted that the court of errors and appeals reversed the supreme court, in the *Atlantic Coast Electric R. Co. Case* (1918) — N. J. L. —, — A.L.R. —, P.U.R.1919C, 489, 104 Atl. 218, and held that the power of the municipality to grant or refuse consent to a location of tracks, and to impose lawful restrictions, did not carry with it the implied power to make an inviolable contract as to rates, which could not be reduced by the Commission without violating the constitutional prohibition against impairment of contract obligations.

Of course, the Commission will be

considered as having power to increase rates if a municipality waives any rights which it may have in the contract. *Re People's Natural Gas Co.* (1915; N. Y. 2d Dist.) P.U.R.1916A, 349; *Re Hudson Valley R. Co.* (1918; N. Y. 2d Dist.) P.U.R.1919B, 448.

It is to be noted that the rule that municipalities, in making rate contracts, are acting merely as agents of the state, would not apply were the attempt made to reduce the franchise rates against the protest of the utility, and it apparently carries the implication that as to the utility the franchise constitutes an inviolable contract. But it should also be noted that this rule is very frequently stated as merely supplementary to the rule above set forth, that the rights of both parties must yield to the paramount power of the state.

### *III. Delegation of power of state to commission.*

As was stated above, it is assumed in many cases that the commission has been delegated the plenary power of the state over rates, but the question whether there has been such delegation has been expressly raised and passed upon in some of the cases.

In several jurisdictions it has been held that, whatever may be the power of the state to increase franchise rates, this power has not been delegated to the commission.

Thus, under a constitutional provision that the general assembly shall not authorize the construction of any street railway within the limits of any incorporated town or city without consent of the corporate authorities, a city may reasonably and legally impose terms fixing the rates of such utility before granting its consent to the use of the streets; such a contract, when accepted by the utility, although made subject to the right of the state to change the same, is beyond the power of the Georgia Commission to change, where the statute giving the Commission power over street railways contains the proviso that nothing therein contained shall be construed to impair any valid subsisting contract now in existence between any

municipality and any company, and that the act shall not operate as the repeal of any existing municipal ordinance. *Re Georgia R. & P. Co.* (1918; Ga.) P.U.R.1918F, 624.

Again, in *QUINBY v. PUBLIC SERVICE COMMISSION* (reported herewith) ante, 685, the New York court of appeals held that the legislature had not delegated power to the Commission to increase rates of fare on street railways, which had been agreed upon by the railway and the local authorities. The court said that, in the absence of clear and definite language conferring such power upon the Commission, it should not unnecessarily hold that the legislature had intended to delegate any of its powers in the matter, whatever such powers might be.

The following statement includes practically everything said by the court: It is impossible to find a word in the statute which discloses the legislative intent to deal with the matters of rates fixed by agreement with local authorities. As it has often been held in connections other than that of legislative power over them, that such agreements are valid, it may well be inferred that the legislature excluded them from consideration by failure to mention them, and that it has made no attempt to turn them over to the Public Service Commission for revision. The authority of the Commission to regulate rates in such cases, and thus to extinguish an undoubted power of the local authorities, should fairly appear before it is assumed to exist.

But in *People ex rel. South Glens Falls v. New York Public Service Commission* (1919) 225 N. Y. 216, P.U.R. 1919C, 374, 121 N. E. 777, it was held that the New York Commission had the power to fix the price of gas for a company operating in a community, for which the legislature itself had not fixed a price, notwithstanding the price fixed in a contract by virtue of which the gas company was occupying the streets of the village. Standing by itself this decision is apparently in accord with the great weight of authority, but it is extremely difficult to reconcile this case with the decision of the same court in *QUINBY v.*

PUBLIC SERVICE COMMISSION (cited above and reported herewith). In speaking of the QUINBY CASE, Judge Crane, who wrote the prevailing opinion in the South Glens Falls Case, said: "This case is not inconsistent or contrary to what is here stated. The matter there at issue was a railroad rate, fixed by city charter, and contained in the street franchise to the company. We held that in view of article 3, § 18, of the Constitution, requiring the consent of the local authorities to the construction of a railroad, the power given to the Public Service Commission to modify this rate should be distinctly and expressly conferred, and such power had not been given." Judge Chase, however, in a dissenting opinion, after calling attention to the fact that the constitutional provision in question did not in any way prescribe or limit the fares to be charged by a street railway corporation, said: "It does not in any way affect the question now before us, relating to the power of the Public Service Commission to increase the maximum rate of fare to be charged by street railroad corporations, or the price of gas to be charged by gas corporations, over and above the amount agreed upon by the street railroad or gas companies, respectively, and the municipality. . . . Both cases should, in my judgment, stand upon the language quoted from the Quinby opinion, to the effect that the legislature did not intend to delegate its power in cases where the rates of fare or price of gas had been established by and between the street railroad or gas companies, respectively, and the municipality."

In an attempt to reconcile these decisions, it should be borne in mind that there is one distinction between street railway cases and gas or other utility cases. Article 3, § 18, of the New York Constitution, provides that no law shall authorize the construction or operation of a street railroad, except upon the condition that the consent of the owners of one half in value of the property bounded on, "and the consent, also, of the local authorities having the control of that

portion of a street or highway upon which it is proposed to construct or operate, such railroad, be first obtained." There appears to be no such constitutional provision applicable to utilities other than street railways. Of course, if the view is taken that this constitutional provision does give the municipality certain rights with regard to the fixing of rates, such right cannot be taken away by any act of the legislature. But the view may possibly be taken that, under this constitutional provision, the municipalities had for years assumed certain rights which had been more or less recognized by the legislature and by the courts, and it would not be assumed that such rights, whatever in fact they might be, were taken away by the legislature, in the absence of "clear and definite language." It must be admitted that the language used by Judge Pound in the QUINBY CASE is general, that no apparent distinction was made between street railways and any other utility, and that the decision apparently turned upon nothing other than the power of the commission in "the matter of rates fixed by agreement with local authorities." But the court was, as a matter of fact, dealing with a street railway company, and the Constitution had given the municipality some power with reference to street railways which it had not given to them with respect to other utilities.

Prior to the decision of the New York court of appeals in the QUINBY CASE, the New York Commission, first district, had held that it did not have authority to increase the rates of a street railway company in excess of the maximum charge stipulated in a franchise. *Re New York & N. S. Traction Co.* (1918; N. Y.) P.U.R.1918A, 893.

The appellate division, third department, of the New York supreme court, had, however, held to the contrary, in *People ex rel. New York & N. S. Traction Co. v. Public Service Commission* (1916) 175 App. Div. 869, P.U.R.1917B, 957, 162 N. Y. Supp. 405. This decision of the appellate division was followed by the New York Com-

mission, second district, in *Walton v. Walton People's Teleph. Co.* (1917; N. Y.) P.U.R.1917E, 774; *Frankfort v. Utica Gas & E. Co.* (1917; N. Y.) P.U.R.1917E, 900; *South Glens Falls v. United Gas, Electric Light & Fuel Co.* (1917; N. Y.) P.U.R.1918A, 888; *Re Huntington R. Co.* (1917; N. Y.) P.U.R.1918A, 249.

The decision of the appellate division must be considered as overruled, in effect, by the decision of the court of appeals in the *QUINBY CASE*, while the decision of the Commission in the *South Glens Falls Case* was affirmed by the court of appeals in *People ex rel. South Glens Falls v. Public Service Commission* (1919) 225 N. Y. 216, P.U.R.1919C, 374, 121 N. E. 777. This decision of the court of appeals may be considered as supporting the decision of the Commission in the *Frankfort Case*, which was another gas case, and also in the *Walton Case*, which was a telephone case.

The *QUINBY CASE* was subsequently followed by the New York Commission, first district, in *Re Third Ave. R. Co.* (1918; N. Y.) P.U.R.1918E, 100.

The Federal court in *Westinghouse Electric & Mfg. Co. v. Binghamton R. Co.* (1919) P.U.R.1919C, 780, 255 Fed. 378, recognized the principles enunciated by the New York court of appeals in *QUINBY v. PUBLIC SERVICE COMMISSION* (reported herewith) ante, 685, to the effect that the Public Service Commissions of New York had not been granted the power by the legislature to increase fares fixed in a franchise to a street railway company; but held further that a maximum-fare provision in a franchise ordinance, in which the motive power of a street railway was limited to horses or mules, is abrogated by a subsequent ordinance, silent as to fares, which authorized the company to change its motive power to electricity.

In a number of jurisdictions it has been held that the public service commission has plenary power to increase rates, although fixed in municipal franchises; in other words, the legislature has delegated to the commission any power which it, itself, may have had in the premises.

**Delaware.**—*Robertson v. Wilmington & P. Traction Co.* (1918) — Del. —, P.U.R.1919B, 129, 104 Atl. 839.

**Georgia.**—*Re Georgia R. & P. Co.* (1918) P.U.R.1918F, 624 (electric, but not street, railway rates).

**Maine.**—*Re Lincoln Water Co.* (1919) P.U.R.1919B, 752.

**Massachusetts.**—*Board of Survey v. Bay State Street R. Co.* (1916) 224 Mass. 463, 113 N. E. 273; *Fall River v. Public Service Com.* (1919) 228 Mass. 575, P.U.R.1918B, 141, 117 N. E. 915; *Re Bay State Street R. Co.* (1917; Pub Service Com.) P.U.R.1917C, 554; *Re Norfolk & B. Street R. Co.* (1915) 3 Ann. Rep. Mass. P. S. C. 112, P.U.R. 1915E, 411.

**New Jersey.**—*Collingswood Sewerage Co. v. Collingswood* (1918) 91 N. J. L. 20, P.U.R.1918C, 261, 102 Atl. 901.

**Oklahoma.**—*Pawhuska v. Pawhuska Oil & Gas Co.* (1917—Okla. —, P.U.R. 1917F, 226, 166 Pac. 1058.

**Oregon.**—*Portland v. Public Service Commission* (1918) 89 Or. 325, P.U.R. 1919A, 127, 173 Pac. 1178.

**Pennsylvania.**—*Newcastle v. Newcastle Water Co.* (1918) P.U.R.1919A, 775.

**Washington.**—*State ex rel. Webster v. Superior Ct.* (1912) 67 Wash. 37, L.R.A. 1915C, 287, 120 Pac. 861.

**West Virginia.**—*Benwood v. Public Service Commission* (1914) 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295.

Thus, in *Robertson v. Wilmington & P. Traction Co.* (1918) — Del. —, P.U.R.1919B, 129, 104 Atl. 839, the court said: "When the board is given power to hear complaints concerning rates charged by a railway company, or other public utility, and make such orders as it may deem proper concerning such rates, we must conclude that it had the power to change any rate which the legislature could have changed."

So, in *Benwood v. Public Service Commission* (W. Va.) supra, the court said: "The language of the act is so plain that all doubt as to the power of the commission for general and statewide administration of rates, for service rendered by corporations or individuals to the public, must be eliminated."

And in *Pawhuska v. Pawhuska Oil & Gas Co.* (1917) — Okla. —, P.U.R. 1917F, 226, 166 Pac. 1058, the court said that the Corporation Commission is vested with authority to make all valid and lawful orders prescribing rates, which the state, in the exercise of its sovereign capacity, could prescribe or make.

So, too, in *Board of Survey v. Bay State Street R. Co.* (1916) 224 Mass. 463, 118 N. E. 273, after setting out various provisions of the statute, including provisions that the Commission has power to increase rates insufficient to yield a reasonable return for the service rendered, the court said: "It is manifest that such broad powers justly cannot be exercised to the extent conferred by the words used, except when joined either with equally full power to regulate charges, rates, and fares, or with freedom of action by the carrier in these respects, so as to enable the carrier to receive a fair return for the service required.

. . . The statute is a legislative determination that it is unwise and inexpedient longer to permit the full development of interurban transportation by street railways to be hampered by conditions as to fares, contained in locations granted by the public officers of different municipalities." This decision was cited and followed in the *Bay State Rate Case* (1916) 4 Ann. Rep. Mass. P. S. C. 3, P.U.R. 1916F, 221.

That the power to increase franchise rates had been delegated to the Commission is also asserted in *Re Norfolk & B. Street R. Co.* (1915) 3 Ann. Rep. Mass. P. S. C. 112, P.U.R. 1915E, 411, where the Massachusetts Public Service Commission cited the *Middlesex & B. Rate Case* (1914) 2 Ann. Rep. Mass. P. S. C. 99, in which the Commission laid down the following ruling: "The Commission rules as a matter of law that any alleged conditions or limitations as to fares, contained in original grants of locations or growing out of agreements, or attempted agreements, between municipal authorities and the petitioning railway company or any of its antecedent constituent corporations, are not valid

and controlling as against the rate-making power now vested in this Commission by the Public Service Act."

Again, in *Collingswood Sewerage Co. v. Collingswood* (1918) 91 N. J. L. 20, P.U.R. 1918C, 261, 102 Atl. 901, the supreme court of New Jersey said that the commission was authorized to raise rates by § 16c of the Public Utility Act, which authorizes the commission, after hearing upon notice, by order in writing, to fix just and reasonable individual rates whenever an existing rate is unjust, unreasonable, insufficient, or unjustly discriminatory or preferential. The court said: "It is too plain to require statement that a rate may be unjust and unreasonable because too low as well as because too high; the statute aims to secure justice to both sides. If the words, 'just and reasonable,' were not enough, the inclusion of the case where the existing rate is insufficient would remove all doubt. Injustice and unreasonableness due to an insufficient rate can only be corrected by raising it, and injustice due to discrimination or preference may require that one rate be raised, or that the other rate be lowered, in order to produce a rate that shall be just and reasonable. Only by adhering to the express language of § 16c can the result be reached that is set forth in § 15, that the board shall have general supervision and regulation of, jurisdiction and control over, all public utilities, and over their property, property rights, equipments, facilities, and franchises, so far as necessary to carry out the provisions of the act."

"The legislature by the Public Service Company Law has clearly, by broad and general terms, vested in the Public Service Commission full and complete authority to inquire into and regulate the reasonableness of rates of all public utilities." *New Castle v. New Castle Water Co.* (1918; Pa.) P.U.R. 1919A, 775.

There is no statutory limit upon the jurisdiction of the Georgia Commission to fix electric light and power rates, similar to the limitation upon its power to fix railway rates where prescribed by municipal contracts and



ordinances. *Re Georgia R. & P. Co.* (1918; Ga.) P.U.R.1918F, 624.

The rule in *Indiana* appears to be that, in case of an emergency, the Commission has been delegated jurisdiction to entertain a petition for relief from rates specified by municipal franchise. *State ex rel. Indianapolis Traction & Terminal Co. v. Lewis* (1918) — Ind. —, P.U.R.1918F, 111, 120 N. E. 129.

The Minnesota Commission has authority to change the rates for telephone service fixed by franchise, upon the utility's compliance with the statute giving the Commission jurisdiction, namely, the surrender of its franchise for an indeterminate permit. *Re Standard Teleph. Co.* (1917; Minn.) P.U.R.1918B, 573.

In some cases it has been contended that the statutory power of the commission to regulate rates has been limited by exceptions contained in the statute as to certain contracts, but this contention has been generally overruled.

Thus, in *State ex rel. Billings v. Billings Gas Co.* (1918) — Mont. —, P.U.R.1918F, 768, 173 Pac. 799, it was held that the provision in § 12 of the act that "this, however, does not have the effect of suspending, rescinding, invalidating, or in any way affecting existing contracts," applied only to the preceding part of the section relative

to rebates, concessions, etc., and did not apply to the terms of the act in its entirety.

A similar decision was made by the Maine Commission in construing a similar provision in the statute of that state. *Re Lincoln Water Co.* (1919; Me.) P.U.R.1919B, 752.

The Indiana statute legalizes franchises for the use of streets, alleys, and other public places in cities and towns, and such franchises are "made valid and shall be as effective as if granted under the provisions of this act;" but the act also requires franchises and other contracts to be reasonable, and therefore, if existing franchises are unreasonable, they are subject to revision by the commission, the same as franchises made under the act. *Winfield v. Public Service Commission* (1918) — Ind. —, P.U.R. 1918B, 747, 118 N. E. 531.

But in *Re Georgia R. & P. Co.* (Ga.) *supra*, the Georgia Commission held that it did not have power to change street railway rates fixed by municipal contracts, since the statute extending the power of the Railroad Commission over street railways expressly provided "that nothing herein contained shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company." W. M. G.

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FRANK W. DARLING, Appt.,

v.

CITY OF NEWPORT NEWS.

*Virginia Supreme Court of Appeals—June 18, 1918.*

(— Va. —, 96 S. E. 307.)

**Fish — lease from state — pollution.**

1. A lease by the state to an individual of land under tidal waters for the purpose of planting and propagating oysters thereon, which guarantees the absolute right to continue to use and occupy such grounds, subject only to the right of fishing in the waters over said bottom, confers no right in derogation of the common-law right of municipalities to drain their sewage into such waters.

[See note on this question beginning on page 762.]

**Eminent domain — exercise of sovereign power over public water.**

2. All privileges granted in public waters are subject to the exercise of the sovereign power over such waters, and an exercise of such power to the injury of the privilege granted is not a taking for which compensation must be made.

[See 10 R. C. L. 79 et seq.]

**Deed — construction — derogation of public right.**

3. Grants in derogation of the com-

mon or public right are strictly construed against the grantee.

[See 11 R. C. L. 1025.]

**Evidence — common knowledge — land for oyster culture.**

4. It is a matter of common knowledge that there are vast areas of land in the tide waters of Virginia remote from the centers of population and suitable for oyster culture.

[See 15 R. C. L. 1085-1087.]

(Sims, J., dissents.)

**APPEAL** by plaintiff from a judgment of the Circuit Court of the City of Newport News sustaining a demurrer to and dismissing a bill filed to recover damages for injury to plaintiff's oyster beds, alleged to have been caused by defendant's sewer system. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Jones & Woodward and J. Winston Read for appellant.

Mr. J. A. Massie for appellee.

Prentis, J., delivered the opinion of the court:

The appellant filed his bill against the appellee, basing his claim for relief upon the fact that he is the lessee from the state of very valuable oyster planting grounds, located in Hampton Roads, on the northern side thereof near the city of Newport News, and that a considerable portion thereof has already been damaged and the oysters thereon polluted because of the sewer system of the city, which conducts sewage into Salter's creek and thence into the tidal waters of Hampton Roads, across the appellant's oyster beds, and that other and greater damage therefrom is probable. To this bill the appellee filed a demurrer, which the lower court sustained because of opinion that the case of *Hampton v. Watson*, 119 Va. 95, L.R.A.1916F, 189, 89 S. E. 81, is controlling upon the main question involved.

In this conclusion of the trial court we concur. The syllabus of that case fairly states the conclusions of this court as follows:

"1. There is a marked and well-defined distinction between the pollution of a small non-navigable stream and the pollution of large ti-

dal navigable bodies of salt water, for the reason that in the first case the bed of the stream and the waters are owned by the riparian owners, while in the latter case the bed of the navigable, tidal salt water and the waters themselves are owned and controlled by the state, for the use and benefit of all the public, subject only to navigation. It is for the state to say what uses shall be made thereof and by whom, subject always to the right of the public, and for the state, through the legislative branch of the government, to say how much pollution it will permit to be emptied into and upon its waters, so long as the owners of the land between low-water and high-water mark are not injured.

"2. A municipal corporation situated on an arm of the sea, adjacent to tidal waters, has the right to use such waters for the purpose of carrying off its refuse and sewage to the sea, so long as such use does not create a public nuisance, and any injury occasioned thereby to private oyster beds is *damnum absque injuria*."

Additional authorities to those cited in *Hampton v. Watson*, *supra*, all relating, however, to the Federal government, to the effect that the power of the sovereign state or na-

tion is perpetual, not exhausted by one exercise, and that all privileges granted in public waters are subject to that power, the exercise of which is not the taking of private property for public use, but only the lawful exercise of a governmental power for the common good, are: *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 59 L. ed. 939, 35 Sup. Ct. Rep. 551; *Willink v. United States*, 240 U. S. 572, 60 L. ed. 808, 36 Sup. Ct. Rep. 422; *State v. Cleveland & P. R. Co.* 94 Ohio St. 61, L.R.A.1917A, 1014, 113 N. E. 677.

The appellant relies upon *Huffmire v. Brooklyn*, 162 N. Y. 584, 48 L.R.A. 421, 57 N. E. 176, and this case appears to sustain his contention, though it is observed that the New York statute, under which the owner of the oyster bed claimed there, provided that he should have "the exclusive property in the oysters so planted and the exclusive use of such oyster beds" (Laws 1868, chap. 734), while the Virginia statute employs different language, and provides that the oyster beds may be occupied "for the purpose of planting or propagating oysters thereon," and that so long as the rent is paid annually in advance the state will guarantee to the renter for twenty years "the absolute right to continue to use and occupy such grounds, subject only to the right of fishing in the waters above the said bottom." Sections 6 and 9, General Oyster Law (Acts 1910, p. 543).

In *Seaman v. New York*, 176 App. Div. 608, 161 N. Y. Supp. 1002, the pollution of tidal waters by sewage is held *damnum absque injuria* as to a riparian owner who had his oysters, over which, while stored in his cellar, the polluted waters of Jamaica bay ebbed and flowed.

The authorities upon the general subject are collected and summarized in the note to *Winchell v. Waukesha*,

84 Am. St. Rep. 921, and in 9 R. C. L. 682.

Grants in derogation of the common or public right are always strictly construed against the grantee. Nothing passes except what is granted specifically or by necessary implication.

As Mr. Justice Shiras states the rule in his dissenting opinion in the case of *Illinois C. R. Co. v. Illinois*, 146 U. S. 468, 36 L. ed. 1048, 13 Sup. Ct. Rep. 124: "It must be conceded, in limine, that in construing this grant the state is entitled to the benefit of certain well-settled canons of construction that pertain to grants by the state to private persons or corporations, as, for instance, that if there is any ambiguity or uncertainty in the act that interpretation must be put upon it which is most favorable to the state; that the words of the grant, being attributable to the party procuring the legislation, are to receive a strict construction as against the grantee; and that, as the state acts for the public good, we should expect to find the grant consistent with good morals and the general welfare of the state at large and of the particular community to be affected."

Applying this rule to the grants made under the Virginia Oyster Law, we find that the lease is made only "for the purpose of planting and propagating oysters thereon," and it is for this purpose alone that the planter is authorized to use and occupy such ground, that is to say that, while any citizen might have taken oysters therefrom before the grant, afterwards he only may do so, and all others are excluded from either planting or taking oysters from such ground during his term. This marks the limit of his right, for there is nothing to indicate that any other public or private right is withdrawn, limited, or curtailed. He does not take a fee-simple title, nor can he use the property for any other purpose except for that stated in the statute, and hence every other

**Eminent domain—exercise of sovereign power over public water.**

**Deed—construction—derogation of public right.**

right theretofore in the public is preserved. Nor is there any language in the statute indicating any intent to destroy or impair any of the ancient rights of the riparian owners.

In *Prior v. Swartz*, 62 Conn. 132, 18 L.R.A. 668, 36 Am. St. Rep. 333, 25 Atl. 398, it is expressly decided that the right of the riparian owner to build wharves and dig channels to connect his highland with navigable waters is superior to the right of the oyster planter. This right of the riparian owner to build wharves is everywhere recognized. *Miller v. Mendenhall*, 19 Am. St. Rep. 231, note; *Norfolk City v. Cooke*, 27 Gratt. 435.

It is a matter of common knowledge, and therefore must have been within the contemplation of the general assembly when the law was enacted, that there are vast areas of land in the tidal waters of Virginia,

remote from the centers of population and suitable for oyster culture.

Hampton Roads, in which the appellant occupies 1,800 acres of oyster-planting ground, of which 100 acres is alleged to be polluted, is a large, tidal, navigable body of salt water, formed by the confluence of the waters of the Atlantic ocean, Chesapeake bay, the James, Elizabeth, and Nansemond rivers, Hampton creek, and other smaller streams. That some of its waters have been long polluted and unfit for the planting of oysters for human food is also apparent from *Hampton v. Watson*, *supra*. Upon its shores, or closely adjacent thereto, are the cities of Norfolk, Portsmouth, Newport News, and Hampton, the towns of Phoebus and Kecoughtan, and great railway terminals and coaling stations. There is also the large population at Fortress Monroe, the National Soldiers' Home, and in fact along the entire adjacent coast. There the Federal government has recently located large military and naval stations, and is building an immense freight terminal for military purposes. Up-

on its waters innumerable ships of war and commerce, domestic and foreign, constantly float. From all of these sources the waters of Hampton Roads are constantly subject to pollution and contamination, such as is necessarily incident to all such roadsteads. This large population is destined still further to increase, and hence the probable sources of contamination will be increased.

If it be true that the private right of the appellant to continue to use and occupy this territory for the planting of oysters has been so guaranteed by the state as to make his rights superior to the interest of the large public otherwise entitled, within proper limits, to use the waters of Hampton Roads for its sewage, then the burden is clearly upon him to show that this is true. Until this is shown, it is unnecessary to discuss the proposition so urgently and well presented in the dissenting opinion; that is, that the general assembly possesses unlimited power to grant absolute property rights in the lands of the state lying under the tidal waters.

That the right claimed by the city clearly existed before the enactment of the Oyster Law cannot be doubted, and the legislature cannot be presumed to have intended to destroy this ancient and undoubted public right in the absence of a clear and explicit statute indicating such purpose. We think the more reasonable view of the statute is that it was not conceived that it would be thought desirable to continue to plant oysters in an area so certain ultimately to be polluted, and so likely, upon inspection by the Federal and state authorities, to be condemned as unsuitable for that purpose.

This construction is not, as the dissenting opinion suggests, the substitution of the will and judgment of this court for the will and judgment of the legislature, but, on the contrary, ascertains and declares the true meaning of the statute in accordance with the will and judgment of the general assembly, which not only seeks to encourage oyster cul-

Evidence—  
common  
knowledge—  
land for oyster  
culture.

ture, but has also expressly authorized cities and towns to construct sewers within or without their limits. Acts 1908, p. 624. This conclusion effectuates both of these purposes. The bill seeks to deny to the city of Newport News a privilege which is freely exercised by every ship which sails on these waters, and, except as restrained by local law, by every individual on these shores.

Under the Virginia statute, then, as construed by this court, the oyster planter takes his right to plant and propagate oysters on the public domain of the commonwealth in the tidal waters, subject to the ancient right of the riparian owners to drain the harmful refuse of the land into the sea, which is the sewer provided therefor by nature; while another statute (Acts 1916, p. 51) provides for the examination of such oyster-planting grounds so as to discover polluted areas, and prohibits the taking of oysters therefrom except for the purpose of removing them to unpolluted waters, there to remain until cleansed, purified, and made suitable for human food.

**Fish—lease  
from state—  
pollution.**

Affirmed.

**Sims, J., dissenting:**

The decision of this case, so far as the right of recovery of damages is concerned, turns upon the question whether the appellant had a private right of property in the oysters upon or in the oyster-planting ground in the bill mentioned.

If such property right existed, the city of Newport News, a municipal corporation, had no right to damage or destroy such property by what would have been a private nuisance at common law if created by a private person. 1 Farnham, Waters, §§ 138b, 138c, 138d; Gould, Waters, §§ 545, 546; Joyce, Nuisances, § 284.

Under the Constitution of Virginia of 1902, § 58, the legislative authority of the city does not shield it from liability to make "just compensation" for "damage" it may cause to private property by acts

since that Constitution went into effect, which would have created a private nuisance at common law, although such property be not "taken." 1 Farnham, Waters, § 138d; note in 48 L.R.A. 691, 698, et seq.; Swift & Co. v. Newport News, 105 Va. 108, 3 L.R.A. (N.S.) 404, 52 S. E. 821; Rigney v. Chicago, 102 Ill. 64; 1 Lewis, Em. Dom. 3d ed. §§ 16 to 61, 108, 346, 356, 360, 361.

As said in the syllabus to *Hampton v. Watson*, 119 Va. 95, L.R.A. 1916F, 189, 89 S. E. 81: "There is a marked and well-defined distinction between the pollution of a small non-navigable stream and the pollution of large tidal navigable bodies of salt water;" but this distinction, as also stated by such syllabus, exists only "for the reason that in the first case the bed of the stream and the waters are owned by the riparian owners, while in the latter case the bed of the navigable, tidal salt water and the waters themselves are owned and controlled by the state."

With respect to private exclusive rights of ownership which may be and have in fact been acquired from the commonwealth, there is no distinction between the liability in damages for a pollution injuriously affecting such private property rights in tidal, navigable salt waters and the beds thereof, and for a pollution so affecting private property rights in small non-navigable streams.

Now it is undoubtedly true that the private rights of ownership which may be acquired and held in tidal, navigable waters and the beds thereof must be acquired from the commonwealth, and must be held subject to such regulations as it may prescribe for the protection of the public interest. It is also true, as said in *Hampton v. Watson*, 119 Va. at pp. 98, 99: "The tidal, navigable salt waters and the beds thereof belong to the commonwealth, in a sovereign capacity, for the benefit of all the public, and cannot be disposed of to the detriment of the public interest" (citing a number of authorities).

But who is to decide whether a

disposition of such subject in any particular instance is in detriment of the public interest, and what interest has the public in the subject? These are different questions, which will be hereinafter considered.

And it is unquestionably true that in the absence of such exclusive private property rights, acquired from the commonwealth, the pollution of such waters and the beds thereof by sewage discharged therein or thereon by private persons, corporations, or municipalities, whether under legislative authority or without, cannot create a common-law nuisance, so long as only such waters and bed thereof are affected, since the rights of riparian owners in such case would not be affected. But, as is also said in the opinion of the court in the case last cited, referring to the holding in *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, such sovereign ownership in the commonwealth is held, "with the consequent right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters." (Italics supplied.)

Now it is settled beyond all controversy that exclusive private rights of ownership in such waters and in the beds thereof, consisting of exclusive rights of fishery, namely, of shellfishery, being the precise rights which were acquired by appellant in the instant case from the commonwealth, may be acquired from the commonwealth, and that such disposition of a portion of the sovereign ownership by the latter is not such an impairment of the interest of the public in the waters and beds thereof as aforesaid as to prevent such disposition being valid and effectual to vest in private persons such property rights. 2 Farnham, Waters, §§ 370, 402.

As said by the latter learned author in said § 370 above cited: "Rights of Legislature to Grant Exclusive Rights in Tidewater.—When the American colonies separated from the mother country and

acquired their freedom, they acquired all the powers, not only of the Crown, but of Parliament also, and, unless restricted by the Constitution, this power resides in the legislatures. Parliament, in England, always had the right to grant exclusive fishery rights in tide-waters. *Reg. v. Robertson*, 6 Can. S. C. 52. And that power rests in the legislatures, except where it is withdrawn from them by the constitutions. *Com. v. Weatherhead*, 110 Mass. 175; *Rowe v. Smith*, 48 Conn. 444; *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Martin v. Waddell*, 16 Pet. 367, 369, 10 L. ed. 997, 998; *Den ex dem. Russell v. Jersey Co.* 15 How. 432, 14 L. ed. 760; *Wooley v. Campbell*, 37 N. J. L. 163; *Carter v. Tinicum Fishing Co.* 77 Pa. 310; *Shreves v. Liveson*, 2 N. J. L. 247; *Munson v. Baldwin*, 7 Conn. 168; *Walker v. Stone*, 17 Wash. 578, 50 Pac. 488; *Halleck v. Davis*, 22 Wash. 393, 60 Pac. 1116; *Com. v. Hilton*, 174 Mass. 29, 45 L.R.A. 475, 54 N. E. 362. And when grants to private individuals have been made, they are valid and will be upheld; so that there may be a several fishery in a tidal water. *Fitzgerald v. Faunce*, 46 N. J. L. 536; *Den ex dem. Bispham v. Rice*, cited in *Gough v. Bell*, 22 N. J. L. 463."

As stated in note 2 to such section: "Public fisheries may be leased and disposed of by the legislature in any manner so that it does not interfere with or impair the public right of navigation or the power of the general government to regulate commerce and navigation in bays and harbors. *Gough v. Bell*, 21 N. J. L. 156."

In § 402 above cited, the same learned author last quoted says: "Public Right in Shellfisheries.— . . . This right is subject to . . . grants from the public which have placed the title to the beds in private ownership. *Peck v. Lockwood*, 5 Day, 22; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Parker v. Cutler Milldam Co.* 20 Me. 353, 37 Am. Dec. 56; *Bagott v. Orr*, 2 Bos.

& P. 472, 126 Eng. Reprint, 1391, 5 Revised Rep. 668; *Paul v. Hazleton*, 37 N. J. L. 106; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Proctor v. Wells*, 103 Mass. 216. . . . The shellfisheries may, however, be granted to private individuals so as to exclude the public right of fishing there. *Com. v. Manimon*, 136 Mass. 456."

And, on principle, this must necessarily be so with us. For the sovereign power of the legislature is unlimited save only as it may be limited by the state Constitution or by the grant of powers to the Federal government resulting from the Federal Constitution; and, when neither state nor Federal Constitution contains any provision limiting the legislative power to grant a private right of fishery, such as held by the appellant in the case before us under grant, lease, from the legislature, in tidal, navigable salt waters and the beds thereof, for the courts to say that such legislative power is limited by a rule that the private right so granted shall not interfere with the public use of such waters and beds thereof for the discharge of sewage is for the judicial branch of the government to usurp the function of the Constitution, state and Federal, and to attempt to impose a limitation upon the sovereign power of the legislature. The bare statement of the proposition is sufficient to refute the contention that such a limitation upon the legislative power exists with us, or can be imposed by the courts.

In England, the Crown had not the same plenitude of power to grant exclusive private rights of fishery in tidal, navigable salt waters and beds thereof, at least not after *Magna Charta*, so as to interfere with the public use of such waters and beds thereof; but it would serve no useful purpose to attempt here the difficult task of delving into ancient rules of the common law, which hedged about the power of the Crown when attempted to be exercised without the consent of Parliament in matters affecting the *jus*

publicum, since the power of our legislature is not measured by the power of the Crown of England. It should be noted, however, that in the consideration of this subject it must be constantly borne in mind that much which is found in the books, of text-writers and of decisions, with respect to the inalienable nature of the *jus publicum*, has its origin in the common-law doctrine touching the limitations above alluded to upon the power of the Crown, and has no correct application to the legislative power in the premises.

In truth, aside from the public right of navigation, which falls within the control of the Federal government as a result of the grant of powers to the latter by our Federal Constitution, there is no *jus publicum*, or public right, or public interest in tidal, navigable salt waters or the beds thereof, except such right or interest as the public is permitted to enjoy by legislative sufferance or legislative grant. And this is true of municipalities, other corporations, public or private, and of private persons composing the public. They have no vested rights in the premises which the legislature cannot take away. Such rights are subject at all times to the control of the legislature, since we have no constitutional limitation on the subject, as aforesaid. 2 *Farnham, Waters*, § 370, p. 1375.

All rights claimed by municipalities, and by all other persons, corporate or individual, to use such waters or beds thereof for any purpose, must be derived from the commonwealth, by sufferance or by legislative grant. They can have no other source of origin. As to origin, they differ not at all from all titles and rights of ownership and of use of lands above tidewater. The private right or title to all such things is derivative from one and the same source alone, the commonwealth. See *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. at page 248, *supra*, for reference to this principle, if reference be needed.

If, therefore, as in the case be-

fore us, the commonwealth, acting through the legislature, makes a grant, or lease, of an exclusive private right of fishery in tidal, navigable waters and beds thereof to an individual, the appellant, that is but an exercise of the sovereign power of the commonwealth to do what it may will with its own; no constitutional limitation existing forbidding it so to do, by that grant, or lease, the commonwealth takes away from other individuals and corporations, municipal and others, the privilege they may have theretofore enjoyed of using such waters and beds thereof by sufferance of the commonwealth. They had no vested right in such use. It was a privilege merely, just as soil above tidewater belonging to the commonwealth may be used in common by all or any of its citizens, until there is a private grant thereof from the commonwealth. Upon such private grant issuing in pursuance of legislative enactment, the public use in common must cease.

The foregoing assumes, of course, that the private grant, or lease, of exclusive right of fishery to the individual instanced, is a prior grant, or lease, as in the case before us. In such case, if another, a municipal corporation, such as the appellee, for instance, were, since the Constitution of Virginia of 1902 went into effect, to invade such private right of fishery under express legislative authority, such authority would be null and void under § 58 of Constitution of Virginia of 1902, forbidding the legislature to authorize the taking or damaging of private property for public use without just compensation.

Section 1338 of the Code of Virginia is declaratory of the common-law rights of sovereignty of the commonwealth of Virginia aforesaid, pertaining to this subject, and specifically refers to its rights "by special grant" to withdraw from the use "in common by all the people of the state," portions of "the beds of the bays, . . . and shores of the sea within the jurisdiction of this

commonwealth," and to vest exclusive rights of property in such portions thereof in private persons, except that any grant of such exclusive private property rights was forbidden to be issued after such statute went into effect, "in any natural oyster bed, rock, or shoal, whether the said bed, rock, or shoal shall ebb bare or not." *Taylor v. Com.* 102 Va. 759, 102 Am. St. Rep. 865, 47 S. E. 875. The exception contained in such statute is merely a declaration of legislative policy by way of a self-imposed limitation of the sovereign right of the commonwealth to "grant" and "pass any estate or interest of the commonwealth" in such natural oyster beds, rock, or shoal, in tidal, navigable waters. (The rights of fishery held by appellant do not include "any natural oyster bed, rock, or shoal.") Accordingly the power of the legislature of Virginia to authorize by statute the leasing to private persons of oyster grounds beneath the navigable, tidal waters within its jurisdiction has been uniformly recognized by the decisions of this court. And it has been uniformly held that such leases confer an "exclusive right [upon] the lessee to use and occupy the land" for the period of the lease. As said by this court in *Power v. Tazewells*, 25 Gratt. 786, speaking of such a lease: "It confers in fact an exclusive right to use, occupy, or take the profits of the land by planting or sowing oysters upon it."

Such a private right of property is vested by such a lease in the lessee in the bed of the ground beneath the waters that the lessee, occupying the precise position as that occupied by the appellant, may maintain an action of unlawful detainer to recover the possession thereof. See, to the same effect, *Hurst v. Dulany*, 84 Va. 701, 5 S. E. 802; *Mears v. Dexter*, 86 Va. 834, 11 S. E. 538. Such a grant of exclusive private property right is not in violation of the power of the Congress to regulate commerce under the Federal Constitution, and such a grant confers a property right. *McCready v. Vir-*



ginia, *supra*. The existence of such property rights is also recognized by statute in Virginia. Section 2137a, Code of Virginia, provides that "the interest in said oyster planting ground shall be construed to be a chattel real, and shall at the death of the renter pass into the hands of the personal representatives for the benefit of creditors and the heirs of the decedent," etc.

Therefore, as against the private property rights of appellant, acquired in pursuance of statute of the commonwealth of Virginia, the acts of the appellee complained of created what would have been at common law a private nuisance if created by a private person, and for which the appellee is liable to appellant in damages to the extent of making the "just compensation" required by § 58 of the Constitution of 1902 of Virginia. *Huffmire v. Brooklyn*, 162 N. Y. 584, 48 L.R.A. 421, 57 N. E. 176. As said in the latter case: "The plaintiffs contend that the casting of noxious and destructive substances upon their oyster bed was not a consequential, but a direct, injury. The defendant insists that the discharge of the sewer in question into the waters of Mill creek is simply the consequential result of obedience to the legislative mandate, and that, in the absence of negligence on the part of the municipal authorities in the construction and operation of said sewer, the defendant is not liable. Applying the rule which the defendant invokes in all its force and breadth, we think this case falls directly within the constitutional inhibition against the taking of property without compensation. The plaintiffs were lawfully in possession of a piece of land under water upon which they had planted a bed of oysters. They held their title under legislative authority, which was as ample and unquestioned as that under which defendant's sewer was constructed. Although this land was under public waters, it was as much the private property of the plaintiffs as though it had been a tract of farm land held under a lease from the

town of Flatlands under legislative authority. The act of the defendant in pouring its sewage upon this land was not consequential. It was as direct as though it had been discharged upon a piece of land owned or rented by the plaintiffs, and used for farming or gardening purposes. In the latter case a municipal corporation could not successfully defend its trespass because it was acting under legislative authority, or because its sewage had been carried to the lands of the person complaining over the lands of others. The fact that plaintiffs' land was under public water, and that defendant's sewage was discharged upon it, after passing through 300 feet of public water, the land under which was not in the possession or control of the plaintiffs, does not differentiate this case in principle from the illustrative case of a discharge of sewage upon surface lands. In either case the injury is so direct as to amount to an invasion of a private right, which no legislative sanction or direction can justify or excuse. These views are, we think, sustained by abundant authority."

The Constitution of the state of New York contains no provision requiring compensation to be paid for private property "damaged" for the public use, such as the Constitution of Virginia of 1902, § 58, but only such a provision as to the "taking" of private property. But under the view taken by the New York courts of the subject, also taken in Massachusetts, and in a few other jurisdictions, a physical invasion of private property as the result of public use is held to be a "taking" within that constitutional provision. It is true that in Virginia, prior to its Constitution of 1902, a stricter rule obtained, and nothing short of an actual "taking" of private property for public use was held to come within the former constitutional provision in this state on the subject, which, like the New York Constitution, required compensation to be made only for a "taking" of private property for public use. Hence, in-

deed, the amendment of our Constitution in 1902, adding in § 58 thereof the words, "or damaged." Debates, Const. Convention, 1901-02, pp. 697 et seq.

Therefore the case of *Huffmire v. Brooklyn*, supra, is directly in point as to what the holding in this case before us should be under our present Constitution.

The appellee relies upon the cases of *Hampton v. Watson*, 119 Va. 95, L.R.A.1916F, 189, 89 S. E. 81; *Seaman v. New York*, 176 App. Div. 608, 161 N. Y. Supp. 1002; *Sayre v. Newark*, 60 N. J. Eq. 361, 48 L.R.A. 722, 83 Am. St. Rep. 629, 45 Atl. 985; *Doremus v. Paterson*, 65 N. J. Eq. 711, 55 Atl. 304; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Haskell v. New Bedford*, 108 Mass. 208-214; *Grey ex rel. Simmons v. Paterson*, 60 N. J. Eq. 385, 48 L.R.A. 717, 83 Am. St. Rep. 642, 45 Atl. 995. But in these cases either there did not exist in the plaintiff any property right acquired from the commonwealth, or, if it did, it was not "taken" or "damaged" by the acts complained of, within the meaning of the constitutional provision on the subject.

In the *Hampton v. Watson* Case, supra, it is true that the opinion of this court rested the decision upon the ground that "the beds and waters of Hampton creek [in question in that case], . . . being tidal, navigable salt waters, are held in trust by the state of Virginia for the public, and cannot be granted to an individual so as to impair the public interests therein, or the use thereof."

But the public use of such beds and waters which the court had in mind, and of which it was speaking in that case, was a use which, long prior to the institution of plaintiff's action in 1915, had taken actual possession of such beds and waters as a dumping ground for the discharge of sewage, to the extent of completely polluting the ground of plaintiff, so that it was unfit for his purposes before his action was instituted. The facts in that case were that,

long prior to the institution of the plaintiff's action in 1915, to wit, in 1899-1900, the city of Hampton constructed its sewer system and put it in operation, discharging into Hampton creek, and in 1908 made additions thereto and put same in operation, having the same place of discharge. And this was not all. From a time prior to 1908 there were private sewer systems emptying into the same place established by the county poorhouse, the National Soldiers' Home, with over 3,000 inmates, the normal school, with 1,100 inmates, and other private sewers and closets, which were not connected with any sewer of the defendant city, and which continuously drained and emptied directly into Hampton creek. And, as said in said opinion: "The evidence shows that the sewerage from these private sources is many times more than sufficient to pollute the waters in question, so as to forbid the sale of oysters directly therefrom."

As also stated in such opinion: "It further appears that in the summer of 1909 the oyster planters in Hampton creek were notified by the health officer of the county that those waters were too polluted to permit the sale of oysters therefrom, and again in 1914 the United States health authorities made an examination, and found that the waters were too polluted for oysters to be sold directly therefrom, and thereupon the pure food and dairy department of the state of Virginia notified the defendant in error, among others, that they would not be permitted to sell their oysters without first transplanting them to unpolluted waters."

In that case the plaintiff's right to maintain his action necessarily depended upon his having had an exclusive private right of ownership, an exclusive private right of fishery, in the tidal waters and bed thereof in question, as of the time his alleged cause of action arose. Plainly, under the facts of that case, he did not have such exclusive private property right at the time his alleged cause of action arose, since the city

of Hampton, by its sewer system established and begun in operation in 1899-1900 and enlarged in 1908, certainly by 1914 (five years having expired after the injury therefrom began) had acquired a statutory right to discharge its sewage in the locality in question. *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 10 L.R.A. (N.S.) 465, 56 S. E. 216, 10 Ann. Cas. 179; *Southern R. Co. v. McMenamin*, 113 Va. 121, 73 S. E. 980; *Magruder v. Virginia-Carolina Chemical Co.* 120 Va. 352, 91 S. E. 121. The *Hampton v. Watson Case*, therefore, presented the question whether a plaintiff, claiming an exclusive private right of fishery under grant (lease) from the commonwealth, which he had lost, by reason of the bar of the Statute of Limitations, before he instituted his action, because of public use in conflict with such private right, could yet maintain his action. That was a very different question from the one presented in the instant case, where the appellant held and owned, at the time his alleged cause of action arose, an exclusive private right of fishery under grant (lease) from the commonwealth, which he had not lost before he instituted his action.

What is said, therefore, in the *Hampton v. Watson Case*, should be construed in the light of the facts of that case.

Moreover, as said in *Williams Printing Co. v. Saunders*, 113 Va. 156, at page 179, 73 S. E. 472, 478, Ann. Cas. 1913E, 693: "The value of a case as a precedent is affected by the consideration that the precise point for which it is relied upon as authority was presented in argument and considered by the court."

It seems that in the *Hampton v. Watson Case* the point was not presented in argument that, by the provision of § 58 of the Constitution of Virginia of 1902, the authority of the legislature to authorize a municipality to *damage* private property for public use without just compensation was taken away, so that the *damnum absque injuria* rule applied

by the court in that case should not have been applied. Certainly, that point was not considered by the court, as appears from the opinion. Therefore, for this reason also, the *Hampton v. Watson Case* should not be considered as decisive of the instant case. But if that case can be construed to apply to the instant case, it can only be upon the ground that it holds that an exclusive private right of fishery cannot be granted by the commonwealth. Such a holding would be unsound because in conflict with the principle of law involved and the settled law on the subject, as above noted. Hence I am of opinion that the *Hampton v. Watson Case* cannot properly rule the instant case.

In *Seaman v. New York*, 176 App. Div. 608, 161 N. Y. Supp. 1002, the plaintiff had no property right which he had acquired of the commonwealth in the tidal water in question, nor in the bed thereof.

In *Sayre v. Newark*, 60 N. J. Eq. 361, 48 L.R.A. 722, 83 Am. St. Rep. 629, 45 Atl. 985, there was no private property right in the bed of the stream acquired from the commonwealth, nor was there any "taking" of the property right in question. It was merely a riparian property right which was "damaged." The Constitution of New Jersey contains no provision against private property being "damaged" for public use without just compensation, but only such provision as to a "taking" of private property for public use. In New Jersey, the construction of the latter provision by its courts is the same as the Virginia doctrine on that subject before our Constitution of 1902. Hence that case is not authority in point on the question under consideration, under the latter Constitution.

In *Doremus v. Paterson*, 65 N. J. Eq. 711, 55 Atl. 304, the stream affected by the pollution was above tidewater, and the plaintiff had acquired no property right in the water in question.

In *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, the

property right affected was a riparian right only, not a right in the bed of the stream. The court remarked that it was not an "acquired property right in possession." However, that case is to some extent distinguished by a holding of the court somewhat peculiar to Massachusetts (1 Farnham, Waters, § 138c); and, further, it rests upon an application of the doctrine of *damnum absque injuria*, which has not been sanctioned in Virginia. *Arminius Chem. Co. v. Landrum*, 113 Va. 7, 38 L.R.A. (N.S.) 272, 73 S. E. 459, Ann. Cas. 1913D, 1075.

In *Haskell v. New Bedford*, 108 Mass. 208, 214, among the plaintiff's property rights was one which he had acquired from the commonwealth, and that was a title to the channel of the river underneath tidewater, by virtue of a certain statute of the state of Massachusetts. As to that right the court in its opinion says: "But the right conferred upon the city of New Bedford to lay out common sewers 'through any streets or private lands' does not include the right to create a nuisance, public or private, upon the property of the commonwealth, or of an individual, within tidewater. *Hale de Mortibus Maris*, chap. 7, in *Hargrave's Law Tracts*, 85; *Richardson v. Boston*, 19 How. 263, 270, 15 L. ed. 639, 642, and 24 How. 188, 193, 16 L. ed. 625, 627; *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223; *Sherman v. Tobey*, 3 Allen, 7; *Atty. Gen. v. Birmingham*, 4 Kay & J. 528, 70 Eng. Reprint, 220, 6 Week. Rep. 811; *Atty. Gen. v. Leeds*, L. R. 5 Ch. 583, 39 L. J. Ch. N. S. 711, 19 Week. Rep. 19."

And the court held that the city, notwithstanding its legislative authority to establish its sewers as it did, discharging into the bed of the channel of the said river, was liable in damages to the plaintiff for the injury done him by the accumulation of sewage in such river bed below tidewater, and filling it up, that being a private nuisance; and reversed the court below on this point for holding to the contrary. See

pages 214, 215, 216, of the report of that case in 108 Mass. Indeed the court in that case went farther and held that "against the continuance of such a nuisance, if clearly proved, equity will also grant relief by injunction" (citing a number of cases).

See 108 Mass. p. 216.

In *Grey ex rel. Simmons v. Paterson*, 60 N. J. Eq. 385, 48 L.R.A. 717, 83 Am. St. Rep. 642, 45 Atl. 995, the plaintiffs at whose relation the suit was brought were riparian owners, and those whose lands bordered on the river at tidewater had acquired no property right in the tidal waters or beds thereof; such right still remained in the commonwealth.

There is nothing in the cases of *Taylor v. Com.* 102 Va. 768, 102 Am. St. Rep. 865, 47 S. E. 875; *Newport News Shipbuilding & Dry Dock Co. v. Jones*, 105 Va. 503, 6 L.R.A. (N.S.) 247, 54 S. E. 314; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, or *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400, cited in the opinion of this court in *Hampton v. Watson*, 119 Va. 95, L.R.A. 1916F, 189, 89 S. E. 81, which is in any way in conflict with the holding in the case of *Huffmire v. Brooklyn*, 162 N. Y. 584, 48 L.R.A. 421, 57 N. E. 176.

It is true that, in the opinion in the case of *Coxe v. State*, just mentioned, there is a distinction sought to be made between the character of the title vested in the commonwealth with respect to tidal navigable waters and the beds thereof and the character of such title with respect to land above tidewater. But for the reasons indicated above, both on principle and upon authority, such a distinction cannot be sound. The opinion confuses the character of title vested in the Crown in England with that vested in our American commonwealths, and attributes to the latter limitations which in truth have and can have no existence unless imposed by Constitution, state or Federal. A detailed discussion of the authorities referred to in such case would make this even more

manifest, but that would needlessly prolong this opinion, since what is said in *Coxe v. State* on the subject under consideration does not contravene the power of the legislature to grant an exclusive private right of fishery which does not interfere with the powers vested in the Federal government under the Federal Constitution to control navigation and regulate commerce. Such a grant, even under the position taken in that case, would be considered a reasonable exercise by the state of its legislative power, and valid to vest exclusive private right of fishery, and hence such case is not in conflict with the case of *Huffmire v. Brooklyn*, *supra*.

What the case of *Coxe v. State*, *supra*, decided was that a legislative grant to a private individual or corporation to dike off a part of the tidal, navigable salt waters, and fill in so as to reclaim the beds underneath such waters, was void because in conflict with the Federal Constitution, granting to the Federal government the exclusive power to regulate foreign and domestic commerce. There is nothing in that holding in conflict with either the *Huffmire v. Brooklyn Case*, or what has been said above on the fundamental principle involved.

That case also rests its decision on the ground that the act of the legislature in question was void under the New York state Constitution, because it embraced more than one subject; but that ground is, of course, foreign to the subject we have under consideration, and is merely referred to as further showing that the court did not rest its decision of the case upon the distinction sought to be made in its opinion, as aforesaid, with respect to the character of title vested in the commonwealth to tidal, navigable waters and the beds thereof.

There is nothing in the cases of *Scranton v. Wheeler*, *Greenleaf Johnson Lumber Co. v. Garrison*, *Willink v. United States*, or *State v. Cleveland*, cited in the majority opinion, in conflict with what has

been said above. Those cases concern the power of the Federal government under the Federal Constitution. They hold, in effect, that no private property right in navigable waters and the beds thereof can be acquired or held as against the power of the Federal government to control navigation and regulate commerce, conferred upon the latter by the Federal Constitution.

I have no difference with the majority opinion on the subject that, as stated in such opinion, "grants in derogation of the common or public right are always strictly construed against the grantee. Nothing passes except what is granted specifically, or by necessary implication." *Illinois C. R. Co. v. Illinois*, 146 U. S. 469, 36 L. ed. 1048, 13 Sup. Ct. Rep. 110, cited in the majority opinion, and numerous other authorities which might be cited, so holding in effect. But after giving full force and effect to this rule, as we have seen from a consideration of the Virginia statute law on the subject, such statute law is free from all ambiguity and all uncertainty, and plainly and unquestionably has made the grant to the appellant of the exclusive rights of fishery aforesaid, in the locality aforesaid, "for the purpose of planting and propagating oysters thereon." And such grant was accepted by the appellant, and he entered into the possession thereof before the appellee acquired any rights under the legislative grant of authority to it, as a municipality, to construct its new sewerage system and to discharge its sewage therefrom, complained of by appellant. The circumstance that the fee simple was not granted to the appellant seems to me to be wholly immaterial. Other property rights are just as sacred, may be of the same value, and are just as much entitled to protection as are fee-simple interests in property. The point is that exclusive private property rights were "specifically" granted to and derived by the appellant under legislative enactments of the commonwealth of Virginia; and such

rights were so acquired by the appellant before any conflicting rights were acquired by the appellee under its legislative authority. The new sewer and the discharge of sewage therefrom, complained of by appellant, was not begun by appellee until 1907, after the Constitution of Virginia of 1902 went into effect. If prior to such Constitution the appellee had any legislative authority to discharge its sewage to the damage of said private rights of appellant without liability to him in damages, such authority was annulled by the provision of such Constitution (§ 58) above referred to. *Swift & Co. v. Newport News*, 105 Va. 108, 3 L.R.A. (N.S.) 404, 52 S. E. 821, *supra*, and other authorities cited above on this subject. Hence in 1907 and thereafter, when the appellee committed the acts complained of, creating what would be a private nuisance if created by an individual, the appellant's private property rights aforesaid were protected by such constitutional provision, and the legislative authority relied on by appellee could furnish no warrant to damage such property rights as aforesaid, and no shield to it from liability for damages therefor.

The majority opinion refers to certain authorities on the subject of the rights of riparian owners of real estate bordering upon navigable waters. I have no difference with those authorities. The rights of such riparian owners exist at common law and under statute. Such rights are well settled by the authorities, and it is firmly established that such rights, unless derived from legislative authority, never extend beyond the low-water mark into navigable, tidal salt waters, or upon the beds thereof. The right to build wharves extending beyond the low-water mark of navigable, tidal salt waters must be derived from legislative grant. *Taylor v. Com.* 102 Va. 759, 102 Am. St. Rep. 865, 47 S. E. 875; *Newport News Shipbuilding & Dry Dock Co. v. Jones*, 105 Va. 503, 509, 6 L.R.A. (N.S.) 247, 54 S. E. 314. Hence the alleged right of a munic-

ipality, relied on by appellee in the instant case, to discharge sewage into the waters aforesaid and upon the beds thereof is not the right of a riparian owner, and the authorities referred to in the majority opinion on this subject have no bearing in principle or controlling application to the instant case, as I must say, with all due deference.

My view is that the right of the appellee, on which it relies in this case, can be nowhere found unless under its legislative authority; and, as above stated, it cannot be found under that authority.

The remaining authorities cited in the majority opinion, not referred to above, of note to case of *Winchell v. Waukesha*, 84 Am. St. Rep. 921-923, and 9 R. C. L. 682, confirm the correctness of the conclusion of this dissenting opinion. There is nothing in the Act of Assembly of 1908, page 624, referred to in the majority opinion, to the contrary. Indeed, the latter act expressly provides that the municipality shall "acquire" the land necessary to operate its sewers "by purchase, condemnation, or otherwise," and does not contemplate the damaging of any private property rights without due compensation.

Hence, upon principle and upon authority, I think the appellee, upon the case made by the allegations of the bill, is liable in damages to the appellant to the extent of the just compensation required to be paid by § 58 of the Constitution of Virginia of 1902.

The learned judge of the court below would have so held, as appears from the decree appealed from, but for the supposed binding authority to the contrary of the case of *Hampton v. Watson*, 119 Va. 95, L.R.A. 1916F, 189, 89 S. E. 81. For the reasons stated above, I do not consider the latter case authority to the contrary. And if it were, I am convinced that upon principle and authority, as aforesaid, it should be overruled.

It is not intended by anything which is said above to intimate that

I think an injunction should be granted in the instant case. The granting or refusal of an injunction would depend upon other considerations.

Where a municipal corporation has at great expense constructed and put in operation, and used for a long time, a system of sewerage, an injunction should be refused on the ground that it would be inequitable to give such relief, where relief can be otherwise afforded, as by making just compensation in damages. *Grey ex rel. Simmons v. Paterson*, 60 N. J. Eq. 385, 48 L.R.A. 717, 83 Am. St.

*Rep.* 642, 45 Atl. 995. Many other authorities might be cited to the same effect.

For the reasons stated above, I am constrained to dissent from the majority opinion.

Petition for writ of certiorari denied by the Supreme Court of the United States, October 28, 1918 (U. S. Adv. Ops. 1918-19, p. 14) 248 U. S. 567, 63 L. ed. —, 39 Sup. Ct. Rep. 9. Affirmed by the Supreme Court of the United States, April 28, 1919 (U. S. Adv. Ops. 1918-19, p. 451) — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 371.

## ANNOTATION.

### Pollution of oyster beds.

In Virginia, the rule as laid down in *Hampton v. Watson* (1916) 119 Va. 95, L.R.A.1916F, 189, 89 S. E. 81, and followed in the reported case (*DARLING v. NEWPORT NEWS*, ante, 748), which has been affirmed by the Supreme Court of the United States (U. S. Adv. Ops. 1918-1919, p. 451), — U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 371, is to the effect that a lease by a state to an individual of land under tidal water, granted pursuant to a statute authorizing the leasing of such lands, and "for the purpose of planting or propagating oysters thereon," and guaranteeing "the absolute right to continue to use and occupy such grounds, subject only to the right of fishing in the waters above the said bottom," confers no right in derogation of the right of a municipal corporation to drain its sewage into such waters with resulting damage to the leased oyster beds therein. In other words, since tidal, navigable salt waters of Virginia are held in trust by the state for the public, the public interest therein and use thereof for natural sewerage purposes cannot be impaired or interfered with by the leasing by the state of oyster grounds, even though such grounds cannot be used because of the pollution of the waters by the sewage. In *Hampton v. Watson*, the court, in

reaching the above-stated conclusion said: "Since the state holds its tidal waters and the beds thereof for the benefit of all the public, we are of the opinion that the city of Hampton has the right to use the waters of Hampton creek for the purpose of carrying off its refuse and sewage to the sea, so long as such use does not constitute a public nuisance, and, as such, be discontinued by the legislature, which has control over the extent to which these waters may be so used. The sea is the natural outlet for all the impurities flowing from the land, and the public health demands that our large and rapidly growing seacoast cities should not be obstructed in their use of this outlet, except in the public interest. One great natural office of the sea and of all running waters, is to carry off and dissipate, by their perpetual motion and currents, the impurities and offscourings of the land. The owner of any lands bordering upon the sea may lawfully throw refuse matter into it, provided he does not create a nuisance to others. And there can be no doubt that public bodies and officers, charged by law with the power and duty of constructing and maintaining sewers and drains for the benefit of the public health, have an equal right. . . . Sewerage systems for all thickly popu-

lated communities have become an imperative necessity, a public right, which is superior to the leasing by the state of a few acres of oyster land. . . . Any injury occasioned the private oyster bed of the plaintiff thereby was *damnum absque injuria*." In the reported case (*DARLING v. NEWPORT NEWS*, ante, 748), the court said that the Hampton Case was controlling upon this general question, emphasizing particularly the distinction between tidal and nontidal waters. And the Supreme Court of the United States, in affirming the *DARLING CASE*, approved the reasoning adopted by the Virginia supreme court of appeals, and also approved the statement that a lessee of land for oyster beds under tidal waters surrounded by large towns and cities, must be held to take the risk of the pollution of the water by sewage.

Another point made in the reported case (*DARLING v. NEWPORT NEWS*), and followed by the Federal Supreme Court in affirming that case, was that the pollution of the waters over plaintiff's oyster beds by the discharge of the sewage by the defendant municipality was not a taking of plaintiff's property therein, within the meaning of a constitutional provision requiring compensation for property taken or damaged for public use.

But, as is stated in the *DARLING CASE*, a contrary conclusion was reached in the New York case of *Huffmire v. Brooklyn* (1900) 162 N. Y. 584, 48 L.R.A. 421, 57 N. E. 176, affirming (1897) 22 App. Div. 406, 48 N. Y. Supp. 132. This was an action to recover compensation for damages to a bed of oysters planted by a licensee, under a statute authorizing the licensing of certain tidelands, and providing that the licensee shall have "the exclusive property in the oysters so planted, and the exclusive use of said oyster beds," resulting from the discharge thereon by the defendant city of sewerage through a properly constructed sewer, and as authorized by statute. The city sought to avoid liability by invoking the rule that, in the construction or operation of a public work under legislative authority or

direction, a municipal corporation is not answerable for such a consequential injury as may result to others, where there is no negligence in such construction or operation; but the court, after saying that the precise question thus presented was whether the injury complained of was purely consequential or was so direct as to amount to a taking of property which entitled the plaintiff to compensation, within the meaning of the constitutional inhibition against the taking of property without compensation, adopted the view that the destroying of plaintiff's oyster beds was not consequential and incidental to the maintenance of the sewer, but constituted a direct invasion and appropriation of the plaintiff's property for public use, entitling him to compensation in damages therefor, it being maintained that the injury was so direct as to amount to an invasion of a private right which no legislative sanction or direction could justify or excuse. This conclusion, as before stated, is directly contrary to that reached in the reported case (*DARLING v. NEWPORT NEWS*, ante, 748), and would seem to be irreconcilable therewith, unless perhaps it can be differentiated by the fact that the lessee in the *DARLING CASE* occupied the beds in question "for the purpose of planting or propagating oysters thereon," whereas the licensee in the *Huffmire Case* had "the exclusive property in the oysters so planted, and the exclusive use of said oyster beds." It is also of interest that Sims, J., in his dissenting opinion in the reported case, said that the decision in the *Huffmire Case* "is directly in point as to what the holding in this case before us should be."

And again, in *Bailey v. New York* (1902) 38 Misc. 641, 78 N. Y. Supp. 210, where sewage discharged through an authorized sewerage system injured plaintiff lessee's oyster bed, it was held that the defendant municipality was liable in damages for the loss caused, and also that an injunction would issue against the city, restraining it from so continuing the operation of the sewer as to prevent the use



of plaintiff's bed for the purpose for which it was leased to him.

In Massachusetts, under a statute authorizing the construction of a canal and providing for payment of damages to owners of oyster fisheries, caused by the deposit of "excavated materials, or in any other way," it has been held (*Taylor v. Boston*, C. C. & N. Y. Canal Co. (1916) 224 Mass. 307, 112 N. E. 650) that a party holding oyster bed licenses, granted pursuant to statute, may maintain an action for damages to the oysters and oyster seeds therein, caused by the sand and decayed organic matter which was disturbed in excavating for the canal, and which roiled and polluted the waters flowing over such beds. The defendant's contention was that the damages suffered were too remote and indirect to be recoverable, and that the injury to particular oysters, as distinguished from impairment in the future of the value of the licenses, is not within the purview of the statute; but the court overruled such exceptions, saying that if this construction is adopted, the words, "oyster fisheries," and "licensee," become meaningless, that the legislature must be presumed to have intended statutory fisheries such as the plaintiff's, that "while it is true that the destruction of the shellfish was not caused by the 'deposit of excavated materials' dumped upon the flats, the context, 'or in other ways,' leaves no doubt that even if the portions occupied by the petitioner have not been taken, compensation is provided if the injury proved is found attributable to the authorized construction and completion of the canal as a navigable waterway," and that "the petitioner not having sought or been awarded damages for any diminution in the future of the value of the granted flats for cultivation as an oyster fishery, and the measure of recovery having been strictly limited to the oysters in the soil and the oyster seed attached thereto," the defendant may not complain of the award of damages.

And in *Payne v. Providence Gas Co.* (1910) 31 R. L. 295, 77 Atl. 145, Ann. Cas. 1912B, 65, a private gas manu-

facturing company, prohibited by general statute from discharging any waste products into Providence harbor or waters which would be injurious to shellfish therein, was held liable for injury to private oyster beds in Providence waters, held under lease from the state, resulting from the discharge into such waters of deleterious by-products, such as water-gas tar, etc. And see also *Bell v. Providence Gas Co.* (1914) — R. L. —, 90 Atl. 2.

In Florida, it has been held that since the navigable waters in the state and the lands thereunder are the property of the state, no one can acquire such a right by locating and constructing an oyster bed thereunder as will permit the maintaining of an action for injury thereto resulting from pollution of the stream, unless such right of location and construction was acquired by virtue of legislative authority. Thus in *Symmes v. Prairie Pebble Phosphate Co.* (1912) 64 Fla. 480, 60 So. 223, it was held that one who had constructed an oyster bed in a navigable stream of the state could not maintain an action for injuries thereto resulting from the casting into it of large quantities of mud and refuse, in the absence of a showing that he acquired such right of location from the state in the manner provided by statute (Florida Gen. Stat. 1906, §§ 646-651), authorizing county commissioners to grant within designated limits exclusive rights to plant oysters in the public waters of the state. And it has been held that where the statute does not allow the granting of private rights in public waters as to the "existing natural or maternal oyster beds," one who has acquired a right to construct an oyster bed in a navigable stream cannot maintain an action for injuries resulting from the pollution of an oyster bed, without showing that the asserted private rights did not cover any "natural or maternal oyster beds." *Symmes v. Prairie Pebble Phosphate Co.* (Fla.) *supra*. But that, where the statute expressly provides that no license shall be granted covering any portion of tidewater flats where a natural oyster bed exists, it is to be assumed, in an

action for damages to licensed beds, that the authorities in granting the license complied with the statute, see *Taylor v. Boston, C. C. & N. Y. Canal Co. (Mass.) supra.*

In the English case of *Hobart v. Southend-on-Sea Corp. (1906) 75 L. J. K. B. N. S. (Eng.) 305, 70 J. P. 192, 54 Week. Rep. 454, 94 L. T. N. S. 337, 22 Times L. R. 307, 4 L. G. R. 757* (appealed, but settled during argument; see (1906) 22 Times L. R. 530, wherein it was stated that the settlement provided that the injunction should be dissolved and that the judgment for damages should stand), it was held that the defendant municipal corporation had no right, either at common law or under statute, to discharge its sewage into public waters in such quantities as to pollute private oyster beds therein held under lease, and that where it unlawfully did so pollute an oyster bed such acts would be enjoined and damages allowed for past injuries. Moreover, it was said that in the present case such pollution was validly prohibited by a by-law of the local sea fisheries commission, prohibiting the deposit or discharge of any solid or liquid substance detrimental to sea fish, which by-law had been enacted pursuant to authority conferred upon the commission by the *Sea Fisheries Regulation Act 1888 (51 & 52 Vict. chap. 54)* authorizing the delegation to local commissions of power to regulate and prohibit the deposit or discharge of substances detrimental to sea fish or fisheries; and, further, that by the *Sea Fisheries Act of 1868 (31 & 32 Vict.*

*chap. 45)* it had been made unlawful for any person other than a grantee within the limits of a fishery knowingly to disturb or injure any fishery or oyster bed.

So, in *Owen v. Faversham (1908) 73 J. P. (Eng.) 33, affirming (1908) 72 J. P. 404*, it was again held that a municipal corporation has no common-law right to discharge untreated sewage into tidal waters so as to cause a nuisance by polluting private oyster beds therein, and that an injunction with an inquiry as to damages must be granted against such a practice. This holding was as against the contention that the defendant corporation was entitled, as of right, to discharge its sewage into the arm of the sea in question.

And again, in *Foster v. Warblington Urban Dist. [1906] 1 K. B. (Eng.) 648, 75 L. J. K. B. N. S. 514, 70 J. P. 233, 54 Week. Rep. 575, 94 L. T. N. S. 876, 22 Times L. R. 421, 4 L. G. R. 735, affirming (1905) 69 J. P. 42, 21 Times L. R. 211, 3 L. G. R. 605*, damages were allowed for pollution of private oyster beds by sewage discharged into the sea by defendant corporation. It was also held in this case that no one, not even a municipal corporation, could acquire by prescription a right to pollute an oyster bed. And the rule that a prescriptive right to discharge sewage into tidal waters containing private oyster beds cannot be obtained as against such owners was also approved in *Owen v. Faversham (1908) 72 J. P. (Eng.) 404, affirmed in (1908) 73 J. P. 33.* G. J. C.

HJORTH OIL COMPANY, Plff. in Err.,

v.

FRANK G. CURTIS.

*Wyoming Supreme Court—March 5, 1917.*

(25 Wyo. 1, 163 Pac. 362.)

**Corporation — sale of property — right of stockholder to compensation.**

1. A stockholder in a corporation need not, in order to recover compensation for services rendered in selling corporate property, be employed by

the corporation as a broker to negotiate such sale, and therefore, in order to justify such recovery, he need not show that he produced the buyer or was the sole procuring cause of the sale.

[See note on this question beginning on page 778.]

— undertaking as member of committee.

2. A stockholder of a corporation may, at its special instance and request under appointment as a member of a committee, undertake the sale of its property so as to be entitled to compensation for effecting a sale.

[See 7 R. C. L. 449.]

Appeal — finding on evidence — conclusiveness.

3. Whether or not a stockholder was to be paid a reasonable amount or a per diem for his time in selling property of the corporation is, upon conflicting evidence, settled by the finding of the trial court.

[See 2 R. C. L. 202.]

— motion for new trial — preserving question for review.

4. Error in the amount of recovery cannot be preserved for consideration on appeal by a motion for new trial on the ground that the findings are not sustained by sufficient evidence, that they are contrary to law, and that the evidence was and is insufficient in law to warrant any finding or judgment in favor of plaintiff against defendant.

[See 2 R. C. L. 83, 98-100.]

Corporation — appointment of committee to sell property — recovery of compensation.

5. A stockholder of a corporation who is acting as assistant secretary, and who, in consequence of appointment upon a committee to negotiate a sale of corporate property, succeeds in effecting such sale, is entitled to recover from the corporation what his services are reasonably worth.

[See 7 R. C. L. 449, 464-466.]

— implied contract to pay.

6. When a stockholder who is not an officer or director renders a service to the corporation on prior request or authority, a contract is implied to pay him the reasonable value of his services unless the circumstances negative such implication.

[See 7 R. C. L. 469.]

— contract to pay director — implication.

7. A contract on the part of a corporation to pay a director or other officer for services rendered outside the scope of his official duties may be implied.

[See 7 R. C. L. 464-466.]

ERROR to the District Court for Natrona County to review a judgment in favor of plaintiff in an action brought to recover compensation for negotiating a sale of defendant's leasehold interest in certain lands. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. William J. Miles for plaintiff in error.

Messrs. B. D. Townsend, Fred C. Rabb, and R. H. Nichols for defendant in error.

Potter, Ch. J., delivered the opinion of the court:

Frank G. Curtis brought this action against the Hjorth Oil Company, a corporation, to recover the alleged value of his services and expenses in negotiating and making a sale of that company's leasehold interest in a certain tract of land in Natrona county, this state, upon which the company had drilled a productive oil well, and in procuring from the purchasers an agree-

ment to take the oil produced by the company upon land owned by it at the market price. Such services and expenses were alleged to be of the reasonable value of \$35,000, and it was alleged that no part thereof had been paid except \$60 advanced by said company for expenses. On the trial in the district court without a jury it was found that the plaintiff was entitled to recover for his services in negotiating and making the sale aforesaid, the sum of \$10,000, as the reasonable value thereof, together with interest thereon at the legal rate of 8 per cent per annum from a specified date, and judgment was rendered in

his favor for said sum and interest aggregating \$11,497.80.

The petition alleges that the plaintiff is, and during the period mentioned therein was, an attorney and counselor at law, and engaged in the practice of his profession in the city of Jamestown, New York, and also in the business of a broker and in the sales of stocks, bonds, and other properties, and that he was a stockholder of the defendant. Stripped of all other matter of inducement, the petition alleges, in substance, that the plaintiff undertook the sale of the defendant's interest in the land aforesaid, and to provide for the sale of oil produced on lands owned by it, at the special instance and request of the defendant, and that the defendant agreed to pay the plaintiff a reasonable sum for his services in addition to his actual expenses in conducting the necessary negotiation for said sale; that pursuant to said agreement the plaintiff made the sale for the sum of \$75,000 in cash and 750 shares of the capital stock of a company to be organized by the purchasers, said shares to include 250 shares of 7 per cent cumulative preferred stock and 500 shares of common stock; that the proposed company was organized, and the stock aforesaid, of the value of \$35,000 or more, was about to be issued to defendant pursuant to said sale and the terms thereof; that an agreement was procured from the purchasers to take oil from the defendant at the market price for an indefinite period of time; that plaintiff's services and expenses in making said sale and contract were reasonably worth the sum of \$35,000.

The answer admits that plaintiff was an attorney and counselor at law engaged in the practice as alleged, but denies, for want of information, his having been engaged in the business of broker as alleged. It further denies his alleged employment to make the sale, or that the sale was made by him, and alleges that the plaintiff was one of defendant's stockholders, and the only

agreement with him by the company was to pay him, in addition to his actual expenses, the sum of \$15 per day for such time as he should be actually absent from the city of Jamestown upon any business of the defendant; that the sale aforesaid was made by the defendant itself, acting through certain of its officers and stockholders; that plaintiff's only connection therewith was as one of a committee of three stockholders appointed by the board of directors for the sole purpose of acting for it in its corporate capacity, and not as brokers or promoters.

The findings of fact were stated in writing substantially as follows:

(1) That defendant is a corporation organized under the laws of New York. (2) That plaintiff is and was since prior to January 1, 1913, engaged in practice as an attorney and counselor at law and in the business of a broker in the sale of stocks and bonds and other properties. (3) That defendant, prior to January 1, 1913, became the owner of a certain leasehold estate in an oil placer mining location upon a certain tract of public land situated in Natrona county, in this state, and continued to be the owner thereof until its sale on April 16, 1913. (4) That subsequent to January 1, 1913, and prior to April 16, 1913, the defendant employed the plaintiff to sell said leasehold interest, and agreed to pay him, and he agreed to accept, a reasonable compensation for his services in negotiating and making such sale. (5) That pursuant to said contract of employment the plaintiff, on April 16, 1913, negotiated and made a sale of said leasehold interest for \$75,000 in cash and \$50,000 of the common stock and \$25,000 of the preferred stock of a corporation to be organized to own said interest. (6) That thereafter and prior to May 10, 1913, the sale was accepted, ratified, and approved by the defendant, and its said interest duly conveyed to the purchaser, who then and there paid to the defendant the pur-

chase price aforesaid, viz., \$75,000 in cash, and \$75,000 par value of the capital stock of the Keystone Oil Company, the corporation organized for the purpose aforesaid, and that the said capital stock so paid to defendant was of a cash value exceeding \$25,000. (7) That the sum of \$10,000 is a reasonable compensation for plaintiff's said services. As a conclusion of law the court found the defendant to be indebted to the plaintiff in the sum of \$10,000, with interest at 8 per cent per annum from June 16, 1913.

The findings concluded with an order for judgment and a recital that all were excepted to by the defendant. Thereafter the defendant filed a statement of its exceptions to the findings and decision, specifying that it excepted to the fourth and fifth findings of fact, that part of the second finding to the effect that plaintiff had been engaged in the business of a broker, the sixth finding so far as it may imply that defendant ratified or approved any sale or alleged sale by the plaintiff, acting in the capacity of a broker for defendant, the conclusion of law, and order for judgment. It is shown also by the bill of exceptions that a motion for new trial was filed by the defendant, stating the following grounds: (1) That the court erred (a) in denying defendant's motion for nonsuit or for judgment at the end of plaintiff's evidence in chief; and (b) in denying defendant's motion for judgment in its favor at the conclusion of all the evidence. (2) That the findings are not sustained by sufficient evidence, and are contrary to the evidence. (3) That the evidence is insufficient in law to warrant any finding or judgment in favor of the plaintiff. (4) That the findings are contrary to law.

The case is here on error, with the errors complained of set forth in the petition in error substantially as follows: (1) That the court erred in denying defendant's motion for nonsuit or judgment made at the end of plaintiff's evidence in

chief. (2) That the court erred in denying defendant's motion for judgment made at the end of all the evidence. (3) That the court erred in its second, fourth, and fifth findings of fact, in that said findings are not supported by the evidence, and are contrary to the facts adduced at the trial. (4) That the decision and judgment are not sustained by and are contrary to the evidence. (5) That the decision and judgment are contrary to law. (6) That the court erred in denying defendant's motion for a new trial. (7) That upon the evidence and the law the judgment should have been in favor of the defendant.

Thus, the question presented is whether, upon the evidence and the law applicable thereto, the plaintiff was employed and made the sale as alleged and under such circumstances as to entitle him to a reasonable compensation for his services. The evidence is voluminous, comprising several hundred pages of testimony and a large number of exhibits, the latter including, among other papers, the record of the incorporation and the proceedings of many of the meetings of the stockholders and directors of the defendant company, and numerous letters and telegrams relating to the negotiation for the sale of the property in question and other incidental matters, so that our reference to it must necessarily be confined to stating generally the material facts seeming to be established without substantial conflict, or, where the evidence is conflicting, the character thereof and our conclusion as to its effect in this proceeding to reverse the judgment.

The organization of the defendant company was proposed by William Hjorth, a resident of Jamestown, New York, for the purpose of taking over and operating under an oil lease which he had secured, covering certain lands in Natrona county in this state, including the quarter section involved in this controversy. The company was incorporated and organized in June, 1912, under the

laws of New York, after a stock subscription list had been circulated and signed. Thereupon the lease aforesaid was taken over by the company, and it proceeded to operate thereunder. At the organization meeting F. O. Strandberg was elected president of the company, and the said William Hjorth was elected secretary and treasurer. The officers and most of the stockholders, as we understand, resided in or near Jamestown, and the company had its home office at that place. The original capital stock was \$15,000, all of which we understand to have been subscribed. The plaintiff subscribed \$1,000 of the capital stock, and became the owner of that amount of stock in the company at the time of its organization. He prepared and filed the defendant's articles of incorporation, and thereafter, and during the period covered by the transaction involved in this controversy, acted as legal adviser of the company, and seems also to have solicited some of the original subscriptions to the capital stock. He was not at any time a director of the company, nor an officer, except that at a meeting of the directors held on November 13, 1912, he was named in a resolution adopted by them to act as assistant secretary, and held that position until February 3, 1913, when another person was selected to act in that capacity. Prior to said November meeting, however, he had written up the proceedings of several of the meetings of the stockholders and directors, signing the same as "acting secretary," and at that meeting his acts in so doing were ratified.

Some time in 1912, the exact time not being material, though we understand it to have been in October, the company's operations under the lease aforesaid resulted in a producing well upon the quarter section of land here involved, and there seeming to have been some delay or difficulty in arranging for a disposition of the oil from that well, the plaintiff interested himself in the matter,

and corresponded and had an interview with a representative of another oil company concerning it prior to January, 1913, but without any definite result. He also corresponded about it with the defendant's representative in the field, in which correspondence the matter of selling the defendant's interest in the tract aforesaid was referred to. The matter of this correspondence is only incidental to the present controversy, and is mentioned here only as showing that the question of selling defendant's interest in the lease upon said tract had been under consideration prior to January, 1913, and the negotiation finally resulting in a sale. Mr. Hjorth, the secretary of the company, wrote from Casper on November 9, 1912, that he had seen a party, naming one of the leading oil companies of the district, about buying for \$70,000, that he thought the company could not do any better, and advising a sale at that price. On November 12th, the plaintiff wrote Mr. Hjorth from Jamestown, referring to a telegram sent the latter, asking if the party would give them \$70,000 for the lease inside of five days, and mentioning a different offer which had been made by another party, and stating as the writer's personal opinion that the stockholders would sell for \$70,000 cash, or part cash and the remainder properly secured, to be paid within a reasonable time. In a letter of November 19, 1912, written to the plaintiff by Mr. Hjorth, he stated that the party he had referred to would not buy then, but would rather wait for another well, and would be willing to double the price if they did buy. In a letter dated November 22, 1912, by the plaintiff to Mr. Hjorth, the fact was mentioned that the latter's telegram had just arrived, asking if he should give an option on lease for two weeks for \$90,000 net, and stating that the telegram would be reported to the meeting that night. And it appears that, at a special meeting of the stockholders held on November 23,

1912, they refused to give an option at \$90,000 for two weeks, and Mr. Hjorth was so advised by the plaintiff in a letter of the same date, in which it was further stated, in substance, that the sentiment was against giving an option, but there might be an exception in favor of an option for two weeks upon the payment of \$5,000, and suggesting that anyone wishing to buy make a flat offer. At the meeting on November 23, 1912, it was voted also to increase the capital stock to \$100,000.

Nothing definite having been accomplished as to the sale of defendant's oil or the well aforesaid, or that part of its lease which included the well, the plaintiff was visited at his office in Jamestown early in January, 1913, by Mr. S. S. Cramer of Milwaukee, Wisconsin, who afterwards became one of the purchasers of the defendant's said interest, the other purchaser being Mr. Wadhams of Milwaukee. These parties were connected with a concern known as the Wadhams Oil Company, with headquarters, as we understand, at Milwaukee. The purpose of Mr. Cramer's visit to Jamestown, as explained in his testimony, was to purchase, if possible, a majority of the stock in the defendant company and to engage someone to do that for him. He called upon the plaintiff at his office in Jamestown to secure his services in acquiring such stock, having been referred to him as the best man to see in that connection. He did not at first advise the plaintiff that he was connected with an oil company, nor does it appear that he knew the latter to be connected in any way with the defendant company. Upon stating the object of his visit, the plaintiff informed him that he could not serve him in the matter, for the reason that he was assistant secretary and attorney for the company, and sought to discourage any attempt on his part to buy the stock; but in the course of the conversation he suggested to Cramer that he consider the matter of buying the defend-

ant's lease, or that part of it covering the tract upon which its well aforesaid was located, and they discussed that matter several times during the few days that Cramer remained in Jamestown, the plaintiff stating, as his opinion, that the property was worth a quarter of a million dollars. Thereafter considerable correspondence passed between them with reference to the matter, and Cramer submitted some written suggestions to the effect that the defendant company be reorganized so as to provide for \$100,000 of preferred stock and \$200,000 of common stock, and selling one half of the common stock to his company for enough to pay back to the original stockholders of the defendant company the whole amount of their investment in the shape of dividends, and their present holdings to be exchanged for five times the amount in preferred stock, answering which, the plaintiff wrote that the stockholders would not accept what Cramer had suggested, but urged that he come to Jamestown forthwith, prepared to buy the lease. In response to that letter Cramer telegraphed the plaintiff that he could not come to Jamestown, and suggested that one or three of the directors of defendant company come to Milwaukee with full power to act, to which the plaintiff responded by writing that he doubted if the company would send one or more of the directors to Milwaukee, "in view of the policy they have been pursuing," but that he might suggest at the stockholders' meeting to be held soon, the advisability of conferring with him. The plaintiff made a report concerning his conference and correspondence with Mr. Cramer at a special meeting of the stockholders on January 24, 1913, and at that meeting the following resolution was adopted: "Resolved, that William Hjorth and Frank G. Curtis, be and they are hereby authorized to go to Milwaukee, Wisconsin, on behalf of this company, to confer with S. S. Cramer and others relative to

the disposition of our oil products or lease, and report at the regular annual meeting of the company to be held February 3, 1913."

On the following day, January 25, 1913, the directors held a meeting at which a motion was made and carried to the effect that William Hjorth and Frank G. Curtis be given power to sell the company's lease on section 33 (the quarter section here involved), using their best judgment, but at a price not less than \$75,000. Pursuant to the resolution and authority aforesaid, the plaintiff and Mr. Hjorth went to Milwaukee and there conferred with Mr. Cramer and Mr. Wadhams, and made a written report concerning the matter at the annual meeting of the defendant's stockholders held on February 3, 1913. It is unnecessary to refer to the report otherwise than to say that it was stated therein that they had quoted a price for the lease of \$100,000 cash and \$150,000 of 8 per cent preferred stock in a refining company, to be formed for the purpose of taking over the lease, and that the conference resulted in their submitting to Wadhams and Cramer the following written proposition upon which the latter asked an option of sixty days:

Milwaukee, Wis., Jan. 31, 1913.

Messrs. E. A. Wadhams and S. S. Cramer, Milwaukee, Wis.

Gentlemen:—

Our Hjorth Oil Company would sell you quarter section No. 33 which has our well No. 1 upon it for \$100,000 cash and \$150,000 preferred stock, in a corporation to be formed to refine the oil from our property. The proposed corporation to be incorporated at not to exceed \$1,200,000. The preferred stock shall draw 8 per cent cumulative dividend and equally participate with common stock on all over 8 per cent paid to common stockholders. The Hjorth Oil Company shall sell all of its oil in the future to your proposed refinery company for the ruling price of oil, and you shall take our oil under these condi-

tions. The Hjorth Oil will agree not to enter into the refining business.

Yours very truly,

Frank G. Curtis,

Approved: Wm. Hjorth.

We understand from the evidence that the record of the proceedings at that meeting does not show any action upon said report. But on the day following the meeting the plaintiff wrote to the prospective purchasers that it had been decided at the meeting to give them an option in accordance with "the inclosure," and he testified that an option agreement was prepared and sent to them with the letter. The agreement was returned with the statement that it could not be accepted, but that they had been willing to pay \$100,000 in cash and \$150,000 in common stock in the new company. An amended option was then sent them by plaintiff, providing, as we understand, for a division of the stock payment into part preferred and part common, which does not seem to have been accepted, though the time granted for acceptance was afterwards extended a few days, and in the meantime several letters concerning it passed between them and the plaintiff, the latter insisting that the property was fully worth more than the price specified in the option agreement in answer to proposals to pay a less amount, the last letter of the plaintiff in that connection dated April 10, 1913, and addressed to Mr. Wadhams closing with the following: "Whereas the option does not so provide, you assured me in your correspondence that if you could decide yes or no before the twenty-one days expired which we extended to you at \$100 per day, that you would do so. We hope that you will let us know forthwith if you do not want the property at the agreed price, as we figure the \$100 a day a considerable loss as compared with our other prospects."

Following the receipt of that letter and referring to it, Mr. Wadhams, on April 14, 1913, telegraphed the plaintiff that they assumed a



former conversation with the plaintiff a relinquishment of options, and on the same date the plaintiff telegraphed to Wadhams and Cramer, asking if they would be at home Wednesday "to confer with us," and to wire reply, responding to which on the same date Wadhams telegraphed the plaintiff an affirmative answer. In the meantime, on April 10, 1913, at a meeting of defendant's directors, it had been decided "that a committee of three, consisting of F. O. Strandberg, William Hjorth, and Frank G. Curtis, as attorney, go to Milwaukee to confer and close a deal with Wadhams and his people." The trip to Milwaukee was delayed a few days, and plaintiff testified that such delay was at his suggestion, to await further developments, and on April 15, 1913, another meeting of the directors was held, at which a resolution was adopted that Frank O. Strandberg, William Hjorth, and Frank G. Curtis, as a committee of three, be authorized to sell, assign, and transfer any of the property, rights, or interests of the company in Wyoming for such an amount and on such terms and conditions as said committee, acting jointly, elects, and to sign, seal, and deliver the necessary papers.

The committee thus appointed and authorized by these resolutions went to Milwaukee immediately after the meeting of April 15th, and closed the sale with Wadhams and Cramer, which was finally accepted and ratified by the company, as found by the trial court, and on the general terms stated in the findings. It also appears that at a previous special meeting of the directors held on February 10, 1913, it was resolved that S. S. Cramer be telegraphed to learn if he is authorized to sign an option contract with the company, and, if he has such right, then that Frank G. Curtis be authorized to leave for Milwaukee on February 11 to close an option contract with him, the company to get \$100,000 in cash for the quarter section in question, and as much

stock, common and preferred, or common or preferred, as possible, but not less than \$150,000 par value; the option agreement to be kept as short as possible, not to exceed forty days from date of option, an additional thirty days to be allowed if refiners agree to purchase.

The contract for the sale having been agreed upon on April 16, 1913, the stockholders of the defendant company held a meeting at Jamestown on April 18, 1913, at which gratification was expressed over the consummation of the sale, and the thanks of the company were extended to Messrs. Strandberg, Hjorth, and Curtis, and from the proceeds to be received from the sale it was decided that a dividend of 200 per cent be declared. All of the correspondence with the purchasers preceding the sale seems to have been carried on for the Hjorth Oil Company by the plaintiff; he also acted generally as spokesman for the committee in their conference with the purchasers; and the money for the cash payment was delivered to the company through his hands.

Before closing this recital of the facts the further fact should be mentioned that Wadhams and Cramer had first learned of the defendant's property through an agent sent by them to investigate the field in which the property is located, who had reported about this property, and that one of the defendant's representatives in the field had named \$100,000 as a price for which the company's interest might be purchased, and, further, said agent's opinion that the property would be cheap at that price, though those facts do not seem to have been communicated to the plaintiff. And that report of his agent was the cause of Cramer's going to Jamestown in January, 1913.

There seems to be some conflict in the evidence as to whether the plaintiff, prior to the meeting of January 24, had mentioned to any officer of the company the fact that he had met Cramer and was corre-

sponding with him about his buying the property, but, in our view of the case, that matter is not very material.

The only material point upon which there is a substantial conflict is whether there was an understanding that plaintiff was or was not to receive compensation for his services or what was said concerning it. The plaintiff testified that after the adoption of the resolution at the January meeting, authorizing him and Mr. Hjorth to go to Milwaukee to confer with Cramer and others, someone present asked what he was going to charge, and that he replied by saying: "I will go for \$15 a day and expenses, if I do not close a deal, but if I close a deal, I will expect to be paid what is right." That Mr. Hjorth then rose and said that he would go for nothing, except his expenses, and that he, the plaintiff, then said: "I will go for nothing, except my expenses, unless I close a deal. If I close a deal I will expect what is right, for I anticipate the laborer is still worthy of his hire."

And he is corroborated in this by two of the stockholders who were present at the meeting, one of whom had offered the resolution aforesaid. In passing it might be said that Mr. Hjorth had been representing the company in the field, and was receiving a salary of \$150 a month when away from home. Most of the witnesses for defendant, who were examined on the subject, admitted that something was said at the meeting aforesaid about plaintiff's compensation, but testified that what was said or what they understood was that plaintiff was to receive \$15 a day, his usual fee when away from home, as added by some of the witnesses, in addition to expenses, if a deal was closed or a sale made, and such witnesses generally denied that plaintiff, at such meeting, made the statement aforesaid about a laborer being worthy of his hire; some of them testifying that the statement

was made at a meeting held after the sale.

The matter of plaintiff's compensation does not appear to have been mentioned at any subsequent meeting until after the sale, but the plaintiff relies upon the resolution adopted at the January meeting aforesaid, and what was then said with reference to what he would charge, as showing his employment to negotiate the sale and his right to reasonable compensation for his services, and defendant's evidence to the effect that plaintiff was to be paid only \$15 a day is based upon what occurred and was said at such meeting, and the general effect of its evidence is that, from what was then said, it was understood that plaintiff was to receive compensation for his services under the appointments aforesaid, if a sale was made, but that it was to be \$15 a day. And it appears that in an action brought in New York by the plaintiff to recover for his services, which we understand to have been dismissed upon or before the bringing of the suit here, the defendant filed an answer, alleging, in substance, that Strandberg, Hjorth, and Curtis were appointed a committee to consummate a sale of the property, which had been under negotiations for some time, upon the understanding and agreement that said committee were acting in their own behalf and for the other stockholders, and that no compensation was to be paid them except their traveling expenses, unless the sale was consummated, in which event there was to be paid to Curtis \$15 per day for the time actually spent in addition to such expenses; a copy of that answer having been introduced in evidence by the plaintiff without objection.

The only evidence as to the reasonable value of plaintiff's services is his testimony, fixing it at "\$35,000 and more," and stating the basis or percentage upon which it was computed at that amount, and explaining the reasons therefor, including the time occupied, the ad-

vantage to the company from the sale, and the provision in the contract for disposing of its oil, and other matters considered in estimating such value. The defendant offered no evidence on the subject.

The contention of the plaintiff is that he was employed by the defendant as a broker to negotiate and make the sale, and that he acted in that capacity, entitling him to a reasonable compensation for his services. Defendant's contention is: First, that the plaintiff was not so employed, but that the only authorized service rendered by him in connection with the sale was as a member of a committee of stockholders; and, second, that he was not the procuring cause of the sale, and did not discover or produce the buyers, and, therefore, performed no service as a broker, entitling him to compensation as such.

There is sufficient evidence to sustain the finding that the plaintiff, in addition to his law practice, was engaged in the business of a broker in the sale of stocks, bonds, and other properties, but that fact does not seem to us to be very material, except as showing a reason for the plaintiff's employment or appointment to negotiate and make the sale. The fact of his experience in such matters, together with the fact that he had been in correspondence with the parties, had met one of them, and proposed their purchase of the property, may have been considered in appointing him as one of a committee to confer with the prospective purchasers, and with authority to negotiate and consummate the sale. In our view of the case, under the issues and upon the evidence, the right of the plaintiff to compensation for his services in connection with the sale does not depend upon his having been employed strictly or distinctively as a

Corporation—  
sale of prop-  
erty—right of  
stockholder to  
compensation.

broker, and for that reason it is not essential to his recovery of a reasonable compensation that he should have produced the

buyers or been the sole procuring cause of the sale, although we are inclined to the opinion that if his employment should be considered as calling for his services strictly as a broker the evidence would be sufficient to sustain a finding to the effect that he had produced the buyers and was the procuring cause of the sale, within the rule under which those conditions are to be considered in determining a broker's right to compensation.

While the petition alleges that the plaintiff was engaged in the business of a broker, it is not alleged, at least not directly, that he was employed or made the sale in that capacity, nor do the findings state that he was so employed, or that the sale was made by him as a broker. On the contrary, the petition alleges, in substance, as to the employment and sale merely that, at the special instance and request of the defendant, the plaintiff undertook the sale of the property, and to provide for selling defendant's oil, for which the defendant agreed to pay him a reasonable sum, and that pursuant to said agreement he made the sale, thus omitting to allege that he undertook or made the sale as a broker or in any particular or stated capacity. And clearly, he might have undertaken the sale at the special instance and request of the defendant, under his

—undertaking  
as a member of  
committee.

member of a committee appointed for that purpose, and we think the evidence shows that he did so undertake the sale; that is to say, he continued the negotiations as a member of such committee under the authority vested in him by such appointment, and finally entered into the contract of sale pursuant to such appointment, although acting jointly with the other committee member or members in his conferences with the purchasers and in concluding the contract of sale, and may have consulted with them, and from time to time with the directors, respecting the intervening correspondence car-

ried on between him and the purchasers. And the findings, although stating in one paragraph that the plaintiff had been engaged in the business of a broker, state as to his employment merely that he was employed to sell the property, without stating the capacity in which he was employed.

As we understand and construe the petition and findings, therefore, the right of the plaintiff to recover the reasonable value of his services is not thereby limited to services rendered under an employment distinctively or strictly as a broker, but will sustain the judgment if upon the law and the evidence the plaintiff is entitled to recover at all for his services rendered under his appointment aforesaid. And we deem it unnecessary to determine whether the evidence shows, or is sufficient to show, that he was employed, or that the property was placed in his hands, as a broker.

That it was understood that the plaintiff was to receive compensation for his services is, we think, made clear by the evidence, the only substantial controversy in that respect having reference to the amount of such compensation; the plaintiff claiming that he was to be paid a reasonable compensation, or "what is right," and the defendant claiming that it was limited to \$15 per day. The trial court determined the conflict in the evidence as to that matter in plaintiff's favor, and as there is sufficient evidence to sustain such finding, the case must be considered by this court upon that view of the evidence, viz., that the agreement or understanding

Appeal—finding on evidence—conclusiveness.

was that the plaintiff should receive a reasonable compensation for his services. No objection is here raised as to the amount of the recovery, nor was it challenged as excessive by the motion for new trial. It is, at least, doubtful whether the finding as to the amount should be considered as having been excepted to, for, although it is stated at the conclusion

of the findings that all were excepted to, such finding is not mentioned in the written statement of the defendant's exceptions, a paper not required by our practice, but evidently filed to clearly state in the record the particular findings to which the defendant excepted.

However, the finding as to the amount was not complained of in the motion for new trial, at least not in the proper way to present the question of error in amount of recovery to the trial court. The only grounds of the motion referring to the findings or judgment are that the findings are not sustained by sufficient evidence that they are contrary to law, and that the evidence was and is insufficient in law to warrant any finding or judgment in favor of the plaintiff or against the defendant. And, as held in *Syndicate Improv. Co. v. Bradley*, 7 Wyo. 228, 51 Pac. 242, 52 Pac. 532, that is insufficient to present the question of error in the amount of recovery to the district court or as ground for reversal in this court.

—motion for new trial—preserving question for review.

His services, however, were such as are usually performed by a broker or agent in the sale of property belonging to another, and that he should render that kind of service was clearly contemplated by his appointment. And it appears to have been largely the result of his efforts that the sale was finally made for the price and on the terms stated. Hence, under the finding of the court upon the conflicting evidence aforesaid, he is entitled to receive and recover what his services were reasonably worth, unless prevented therefrom by the fact that the services were performed under an appointment as member of a committee, or that he was a stockholder in the company, and, when the negotiations were commenced and the original appointment made, the assistant sec-

Corporation—appointment of committee to sell property—recovery of compensation.

retary. But his right to such compensation, under the circumstances of the case, is not invalidated by either of those facts or all combined, nor would the law deny such right if he had remained assistant secretary through the entire period of the negotiations and until the sale was made.

It is well settled that when a stockholder, who is not an officer or director, renders a service to the corporation by proper request or

authority, a contract is implied to pay the reasonable value of his services, unless the circumstances negative such implication, as by showing that the services were to be gratuitous. 2 Thomp. Corp. § 1730; Goodin v. Dixie-Portland Cement Co. 79 W. Va. 83, L.R.A.1917F, 308, 90 S. E. 544; Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36; 10 Cyc. 900, 935, 1034; Cheeney v. Lafayette, B. & M. R. Co. 68 Ill. 570, 18 Am. Rep. 584; Holder v. Lafayette, B. & M. R. Co. 71 Ill. 106, 22 Am. Rep. 89.

And by the great weight of authority such a contract may be implied in favor of a director or other officer as to services outside the

scope of his official duty. 2 Cook, Corp. § 657; 3 Clark & M. Priv. Corp. § 671; Montana Tonopah Min. Co. v. Dunlap, 116 C. C. A. 286, 196 Fed. 612; Dunlap v. Montana Tonopah Min. Co. (C. C.) 192 Fed. 714; Huffaker v. Krieger (Huffaker v. Germania Safety Vault & T. Co.) 107 Ky. 200, 46 L.R.A. 384, 53 S. W. 288; Paine v. Kentucky Ref. Co. 159 Ky. 270, Ann. Cas. 1915D, 389, 167 S. W. 375; Santa Clara Min. Asso. v. Meredith, 49 Md. 389, 33 Am. Rep. 264, 4 Mor. Min. Rep. 44; National Loan & Invest. Co. v. Rockland Co. 36 C. C. A. 370, 94 Fed. 335; Barrenstecher v. Hof Brau, 67 Or. 194, 135 Pac. 518; Apsey v. Chattel Loan Co. 210 Mass. 364, 103 N. E. 899. Re Knox Automobile Co. (D. C.) 229 Fed.

241; and cases cited in note to Lowe v. Ring, 3 Ann. Cas. 731, 734, and note to Winfield Mortg. & T. Co. v. Robinson, Ann. Cas. 1915A, 451, 454. And that seems also to be the rule in New York. Bagley v. Carthage, W. & S. H. R. Co. 165 N. Y. 179, 58 N. E. 895.

We find the rule as to services rendered by one who is only a stockholder well stated in Goodin v. Dixie-Portland Cement Co. 79 W. Va. 83, L.R.A.1917F, 308, 90 S. E. 544, as follows: "The principle underlying the rule respecting directors is that they are trustees for the stockholders, and that in the absence of express contract they should not be permitted to recover for services rendered in the performance of the ordinary duties pertaining to their offices upon any implied contract therefor; but the reason for this rule is not generally applicable to stockholders. They stand in no fiduciary relation to the corporation, and we hold, with the great weight of authority, that when the circumstances of the employment do not negative such implication, and a stockholder is called upon by corporate authority to perform some special service, whether of an official character or otherwise, a contract is raised by implication to pay him what his services are reasonably worth."

In Clark & Marshall on Private Corporations, it is said, in substance, that while the directors of a corporation are not entitled to salary or other compensation when performing nothing more than the usual and ordinary duties pertaining to their office, in the absence of an express provision or agreement for compensation when the services are performed, such rule applying also to directors serving in an official capacity, the rule, by the weight of authority, does not apply to services rendered by a director, president, vice president or other managing officer, as a mere attorney, broker, or agent, or in a purely ministerial capacity, or otherwise outside of the usual and or-

dinary duties of his office; and that by the overwhelming weight of authority the doctrine denying compensation to directors and other managing officers, in the absence of express provision or agreement therefor, has no application to services not properly pertaining to their office, but rendered by them outside of their regular duties, and that if such services are rendered at the request of the corporation or the board of directors, with the understanding that they are to be paid for, the law will imply a promise, in the absence of any special agreement, to pay what they are reasonably worth. And, further, that the rule denying such compensation, in the absence of express provision or agreement therefor, does not apply to ministerial officers and employees who are not directors, and have no control over the property and funds of the corporation, even though they may be stockholders; "and if such an officer or employee is elected or appointed to perform valuable services for the corporation under circumstances indicating intention and expectation of payment, but without any express contract, the law will imply a promise on the part of the corporation to pay a reasonable compensation." § 671, pp. 2050, 2053, 2055.

In *National Loan & Invest. Co. v. Rockland Co.* 36 C. C. A. 370, 94 Fed. 335, Circuit Judge Sanborn, speaking for the United States court of appeals for the eighth circuit, discusses the rule as to directors and officers, and concludes as follows: "Some authorities have gone so far as to hold that officers of a corporation, who are also its directors, cannot recover for the discharge of their duties unless their compensation is fixed by a by-law, or by a resolution of the board before their services are rendered. . . . We are unwilling to hold that such officers should be deprived of all compensation because the amounts of their salaries were not definitely fixed before they entered upon the discharge of their

duties. A thoughtful and deliberate consideration of this entire question, and an extended consideration of the authorities upon it, have led to the conclusion that this is the true rule: Officers of a corporation, who are also directors, and who, without any agreement, express or implied, with the corporation or its owners, or their representatives, have voluntarily rendered their services, can recover no back pay or compensation therefor; and it is beyond the powers of the board of directors, after such services are rendered, to pay for them out of the funds of the corporation, or to create a debt of the corporation on account of them (citing cases). But such officers, who have rendered their services under an agreement, either express or implied, with the corporation, its owners or representatives, that they shall receive reasonable, but indefinite, compensation therefor, may recover as much as their services are worth; and it is not beyond the powers of the board of directors to fix and pay reasonable salaries to them after they have discharged the duties of their offices."

In the Maryland case above cited, *Santa Clara Min. Asso. v. Meredith*, 49 Md. 389, 33 Am. Rep. 264, 4 Mor. Min. Rep. 44, after stating the general rule as to the necessity for an express contract to entitle a director or president of a corporation to recover compensation for services within the line and scope of his duty as such, the court says: "But if a president or director of a corporation renders services to his corporation which are not within the scope of, and are not required of him by, his duties as president or director, but are such as are properly to be performed by an agent, broker, or attorney, he may recover compensation for such services upon an implied promise."

In *Huffaker v. Krieger* (*Huffaker v. Germania Safety Vault & T. Co.*) 107 Ky. 200, 46 L.R.A. 384, 53 S. W. 288, directors were held entitled to compensation for their services

in disposing of the property of the corporation, through which the corporation was relieved of its embarrassed financial condition, and enabled to pay its debts and a considerable dividend to the stockholders; it being held that such services did not pertain to the ordinary duties of the office of director, and a contract was implied to pay for them; it appearing that to effect the sale the directors had been required to expend large amounts from their personal means to travel to distant cities, and remain there for months. And in *Paine v. Kentucky Ref. Co.* 159 Ky. 270, 167 S. W. 375, Ann. Cas. 1915D, 389, it appeared that a director had been appointed a member of a committee to audit and investigate a great mass of books and accounts of the corporation, and eighteen subsidiary companies, in an effort to settle a dispute between the corporation and its general manager, the other members of the committee, being salaried officers, leaving practically all the work to the unsalaried director aforesaid, who was an experienced accountant, and he was entitled to recover a reasonable compensation for such service as upon an implied promise to pay.

If a director or managing officer is permitted to recover upon an implied contract a reasonable compensation for services rendered outside of his official duties, it must certainly be true that one who does not hold such official position, but is merely a stockholder, or if he be also an assistant secretary, may

likewise recover a reasonable compensation for his services when called upon by corporate authority to perform them, and especially when it has been agreed or understood that he was to be paid for such services. The plaintiff was not in fact assistant secretary at the time of the sale, nor during the latter and greater part of the period of the negotiations, but there is nothing in the evidence to show that the duties of that position were other than merely ministerial, and clearly they did not include the carrying on of negotiations for and selling valuable property of the corporation. Something is said in the brief about the plaintiff, as assistant secretary, being a salaried officer; but as we recall the evidence he was paid for his service in that capacity only the sum of \$15 per month.

We have thus considered the case upon its merits under the evidence and the findings and the exceptions to the findings, notwithstanding that we have failed to find in the bill of exceptions anything to show an exception to the overruling of the motion for new trial, although the journal entry of the overruling of the motion in the record outside the bill shows an exception. But the question was not raised or suggested by counsel. For the reasons aforesaid we are of the opinion that the judgment must be affirmed; and it will be so ordered.

Beard, J., concurs.

Scott, J., did not sit.

#### ANNOTATION.

**Right of stockholder not a director, officer, or employee of the corporation to compensation for services in selling stock or corporate property in absence of express contract.**

There is no reason why an ordinary stockholder should not contract with his corporation with the same freedom as an individual, provided only that the weight of his holding of stock does not compel the making of contracts with him unfavorable to the in-

terests of his fellow stockholders. The fact of his interest in the corporation may, however, lend force to the contention that he intended services rendered by him to it to be gratuitous.

With the exception below referred

to, no case has been found involving the right of a stockholder, who was not a director, officer, or employee of the corporation, to compensation for services in selling stock or corporate property in absence of express contract.

In *Sidway v. Missouri Land & Live Stock Co.* (1901) 163 Mo. 342, 63 S. W. 705, the largest stockholder of a Scotch corporation owning large properties in Missouri claimed to have rendered services to it over a long series of years, including services in relation to sales of its lands, although he had made frequent statements in writing that the services were gratuitous. In reversing a judgment in his favor, the court said: "If there was no substantial evidence, as it seems there was not, to overcome the frequently written admissions of plaintiff that his services were gratuitous, then there was no basis laid for an instruction given at the instance of plaintiff to the effect that the burden was on defendant to show 'that said services were gratuitously performed.' It is every-

where conceded that no one can make another his debtor without the latter's consent. 'But, ordinarily, if one stands by in silence and sees labor performed on premises belonging to him, of which he accepts and enjoys the benefits, a promise to pay therefor may be inferred.' 8 Wait, Act. & Def. 719, citing cases; *Sprague v. Sea* (1899) 152 Mo. l. c. 332, 53 S. W. 1074. In this case, however, no such assumption can be raised or implied in the very teeth of continued written assertions of plaintiff that his services were free, and that he was getting no pay." In reversing a second judgment for the plaintiff (1904) 187 Mo. 649, 86 S. W. 150, the court said: "The law of this state is, there can be no recovery for services rendered voluntarily and with no expectation at the time of rendition that they will be compensated, and this is true whether the services were or were not beneficial. A subsequent change of intention by the party performing the service does not alter the rule." B. B. B.

W. I. HALEY, Appt.,  
v.  
STATE OF TEXAS.

*Texas Court of Criminal Appeals—February 26, 1910.*

(— Tex. Crim. Rep. —, 209 S. W. 675.)

**Evidence — of other offense — admissibility.**

1. Evidence is not admissible in a prosecution for crime to show the guilt of accused of another crime, even if it is within the exception to the rule excluding such evidence, unless the proof of the other offense is clear.

[See note on this question beginning on page 784.]

— homicide — chain of circumstantial evidence.

2. To render evidence admissible in a case depending upon circumstantial evidence, it is necessary only that it tends to prove the issue or constitutes a link in the chain of evidence.

[See 8 R. C. L. 179; 10 R. C. L. 930.]

— finding of shotgun.

3. In a prosecution for murder by gunshot wound depending upon circumstantial evidence, evidence is admissible of the finding after the homicide, at the

place of business of accused, of a shotgun bearing signs of recent discharge.

[See 8 R. C. L. 179, 180.]

— automobile tracks.

4. Tracks of an automobile corresponding to those made by a car driven by accused on the night of the homicide, which were found near the scene of the crime, are not rendered inadmissible by the fact that they might have been made before the crime or might have been made by some other car.

[See 8 R. C. L. 183.]



## — tracks.

5. Upon trial for homicide evidence is admissible of the finding near the scene of the crime of tracks corresponding with those made by accused.

[See 8 R. C. L. 183.]

## Criminal law — new trial — comment on failure of accused to testify.

6. Comment by counsel in argument on the failure of accused to take the witness stand is ground for new trial where the statute provides that the failure of an accused to testify on his own behalf shall not be alluded to or commented on by counsel in the case.

[See 2 R. C. L. 242.]

## Evidence — motive for crime.

7. Upon trial of one for killing a man, testimony of the wife of deceased as to her criminal relations with accused and his desire that she abandon her husband is admissible in evidence.

[See 8 R. C. L. 181-183.]

## — murder of other person.

8. Upon trial of one for killing a man in order to gain possession of his wife, with whom accused had maintained illicit relations, evidence is admissible that shortly before the alleged crime he had poisoned his own wife as tending to show a systematic plan formed and executed by accused.

[See 8 R. C. L. 198, 199.]

APPEAL by defendant from a judgment of the District Court for Kaufman County convicting him of murder. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Williams, Puckitt, & Harty and Martin & McDonald for appellant.

Mr. E. A. Berry, Assistant Attorney General, for the State.

Morrow, J., delivered the opinion of the court:

This conviction is for murder, the punishment being fixed at confinement in the penitentiary for twenty years.

The state's theory is that the deceased was assassinated. The evidence relied upon by the state is wholly circumstantial. The deceased resided in the country, and early in the morning a neighbor went to his house and found his body in his yard, near the door of his garage. The body was cold and stiff, and apparently the deceased had been dead six or eight hours. There were a number of buckshot wounds in his face and head. As a motive for the homicide the state advanced the theory, supported by the testimony of the wife of deceased, that she and appellant were criminally intimate; that she on the day preceding the homicide had told the appellant that their intimacy must cease, and he had declared his determination to have her.

There are a number of bills of exception complaining of the admission of evidence. These bills complain of the introduction of specific parts of the evidence, but are not so

drawn as to disclose the relation of the facts to which they refer to other facts in the case, nor to negative their relevancy as links in a chain of circumstantial evidence when considered in connection with other circumstances. In a case depending upon circumstantial evidence it is necessary only to render it admissible that it tends to prove the

issue, or constitutes a link in the chain of proof, and it is not to be rejected, though standing alone it might not justify a verdict. In such cases incidents may be legitimate evidence which would be deemed irrelevant in a case depending upon direct and positive testimony. *Preston v. State*, 8 Tex. App. 30; *Washington v. State*, 8 Tex. App. 377; *Simms v. State*, 10 Tex. App. 132; *Langford v. State*, 17 Tex. App. 445; 2 *Vernon's Crim. Stat.* p. 595, note 18. Under these rules the bills show no error wherein complaint is made of the fact that a

shotgun was found at appellant's place of business, and that subsequent to the homicide, it bore evidence of recent discharge. *Whart. Homicide*, p. 943; *Baines v. State*, 43 Tex. Crim. Rep. 490, 66 S. W. 847; 1 *Michie, Homicide*, p. 821, § 170.

There was evidence that late in

Evidence—  
homicide—  
chain of circum-  
stantial evi-  
dence.

— finding of  
shot gun.

the evening preceding the homicide the deceased was in the village of Forney, at which the appellant lived, and near which the deceased lived; that about 9 o'clock the same night an automobile passed along the road near the scene of the homicide. There was evidence that appellant owned an automobile; that the tire on one side was smooth and on the other a Diamond tread. There were found on the ground a short distance from the scene of the homicide tracks made by an automobile with a smooth tire on one side and a Diamond tread tire on the other. There was evidence that on the same night that the homicide took place appellant was recognized driving his car. The imprint made by the Diamond tread tire on the mud near the scene of the homicide was preserved and introduced in evidence, and a plaster cast of the tire on appellant's car was also made and proof introduced that the tread on his car and the impression on the mud were identical in size and shape. The fact that it was possible that the track may have been made prior to the homicide, or that it might have been made by an automobile other than that of appellant, would, under the circumstances, relate to the weight of the testimony, but would not be legal ground for its rejection. Baines v. State, 43 Tex. Crim. Rep. 495, 66 S. W. 847; Doss v. State, 50 Tex. Crim. Rep. 49, 95 S. W. 1040; Rucker v. State, 51 Tex. Crim. Rep. 222, 101 S. W. 804; Liles v. State, 58 Tex. Crim. Rep. 310, 125 S. W. 921; Liles v. State, 62 Tex. Crim. Rep. 34, 135 S. W. 1177; Pinkerton v. State, 71 Tex. Crim. Rep. 195, 160 S. W. 87; 1 Michie, Homicide, p. 819, § 170 (41).

The bills of exception complaining of the identification of the car belonging to appellant present no error.

The complaint of the evidence that footprints were found in the vicinity of the homicide, and that appellant's

shoe was identified and compared with the tracks, is — tracks. not well founded.

Branch's Ann. P. C. p. 81; Weaver v. State, 43 Tex. Crim. Rep. 340, 65 S. W. 534. Proof of tracks and other matters found at or near the scene of the homicide was legitimate. 1 Michie, Homicide, p. 829, § 171 (1½b); Tate v. State, 35 Tex. Crim. Rep. 231, 33 S. W. 121.

The trial court should have granted a new trial because of the remarks of the county attorney. Among other things, it appears from the bill he said, referring to counsel for appellant: "You said the facts of this case point just as much to the guilt of these men, Terry McKeller and John McKeller, as Irvin Haley. The state has seen fit to put the two McKellers upon the witness stand to deny their guilt; but you did not put Mr. Haley upon the witness stand to deny his guilt."

There were other similar remarks not necessary to quote. Our statute (Code Crim. Proc. art. 790) provides: "The failure of any defendant to testify" in his own behalf "shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause."

A disregard of this command of the statute has been, from the date of its passage, uniformly held an impermissible cause for reversal. Alvilla v. State, 32 Tex. Crim. Rep. 136, 22 S. W. 406; Vernon's Crim. Stat. (Tex.) vol. 2, p. 716, note 29, and cases cited.

The conversations between appellant and Mrs. Williams, detailed by her, disclosing his illicit relations with her, his desire that she abandon her husband, her unwillingness to do so, his references to his freedom since the death of his wife, and other matters detailed in her testimony, were relevant

and admissible in evidence. Weaver v. State, supra; Rice v. State, 54 Tex. Crim. Rep. 149, 112 S. W. 299.

Criminal law—  
new trial—  
comment on  
failure of accused to testify.

Evidence—  
motive for  
crime.

—automobile  
tracks.

The state introduced evidence for the purpose of showing that, some ten months prior to the homicide in question, the appellant had killed his wife by administering poison to her. The admissibility of this testimony is challenged upon various grounds. The manner in which this is presented in the bill of exceptions renders it difficult to grasp entirely appellant's viewpoint, but in view of another trial we express such views as we have formed touching its relation to the case. The evidence showed that appellant's wife died at night. He called a physician and her stepmother, who arrived after her death. According to their statement appellant and his wife came in from a drive; that his wife had been taking some aspirin for neuralgia which she had; that they went to bed, and later she told him to bring her that dose of quinine she got that evening in capsules; that he gave it to her, and after taking it she went to sleep and dozed off, and later she woke him up saying she was feeling bad; that she said she did not need a doctor, she would be all right, but that she had a convulsion, and he phoned for a doctor, and that she died in his arms. The doctor said he did not remember that the appellant told him how long his wife lived after she complained; that she woke up suddenly and grabbed him; that he had given her some quinine about an hour before the doctor was called. The doctor testified: "In an examination of the body I found the lower lip bitten. After that I looked over her arms and portions that were exposed, I think. I think there was some remark made about some splotches on her body. I think, as a rule, pied splotches follow strychnine poisoning. I made no analytical examination of the contents of the stomach; there was no post mortem examination had."

As we understand the record there was no prosecution founded upon this matter. Evidence was introduced, however, on the trial of this case that some time subsequent to

the death of Mrs. Haley her stepmother visited the house of appellant, and found a bottle marked "strychnine," and talked to appellant about it, and he said he knew it was there; that he had bought it several years ago to kill a dog and had never used it; that she asked him if he did not know that it was half gone, and he replied, "no," that it had never been unwrapped; that the bottle was turned over to her husband, and it was introduced upon the trial.

The general rule of evidence is that evidence of extraneous crimes is not received. The reason for its rejection, as stated by Mr. Underhill, is "that persons selected as jurors will very naturally believe that a person is guilty of the crime with which he is charged if it is proved to their satisfaction that he has committed a similar offense, or any offense of an equally heinous character; and it cannot be said with truth that this tendency is wholly without reason or justification, as every person can bear testimony from his or her experience, that a man who will commit one crime is very likely subsequently to commit another of the same description. To guard against this evil, and at the same time to avoid the delay which would be incident to an indefinite multiplication of issues, the general rule (to which, however, some very important exceptions may be noted) forbids the introduction of evidence which will show, or tend to show, that the accused has committed any crime wholly independent of that offense for which he is on trial." Underhill, *Crim. Ev.* § 87.

If it be assumed that the facts of this case bring it within one of the exceptions to which we will hereafter refer, it is clear that the due administration of justice demands that evidence tending to show appellant's guilt of another crime should not be admitted, unless the proof of the other offense is clear. In this case, if it is proper for the state to use the alleged fact that

— of other  
offense—  
admissibility.

appellant poisoned his wife as a circumstance connecting him with the assassination of Williams, it should be shown beyond a reasonable doubt that his wife died from poison knowingly administered by him with intent to destroy her. Applying this principle to the case in hand, we find no satisfactory evidence that the appellant's wife died from poisoning.

"In a case of . . . poisoning, where the symptoms and appearances during the last illness become controlling facts in determining whether the death was from poison or from disease, the charge is not made out unless the prosecution negative everything but poison as the cause of death. And this they can only do by showing affirmatively that the combined symptoms, and the absolutely certain facts with which they are associated, are inconsistent with any other disease or ailment." *People v. Millard*, 53 Mich. 63, 18 N. W. 562; 1 Whart. Crim. Ev. p. 162.

The circumstances, especially when taken in connection with the subsequent developments growing out of the present prosecution, surrounded appellant with suspicion connecting him with the death of his wife; but to justify the admission of evidence of another crime, its commission must be proved, and if the state can do no more than supply evidence casting suspicion upon the accused, the evidence should be rejected. We think on the application of this rule the evidence admitted on the subject should have been excluded from the jury. If, upon another trial, evidence is proffered sufficiently cogent to establish the fact that appellant's wife died from poison, we believe the evidence should be received as coming within that excep-

— murder of  
other person.

tion to the rule excluding independent crimes which recognizes their admissibility when they are evidence of a systematic plan formed and executed by the accused. This arises from the theory advanced by the state that the appellant, desiring to continue unobstructed his

illicit relations with the wife of deceased, formed a plan to remove the obstacles, viz., his own wife and the deceased Williams, and proof that he killed his wife in pursuance of his purpose to attain the same object which would furnish the motive for the killing of the deceased tended to identify appellant as the slayer of Williams. Concerning the admissibility of similar acts, although they constitute other offenses, on the theory that they are a part of a design or system, Mr. Wigmore, in his work on Evidence, § 104, says: "There is no situation in which a design to do an act would be irrelevant to show the doing of the act."

Again, at § 304: "When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's design or plan to do it." "To render them admissible, there must be not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan, of which they are the individual manifestations."

Thus he says: "To show a plan to rob a safe, the stealing of the key would be relevant; or to show a plan to murder a whole family and obtain their insurance money, the killings of other insured members of the family would be admissible."

Precedents from which these general statements of the author are taken will be found at § 363 of the same volume. Among these are cases in which, the plan being to get rid of obstacles to the marriage or association with a particular woman, crimes committed in furtherance of this design have been received as relevant to the issue of identity of the slayer of the deceased in the particular case. See *Stephens v. People*, 19 N. Y. 571. Such evidence has often been received in cases of poisoning where the evidence of identity was circumstantial.

If this evidence is received upon another trial, it should be limited in the charge of the court, and it should

be made clear to the jury that it is not to be considered at all against the appellant, unless the state had shown beyond a reasonable doubt that appellant's wife died from poi-

son, knowingly administered by the appellant with intent to kill her.

Because of the errors pointed out, the judgment of the lower court is reversed, and the cause remanded.

### ANNOTATION.

#### **Admissibility in criminal prosecution of evidence to prove other crime as affected by degree or sufficiency of the evidence.**

As a general rule, in a prosecution for one offense evidence that another independent crime has been committed by the defendant is inadmissible. There are, however, certain well-defined exceptions to this rule. This note is not concerned with the competency or relevancy of such evidence, but merely with the question of the degree of proof of the other crime necessary to render it admissible in cases in which it is otherwise proper.

It will be observed that in the reported case (*HALEY v. STATE*, ante, 779) it was held that the due administration of justice demands that evidence of the accused's guilt of another crime should not be admitted unless the proof of the other crime is clear, and that, in order to use the alleged fact that he has committed another crime, its commission must be shown beyond a reasonable doubt. This conclusion finds support in other cases.

Thus, in *Baxter v. State* (1914) 91 Ohio St. 167, 110 N. E. 456, in a trial for embezzlement, it was held that evidence that the accused was guilty of other similar offenses must be such that a jury would be authorized to find him guilty of the offenses. The court said: "Evidence of a vague and uncertain character offered for the purpose of proving that the defendant had been guilty of similar offenses should never be admitted under any pretense whatever. True, it is not always possible to show an entire transaction by one witness, and, therefore, if the state offers evidence which may become important in connection with other evidence proposed to be offered later in the case, it should be admitted; but if the state fails to introduce such further evidence, which, if uncontradicted, would authorize the jury to find the

defendant guilty of the other offenses sought to be proved, then there is an absolute failure on the part of the state to make a prima facie case of guilt of the defendant of these other offenses, and it becomes the peremptory duty of the trial court to strike such evidence from the record, and to instruct the jury that they are not to consider it for any purpose whatever. In this particular case the state sought to prove that this defendant had been guilty of a similar offense in Cincinnati, Ohio, and a similar offense in Kenton, Ohio. The evidence offered on behalf of the state in respect to these two other offenses was absolutely and wholly insufficient to make anything like a prima facie case against the defendant as to these transactions. If the accused had then been upon trial for either of these offenses, it would have been the duty of the trial court to instruct the jury to return a verdict of 'Not guilty.' The whole scope and extent of the evidence offered tended to prove no more than a suspicion of guilt. If either of these offenses had in fact been committed, the evidence did not connect this defendant with them, further than to show that he had the opportunity to be guilty; but it also appeared that at least a half dozen other persons in each of these transactions had equal opportunity with the defendant to appropriate the funds claimed to have been embezzled. The court of appeals of Franklin county, which is the court of last resort on disputed questions of fact, found that the testimony admitted in regard to these other offenses was of such a circumstantial character that it did not afford even probable cause that the defendant was guilty, but refused to reverse for this

reason, upon the theory that this evidence before an intelligent jury would not have any weight. Evidence that an accused was guilty of other similar offenses must be such that a jury would be authorized to find him guilty of these offenses. The trial court erred in receiving this evidence, erred in failing to instruct the jury at the time it was received as to the purpose for which it was competent, and erred in not striking all of this evidence relating to these other transactions from the record and instructing the jury to disregard the same. The trial court did charge the jury in its general charge that it must find from the evidence offered that the defendant was guilty of these other offenses, beyond a reasonable doubt, before it would be authorized to consider that evidence for any purpose. But this charge, while perfectly proper in a proper case, could not be otherwise than prejudicial to the accused in this particular case, because the jury would necessarily infer therefrom that there was substantial evidence of the guilt of the accused of these other offenses that it was authorized to consider, when in truth and in fact there was no such evidence."

And in *Pelton v. State* (1910) 60 Tex. Crim. Rep. 412, 132 S. W. 480, Ann. Cas. 1912C, 86, in a prosecution for forgery, it was held that, in order for evidence of other forgeries by the defendant to be used by the jury as evidence of his intent in committing the alleged forgery for which he was being tried, they must believe from the evidence, beyond a reasonable doubt, that the other transactions were forgeries, the court stating that if the evidence merely tended to show them to be forgeries they were not admissible against the defendant. This case follows *Taylor v. State* (1906) 50 Tex. Crim. Rep. 381, 97 S. W. 474, also a prosecution for forgery, in which the same result was reached.

And in *Com. v. McGarvey* (1914) 158 Ky. 570, 165 S. W. 973, a prosecution for receiving stolen goods, knowing them to have been stolen, it was held that evidence offered as to goods found in the possession of the defend-

ant other than those charged in the indictment, unless such evidence was a part of the *res gestæ*, must be such as would prove the other goods to have been stolen; and the evidence in this case was held insufficient to show this.

In *State v. Hyde* (1911) 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191, it was held that in order that evidence of the commission of other crimes be admitted there must be substantial evidence that the accused had committed such crimes. There was held to be no substantial evidence in this case that the defendant, who was a physician and charged with the murder of a relative of his wife to obtain his property, also intentionally killed another relative by bleeding him, ostensibly to relieve him from an apoplectic attack, where the testimony showed that another physician was present and participated in the operation, although it also showed that there was a difference of opinion between them as to the quantity of blood that should be drawn, and that the drawing continued after the other physician stated that he thought enough had been drawn. It was further held in this case that there was no substantial evidence that the defendant had poisoned another relative of his wife, the testimony showing that such relative had a fatal case of typhoid fever, and failing to show poison in his organs, and being inconsistent with the poison theory. And there was also held to be no substantial evidence that the defendant killed still other members of his wife's family by planting typhoid germs in a water cooler, there being no proof that he had planted such germs, or that any germs came from the cooler, although there was evidence that the defendant, a physician, had previously obtained typhoid germs for use, as he stated, in laboratory work. And other claims that the defendant inoculated some of his wife's relatives with typhoid germs by giving them candy and capsules were held not supported by any evidence worthy of consideration. The court in this case said: "We are of opinion that none of the testimony of other alleged crimes should

have been given to the jury. Having been admitted, it should have been withdrawn from their consideration. We also think that the better practice would be that the court should, as a preliminary matter, when the state proposes to offer evidence of other crimes, either hear the evidence or satisfy itself as to its character and scope by inquiry of the prosecuting attorney, and determine whether there is sufficient evidence of the other alleged crime to justify its submission to a jury. We do not mean to say that the evidence upon such preliminary hearing must prove beyond a reasonable doubt that the other crime has been committed, but that there should appear substantial evidence sufficient to take a case to a jury."

And in *Com. v. Robinson* (1886) 146 Mass. 571, 16 N. E. 452, where the question involved was as to the sufficiency of preliminary evidence before the trial court, as to a scheme and intention by the accused to kill her sister and then the latter's husband, in order to obtain his insurance, to warrant the admission, in a prosecution for killing the husband, of evidence that she had poisoned her sister, the court, in holding the preliminary evidence in the case sufficient, said: "But where, in a case like the present, the admissibility of testimony depends upon the determination of some prior fact by the court, there is no rule of law that, in order to render the testimony admissible, such prior fact must be established by a weight of evidence which will amount to a demonstration, and shut out all doubt or question of its existence. It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury. The fact of the admission of the evidence by the judge does not in a legal sense give it any greater weight with the jury; it does not affect the burden of proof, or change the duty of the jury in weighing the whole evidence. They must still be satisfied, in a criminal case, upon the whole evidence, beyond a reasonable doubt. Ordinarily, questions of fact are exclusively for the jury, and questions of law for the

court. But when, in order to pass upon the admissibility of evidence, the determination of a preliminary question of fact is necessary, the court, in the due and orderly course of the trial, must necessarily determine it, as far as is necessary for that purpose, and usually without the assistance, at that stage, of the jury. If, under such circumstances, testimony is admitted against a party's objection, it may often happen that he may still ask the jury to disregard it."

It has been held, in a prosecution for arson, that evidence that the defendant had another fire some years before was not admissible, without positive proof that the former fire had been set by the defendant. *Kahn v. State* (1914) 182 Ind. 1, 105 N. E. 385.

And in *State v. Carter* (1900) 112 Iowa, 15, 83 N. W. 715, in a prosecution for obtaining money by false pretenses, evidence of other similar pretenses was held not admissible to show intent, where there was no evidence to show that the other pretenses were false.

In *State v. Foxton* (1914) 166 Iowa, 181, 52 L.R.A.(N.S.) 919, 147 N. W. 347, Ann. Cas. 1916E, 727, evidence that other checks, drawn by one on trial for obtaining money on a bad check, were not paid, was held inadmissible, in the absence of anything to show that they were presented to the drawee, or that they would not have been paid if presented. And in this case, evidence that another check drawn by the defendant was not paid, without showing that there were no funds to meet it, was held prejudicial, where the accused testified that he thought he had made arrangements for the payment of the check, for the making of which he is on trial.

In *People v. Jones* (1909) 12 Cal. App. 129, 106 Pac. 724, it was held that a book containing an entry of a subscription solicited by the defendant in a prosecution for forgery was not rendered inadmissible because of entries therein of other subscriptions, the court stating that such irrelevant entries, unless supplemented by other evidence, would have no tendency to prove other offenses. J. T. W.

JOHN J. O'CONNOR  
v.  
MARYLAND MOTOR CAR INSURANCE COMPANY, Appt.

*Illinois Supreme Court — February 20, 1919.*

(287 Ill. 204, 122 N. E. 489.)

**Insurance — theft — recovery of property — effect.**

1. Under a policy insuring against automobile theft, providing for payment sixty days after notice and proof of loss, the recovery of a stolen automobile after the expiration of the sixty days will not defeat liability on the policy.

[See note on this question beginning on page 793.]

**Definition — abandonment.**

2. Abandonment in its technical sense means the relinquishment of a right, the giving up of something to which one is entitled, absolutely, without reference to any particular person or purpose.

[See 1 R. C. L. 1-3.]

**Abandonment — when complete.**

3. The moment an intention to abandon and relinquishment of possession unite an abandonment is complete.

[See 1 R. C. L. 1-3.]

**Insurance — abandonment — when permissible.**

4. Abandonment in insurance is not necessary when the loss is actually complete, and cannot be made unless the loss is constructively complete.

[See 14 R. C. L. 1276 et seq.]

**— right to abandon.**

5. A provision in a policy insuring against loss of automobile by theft and making the policy payable sixty days after notice and proof of loss, that there can be no abandonment to the company of the property described, means no abandonment before the expiration of the sixty days.

**— sufficiency of proof of loss — assurance of agent.**

6. One whose automobile is insured against loss by theft is entitled to rely

on the assurance of the insurer's agent that his proof of loss is sufficient, although sworn proof is not furnished.

[See 14 R. C. L. 1346.]

**Appeal — question raised for first time — proper party.**

7. The objection that an action upon a policy of insurance against theft was not brought by the right party, because the policy had been assigned by plaintiff as collateral security, cannot be raised for the first time on appeal.

[See 2 R. C. L. 85, 86.]

**— improper evidence — ground for reversal.**

8. A verdict directed for the proper party in an action on a policy insuring against automobile theft cannot be interfered with on appeal because evidence was admitted that insured had purchased another machine shortly after the theft.

[See 2 R. C. L. 250-253.]

**— letter advising settlement.**

9. A reversal for improperly admitting in evidence a letter from the agent to the home office, advising settlement of the claim, is not required in an action on a policy of insurance against theft, if the verdict was directed for the right party.

[See 2 R. C. L. 198, 250-253.]

**APPEAL** by defendant from a judgment of the Second Branch of the Appellate Court, First District, affirming a judgment of the Municipal Court of Chicago in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy insuring against automobile theft.  
*Affirmed.*

The facts are stated in the opinion of the court.



Messrs. Bates, Hicks, & Folonie, for appellant:

Plaintiff did not suffer an "actual" total loss of his automobile.

Globe Ins. Co. v. Sherlock, 25 Ohio St. 50.

The object of the policy is to make good loss or damage from theft of the property, not, in the event of damage, to purchase it. The insurers have no right to compel the insured to hand the property over to them.

Ibid.; 2 Wood, Fire Ins. § 489; Joyce, Ins. 2d ed. § 27F.

Actual total loss by theft exists only when the deprivation of the assured is irretrievable.

Hamilton v. Mendes, 2 Burr. 1198, 97 Eng. Reprint, 787, 1 W. Bl. 276, 96 Eng. Reprint, 154, 1 Eng. Rul. Cas. 112, approved in Dutilh v. Gatiliff, 4 Dall. 446, 1 L. ed. 903; Murray v. Harmony F. & M. Ins. Co. 58 Barb. 9; Bainbridge v. Neilson, 10 East, 329, 103 Eng. Reprint, 800, 1 Campb. 237, 10 Revised Rep. 316, 1 Eng. Rul. Cas. 121; Patterson v. Ritchie, 4 Maule & S. 394, 105 Eng. Reprint, 879, 16 Revised Rep. 498; Brotherston v. Barber, 5 Maule & S. 418, 105 Eng. Reprint, 1104, 17 Revised Rep. 378; Naylor v. Taylor, 9 Barn. & C. 718, 109 Eng. Reprint, 267, 4 Mann. & R. 526; Ruys v. Royal Exch. Assur. Corp. [1897] 2 Q. B. 135, 66 L. J. Q. B. N. S. 534, 77 L. T. N. S. 23, 8 Asp. Mar. L. Cas. 294; McCormack, Ins. § 3; Godsall v. Boladero, 9 East. 72, 103 Eng. Reprint, 500; McCarthy v. Abel, 5 East, 388, 102 Eng. Reprint, 1118, 1 Smith, 524, 7 Revised Rep. 711.

A constructive total loss is the subject of recovery of the whole value only by aid of an abandonment, vesting the property in the insurer.

2 Arnould, Marine Ins. 9th ed. § 1043; Norton v. Lexington F. L. & M. Ins. Co. 16 Ill. 235.

Elimination of the abandonment privilege bars recovery of the value of the property in all cases where the property still exists in specie, in the home town of assured, with power on his part to take possession.

Globe Ins. Co. v. Sherlock, 25 Ohio St. 50; Washburn & M. Mfg. Co. v. Reliance Marine Ins. Co. 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. Rep. 1.

If the property insured exists in specie, then in the absence of proof that what remains is valueless, the assured must prove his damage or fail in his suit.

Young v. Pacific Mut. Ins. Co. 2

Jones & S. 321; Burt v. Brewers & Maltsters' Ins. Co. 78 N. Y. 400; Washburn & M. Mfg. Co. v. Reliance Marine Ins. Co. supra.

A "theft policy" is not a contract by the insurance company to buy second-hand automobiles. It is a contract of indemnity.

Brotherston v. Barber, 5 Maule & S. 425, 105 Eng. Reprint, 1106, 17 Revised Rep. 378; 2 Wood, Fire Ins. § 489.

Waiver of proofs of loss cannot be made by an agent after expiration of time fixed for furnishing them.

Dwelling House Ins. Co. v. Jones, 47 Ill. App. 261; Cedar Rapids Ins. Co. v. Shimp, 16 Ill. App. 248.

Messrs. Adler, Lederer, & Beck, for appellee:

Plaintiff suffered a total loss of his automobile by theft by persons not in his employ, service, or household; Since the policy itself valued the automobile at the sum insured, plaintiff, by the plain terms of his policy, was entitled to recover the full amount of his insurance.

Norton v. Lexington F. L. & M. Ins. Co. 16 Ill. 235; Dutilh v. Gatiliff, 4 Dall. 446, 1 L. ed. 903; Bradlie v. Maryland Ins. Co. 12 Pet. 378, 9 L. ed. 1123; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. Rep. 68.

Defendant cannot be heard to urge any alleged defect or informality in the proof of loss made by plaintiff.

Atlantic Ins. Co. v. Wright, 22 Ill. 462; Insurance Co. of N. A. v. McDowell, 50 Ill. 120, 99 Am. Dec. 497; Manchester F. Assur. Co. v. Ellis, 85 Ill. App. 634; National Masonic Acci. Asso. v. Seed, 95 Ill. App. 43; 13 Am. & Eng. Enc. Law, 2d ed. 201; Huftalin v. Misner, 70 Ill. 205; Westphal v. Sipe, 62 Ill. App. 111.

Claypool, being the authorized agent representing defendant in its transactions with the plaintiff, was properly called for cross-examination under § 33 of the Municipal Court Act.

Kaestner v. Pope, 152 Ill. App. 22.

Carter, J., delivered the opinion of the court:

Appellee, John J. O'Connor, having had his automobile stolen, upon which he had a theft insurance policy in the appellant company, brought suit in the municipal court of Chicago to recover the value of the automobile as fixed by the policy. The trial court directed a verdict in

his favor for \$1,375 and costs, and from the judgment entered thereon an appeal was taken to the appellate court, where the judgment was affirmed. The appellate court issued a certificate stating that the questions involved were of such importance that they should be passed upon by the supreme court, and the case is here by appeal.

Appellee was the owner of a Hudson car and insured it in the appellant company for one year from March 31, 1916, through Roy E. Claypool, an agent of the company. Sunday evening, September 10, 1916, O'Connor left his car at the corner of La Salle and Randolph streets, in Chicago, while he went to a near-by restaurant, asking a street railway employee to watch it. A few minutes thereafter a young man jumped into the car, unlocked it, and drove rapidly away. The next day appellee went to Claypool's office and reported his loss, and also sent a letter detailing the circumstances. About five days thereafter appellee bought a new car, giving his note therefor, and assigning the policy here in question to the company from which he bought the automobile, as collateral security for the note. On November 15, 1916, the Chicago police department notified appellee that they had recovered the stolen car, and he accompanied a police officer to a downtown garage, where he identified it as the car which had been stolen from him. He refused, however, to take it, on the ground that he was entitled to the insurance money under the policy from the appellant company and that the car belonged to the company, and he wrote to the company to that effect, stating that he intended to use the money from said policy to pay off the note given for the new car. The company refused to pay the policy, on the ground that the car had been recovered and that appellee could take it if he desired.

Appellee brought this suit for a recovery under the policy on February 21, 1917. The automobile was insured for an amount not exceeding

\$1,375 against loss by fire, and also "against loss or damage by theft or robbery by any person or persons other than those in the employment, service, or household of the insured."

The policy provides, among other things: "In the event of loss or damage under this policy this company shall be liable only for the actual cost of repairing, or, if necessary, replacing the parts damaged or destroyed. It shall be optional with this company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice, within thirty days after the receipt of the sworn statement of loss herein required, of its intention so to do; but there can be no abandonment to this company of the property described."

It further provides: "In the event of loss or damage the insured shall forthwith give notice thereof in writing to this company or the authorized agent who issued the policy, and protect the property from further loss or damage, and within sixty days thereafter, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and cause of the loss or damage."

The last provision of the policy, which it is particularly necessary to consider in order to reach a correct conclusion on the questions here involved, reads as follows: "The sum for which this company is liable pursuant to this policy shall be payable sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company."

Counsel for appellant state correctly, in our judgment, that the policy here in question is, in part at least, a combination of fire and marine insurance form of contract. Many decisions are cited by counsel for each side with reference to loss

under maritime insurance policies, and there can be no question that, on principle, the theft of an automobile insured against theft, and subsequently recovered, presents a case somewhat analogous to the capture of an insured ship in time of war, which is subsequently recovered from the enemy and restored to the owner. A policy similar to the one here in question does not seem to have been construed heretofore by the courts of this state. The decisions from other jurisdictions on policies similarly worded may be persuasive as to the conclusion to be reached, but are certainly not decisive. The correct conclusion on the questions here raised depends largely upon the proper construction to be given to the particular policy here in question.

Counsel for appellant contend, as we understand their argument: (1) That the policy denies the right of abandonment and recovery under the policy (because of such abandonment) for the total loss of the automobile; (2) that the alleged abandonment became wrongful or invalid upon the subsequent recovery of the automobile. These two claims, it seems to us, are in a sense inconsistent, for if there is no right of abandonment then there would be no rights growing out of the alleged abandonment that could be divested by subsequent occurrences. Abandonment, in its technical sense, means the relinquishment of a

**Definition—  
abandonment.**

right; the giving up of something to which one is entitled; the giving up of a thing absolutely, without reference to any particular person or purpose. In maritime law it means relinquishment to the underwriters of all claim. 1 C. J. 5; 1 R. C. L. 2, 3. Time is not an essential element of abandonment. The moment the intention

**Abandonment—  
when complete.**

to abandon and the relinquishment of possession unite the abandonment is complete. 1 C. J. 8. Abandonment is not necessary

when the loss is actually total, nor can the abandonment be made unless the loss is constructively total. It is never obligatory upon the insured, but operates only as a voluntary transfer of title. The St. Johns (D. C.) 101 Fed. 469. It is manifest from the provisions of the policy quoted above that it is intended there should not be any voluntary abandonment by the insured to the company, using that word in its technical sense; but it is also apparent from reading and construing the provisions of the policy together that it was intended that there could be no recovery for a total loss of the automobile, if the insurance company desired to replace the property on giving, in accordance with the terms fixed in the policy, the required notice. The policy also provides that the sum for which the company is liable shall be payable in sixty days after notice and satisfactory proof of the loss.

**Insurance—  
abandonment—  
when  
permissible.**

There can be no question that the liability of the company might be affected by the return of the automobile and the giving of the required notice before the expiration of the sixty days; but we are disposed to hold that if, after the notice and satisfactory proof of loss were given, sixty days had expired before the finding and return of the automobile, the policy intended that there might be full recovery from the company for the value of the automobile, and this without reference to the question of abandonment. As we construe this policy as to loss by theft, the term "abandonment," as used in the quoted provision, was intended to mean that there could be no voluntary abandonment (using the word in the technical sense) by the owner before the expiration of the sixty days.

**—theft—  
recovery of  
property—  
effect.**

**—right to  
abandon.**

Counsel for appellant cite and rely on a number of English cases which seem to hold that the subse-

quent recovery of a captured ship prevents the owner from being entitled to the insurance as for a total loss, even if such recovery is after the insured has abandoned his interest to the underwriters. Counsel for appellee, on the other hand, argue that the English doctrine on this question has not been followed in this country, and that many of our courts have expressly stated they do not agree with the English doctrine. Counsel cite and rely, in this regard, on *Norton v. Lexington F. & M. Ins. Co.* 16 Ill. 235, and also *Bradlie v. Maryland Ins. Co.* 12 Pet. 378, 9 L. ed. 1123. All of the English and American cases cited have reference to maritime insurance—a branch of the law having well-understood customs and rules, distinct, in some respects, from those relating to other classes of property—and can only be applicable, by analogy, to the case at bar. In view of the construction that we have given to the provisions of this policy, we do not deem it necessary to refer to these decisions, except to say that we agree with counsel for appellee that the decisions in this country, and especially *Norton v. Lexington F. & M. Ins. Co.* supra, decided by this court, are not in accord with the reasoning of the English cases.

This suit was instituted after the lapse of sixty days from the notice and proof of loss, but after the automobile had been found. Counsel for appellant seem to concede that, if the suit had been instituted before the automobile had been found, under the reasoning of the English cases appellee could have recovered for the full amount of the machine; that is, that the date of the starting of the suit fixed the time of recovery for a total loss, if the machine had not been found before that date. Obviously, in order to make an insurance policy of this kind of value to the owner of the property, there must be some time fixed after which the return of the automobile will not release the company from liability. Automobiles are so generally

used in business affairs and other activities of life that public policy requires that a person having a theft policy should not be compelled to wait indefinitely on the chance of having the stolen automobile recovered, or be compelled to incur the expense of buying a new one and thereafter taking the old one back, if recovered. Fairly construed, we think this insurance policy intended to fix the date at sixty days after the notice and satisfactory proof of loss had been received by the company,—in other words, to fix the date at which the insured would not be compelled to take the stolen car back, even if recovered, at the date when the insurance money was agreed to be paid.

Counsel for appellant further argue that there was no proper proof made by appellee of the loss of the automobile. Appellee gave notice in writing on the day following the theft, which, it is shown, was received by the agent of the company the day after it was mailed. On the same day that the written notice was received, appellee called on the agent of the company and offered to make an affidavit or sworn statement, but was told by the agent that the letter had been received and was sufficient, and that no further notice or proof need be given. While some of the letters were addressed to the appellant company, and others were addressed to a guaranty company, which apparently had close connection with appellant, there can be no question, from a consideration of the whole transaction, that the appellant company, through its proper agent, recognized the sufficiency of the notice given and waived the furnishing of sworn proof. Appellee had a right to rely upon the agent's assurance that his proof was sufficient. It was held by this court in *Atlantic Ins. Co. v. Wright*, 22 Ill. 462, that when a representative of an insurance company had no fault to find with the proofs, but was satisfied

—sufficiency of  
proof of loss—  
assurance of  
agent.

with them, if there existed any informality in the preliminary proofs of the loss such informality was expressly waived by the company. The reasoning, also, of this court in *Lumberman's Ins. Co. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497, would lead to the same conclusion. On this record the appellant cannot raise any question that the notice and proof of loss did not comply with the provisions of the policy.

Counsel for appellant further argue that the court erred in permitting a judgment to be entered against appellant when the proof showed that the policy had been assigned to the Louis Geyler Company by appellee as collateral security for the note given for the new automobile. The point now made on this question is that the wrong party is bringing the suit. No such objection was made in the trial court. It is insisted by counsel for the appellee that the policy had been re-assigned by the Louis Geyler Company, before the trial, to the original beneficiary, appellee herein. We

Appeal—  
question raised  
for first time—  
proper party.

agree with counsel for appellant that there is nothing in the record to indicate such reassignment back to appellee. The special point, however, as to the wrong party suing, not having been raised in the trial court, it is too late to raise it for the first time in a court of review.

Counsel for appellant also argue that the trial court erred in its rulings on the admission of evidence. Over the objection of appellant the trial court admitted evidence on behalf of appellee to the effect that he had purchased a new automobile shortly after the theft. They argue that such proof was calculated to mislead the jury into seeking to relieve plaintiff of an undesirable vehicle and require the appellant com-

pany to replace it with a new one. We do not see any ground upon which the evidence was properly admissible, but under a proper construction of the policy, as held above, the verdict as directed by the trial court was justified, and we cannot see how the improper admission of this evidence in any way affected the result.

—improper evidence—ground for reversal.

It is also argued by counsel that the court improperly admitted a letter sent from the local office in Chicago to the home office in Maryland, in which the Chicago agent stated that the claim of the loss had been reported to the office immediately and had been referred to the adjuster, and that the agent considered that proper proof of loss had been made by appellee and that the writer thought that the loss should be paid; that it would be good business policy for the company to pay the loss rather than contest the claim. The evidence tends to show that the local agent of appellant was a personal friend of appellee, and seemed to desire that appellee should recover under the policy, but the main office of the company did not agree with the view of its local agent. Conceding this letter was inadmissible, we do not see, construing the policy as it has been construed, and a directed verdict being justified, that appellant was in any way injured by the introduction of this evidence.

—letter advising settlement.

Counsel also object to the examination of the local agent during the trial under the provisions of § 33 of the Municipal Court Act. *Hurd's Stat. 1917*, p. 906. No material error was committed by the trial court as to this examination.

We find no reversible error in the record, and the judgment of the Appellate Court will be affirmed.

Petition for rehearing denied, April 2, 1919.

## ANNOTATION.

**Recovery of car as affecting insurance covering theft of automobile.**

An interesting and important point was involved in the reported case, (*O'CONNOR v. MARYLAND MOTOR CAR INS. Co. ante, 787*), as to whether the insured could abandon the stolen car to the insurer and recover its insured value under the policy. It will be observed that in that case the policy, which insured against loss or damage by theft, provided that it should be optional with the insurer to repair, rebuild, or replace the property lost or damaged within a reasonable time, on giving notice within thirty days of proof of loss of its intention to do so, but that there could be no "abandonment" to the company of the property; and also provided that in the event of loss the insured should give notice to the company, and within sixty days thereafter, unless the time was extended, should render a sworn statement of his knowledge and belief as to the time and cause of loss or damage; and further provided that the sum for which the company was liable should be payable sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss required had been received. In construing the policy the court held that the term "abandonment," as used therein, meant that there could be no voluntary abandonment before the expiration of sixty days after notice and proof of loss by theft, but that the expiration of that time fixed the date after which the insured would not be required to take the stolen car back, even if it was recovered, but might then recover the amount of the insurance.

Under policies of this kind, in common with other policies, a definite time for the payment of loss is fixed. When this time has elapsed before the recovery of the car, it would seem that the insurer is clearly bound to pay its insured value, and cannot, although the machine may be subsequently recovered, compel the insured to receive it back, unless, of course, an express provision for such return is

contained in the policy. No other case has been disclosed dealing with the construction of express provisions relating to an abandonment to the insurer.

In *Kansas City Regal Auto Co. v. Old Colony Ins. Co. (1917) 196 Mo. App. 255, 195 S. W. 579*, a policy of automobile theft insurance was held to be one of indemnity, under which the insurer was required to make the insured whole in case of loss, rather than to pay the face of the policy; and it was held that the insurer having recovered the car, the insured would have been bound to receive it back, upon proper tender of the car and payment by the insurer of all damages caused by reason of the theft. It does not appear from the report of the case whether or not the car was recovered before the expiration of the period allowed by the policy for the payment of the loss. The insurer was held bound to return the machine to the insured at Kansas City, where it was stolen, and its obligation was held not discharged by notifying the insured that the automobile was at a certain place in another state, and offering to turn it over to him there, and in addition to pay all damages by reason of the theft. The court stated that the insured in Kansas City had no way of knowing what damage had been done to the car stored in the other state; that he should not be required to settle the damages without knowing what liens had been created against it since the theft, and without any exact knowledge of what would be the cost of returning it to his place of residence, to say nothing of the value of the time it would be necessary for him to devote to the matter in having the car returned. The evidence in this case was held not to show a waiver by the insured of the right to have the machine returned to Kansas City, although there was testimony that, when the insurer's attorney at Kansas City offered to return the car, the attorney

said that he did not want the car, but wanted the money; but the testimony did not show that he refused to accept the car in case the insurer refused to pay the money.

In *Callahan v. London & L. F. Ins. Co.* (1917) 98 Misc. 589, 163 N. Y. Supp. 322, affirmed in (1917) 179 App. Div. 890, 165 N. Y. Supp. 1079, it was held that a policy insuring against damage by theft, robbery, or pilferage covered all damage resulting, or which in the contemplation of the parties might result, from theft, including damage caused by reckless driving, or any use which destroyed its value in whole or in part, and the court said: "If, following the theft, the car should be recovered intact, in the same condition it was before the theft, plaintiff's only damage would be expenses incurred in recovering the car, and perhaps, in addition, the value of its use during the period

between the theft and the recovery of the car. If the car were damaged or destroyed while in the custody of the thief, plaintiff's damage would include also the diminution or loss of value of the car thus stolen."

And in *Federal Ins. Co. v. Hiter* (1915) 164 Ky. 743, L.R.A.1915E, 575, 176 S. W. 210, where the car, which was practically new when stolen, was in a badly damaged condition when recovered by the insured, it was held that the diminution in its value resulting from the theft was within the operation of a policy insuring against any loss or damage, if amounting to \$25 or more on any single occasion, by theft, robbery, or pilferage, although the policy also provided that in the event of loss or damage the insurer should be liable only for the actual cost of repairing, or, if necessary, replacing the parts damaged or destroyed. J. T. W.

## CHARLES L. MORGAN

v.

GERMANIA FIRE INSURANCE COMPANY et al., Appts.

*Kansas Supreme Court — March 3, 1919.*

(— Kan. —, 179 Pac. 830.)

### Insurance — gasoline in automobile.

1. The policies provided that they should be void if the insured "kept, used or allowed on the premises gasoline . . . or petroleum or any of its products of greater inflammability than kerosene oil." Held, that the plaintiff's keeping in the building for two or three months his Ford car with its gasoline tank from one-third full to full of gasoline (although not in the building the night of the fire) violated this provision and avoided the policies.

[See note on this question beginning on page 798.]

### Appeal — effect of general verdict.

2. The general verdict in favor of the plaintiff is held to be in effect a sufficient finding that the fire occurred without the plaintiff's fault.

### Insurance — submission to examination.

3. The provision that when required

the plaintiff should submit to an examination under oath was not made a condition precedent to recovery, and his refusal to comply when called upon did not, under the circumstances shown, constitute a valid defense.

**APPEAL** by defendants from a judgment of the District Court for Sumner County in favor of plaintiff and from an order denying a motion for new trial in actions brought to recover the amount alleged to be due on two fire insurance policies. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Edward T. Hackney and C. C. Crow, for appellants:

The storing of gasoline in the barn in the Ford car for the length of time testified to by plaintiff was a substantial violation of the contract prohibiting gasoline being kept upon the premises insured.

State ex rel. American F. Ins. Co. v. Ellison, 269 Mo. 410, 190 S. W. 879; Shader v. Railway Pass. Assur. Co. 66 N. Y. 441, 23 Am. Rep. 65.

Messrs. W. M. Ready and W. W. Schwinn, for appellee:

The temporary incidental presence of some prohibited article on insured premises does not avoid a policy.

Harper v. Albany Mut. Ins. Co. 17 N. Y. 194; Harper v. New York City Ins. Co. 22 N. Y. 441; Hall v. Insurance Co. of N. A. 58 N. Y. 292, 17 Am. Rep. 255; Buchanan v. Exchange F. Ins. Co. 61 N. Y. 26; Thompson v. Equity F. Ins. Co. 17 Ont. L. Rep. 214, 13 Ann. Cas. 540; 14 R. C. L. §§ 288-290.

West, J., delivered the opinion of the court:

The defendants issued to the plaintiff two insurance policies on a frame feed barn. They each contained a clause that the insured, as often as required, should exhibit to any person designated by the company all that remained of any property therein described, and submit to an examination under oath by any person named by the company and subscribe the same. They also provided that they should be void if the insured then had, or there should be kept or allowed, upon the premises gasoline or petroleum or any other products of greater inflammability than kerosene oil. Each policy provided that it should be payable in sixty days after receiving proof of loss. The barn was burned June 2, 1917. On July 23d proofs of loss were served, and on September 27th the action was brought. November 5th the defendants moved to require the petition to be made more definite

and certain by setting out the proof of loss. This was overruled.

January 24th answers consisting of general denials were filed, and in February following amended answers were filed consisting of a general denial and the allegation that on the 4th of that month notice had been served on the plaintiff to appear for examination, which he refused to do, thereby avoiding the policies. On the 28th of February the plaintiff notified the defendants' attorney that he would, on the 7th of March, appear for examination. No examination was made. On March 12th this fact was set up by supplemental reply. It was shown on the trial that proofs of loss were made and delivered to the defendants more than sixty days before the action was brought, and that no objection had been raised thereto and no objection made to the payment of the policies until the suit had been brought. The plaintiff recovered, and the defendants appeal and assign as error the refusal of the court to find for them at the conclusion of the plaintiff's evidence and the refusal to grant a new trial.

They argue that the plaintiff failed to prove his allegation that the building was destroyed without his fault, and that the policies were made void by his having kept his Ford car in the barn with some gasoline in it, and also that the failure to submit to the examination when called upon was fatal to his case.

Assuming, without deciding, that the burden was on the plaintiff to prove his allegation that the building was burned without his fault, it suffices to say that the general verdict in his favor must be construed as likewise settling this question.

Appeal—effect  
of general  
verdict.



The provision that the insured should submit to an examination, when required, was not made a condition precedent to recovery, and hence his refusal did not, under the circumstances shown, avoid the policies. Counsel cite four cases to sustain their contention that this provision, together with the refusal, avoided the policies. *Pearlstine v. Westchester F. Ins. Co.* 70 S. C. 75, 49 S. E. 4; *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 939, 42 S. E. 269; *Sims v. Union Assur. Soc. (C. C.)* 129 Fed. 804; *Harris v. Phoenix Ins. Co.* 35 Conn. 310.

Insurance—  
submission to  
examination.

In the *Pearlstine Case* a nonsuit was asked because a similar provision with others had been violated, and it was held properly refused because waiver might have been shown. As to the examination clause it was merely held that the insured could not avail himself of the excuse for noncompliance that he had fled to avoid arrest for homicide. In the *Firemen's Fund Case* the policy provided that no suit could be maintained until after a compliance with this provision. The same thing was true of the *Sims Case* and the *Harris Case*. In cases involving the iron-safe clause we have held that its violation avoided the policy when so stated therein. *Crandon v. Home Ins. Co.* 99 Kan. 785, 163 Pac. 458.

The plaintiff testified that he had kept his Ford car in the barn most of the time for two or three months, and that it held 10 gallons of gasoline, and was from one-third full to full while in the barn. While he testified that it was not in the barn the night of the fire, the defendants contend that the provision was so violated as to preclude recovery. *Oakland Home Ins. Co. v. Shawnee County*, 54 Kan. 732, 45 Am. St. Rep. 306, 39 Pac. 697, is cited. There, however, the policy forbade the keeping or use of gasoline upon the insured premises, and it was expressly agreed that the violation of this condition should avoid the policy. It was said in the opinion that gasoline stoves and lamps were

used without hindrance or restraint, and that the facts showed clearly that the fire which destroyed the property was occasioned by such use, a situation quite unlike that now presented for consideration.

In *Republic County Mut. F. Ins. Co. v. Johnson*, 69 Kan. 146, 105 Am. St. Rep. 157, 76 Pac. 419, 2 Ann. Cas. 20, the vacancy clause in the policy was to the effect that the latter became void if the premises became vacant for thirty days. More than thirty days after the house became vacant the other building was destroyed by a wind-storm. It was decided that this building was also vacant, and the vacancy avoided the policy. In *German Ins. Co. v. Russell*, 65 Kan. 373, 58 L.R.A. 234, 69 Pac. 345, the policy provided that it should be void if the buildings became vacant without consent. They became vacant, and so remained for twelve days, but were reoccupied before any loss was sustained. It was held that the vacancy forfeited the insurance, and that the reoccupancy did not revive it. It was held in *London & L. F. Ins. Co. v. Fischer*, 34 C. C. A. 503, 92 Fed. 500, that a clause similar to the one before us was not violated by merely permitting gasoline to be carried through the building. In *Norwaysz v. Thuringia Ins. Co.* 204 Ill. 334, 68 N. E. 551, it was held that a violation of such a clause avoided the policy, and that it was not incumbent on the insurer to show that such violation contributed to the loss. The opinion in *Imperial F. Ins. Co. v. Coös County*, 151 U. S. 452, 465, 38 L. ed. 231, 236, 14 Sup. Ct. Rep. 382, contains this language. "The condition which was violated did not, in any way, depend upon the fact that it increased the risk, but by the express terms of the contract was made to avoid the policy if the condition was not observed."

The policy considered in *Harper v. Albany Mut. Ins. Co.* 17 N. Y. 194, provided that if the building should be used for purposes extra-hazardous, the policy should be of no force so long as such use continued.

Camphene, spirit gas, or burning fluid were forbidden to be used unless by permission indorsed on the policy. The plaintiffs conducted a bookbinding business, and used camphene for cleaning rollers, woodcuts, and electrotype plates, as was usual among printers, and necessary and indispensable. The policy gave the privilege of carrying on the printing business, and the insurer was held liable. The fire was caused by the act of a plumber throwing a lighted match into a pan containing a small quantity of camphene. The same ruling was made in *Harper v. New York City Ins. Co.* 22 N. Y. 441; three of the judges vigorously dissenting. These decisions were followed in *Hall v. Insurance Co. of N. A.* 58 N. Y. 292, 17 Am. Rep. 255. The storage and use of enough kerosene to light a paper mill was held not to violate a clause prohibiting the storage or use of petroleum, rock, and earth oil in *Buchanan v. Exchange F. Ins. Co.* 61 N. Y. 26. In *Shader v. Railway Pass. Assur. Co.* 66 N. Y. 441, 23 Am. Rep. 65, it was held that the death of the insured occurred while he was drunk, and that this avoided the policy; although he was killed by a pistol shot; the policy providing that no claim should be made if the death happened while or as a result of intoxication. The Missouri court of appeals in *La Force v. Williams City F. Ins. Co.* 43 Mo. App. 518 (syl. 3), held that a provision that the policy should become void if gasoline was kept, used, or stored on the premises was not breached by the "occasional introduction of small quantities of gasoline into the house, for the purpose of destroying vermin and cleaning clothes." The rule was announced to be that to forfeit a policy requires the use of the prohibited article for the ordinary purposes to which it is usually put, and

that an occasional use for a temporary and extraordinary purpose connected with the occupation of the premises is not fatal.

The supreme court of Missouri held in *State ex rel. American F. Ins. Co. v. Ellison*, 269 Mo. 410, 190 S. W. 879, that a clause against encumbering the insured property was no less binding because its violation did not increase the hazard, the doctrine being plainly and forcibly declared that the courts cannot make contracts for parties qualified to make their own.

Courts and text-writers differ as to what constitutes a breach of such a provision as we are considering. But we believe and hold that the amount of gasoline kept in the car in the barn for two or three months was <sup>—gasoline in automobile.</sup> a breach thereof, and not a permissible and negligible deviation therefrom.

The parties, fully competent, fairly contracted that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or . . . if (any usage or custom of the trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed upon the described premises . . . gasoline . . . or petroleum or any of its products of greater inflammability than kerosene oil."

Thus the contract was not to insure a feed barn in which a car with a tank of gasoline should be kept or stored, but one free from such inflammable stuff. The plaintiff should have kept his contract or had indorsed thereon consent to keep his car in the building.

The judgment is reversed, and cause is remanded, with directions to enter judgment for the defendant.

All the Justices concur.

Petition for rehearing denied.

## ANNOTATION.

**Gasolene in automobile as violation of provision in fire insurance policy on building.**

It will be observed that in the reported case (*MORGAN v. GERMANIA F. INS. Co.* ante, 794) the conclusion was reached that the fact that the insured had kept his automobile, the tank of which contained from 3 to 10 gallons of gasolene, for two or three months in the insured barn, although it was not there on the night of the fire, violated a provision of the policy that the entire policy, unless otherwise indorsed on it, should be void if gasolene was kept, used, or allowed upon the premises, the reasoning of the court being that the parties had fairly contracted, and that the contract was not to insure a feed barn in which a tank of gasolene was kept or stored, but one free from such inflammable fluid, and that the insured should have kept his contract, or have obtained a permit from the insured.

There is, as yet, little direct authority upon the question under consideration.

In *O'Neill v. Caledonian Ins. Co.* (1913) 166 Cal. 310, 135 Pac. 1121, the policies involved, covering personal property and a building, provided that, unless otherwise provided by agreement indorsed thereon, the insurer should not be liable for loss occurring while gasolene exceeding 1 quart was kept, used, or allowed on the premises, and a rider was attached, the printed part of which contained a warranty by the insured that no gasolene "other than contained in the reservoirs of machines shall be admitted into the building where the machine is permanently or temporarily stabled," which was preceded by a written description of the premises, including the statement that they were occupied in part as an "auto repair shop." It was held that it must be presumed that the company undertook to insure against all ordinary risks attending an automobile repair shop, and that the policy was not avoided by reason of the repair man bringing an automobile

with a leaking gasolene tank, which contained 20 gallons, into the repair shop, emptying the tank into four 5-gallon cans; and, after having repaired the tank, pouring the gasolene back into the tank, during the course of which the fluid ignited and started a fire. The court said that the "rider" prevailed over the "suspension" clause and the written part of the rider over the printed part, and the insurer must be presumed to have intended that the usual and necessary operations of an auto repair shop should be allowed.

It was further held in this case that the claim that the policy was avoided under the "suspension" clause, because at the time of the fire there were five other automobiles in the building, each of which contained more than 1 quart of gasolene in its reservoir, could not be sustained. The court said: "We think that this claim cannot be maintained, in view of the provisions of the warranty clause inserted in the rider. It forbids the admission into the building of any gasolene other than that contained in the tanks of machines 'permanently or temporarily stabled' therein. It is no part of the business of an automobile repair shop to permanently stable automobiles in the building in which it is carried on, or to stable any automobile temporarily therein, except such as are brought there to be repaired. As the warranty was drawn by the company, it is to be construed most favorably for the assured. Civ. Code, § 1654. Provisions in an insurance policy are always construed so as to prevent a forfeiture, if the language will reasonably permit such a construction. *Arnold v. American Ins. Co.* (1906) 148 Cal. 666, 25 L.R.A. (N.S.) 6, 84 Pac. 182. Therefore, as the language of the warranty plainly implies that automobiles with gasolene in their tanks were to be stabled in the building, although not brought in for repair, it must be construed to permit such storage.

The word 'machines' is in the plural, and the number of machines allowed to be kept therein is, therefore, not limited. The presence of these automobiles in the building did not suspend the policy."

The decision in this case was followed in *O'Neill v. Union Assur. Soc.* (1913) 166 Cal. 318, 135 Pac. 1124, involving the same loss, and policies in the same form. It was further held in these cases that the insurer could not have been prejudiced by an instruction that the plaintiff's right to recover was not affected by the presence at the time of any gasoline which came into the premises in the reservoirs of automobiles. In criticism of this instruction it was suggested that it would allow the jury to find for the plaintiff although thousands of gallons of gasoline might have been brought into the building in the reservoirs of machines and thereafter emptied into gasoline tanks and kept stored in the building. The court, however, said that the criticism was not based on any facts in the case, and that it was obvious that the instruction referred to the gasoline brought into the building in the reservoir of the car left for repairs, and

which was drained from the reservoir of that car while it was being repaired.

In *Bone v. Detroit Nat. F. Ins. Co.* (1918) 261 Pa. 554, 104 Atl. 742, where the policy which insured a hotel building had a rider attached, marked "dwelling and barn form," which provided that "not more than one automobile shall be stored or kept on the premises," it was held not avoided by reason of the fact that two automobiles were kept in a barn 400 feet from the insured hotel, the view being taken that, as the only risk assumed was the hotel, the word "premises" referred merely to that building.

While not within the scope of this note, attention may be called to *Home Ins. Co. v. Bridges* (1916) 172 Ky. 161, L.R.A.1917C, 276, 189 S. W. 6, where it was held that the temporary possession on premises of a few quarts of gasoline to clean an automobile and vulcanize tires was not a violation of a clause of a policy insuring a building occupied as a residence and grocery, making it void if gasoline was kept, used, or allowed on the premises, such clause not extending to a temporary or occasional use. J. T. W.

## NELLIE WILLIAMSON

v.

## E. B. WILLIAMSON.

*Kentucky Court of Appeals — February 28, 1919.*

(— Ky. —, 209 S. W. 508.)

### Divorce — cruel and inhuman treatment — compelling abandonment of children.

1. Compelling a woman to get rid of her infant children by a former marriage as a condition to living in her second husband's home, when he knew of their existence at the time of marriage and agreed that she might bring them with her, is cruel and inhuman treatment, amounting to abandonment of her.

[See note on this question beginning on page 803.]

### Pleading — divorce — stating cause of action.

2. A petition does not state a cause of action for divorce which omits to state the statutory requirement that the cause of action occurred or ex-

isted within the state within five years before commencement of the action.

[See 9 R. C. L. 418.]

### Appeal — jurisdiction — divorce.

3. The court of appeals of Kentucky

has no revisory jurisdiction over judgments granting divorce.

[See 9 R. C. L. 466.]

**Divorce — alimony without divorce.**

4. A suit for alimony may be maintained independent of and without regard to divorce, where a man treats his wife with cruelty and compels her to leave him.

[See 1 R. C. L. 878-881.]

**Pleading — action for alimony — necessary allegations.**

5. The allegation necessary under the statute in divorce actions, that the cause of action occurred or existed in the state within five years before commencement of the action, is not necessary in an action for alimony.

— cause of action for alimony.

6. To state a cause of action for the allowance of alimony it is sufficient to allege only the marriage and facts showing an abandonment by the husband without fault upon the part of the wife.

[See 1 R. C. L. 883, 884.]

**Venue — action for alimony.**

7. An action for alimony is clearly in personam for the recovery of money, and therefore transitory, of which any court having jurisdiction of the

subject-matter may acquire jurisdiction of the defendant when he is summoned to appear, or voluntarily appears and makes defense.

[See 1 R. C. L. 885.]

**Husband and wife — abandonment — what is.**

8. A man abandons his wife by compelling her to leave him by cruel and inhuman treatment of her.

[See 9 R. C. L. 354 et seq.]

**Divorce — amount of alimony.**

9. An allowance of \$1,500 as alimony for support of the wife and infant child, who are without means, is not excessive where the husband has a large farm and personal property worth at least \$8,000.

[See 1 R. C. L. 929-932.]

**Appeal — disturbance of allowance for alimony.**

10. An allowance of alimony will not be disturbed on appeal, although it might be considered, under some of the circumstances, too small, where the marriage was one merely of convenience arranged by a go-between, without profession of love on either side, and the woman lived with the man as his wife for only a few months.

[See 1 R. C. L. 929 et seq.]

**CROSS APPEALS** from a judgment of the Circuit Court for Pike County in favor of plaintiff in a suit for divorce, alimony, and custody of a child; defendant appealing from the judgment in plaintiff's favor; and plaintiff appealing from the amount allowed her for alimony. *Affirmed on both appeals.*

The facts are stated in the opinion of the court.

Mr. J. C. Cantrell for defendant.

Messrs. Cline & Steele for plaintiff.

Clarke, J., delivered the opinion of the court:

This is an appeal by the defendant from a judgment granting to his wife a divorce, the custody of their infant child, and "the sum of \$1,500 alimony, \$1,000 for herself, and \$500 for the use of their infant child."

The petition did not state a cause of action for a divorce (nor was one asked), because it failed to state, as required by § 423 of the Civil Code of Practice and § 2120 of the Statutes, that the cause of action occurred or existed in this state within five years next before the com-

mencement of the action; but complaint is not made of the judgment for divorce, of which we have no revisory jurisdiction. It is, however, insisted that,

because the petition does not state a cause for divorce, the court erred in awarding alimony, it being the contention of counsel for appellant that alimony cannot be granted, except in a suit and as a part of a judgment for divorce, and we are referred to a statement to that effect in *Freeman v. Freeman*, 11 Ky. L. Rep. 822, 13 S. W. 246; but such is no longer, if ever, the rule in this state, as a suit for alimony may be maintained independent of and without regard to a divorce, where

**Pleading—  
divorce—  
stating cause  
of action.**

**Appeal—  
jurisdiction—  
divorce.**

the husband treats the wife with cruelty and compels her to leave him (Hulett v. Hulett, 80 Ky. 364), and although the abandonment may not have continued long enough to entitle her to a divorce (Steele v. Steele, 96 Ky. 382, 29 S. W. 17; Belcher v. Belcher, 145 Ky. 309, 140 S. W. 309).

Since an independent suit may be maintained for alimony in the absence of grounds for divorce, it is manifest that the Code and statutory provisions referred to above have no application to an action for alimony, and in such an action it is not necessary to give the court jurisdiction, or for any purpose, that there should be an allegation

**Pleading—  
action for alimony—necessary  
allegations.**

that a cause for divorce had occurred or existed within this state and within five years next before the action was commenced; and it is necessary only to allege the marriage and facts showing an abandonment by the husband, without fault upon the part of the wife, to state a cause for alimony.

It is purely an action in personam for the recovery of money, and therefore transitory, except as localized by § 76 of the Code of Practice "to subserve the convenience and possibly the interest of the wife," but over which any court having jurisdiction of the subject-

**Venue—action  
for alimony.**

matter may acquire jurisdiction of the defendant, when he is summoned to answer, or voluntarily appears, and makes defense. Johnson v. Johnson, 12 Bush, 485; Tudor v. Tudor, 101 Ky. 530, 41 S. W. 768; Gillen v. Illinois C. R. Co. 137 Ky. 375, 125 S. W. 1047. Hence there is no merit in the contention that, because of the failure to make the allegations required in an action for divorce, the court was without jurisdiction of the subject-matter or the parties, and without power to award such alimony as the proof warranted.

2. The proof shows that the parties were married in West Virginia in 1912, and that in 1913 the plaintiff left the home of the defendant in West Virginia and returned to her former home in Pike county, Kentucky, where she has since continuously resided; that she has no property of any kind, except one cow, and the defendant has property of the value of \$8,000 at least; that their marriage was the second for each, and purely a marriage of convenience, devoid of any sentiment whatever. At the time, plaintiff was a widow with two infant children of tender years, whom the defendant agreed should have a home with their mother in his home, and that he would provide for them.

To sustain her charge that she was compelled to and did leave the defendant because of his cruel and inhuman treatment of her (which is an abandonment by him; Davis v. Davis, 86 Ky. 32, 4 S. W. 822), she testified that shortly after their marriage he began to manifest an aversion toward her children and treated them unkindly; that just before she left him he informed her that he would not continue to live with her unless she got rid of her children, which evidence appellant insists should have been excluded; but even if it were excluded, practically the same facts are proved by two witnesses for the plaintiff, Anse Blackburn and Acy Hensley, who testified that the defendant told them, about the time plaintiff left him, that he had a home for her but none for her children. Mrs. Harriet Blackburn stated that she never saw him mistreat his wife or his children, but that he pouted around and would not speak to her. The defendant does not contradict any of this testimony, nor testify at all on his own behalf, and this is about all the testimony in the case, except as to the value of defendant's property, and the evidence of neighbors that they never saw the defendant mistreat the plaintiff, and that, so far as they knew or

**Husband and  
wife—abandonment—what is.**

could see, he provided for her and her children a good home.

It would be hard to conceive of treatment that would be more cruel and inhuman by a husband toward a wife than the offer to live with her and give her a home only upon condition that she would get rid of her infant children by a former marriage, whom he knew were entirely dependent upon her when he married her, and agreed she might

**Divorce—cruel and inhuman treatment—compelling abandonment of children.**

bring with her to his home; and that the defendant did this, and forced the plaintiff to leave his home, he does not even deny. The testimony therefore amply justified the chancellor in requiring the defendant to pay to plaintiff a reasonable alimony for herself, and to provide a reasonable sum for the support of their infant child. The evidence shows that the defendant has a large farm and considerable personal property, worth at least \$8,000,

**—amount of alimony.**

and probably more, and the alimony awarded was not only not excessive in amount, but under ordinary circumstances would have been entirely too little.

But the facts in this case are peculiar, and, as the alimony to be allowed must always depend upon the circumstances of any particular case (*Burns v. Burns*, 173 Ky. 105, 190 S. W. 683), we have concluded that the amount allowed by the chancellor here should not be disturbed upon the ground of its insufficiency, as we are urged to do by appellee on the cross appeal. The peculiar circumstances to which we refer, and which we regard as sufficient to sustain the judgment, are that this marriage was one

**Appeal—disturbance of allowance for alimony.**

purely of convenience, arranged by a go-between, without profession of love upon either side. The defendant has six or seven children by his first marriage, and plaintiff lived with him as his wife for only a few months, and, under these circumstances, we do

not feel justified in disturbing the chancellor's finding.

Quite an argument in justification of the defendant's action, assuming he did refuse a home to his wife's children by her former marriage, is based upon the proposition that the defendant was under no legal obligation to support his stepchildren, and quite a number of authorities from other jurisdictions are cited in support of the legal proposition; but we do not deem it necessary, for the purposes of this case, to consider the question, because it is not involved here. Assuming that he was not liable for their support, we are nevertheless convinced their mother was justified in leaving her husband upon the ground of cruel and inhuman treatment, when he made it a condition to a continuation of their marital relations that she must put her children out of his home.

Another ground for reversal relied upon is the fact that this court, in *Stepp v. Stepp*, 178 Ky. 337, 198 S. W. 935, and many other cases, has stated that, although a judgment for divorce improperly granted to the wife cannot be disturbed, the evidence will be examined to see whether the judgment was authorized under the proof, and, if not, a judgment for alimony will be reversed. But this statement was made where the grounds for alimony and divorce were the same, and upon a trial of both questions upon their merits, and without reference to the requirements of the Code that a petition for divorce shall state that the cause had occurred or existed within the state and within five years before the commencement of the action, which, as we have seen, is not required to be stated in an action for alimony; hence such cases are without applicability here, where facts were pleaded and proved which authorized a judgment for alimony, although they were insufficient to constitute a cause for divorce.

Wherefore the judgment is affirmed upon both the original appeal and the cross appeal.

## ANNOTATION.

**Forcing spouse to get rid of child by former marriage as cruelty constituting ground for divorce.**

Probably the nearest case to **WILLIAMSON v. WILLIAMSON** (reported herewith) ante, 799, is **Friend v. Friend** (1884) 53 Mich. 543, 51 Am. Rep. 161, 19 N. W. 176, where it was held that making the separation of the wife from her young daughter a condition of the wife's presence in the house is cruelty justifying a divorce. In that case the husband, having insisted that his wife "should put her daughter somewhere else, and actually sent her from the house, not only locked the doors on complainant and her child, but kept them out till a late hour in the night, and at last compelled them to sleep in an unusual room without letting them have their night apparel, and before admitting them at all used insulting and brutal language towards his wife. The next morning, when they were in the house, and complainant was engaged in household duties, he put both of them forcibly out of doors, and subsequently threatened the daughter if she should ever darken his doors again, and ordered his wife to come back into the house. She, upon this, left and never returned. He afterwards offered to take back his wife, but only on condition of separating from her daughter." The court said: "It is difficult to imagine any worse cruelty to a mother than such conduct, if not explained or excused. The only explanation that is given is that by law a husband is not bound to support step-children. Such a rule, if applicable, is no excuse for personal violence and indecent abuse, and it could not palliate any cruelty which was resorted to from vindictiveness. But we do not think it has any place in this controversy. And we are not required on this record to consider what the law is on that general subject."

Usually the matter is complicated by other acts of harshness. In **Cooper v. Cooper** (1889) 78 Mich. 316, 44 N. W. 381, a divorce was granted the wife for extreme cruelty, where the

acts of cruelty charged were "neglect to support; excluding complainant's children by a former husband from complainant's house and home without cause; using vulgar language to complainant, imputing to her a want of chastity; keeping away from their home complainant's daughters; destroying the affection of their adopted daughter for complainant; threatening to leave complainant; and that he was grossly mean, insulting, and tyrannical to her, compelling her to consult him as to whom she could entertain as her company, and circulating slanderous and defamatory stories about complainant's daughters."

In **Whitacre v. Whitacre** (1887) 64 Mich. 232, 31 N. W. 327, a wife was held entitled to a divorce for cruel treatment and refusal to support where the testimony showed that, "during the year the parties lived together, the defendant, being of sufficient ability, neglected to furnish his wife with any means of support, except \$2.50; and that for ten months of the year he was in the habit of cursing and swearing at her, and using vile and indecent names, in the presence of her children, to one of whom he gave a flogging, and frequently threatened to drive her children away from home; and finally told the complainant he would live with her no longer, and drove her from the house."

In **Rigsby v. Rigsby** (1907) 82 Ark. 278, 101 S. W. 727, it was held that as the departure of the wife was caused by the husband's unreasonable conduct, and as he had never expressed any regret or invited or tried in any way to induce her to return, the courts, after the expiration of a reasonable time, were justified in treating his conduct as in law an abandonment of her. The husband had refused to allow her sixteen-year-old daughter to live with her mother. He forbade her son, a boy of eighteen years of age, to visit his mother, and when this boy



came at the request of his brother to see his mother on a business matter he peremptorily ordered him to leave the place, and seriously injured him. "In leaving with him," said the court, "she did no more than should have been expected of any mother under the circumstances. Her departure was the natural result of plaintiff's treatment of her son."

It was held in *Dawson v. Dawson* (1910) — Tex. Civ. App. —, 132 S. W. 379, that the living of the husband with his wife might be found to be insupportable, so as to entitle him to a divorce, where, after the husband's daughter had been deserted by her husband and left with two children without means of support, the wife, without provocation, hated and abused his daughter in her affliction so that he was unable to give his daughter shelter at his home, and where his wife also "defamed the memory of his dead wife, and wantonly assailed her character, and indulged in other conduct involving constant abuse and the use of opprobrious epithets, assault, avowed hate, the exclusion of him from his dwelling, and the cessation of the performance toward him of the duties of a wife." The charges here were of excesses, cruel treatment, or outrages by her towards him.

But in *Everton v. Everton* (1857) 50 N. C. (5 Jones, L.) 202, the court held that a wife did not allege that her husband did, "by cruel and barbarous treatment, endanger her life, or offer such indignities to her person as to render her condition intolerable, or her life burdensome," where she averred that he treated his stepchildren with cruelty, "that he whipped one of her said children very severely without any reasonable excuse or provocation, and threatened to kill or stamp to death another one of" them; that, although the children were paying their board, "the defendant became so unreasonably intensed against one of her said children that she was compelled to send him, her said child, to live with a relative at a distance from the defendant; that he often threatened to send away from his house the other children, one

of whom was a child of very tender years, entirely too young to be in the keeping of any other person than a mother or some kind female relative."

It may be noted that, in an action for necessities furnished the wife while absent from her husband, it was held that the plaintiff was properly permitted, "for the purpose of showing that she was justified in leaving his house on account of his gross misconduct towards her . . . to give evidence of the manner in which, in her presence, the defendant ordered his wife's son out of the house, and of the harsh language then used towards him. As one of a series of acts of vexation and annoyance, perpetually occurring, by which her residence with him was made at first uncomfortable, and at last insupportable, the conduct of the defendant on this occasion was a fit matter to be laid before the jury, as having some tendency to establish the fact of gross ill treatment, which the plaintiff was attempting, and had a right, to prove in the case. Of itself, it may be thought to be of very little importance; but the jury would judge of the weight to be attached to it; while the court had only to determine whether it was proper to be considered at all." *Mayhew v. Thayer* (1857) 8 Gray (Mass.) 172.

Touching the effect on this subject of the rule so easily asserted in the authorities, that the husband is not bound to support his wife's children of a former marriage, it should be said that this rule (see *Rex v. Benoier* (1727) 2 *Ld. Raym.* 1454, 92 *Eng. Reprint*, 446; *Tubb v. Harrison* (1790) 4 *T. R.* 118, 100 *Eng. Reprint*, 926) seems to have been founded on *Rex v. Munden* (1719) 1 *Strange*, 190, 93 *Eng. Reprint*, 465, where it was held that a son-in-law was not bound to support his wife's mother, as it required a statute to make him liable for the support of his own parents, the court stating that "by the law of nature a man was bound to take care of his own father and mother; but there being no temporal obligation to enforce that law of nature, it was found necessary to establish it by act of Par-

liament, and that can be extended no farther than the law of nature went before, and the law of nature does not reach to this case." It would seem that if a man marries a poor widow having children without property, and too small to support themselves, it

ought to be the American common law, if it is not, that he in marrying their mother incurs the obligation of supporting them as well as her. It is gratifying that there is in the books so little involving circumstances of this character. B. B. B.

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P. A. PEARSON  
v.  
PETER J. RYAN, Appt.

*Rhode Island Supreme Court—February 20, 1919.*

(— R. I. —, 105 Atl. 513.)

**Damages — liquidated demand — allowance of rebate — interest.**

1. A payment called for by a construction contract upon completion of the building is liquidated from time of demand, within the rule that interest is allowed as damages for failure to pay a liquidated demand when it is due, although the court allows a rebate from the amount claimed because of unsatisfactory workmanship and materials.

[See note on this question beginning on page 809.]

— interest — unliquidated demands. will not generally be allowed as damages.

2. Interest on unliquidated demands [See 15 R. C. L. 26.]

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APPEAL by respondent from a decree of the Superior Court for Providence and Bristol Counties in favor of petitioner in a suit to enforce a mechanic's lien. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Thomas F. Farrell for appellant.

Mr. Hugo A. Clason for appellee.

Baker, J., delivered the opinion of the court:

This is an appeal by the respondent from a decree establishing a lien entered by the superior court on a petition in equity to enforce a mechanic's lien in accordance with the provisions of chapter 257 of the General Laws. The evidence shows a written agreement by and between the parties, in which the complainant agreed "to build a bungalow" for the respondent, and "to furnish all labor and materials" therefor, and the respondent agreed to pay the complainant "the sum of \$3,315 in payments as follows: Fifteen hundred dollars when ready for lathing, and \$500 when plastered;

balance of contract when the house is completed." The account filed by the complainant gives credit for two payments on account and for certain materials furnished by the respondent, and claims a balance due of \$1,124.28, with interest. While there is nothing in the papers of the case to show it, the transcript indicates a claim of damages by the respondent by way of recoupment for unsatisfactory workmanship and materials.

Upon hearing the parties the court allowed the respondent's claim to the amount of \$307.50, and found that there was a balance due the petitioner on his account of \$816.78, on which interest from the date of giving notice of the claim was allowed to the amount of \$69.12, making a total of \$885.90 for which the lien

was established. The notice of a claim of lien and the demand of payment were given and made August 29, 1916, and legal proceedings were commenced the following day. The decree was entered March 13, 1918. The only reason of appeal now urged is that the allowance of the item of interest is against the law, in that the petitioner's claim was unliquidated. If the allowance of interest is held to be proper, the amount allowed is not questioned.

Broadly speaking, it is generally held that interest on unliquidated demands will not be allowed as damages. Undoubtedly there is a clear

Damages—  
interest—  
unliquidated  
demands.

distinction between a claim for damages entirely unliquidated, as, for example,

claims for damages arising from assault and battery, from seduction, or from slander and libel, which are wholly at large, and a liquidated claim, where there is an express contract to pay a sum certain at a fixed time. In the former cases, the amount of damages is unknown until determined, after the presentation of evidence, by a decision, award, or verdict. In the contract case, both parties know what the claim is, and when it is due and payable. It is in dealing with cases lying between these extremes, where the distinction is less clear and obvious, that courts have so differed in their interpretation and application of the rule as to interest that their decisions are far from harmonious as to when interest may be allowed. The question as applied to the precise state of facts presented in the case at bar does not appear to have been considered in any reported case of this court. The respondent cites in his brief three Rhode Island cases in support of his claim, namely, *Spencer v. Pierce*, 5 R. I. 63, *Durfee v. O'Brien*, 16 R. I. 213, 14 Atl. 857, and *Dary v. Providence Police Asso.* 27 R. I. 377, 62 Atl. 513.

In *Spencer v. Pierce*, supra, the question arose on the disallowance of interest by the master in the case

on certain sums allowed by him to be due "for labor and service." The court said, on page 71: "The well-settled American rule . . . gives interest, though not stipulated for, as an invariable legal incident of the principal debt, from the day of default, whenever the debtor knows precisely what he is to pay, and when he is to pay it"—citing *People v. New York County*, 5 Cow. 331, 334, and recommitted the master's report, saying, on page 72: "We therefore instruct the master to allow interest at 6 per cent per annum, from the day of default in payment, on all sums allowed by him for labor or service, the amount of which is certain, or can be made certain by computation, under the contract of the parties, and in which the time of payment is fixed by the terms of the contract or by the course of dealing between the parties."

In *Durfee v. O'Brien*, supra, it is said (16 R. I. on page 217): "The time when the payments are due and the agreement to pay interest being definite, the charge for interest was properly allowed."

This is clearly a liquidated claim under the rule.

*Dary v. Providence Police Asso.* supra, was an action of assumpsit to recover moneys claimed to be due as sick benefits. There was a plea of the

—liquidated  
demand—  
allowance  
of rebate—  
interest.

general issue, accompanied by an affidavit of valid defense that the claim for sick benefits had been waived. The case was heard on an agreed statement of facts. As to interest, while the court stated the rule enunciated in *Spencer v. Pierce*, supra, and cited in *Durfee v. O'Brien*, supra, it held that a beneficial association ought not to be treated as a delinquent debtor, before demand made upon it, in order to create the relation of debtor and creditor, but allowed interest from the date of the writ, that being the time of the earliest proof of demand. In this case the right to recover at

all was denied by the defendant, and apparently in good faith.

Some other decisions of this court relative to the allowance of interest may properly be considered in this connection.

In *Hodges v. Hodges*, 9 R. I. 32, the master, in a matter of accounting, disallowed interest on advances made by a husband for the improvement of his wife's estate, in the absence of any evidence of an agreement to pay interest, and the court held that interest should have been allowed, and cited as a correct statement of law the following: "On the money lent, interest in this country is always recoverable, because the defendant has had a use from the plaintiff's money. For the same reason, on money paid on account, or to the use or benefit or at the request of another, interest is allowed from the time of payment, and not merely from the time of notice or demand? . . . 'Money lent, and money paid, carry interest when they form matter of account, as well as when they are detached transactions.'"

*Weeden v. Berry*, 10 R. I. 288, was an action of assumpsit for goods, wares, and merchandise sold and delivered and for work and labor done. The declaration also contained certain common counts, but no count for interest. The case was sent to referees, who allowed plaintiff interest. It was objected to such allowance that there was no count in the declaration claiming interest. The award of interest was upheld. The decision implies that by the terms of the reference, under which power was committed to "determine all questions of law or of fact" in the case, it was within the discretion of the referees to allow interest as damages.

In *Cross v. Brown*, 19 R. I. 220, 240, 33 Atl. 147, the question as to whether a garnishee should be required to pay interest on its debt due the principal defendant during the time it was restrained by the attachment from paying the debt was considered, and answered in the af-

firmative, on the ground that the garnishee had had the use of the money in the meantime after it was due, and that a contrary decision would work an injustice, both to the principal defendant and the attaching plaintiff.

In *Lonsdale Co. v. Woonsocket*, 25 R. I. 428, 56 Atl. 448, damages were sought for a continuing trespass resulting from the diversion of water to which the complainant was entitled as a riparian proprietor. The amount of water so diverted and the amount of the resulting damages were both in controversy, and there was conflicting evidence on each point. On the damages, as determined by him, the master allowed simple interest from the date of the filing of the bill, and the court, on page 444, held this finding to be correct. If interest on unliquidated damages in a tort action is properly allowable from the time of commencing legal proceedings, no reason is apparent why a less liberal rule should apply in actions *ex contractu*.

In *Sedgwick on Damages*, 8th ed. § 315, the author says: "Where interest is refused in actions of contract on the ground that the claim is unliquidated, it is in fact usually allowed from the date of the writ."

See also *Ford v. Tirrell*, 9 Gray, 401, 69 Am. Dec. 297; *Barstow v. Robinson*, 2 Allen, 605; *McFadden v. Crawford*, 39 Cal. 662; *Feeter v. Heath*, 11 Wend. 477; *Case v. Osborn*, 60 How. Pr. 187; *McCollum v. Seward*, 62 N. Y. 316; *Mercer v. Vose*, 67 N. Y. 56; *Tucker v. Grover*, 60 Wis. 240, 19 N. W. 62; *Lowe v. Ring*, 123 Wis. 370, 101 N. W. 698, 3 Ann. Cas. 781.

*Healy v. Fallon*, 69 Conn. 228, 37 Atl. 495, was a proceeding to enforce a mechanic's lien under a written contract to build a house for a stated price. The defendants claimed that the house was not finished as called for in the contract, upon which claim some deduction was made by the trial court from the contract price. On pages 235 et seq. of 69 Conn., the court says:

"We are also of opinion that the court did not err in allowing interest to the date of judgment upon the sum found to be due after deducting the damages caused by the deviations from the contract. . . . It is difficult on principle to see why he should not recover, as compensation for that detention, damages measured by the legal rate of interest upon the sum so detained for that time. It is said, however, that the amount due was unliquidated up to the time of the judgment, and that interest is never allowed upon unliquidated amounts. It may be conceded that the amount due the plaintiff was in a certain sense unliquidated up to the time of the judgment, inasmuch as the amount due him under the contract, which was a liquidated amount, was to be lessened by the as yet unascertained damages caused by his deviations from the contract; but it is not true that damages measured by the rate of interest are never allowed for the nonpayment of money, where the claim is an unliquidated one. In an action for the value of personal property destroyed by the negligent act of the defendant, where the claim was in a sense an unliquidated one, damages were allowed in the shape of interest upon the value of the property as found upon the trial [citing cases]. . . . We think the damages allowed by way of interest in the case at bar come within the principles applied in the cases cited. The claim was wholly a pecuniary one, and was not at large, as are claims for damages for assault and battery, slander, or others of like nature. It represented a loss of a pecuniary value, ascertainable with reasonable certainty, as of a definite time; and we think damages in the shape of interest should be recoverable from that time, for such a loss, for only in this way can equity be done between the parties in the case at bar."

*Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327, was a proceeding to enforce a mechanic's lien under a building contract, where there was

a counterclaim for omissions, substitutions, and delay, a considerable portion of which was allowed. Interest was allowed on the balance found to be due from the commencement of the suit, to which objection was taken. The court, on pages 178 to 189 of 103 Wis., discusses very fully the question of interest, citing and considering many reported cases, and held that "no error prejudicial to defendant was committed in the allowance made by the judgment." See also *West Republic Min. Co. v. Jones*, 108 Pa. 55, 69; *Harwood v. Tappan*, 2 Speers, L. 536, 551; *Watkins v. Junker*, 90 Tex. 584, 586, et seq., 40 S. W. 11; *Bennett v. Federal Coal & Coke Co.* 70 W. Va. 456, 40 L.R.A.(N.S.) 588, 74 S. E. 418, Ann. Cas. 1913E, 578; *Vaughan v. Howe*, 20 Wis. 498; *Sedgwick, Damages*, 8th ed. § 308; *Sutherland, Damages*, 4th ed. § 348; 8 R. C. L. 553.

In *Bernhard v. Rochester German Ins. Co.* 79 Conn. 388, 65 Atl. 134, 8 Ann. Cas. 298, the damages were unliquidated. The judgment included interest from the date of defendant's repudiation of liability. In upholding the allowance of interest, the court, on page 398 of 79 Conn., says: "The purpose sought in awarding damages other than vindictive is to make a fair compensation to one who has suffered an injury. . . . Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon unliquidated damages is one well calculated to defeat that purpose in many cases, and that no right reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages. . . . There are actions to which the suggested rule is applicable. . . . Others, however, present conditions where, without an allowance for interest, although the demand may be unliquidated, fair compensation for the injury done would not be accorded, and justice would thus be denied. The determination of whether or not interest is to be recognized as a proper element of

damage is one to be made in view of the demands of justice rather than through the application of any arbitrary rule."

See contra *Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11, 106 Am. St. Rep. 493, 73 N. E. 494, where the facts are similar to those in the present case, and where the court treats the plaintiff's claim as upon quantum meruit, holding that, "as the defendant's set-off was unliquidated," the plaintiff's damages were "necessarily dependent upon the amount of the set-off," and were unliquidated, and that on them interest was not recoverable.

We do not think it can be successfully urged that the rule enunciated in *Spencer v. Pierce*, 5 R. I. 63, implies that a debtor may be charged interest only when he knows "what he is to pay, and when he is to pay." The entire sentence of the opinion in *People v. New York County*, 5 Cow. 331, 334, cited by this court, reads: "It will surely not be considered inequitable that, whenever the debtor knows precisely what he is to pay and when he is to pay, he shall be charged with interest if he neglects to pay."

There is here no implication that a debtor might not equitably be chargeable with interest as damages under a different set of circumstances. It is evident, also, by

the decisions of this court above cited, and in particular by the one in *Lonsdale Co. v. Woonsocket*, supra, that, while the court has reaffirmed the rule in *Spencer v. Pierce*, in later cases, when applicable to the facts therein, it has not adopted it as an arbitrary rule, but has allowed interest in other instances when it seemed equitable to do so, even when the person so charged did not know the amount of the debt or damages, and when the time of its being due was fixed only by the demand for payment.

In the present case, by the contract, the final payment was due and payable on the completion of the bungalow. The defendant saw fit to contest the payment of the balance specified in the contract, and succeeded in materially reducing the amount claimed. He had, however, the use and benefit of the sum which the court determined that he ought to pay for more than a year and a half after the petitioner made demand of payment and commenced legal proceedings. In these circumstances we find no error in law in the item of interest as allowed by the decree.

The appeal of the respondent is accordingly dismissed, the decree of the Superior Court is affirmed, and the case is remanded to the Superior Court for further proceedings.

## ANNOTATION.

### Reduction of claim under contract as affecting right to interest.

#### Claim for sum fixed by contract.

As a general rule, interest is not allowed on unliquidated damages or demands, for the reason that the person liable does not know what sum he owes, and therefore can be in no default for not paying. 8 R. C. L. title *Damages*, p. 533. See the reported case (*PEARSON v. RYAN*, ante, 805), and the cases cited throughout this note.

In the case, however, of an express contract to pay a sum certain at a fixed time, both parties thereto know what the amount of the claim is, and

when it is due and payable. See the reported case (*PEARSON v. RYAN*).

Hence, the rule is that, where the amount of a claim under a contract is certain and liquidated, or is ascertainable but is reduced by reason of the existence of an unliquidated set-off or counterclaim thereto, interest is properly allowed on the balance found to be due from the time it became due and was demanded, or suit commenced therefor.

**California.** — *McCowen v. Pew* (1912) 18 Cal. App. 482, 123 Pac. 357.  
**Colorado.** — *Henrylyn Orchards Co.*

v. F. W. Meneray Crescent Nursery Co. (1913) 55 Colo. 438, 135 Pac. 980.

Connecticut. — Healy v. Fallon (1897) 69 Conn. 228, 37 Atl. 495. Compare Tucker v. Jewett (1865) 32 Conn. 563.

Georgia.—Meriwether v. Bird (1851) 9 Ga. 594; Howard v. Behn (1859) 27 Ga. 174.

Nevada.—Skinker v. Clute (1874) 9 Nev. 342.

Rhode Island.—See the reported case (PEARSON v. RYAN, *ante*, 805).

South Carolina.—Harwood v. Tappan (1844) 2 Speers, L. 536.

Tennessee.—Compare Stamps v. Tennessee Producers' Marble Co. (1900) — Tenn. —, 59 S. W. 769.

Washington. — Dickinson Fire & Pressed Brick Co. v. Crowe (1911) 63 Wash. 550, 115 Pac. 1087.

Wisconsin. — Vaughan v. Howe (1866) 20 Wis. 498; Laycock v. Parker (1899) 103 Wis. 161, 79 N. W. 327.

In Healy v. Fallon (Conn.) *supra*, an action to foreclose a mechanic's lien, the defendants claimed, and were allowed, a deduction from the amount due under an agreement for the construction of a dwelling house, for deviations from the requirements of the contract. The court allowed interest on the amount then found due to the plaintiff, to the date of the judgment. It was held that the court had not erred in allowing interest to the date of the judgment on the sum found to have been due after the deduction of the damages caused by the deviations from the contract, it not being allowed as interest, *eo nomine*, but as damages for the detention of the sum found due, and the damages being measured by the rate of interest. The court said: "The court, in effect, rightfully found under the pleadings that the defendant owed the plaintiff, after deducting the damages caused by the deviations from the contract, the sum of \$1,475, and that this sum should have been paid to him by a certain time, from which time it in effect added interest to the date of the judgment; and no complaint is made about the time selected as the starting point for interest. By the finding of the court it thus appears that the plaintiff was de-

prived of the use of \$1,475 from the time when it should have been paid to him, to the date of the judgment, and the defendants during that time had the use of that money. It is difficult, on principle, to see why he should not recover, as compensation for that detention, damages measured by the legal rate of interest upon the sum so detained for that time. It is said, however, that the amount due was unliquidated up to the time of the judgment, and that interest is never allowed upon unliquidated amounts. It may be conceded that the amount due the plaintiff was in a certain sense unliquidated up to the time of the judgment, inasmuch as the amount due him under the contract, which was a liquidated amount, was to be lessened by the as yet unascertained damages caused by his deviations from the contract; but it is not true that damages measured by the rate of interest are never allowed for the nonpayment of money, where the claim is an unliquidated one. . . . We think the damages allowed by way of interest in the case at bar come within the principles applied in the cases cited. The claim was wholly a pecuniary one, and was not at large, as are claims for damages for assault and battery, slander, or others of like nature. It represented a loss of a pecuniary value ascertainable with reasonable certainty, as of a definite time; and we think damages in the shape of interest should be recoverable from that time, for such a loss; for only in this way can equity be done between the parties in the case at bar."

A California statute (Civ. Code, § 3287) allows interest when the damages are certain, and also when they are "capable of being made certain by calculation." In McCowen v. Pew (Cal.) *supra*, it was held that the statute applied to a contract for the sale of land, which was valuable principally for its timber, at an agreed price per acre, where there was to be a deduction for the removal of timber from a number of acres, of which number the other party was fully informed, as it would seem to be but a mere matter of calculation to determine what al-

lowance should be made for the timber removed. The amount of the set-off being but trifling in comparison with what was due under the contract, the court held that it was reasonable and just to hold that the balance should bear interest from the time it was due.

In *Meriwether v. Bird* (Ga.) *supra*, an action on a promissory note, the defendants pleaded and proved a set-off for professional services. The court held that since interest was given only by way of damages for the detention of a debt, justice required that, in the case of a claim of a creditor carrying interest and a claim of a debtor not carrying interest, the former claim should be held to be discharged, to the extent of the mutual credit, from the time of such credit taking place, and that interest would only be due for the balance, from that time.

In *Howard v. Behn* (Ga.) *supra*, an action for an account in which was an item paid by the plaintiff factors for the defendant on a draft, the court held that interest was due on the cash balance overpaid by the plaintiffs, the produce furnished by the defendant having been insufficient to refund the cash paid on the draft.

In *Henrylyn Orchards Co. v. F. W. Meneray Crescent Nursery Co.* (1913) 55 Colo. 438, 135 Pac. 980, the garnishee in attachment proceedings claimed a set-off for poor stock from a sale of nursery stock to him by the defendant for an amount certain and liquidated. In an action on the bond, on the dissolution of the attachment, interest was allowed as damages on the balance admitted to be due while it was held up by the garnishment. In holding that the allowance of this interest was not error, the court said: "Certainly a debtor cannot defeat the running of interest against him for the part of a debt which he admits that he owes, and which would otherwise draw interest, by simply making a claim of an unliquidated set-off against the whole debt."

In *Dickinson Fire & Pressed Brick Co. v. Crowe* (1911) 63 Wash. 550, 115 Pac. 1087, the action was to recover the balance due on a quantity of brick

sold for cash, the purchase price having been agreed on prior to the date of the first shipment. The defendant was allowed a set-off for damages sustained by the rejection of some of the brick as not being in conformity with the samples furnished, and interest was allowed on the balance due prior to the date of the entry of the judgment. In holding that this was not error, the court said: "Interest is allowable on a liability to pay money from the time the demand accrues, where the amount can be ascertained by computation. . . . The existence of a set-off or counterclaim, which is unliquidated, will not prevent the recovery of interest on the balance of the demand found due from the date of its maturity."

In *Harwood v. Tappan* (1844) 2 Speers L. (S. C.) 536, an action on a building contract, wherein the defendant claimed a discount from the contract price for variations from the contract requirements, it was held that interest was allowable by way of damages. The court stated that, on the admitted completion and receipt of the buildings, interest would have unquestionably been allowable from the time of completion, and held that the discount claimed by the defendant might reduce the amount covenanted to be paid, but did not impair the claim for interest on the balance, when adjusted by the verdict of the jury.

In *Vaughan v. Howe* (1866) 20 Wis. 498, an action on a written contract for the delivery of a specified quantity of good, sound, merchantable logs, at a stipulated price, there was evidence tending to show that some of the logs were not merchantable, and that the value of the logs delivered was less than the contract price. The answer of the defendant also set up several counterclaims. The jury allowed the plaintiff interest from the time of delivery of the logs, on the balance found due to him. On appeal from that judgment, the court held that it was proper that the jury should have allowed interest, and stated that the testimony supported the verdict.

In *Skinker v. Clute* (1874) 9 Nev. 342, an action for goods sold and de-



livered, wherein it appeared that the answer admitted the receipt of the goods and did not deny their value, but set up as a counterclaim damages for a breach of contract arising out of the transaction sued on, it was held that this was an admission of the plaintiff's claim to the extent set forth in the complaint, subject to the defendant's counterclaim. Hence, the court held, the account was liquidated, and the balance ascertained by the admissions of the answer, and interest on the balance was, therefore, allowable.

In the reported case (*PEARSON v. RYAN*, ante 805), it appears that by the terms of a contract for the building of a bungalow the final payment was due and payable at the time of the completion of the building. The defendant contested the payment of the balance specified in the contract, and succeeded in materially reducing the amount claimed by way of recoupment for unsatisfactory workmanship and materials. It is held that as he had, however, the use and benefit of the sum which the trial court determined that he ought to pay for more than a year and a half after the petitioner made demand of payment and commenced legal proceedings, there was no error in having allowed interest on the balance found due the petitioner from the date of giving notice of the claim.

In *Laycock v. Parker* (1899) 103 Wis. 161, 79 N. W. 327, an action to foreclose a mechanic's lien, it appeared that the conclusion of the court, as a result of the general findings, was that the plaintiff was entitled to recover the contract price of the building, together with the reasonable market value of the additions and extras ordered by the defendant, less the reasonable value of the work and materials omitted, and a deduction for the amount found by the court on the defendant's counterclaim for delay in completion, and the value of the use of the defendant's heating plant. Interest was then allowed the plaintiff on the balance found to be due, from the commencement of the suit.

In *Martin v. Silliman* (1873) 53 N.

Y. 615, it was held that the plaintiff in an action for a commission on a sale effected by him, if entitled to anything, was entitled to the full amount claimed, on which, being a sum liquidated and certain, he had a right to interest. Hence, the court held that the fact that the jury arbitrarily reduced his claim to the amount of the verdict did not, either at law or in equity, affect his right to interest on the amount actually recovered.

In *Stamps v. Tennessee Producers' Marble Co.* (1900) — Tenn. —, 59 S. W. 769, however, an action to recover a balance alleged to be due for a lot of marble shipped to the defendant, with proper interest thereon, it appeared that the defendant claimed that a very large proportion of the marble delivered was defective and not suitable for the purposes for which it was purchased, and tendered to the complainant the sum which it claimed was the true balance due. It was held that the chancellor did not err in refusing to allow the complainant interest on the sums sued for and found due.

Where a plaintiff's demand is of a character which bears interest, and the defendant's demand or discount is not of a character which carries interest, the plaintiff is entitled to interest on his demand up to the time of the verdict, the demand set up by the defendant being regarded as a discount, and not as a payment; an independent, unliquidated demand which does not carry interest. *Russell v. Rogers* (1817) 1 Nott & M'C. (S. C.) 24. See also, *M'Donald v. Ramsey* (1813) 3 Brev. (S. C.) 379, wherein the question was discussed, but not decided. Compare *Tucker v. Jewett* (1865) 32 Conn. 563. In *Russell v. Rogers* (S. C.) supra, it appeared that the defendant, who was a merchant, gave the plaintiff the promissory note on which the action was founded. It was credited with the amount of the plaintiff's store account with the defendant for two years, and the defendant offered as a discount the plaintiff's store account with him for the two succeeding years, though there was no evidence of an agreement that this

account was to go in payment of the note. It was held that, as the plaintiff's demand was of a character in which interest was to be allowed, and as the defendant's discount on demand did not carry interest, the plaintiff was entitled to interest on his demand up to the time of the verdict, and not merely to the time of the filing of the discount. In *Morse v. Ellerbe* (1851) 4 Rich. L. (S. C.) 600, an action on a written contract for the construction of a house, the price being payable in instalments, and the defendant having verbally agreed to add a further sum to the price, to be paid after the last instalment, the defendant set up by way of discount to the plaintiff's claims under the contract, two promissory notes of the latter. It was held that the plaintiff's demand rested on a mere verbal undertaking, and could not bear interest, and hence that the jury had erred in stopping the interest on the plaintiff's notes, set up by way of discount by the defendant at the time when the plaintiff's work was done, and when he ought to have been paid. The court said: "The case of *Russell v. Rogers* (S. C.) *supra*, decides the very point. For there it was held that interest on a promissory note could not be stopped by accounts offered in discount, being credited successively as when due. The same rule must hold when a note is offered in discount of a demand not bearing interest; for a discount is in the nature of a cross action. Looked at in that way, there is no difficulty; the defendant is entitled to recover his notes and interest to the trial; this sum must be discounted from the amount of the plaintiff's demand." In *Tucker v. Jewett* (Conn.) *supra*, however, it was found that, at the commencement of the suit, the plaintiff was indebted to the defendant in a certain sum which was then a proper subject of set-off against any demand on which the plaintiff might be entitled to recover in the action. The court set this sum off without interest, while allowing interest on the sum in favor of the plaintiff down to the time of the judgment. It was held that the court should have made an application of the indebted-

ness, to take effect from the time when it was so found to have been applicable, in which case there would have been nothing due to the plaintiff, and but a small balance in favor of the defendant.

In several instances, it appears that interest has been allowed by the court on the whole amount of the plaintiff's claim, before its reduction by allowance of the defendant's counterclaim. Thus, in *New Zealand Ins. Co. v. Earnmoor S. S. Co.* (1897) 24 C. C. A. 644, 48 U. S. App. 245, 79 Fed. 368 (applying California statute) it appeared that a shipowner demanded of an insurer of the vessel the payment of its share, proportionate to the amount insured by it, of a claim for salvage services and subsequent repairs. The insurance company appeared on the libel brought, and contended that the sum properly due from it was a less sum, but made no tender thereof. Instead, it withheld from the owner for nearly seven years what it admitted was justly due from it; and at the end of a costly litigation extending through that period, the result of which showed that there was a difference of only \$43.60 between the amount originally demanded by the owner and that actually due from the insurer, contended that the small difference found and adjudged by the court below to exist deprived the assured of the right to interest on the proper amount from the date when it should have been paid or tendered. It was held that the court below was clearly right in rejecting that contention, and in allowing the owner interest from the date of the demand on the amount found to have been due from the insurer under the policy.

In *Greenly v. Hopkins* (1833) 10 Wend. (N. Y.) 96, it appeared that suit was brought to recover the moiety of the costs of an action against the defendant as a deputy sheriff, for selling certain property by virtue of an execution in favor of the plaintiff. The defendant in that action obtained a verdict, and double costs were awarded, and an execution for the collection thereof was issued, on which one half of the sum was received by the de-

defendant, and the other half by the attorney who defended the suit. The defendant, having, in compliance with a bond of indemnity, defended the suit, claimed that he was entitled to the whole costs, and commenced this suit on the defendant refusing to pay over the moiety received by him. On the trial of the cause, it appeared that the defendant had aided and had advanced moneys in defense of the suit, and that the plaintiff had made payments to him on account of the services rendered. The trial judge charged the jury that the plaintiff was entitled to recover the moiety of the bill of costs which had been received by the defendant, but that they ought to allow the defendant such sum as, in their opinion, he was entitled to for his services and disbursements in defense of the suit, deducting the payments made to him by the plaintiff. The jury, by the consent of the parties, found a special verdict, subject to the opinion of the court on the question of interest. It was held that, money belonging to the plaintiff having been received by the defendant, who claimed it and illegally withheld it from the plaintiff, he ought, therefore, to pay interest.

In *Smith v. Turner* (1898) 33 Or. 379, 54 Pac. 166, the plaintiff sued on a promissory note bearing interest, to which the defendants counterclaimed their unliquidated damages arising by reason of the plaintiff's supposed breach of contract, as of the date when it was alleged the damages accrued, so as to cut off the running of interest on the note. The court held that this could not be done, however, because it required the verdict of the jury, or at least the confession or default of the plaintiff, to liquidate the defendant's demand for their alleged damages.

In *Stephens v. Burgess* (1878) 69 Mo. 168, it appeared that the plaintiff purchased a dwelling house, paying therefor partly in cash and partly by a note, subsequently paid. The deed, however, was made directly to the defendant, who agreed verbally with the plaintiff to repay him the price paid, with interest. In a suit by the

plaintiff to enforce a vendor's lien, the defendant pleaded a counterclaim, consisting of items for legal services, money paid, and the price of land sold to the plaintiff. The court allowed the defendant's counterclaim, and also allowed the plaintiff interest on the purchase price of the house, at the rate of 6 per cent from the date of his purchase to the day of trial.

#### **Claim for unliquidated sum.**

While there has been some modification of the old common-law rule, which required that a demand should be liquidated or its amount ascertained before interest could be allowed, the extent of the modification is that if the amount due is capable of being ascertained by mere computation the allowance of interest is proper. *Excelsior Terra Cotta Co. v. Harde* (1905) 181 N. Y. 11, 106 Am. St. Rep. 493, 73 N. E. 494, affirming judgment in (1904) 90 App. Div. 4, 85 N. Y. Supp. 732.

Therefore, it has been held that where a claim arising on contract is based in whole or in part on a quantum meruit, and is further subject to a reduction in an unliquidated amount because of faulty performance of the contract, interest should not be allowed on the amount found to be due. *Stephens v. Phoenix Bridge Co.* (1905) 71 C. C. A. 374, 139 Fed. 248 (following New York decisions); *Excelsior Terra Cotta Co. v. Harde*, supra; *Delafield v. Westfield* (1899) 41 App. Div. 24, 58 N. Y. Supp. 277; judgment affirmed in (1901) 169 N. Y. 582, 62 N. E. 1095; *O'Reilly v. Mahoney* (1908) 123 App. Div. 275, 108 N. Y. Supp. 53.

In *Delafield v. Westfield* (1899) 41 App. Div. 24, 58 N. Y. Supp. 277, judgment affirmed in (1901) 169 N. Y. 582, 62 N. E. 1095, an action by a contractor to recover the value of labor performed and materials furnished, it appeared that neither the quantities of the work performed nor the quantities of the materials furnished, for which the prices were agreed on, had been ascertained, nor could they be readily ascertained by the defendant; and that the amount, when ascertained, was subject to a deduction for damages sustained by the

defendant for improper performance by the plaintiff of some of the work; and the amounts due for extra work, for which prices were not agreed on, were clearly unascertainable without taking evidence. It was held that the claims recovered by the plaintiff were unliquidated, and that no error was committed in refusing to allow the plaintiff interest on the several items included in his recovery.

The case last cited was followed in *Excelsior Terra Cotta Co. v. Harde* (N. Y.) *supra*, an action to foreclose a mechanic's lien, filed for work done and materials furnished under a contract. It appeared therein that the complaint set up the contract, alleged its full performance, and claimed a recovery, in addition to the contract price, for extra work done. The answer denied the allegations as to performance and as to extra work, and demanded, by way of counterclaim, a large sum of money for the damage occasioned by defective work and by delay in performance. The trial court made an allowance for the defective workmanship and delay in performance, disallowed the claim for extra work done, and allowed interest on the amount for which judgment was directed. It was held that the modification of this judgment, striking out the amount allowed for interest, was correct, as the plaintiff's claims were, under the circumstances, unliquidated. The court said: "They were, in fact, upon quantum meruit. The finding of the trial court established that the claim under the contract was subject to a reduction, because of defective and dilatory performance, to the extent of nearly one third of its amount; while the claim for extra work was wholly disallowed. The case comes within the authority of *Delafield v. Westfield* (1899) 41 App. Div. 24, 58 N. Y. Supp. 277, affirmed without opinion in (1901) 169 N. Y. 582, 62 N. E. 1095, where the plaintiff's claim, which was in part upon contract, and in part for extra work, was reduced by an award of damages for failure in performance. The appellate division there held that, as the amount, when ascertained, was subject to a

reduction for damages sustained by the defendant for improper performance of the work, and the amounts due for extra work could only be ascertained by proofs, the plaintiff's claims were unliquidated, and that, therefore, interest was not recoverable."

In *O'Reilly v. Mahoney* (N. Y.) *supra*, an action to recover the value of extra work performed for and materials furnished by a subcontractor to the general contractor, it appeared that the claim made by the plaintiff was unliquidated, and subject to a reduction of more than 60 per cent. The court held that the plaintiff was not entitled to interest on the amount recovered.

In *Stephens v. Phoenix Bridge Co.* (Fed.) *supra*, it appeared that the action was brought to recover the reasonable value of the materials and labor furnished by the plaintiff for a viaduct which the defendants were erecting, under a contract between the parties by which the plaintiff undertook to complete the metal work of the structure at a specified date, and "to be subject to a penalty of \$100 per day for any time beyond that day." Performance was not completed by the plaintiff within the time specified in the contract, and on the trial it was not disputed that the reasonable value of the labor and materials was the contract price; but the defendants were not allowed a deduction of \$100 per day for the delay, but were held to be entitled, by way of counterclaim, only to the actual damages sustained by them by the delay in the completion of the contract, and the plaintiff was held to be entitled to interest on any amount which the jury might find to have been owing by the defendants to the plaintiff when the demand became payable. The court held, however, that the sum owing from the defendants to the plaintiff was uncertain and unascertainable by computation at the time of the commencement of the action; it depended not only on what should be found to be the reasonable value of the materials and services furnished by the plaintiff, but also on the amount which it should be found ought to be deducted from the plain-

tiff's claim, and this amount was likewise uncertain and unascertainable by computation. Hence, the court held that, following the rules deducible from the New York decisions, in the absence of controlling decisions in the Federal courts, interest was not allowable in the case.

In *H. G. Vogel Co. v. Lockport Glass Co.* (1909) 118 N. Y. Supp. 351, it appeared that the plaintiff's claim of \$1,700 was reduced by the jury to about \$1,100, by deducting the amount claimed by the defendant as damages. It was held that it was error to direct the jury to add interest.

In *Pengra v. Wheeler* (1893) 24 Or. 532, 21 L.R.A. 726, 34 Pac. 354, it appeared that a water power lease provided that the rent should be a certain sum a year, payable quarterly, and that in default of a sufficient supply of water from any cause a pro rata portion of the accruing water rents should be forfeited. It was held that this provision rendered the amount of rent due under the contract dependent on the supply of water for each quarter, and hence that the amount of rent, in case of an insufficient supply, would be unliquidated; and, since the contract made no provision for interest, it could not be recovered until the amount of the rent which the defendant ought to have paid had been fixed and made certain. The contract having provided that the rent should be paid yearly-quarterly, under the section of the statute (Hill's Code, § 3587) allowing interest on the settlement of matured accounts, interest must, the court held, be allowed from the end of each quarter on deferred payments, except in case of an offset, in which case interest could be recovered only from the time that the balance due could be made certain. Hence, there was no account due the plaintiff, so as to draw interest under the statute, until the balance was ascertained, and the allowance of interest to either party was held to have been error.

In *Greer v. Latimer* (1896) 47 S. C. 176, 25 S. E. 136, the action was on a written promise to pay the plaintiff a certain sum of money, less the expense in defending a certain suit, provided

the defendant was not called to pay a certain judgment previously obtained against him. The defendant not having been called on to pay the judgment, in discussing the question as to whether the plaintiff's claim on the promise was an interest-bearing demand, the court said: "It will be observed that, in this case, there was no promise to pay any definite sum of money at any specific time, for the sum to be paid was to be dependent upon the expense incurred by the defendant in defending himself against the attempt to charge him with the Greer judgment. Indeed, there was no promise to pay at all, except upon a contingency which had not happened at the date of the agreement, and which, so far as then could be seen, might never happen at all; and it seems to us clear that there was error in instructing the jury that the plaintiff was entitled to claim interest upon the whole amount named in the agreement from its date, for that would be making the defendant liable for interest on a greater sum than the defendant agreed to pay in any contingency; for, by the express terms of the agreement, defendant was only liable for so much of said sum as would remain after deducting therefrom the expense incurred in defending himself against the Greer judgment, the amount of which deduction had not and could not have been ascertained at the date of the agreement; and whether defendant should be liable for any part of the sum of money mentioned in the agreement depended upon the contingency whether defendant would be successful in resisting the attempt to charge him with the Greer judgment, which had not then and could not then have been determined. . . . Now, it is quite clear from the terms of the agreement that the plaintiff could not demand payment of any part of the sum mentioned, until it was ascertained that the defendant had been successful in defending himself against the attempt to charge him with the Greer judgment; even then she could not demand payment of the whole amount mentioned in the agreement, but only for so much thereof as might remain after

deducting the expense incurred by defendant in defending himself against such attempt. So that in no event could the defendant be liable for interest, except upon the balance remaining after such expense was deducted, and then only from the time when the amount of such liability was ascertained."

In *Davis v. Walker* (1869) 18 Mich. 25, it appeared that there had been a running account between the parties, but that they had accounted together as to most of the items and found that a certain sum was due to the plaintiff. But certain items due the defendant were not considered at that time, and further accounts subsequently accrued in favor of both parties. Interest was claimed on the amount due the plaintiff at the time of the accounting. The court held, however, that the accounting was in no sense a final one, but was still an open and mutual account, and that, therefore, no balance could be considered as having been struck on which interest could run in the absence of any special agreement to that effect.

So, interest is not allowed when more is demanded than is due, or on uncertain demands which are to be settled by process of law. *The Isaac Newton* (1850) Abb. Adm. 588, Fed. Cas. No. 7,090; *Brady v. Wilcoxson* (1872) 44 Cal. 239; *Doyle v. St. James's Church* (1831) 7 Wend. (N. Y.) 179; *Still v. Hall* (1838) 20 Wend. (N. Y.) 51.

In the case of *The Isaac Newton* (Fed.) supra, an action on a contract for the construction of a steam engine in a vessel, which provided for the payment of the purchase price in instalments from time to time as the work progressed, and under which claims were made for extra work, it was said that if the defendants had accepted the work when the libellants claimed that their contract was fully performed, interest would have become, from that time, a portion of the unpaid debt due the libellants, continuing to run with the debt until that was satisfied by the defendants, or, at least, it would have run from the time the suit was commenced, two days

later. This, the court declared, was on the idea that the agreement had been entirely fulfilled on the part of the libellants, and that they were justly entitled to the compensation stipulated. However, the court held that interest was not allowed when more was demanded than was due, or on uncertain demands which were to be settled by process of law. In this case, the court said, not only was the balance rightfully belonging to the libellants to be settled by process of law, but also a question vital to the right of recovery at all was contested in the suit, with at least reasonable color of grounds of defense on the part of the defendants. They could not, accordingly, the court held, be justly required to recognize the demand or make any tender for its satisfaction until after the decree of the court had fixed the right of recovery, and the report of the commissioners had liquidated the amount.

In *Doyle v. St. James's Church* (1831) 7 Wend. (N. Y.) 179, the plaintiff's demand was an unliquidated account for work, labor, and services. There was no evidence of its rendition to the defendants before suit was brought, nor was it acquiesced in by the latter; and the result showed that the plaintiffs claimed \$300 more than the arbitrators found was due to them. It was held that they could not, under such circumstances, be entitled to interest.

In *Brady v. Wilcoxson* (1872) 44 Cal. 239, the action was brought on a contract for the keeping and feeding of cattle. It provided two separate compensations to the plaintiffs for their care and expense in that respect; first, 8 cents per pound on the net increase in the weight of the cattle at the time of sale, over the agreed net weight at the date of the contract; and, second, two thirds of the increase in the price the cattle should be sold for, over and above 8 cents per pound on the net weight at the date of the agreement. The defendants reserved the right to sell the cattle at any time and on their own terms, and, if sold away from the place where they were being kept, the plaintiffs were to pay two thirds of the whole amount of the

expenses of driving and of sale. The court held that the only reasonable construction of the contract was that the weight and price of the cattle sold elsewhere were to be estimated at the time and place of sale, and that the provision in the contract that the cattle, when sold or delivered, were to be weighed out at the corral of the plaintiffs, applied only to the cattle then sold by the defendants, and not to those driven and sold elsewhere. By this construction of the contract, it appeared that the plaintiff's share of the proceeds of a sale was subject to a deduction for payments and offsets found by the court, which then held that they were not entitled to interest. Their claim, the court held, was an uncertain and unliquidated demand, the amount due not being ascertainable from the face of the contract, but could be settled only by process of law. On such demands, the court held, interest, *eo nomine*, could not be allowed.

In *Still v. Hall* (N. Y.) *supra*, the action was to recover a balance due for services, which balance the defendant conceded to be due, but offered to prove, by way of recoupment, his damages arising from a loss sustained by him by reason of the plaintiff's negligence in the employment. The court held that if the principal sum stood open for liquidation by the testimony offered in abatement, and damages had been proved and deducted, interest should not have been made a part of the balance found. The court stated that the principal would have stood in the light of an uncertain demand, to be settled by process of law, and that on such demands interest was not allowed. The court then held that the defense offered was admissible.

In *Bull v. Rich* (1904) 92 Minn. 481, 100 N. W. 213, 101 N. W. 490, it appeared, on the settlement of a deceased guardian's accounts, that he was in default, whereupon the plaintiffs, part of the sureties on the bonds, paid the wards the entire amount of their liability on the bonds, and filed their claim for the same against the guardian's estate. Thereafter, the plaintiffs

entered into an agreement with the heir of the deceased guardian, whereby he assigned to them certain personal property and securities, and in consideration thereof they agreed to withdraw their claim of right to participation in the dividend, and to release the estate of the deceased guardian from all liability on account thereof. The full amount secured by the plaintiffs was then converted into cash and applied on their claim, after which they brought an action against the rest of the sureties to compel contribution of the amount of their liability as cosureties in the guardianship bond, claiming interest from the date of the payment to the wards. The answer of the cosureties admitted the payment and alleged that the property secured from the estate by means of the alleged settlement was of greater value than had been accounted for; that the release filed by the plaintiffs released them as cosureties, and charged laches in reference to the disposition of the property secured from the estate, and in prosecuting the action for contribution. The trial court, after receiving evidence on the questions, determined the value of the property, and charged against the plaintiffs a considerably larger amount than they had given the defendants credit for. Hence, it was held that it could not be claimed that the liability of the defendants was fixed and determined until the trial court filed its order for judgment, but it was unliquidated; and so it was not error to have disallowed interest.

It has been held that where the amount due the plaintiff is unliquidated and uncertain at the time of the demand, being dependent on an adjustment between himself and the defendant of an unliquidated claim of the latter, interest should be allowed on the balance found due, not from the time of the demand, but from the date of the writ only. *Brewer v. Tyng* (1832) 12 Pick. (Mass.) 547; *Palmer v. Stockwell* (1857) 9 Gray (Mass.) 237. In the case first cited, an action of quantum meruit for labor performed by the plaintiff in

partial performance of a contract which the defendants finished, it was held that the plaintiff was to recover all the price agreed, deducting the reasonable charges which the defendants sustained or were liable to pay for completing the work. As, however, the sum due plaintiff was unliquidated at the time of his demand, the court held that interest thereon should have been calculated from the date of the writ. In *Palmer v. Stockwell* (Mass.) *supra*, an action on a contract to build a house which was subsequently altered and enlarged by verbal agreement between the parties, it appeared that, at the time the plaintiff offered

the key of the house to the defendant and demanded a settlement of accounts between them, the amount due the plaintiff was unliquidated, and there were mutual contested accounts between the parties, growing out of the building of the house. It was held that, the sum due the plaintiff having been unliquidated and uncertain, dependent on an adjustment of debts and credits between himself and the defendant at the time of the demand, and which were allowed for by the auditor, interest should be allowed on the balance found due, not from the time of the demand, but from the date of the writ only. H. D. B.

VICTORIA I. COLBY, Respt.,  
v.  
CITY OF PORTLAND, Appt.

*Oregon Supreme Court (In Banc)—September 17, 1913.*

(89 Or. 566, 174 Pac. 1159.)

**Limitation of actions — time for second action — judgment against agent.**

1. A statutory provision permitting the beginning of a new action within a year after reversal of a judgment for plaintiff does not apply to a new suit against principal where in the former suit a nonsuit was granted in favor of principal and judgment against agent was reversed on appeal.

[See note on this question beginning on page 824.]

**Municipal corporation — presentation of claim for damages — personal injuries.**

2. A provision in a city charter that every claim for damages against the city must be presented to the council and filed with the auditor within a certain time after it accrues, and that no action shall be maintained against the city until it has been so presented, does not apply to claims for damages for personal injuries due to defective condition of a street, where the charter attempts to exempt the municipality from liability for such injuries, and contemplates judgment against the city in certain cases without presentation of claims.

[See 19 R. C. L. 1041-1043.]

**Limitation of actions — statutory prohibition — presentation of claims.**

3. Failure to present to the common council a claim for injuries due to a defective street does not stay the running of the limitation period under a

statute providing that when the commencement of an action is stayed by statutory prohibition the time of continuance of such prohibition shall not be a part of the time limited for commencement of the action, where it is not contemplated that the claim for such injuries shall be so presented.

[See 17 R. C. L. 825-828; 19 R. C. L. 1040.]

**Abatement — former action pending.**

4. The pendency of an action when another one is brought for the same cause between the same parties is cause for abatement.

[See 1 R. C. L. 10.]

**Limitation of actions — action against servant.**

5. The running of the Statute of Limitations is not interrupted by the commencement of an action against the servant of the real party in interest.

[See 17 R. C. L. 870-872.]



**Statute — construction — power of court to extend.**

6. The peculiar language of the Statute of Limitations must control in

all cases since the court is without power to extend the provision beyond the plain language of the enactment. [See 17 R. C. L. 687.]

**APPEAL** by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for personal injuries resulting from a fall on a defective sidewalk, for which defendant was alleged to be responsible. *Reversed.*

**Statement by Bean, J.:**

This is an action of negligence against the city of Portland, brought by Victoria I. Colby for personal injuries alleged to have been received on the 6th day of May, 1915, as the result of a fall on a crosswalk at the intersection of East Salmon and East Thirty-second streets in the city of Portland. The case was tried before the court and a jury, resulting in a verdict for the plaintiff in the sum of \$1,578.50. The facts involved were before this court in the case of *Colby v. Portland*, 85 Or. 359, 166 Pac. 537, decided July 3, 1917. In that case, the trial of the lower court resulted in an alleged order of nonsuit as against the city of Portland, and a judgment against the other defendants who were officers of the municipality. Upon the reversal by this court of the judgment then obtained by the plaintiff against the city officers, this action was brought against the city of Portland alone.

Messrs. W. P. La Roche and Stanley Myers, for appellant:

Defendant is exempt from liability.

*Mattson v. Astoria*, 39 Or. 577, 87 Am. St. Rep. 687, 65 Pac. 1066; *Humphry v. Portland*, 79 Or. 431, 154 Pac. 897; *Elliott, Roads & Streets*, 3d ed. ¶¶ 860 et seq.; *Hill v. Boston*, 122 Mass. 344; *McEvoy v. Sault Ste. Marie*, 136 Mich. 172, 98 N. W. 1006; *Dill. Mun. Corp.* 5th ed. ¶¶ 1642, 1687, and notes; *McQuillin, Mun. Corp.* ¶¶ 2628, 2721; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; 8 Cyc. 1137; *Christianson v. Pioneer Furniture Co.* 101 Wis. 343, 77 N. W. 174, 917; *Cooley, Const. Lim.* p. 74; *Templeton v. Linn County*, 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795; *O'Harra v. Portland*, 3 Or. 525; *Sheridan v. Salem*, 14 Or. 328, 12 Pac. 925; *Rankin v. Buckman*, 9 Or. 253; *Bat-*

*dorff v. Oregon City*, 53 Or. 402, 100 Pac. 937, 18 Ann. Cas. 287; *Colby v. Portland*, 85 Or. 359, 166 Pac. 537; *Caviness v. Vale*, 86 Or. 554, 169 Pac. 95.

The action was not begun within the time prescribed by the Statute of Limitations.

*Caviness v. Vale*, supra; *Sheridan v. Salem*, 14 Or. 328, 12 Pac. 925.

Messrs. Harold V. Newlin and Cleeton & McMenamin, for respondent: Municipalities are liable under the doctrine of respondeat superior.

*Colby v. Portland*, 85 Or. 359, 166 Pac. 537; *Caviness v. Vale*, 86 Or. 554, 169 Pac. 95.

Where statutes are set out clearly, in unambiguous language, by the use of common words of everyday use and meaning, that meaning should be given them which is generally and commonly understood, and the courts cannot hold that they mean something different because they may be in apparent conflict with another section of the same statute or act.

*Ankeny v. Multnomah County*, 4 Or. 271; *Kamer v. Clatsop County*, 6 Or. 238; *State ex rel. Everding v. Simon*, 20 Or. 365, 26 Pac. 170; *Portland v. Meyer*, 32 Or. 368, 67 Am. St. Rep. 538, 52 Pac. 21; *State v. McGuire*, 24 Or. 366, 21 L.R.A. 478, 33 Pac. 666; *Landswick v. Lane*, 49 Or. 408, 90 Pac. 490; *Scott v. Ford*, 52 Or. 288, 97 Pac. 99; *Morgan v. Bross*, 64 Or. 63, 129 Pac. 118.

Plaintiff was within her time in the institution of the present action.

*St. Paul, M. & M. R. Co. v. Olson*, 87 Minn. 117, 94 Am. St. Rep. 696, 91 N. W. 294, 19 Am. & Eng. Enc. Law, 2d ed. 216; 25 Cyc. 1064; *Barstow v. The Aurelia*, 45 Or. 286, 77 Pac. 835; *Blaskower v. Steel*, 23 Or. 109, 31 Pac. 253; *Morgan's Estate*, 46 Or. 238, 77 Pac. 608, 78 Pac. 1029.

"The accrual of the cause of action" means the right to institute and maintain a suit. And whenever one person may sue another, a cause of action

has accrued and the statute begins to run.

Larason v. Lambert, 12 N. J. L. 247; Weiser v. McDowell, 93 Iowa, 772, 61 N. W. 1094; Ware v. State, 74 Ind. 181; Miller v. Perris Irrig. Dist. 85 Fed. 698; Angell, Limitations, ¶ 42; Atherton v. Williams, 19 Ind. 105; Gilbert v. Taylor, 148 N. Y. 298, 42 N. E. 713, modifying 76 Hun, 92, 27 N. Y. Supp. 828; Walden v. Crafts, 2 Abb. Pr. 301; Horner v. Speed, 2 Patton & H. (Va.) 616.

Until the party can resort to a remedy for the enforcement of his claim or right, the Statute of Limitations does not begin to run.

Fernandez v. New Orleans, 46 La. Ann. 1130, 15 So. 378; Cowper v. Godmond, 9 Bing. 748, 131 Eng. Reprint, 795, 2 L. J. C. P. N. S. 162, 3 Moore & S. 219; Williams v. Bergin, 116 Cal. 56, 47 Pac. 877; Brookline v. Norfolk County, 114 Mass. 548; United States v. Louisiana, 123 U. S. 32, 31 L. ed. 69, 8 Sup. Ct. Rep. 17.

Bean, J., delivered the opinion of the court:

1, 2. The first question for consideration is raised by the demurrer to plaintiff's complaint, interposed by the defendant upon the ground that it appears upon the face thereof that the action was not commenced within the time limited by the Code, and is barred. The trial court sustained the complaint and overruled the demurrer.

The complaint shows that the alleged injury occurred on May 6, 1915; that on June 1, 1915, plaintiff filed a claim for damages against the city of Portland with the city auditor; that on July 6, 1915, the claim was presented to the council of the city; and that on July 7 of that year her claim was rejected and disallowed by the council. The record shows that the complaint was filed July 25, 1917. Section 8, L. O. L., provides that an action for any injury to the person or rights of another, not arising on contract and not herein especially enumerated, shall be commenced within two years after the cause of action shall have accrued.

Counsel for defendant submit that the alleged cause of action ac-

crued on the date of the injury, and that it was not incumbent upon the plaintiff, prior to the commencement thereto, to present her claim to the city council and file the same with the city auditor, as provided for in § 282 of the charter of the city of Portland; and that the opinion in the case of Caviness v. Vale, 86 Or. 554, 169 Pac. 95, is decisive of the question. Counsel for plaintiff maintain, *inter alia*, that said section of the city charter was necessarily complied with by the plaintiff, and that her cause of action did not accrue until sixty days had elapsed after her claim was so presented; and that the action was begun within the time prescribed by law; that by virtue of § 282 of the charter there was a statutory prohibition staying the commencement of the action during such time. As the accident occurred on May 6, 1915, and the complaint was not filed until July 5, 1917, it is apparent from the complaint that the action was barred by the Statute of Limitations, unless the time of its commencement was prolonged by § 20, L. O. L., or otherwise especially enumerated and provided for by the Code. Section 20 reads thus: "When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action."

Section 282 of the city charter reads as follows: "Every claim for damages against the city must be presented to the council and filed with the auditor within six months from the taking effect of this charter or within six months after the time when such claim for damages accrues; otherwise there shall be no recovery on any such claim. No ordinance shall be passed allowing any such claim, or any part thereof, or appropriating money or other property to pay or satisfy the same, or any part thereof, until such claim has been referred to the proper department, nor until such de-

partment has made its report to the council thereon pursuant to such reference, unless judgment has been rendered on such claim. No action shall be maintained against the city for any claim for damages until the same has been presented to the council and filed with the auditor as above set out and sixty days have elapsed after such presentation."

The question therefore is, Does the expression, "claim for damages," include claims arising ex delicto, and especially claims arising from injuries occasioned by defects in a street?

In the case of *Caviness v. Vale*, 86 Or. 554, 169 Pac. 95, decided December 11, 1917, this court construed a section of the charter of the city of Vale which is admittedly identical in its wording with this section of the Portland charter. The reasoning followed in the construction of the Vale charter applies in the construction of the Portland charter. The opinion in that case is a final determination of the question presented, adversely to the contention of plaintiff. At page 558 of the opinion, Chief Justice McBride said:

"It is contended that the complaint is insufficient as against the city for the reasons (1) that the claim was not presented within six months after the injury, as required by the charter, . . .

"The first contention is settled adversely to the claim of respondent in *Sheridan v. Salem*, 14 Or. 328, 12 Pac. 925, wherein it was held that a provision of the charter which provided that 'no claim against the city shall be paid until it is audited and allowed by the common council' did not apply to claims arising ex delicto. . . . The words, 'claim for damages,' used in the Vale charter, if standing alone and without reference to other provisions of the charter, would seem to be broad enough to include claims arising ex delicto. But a fair construction would seem to be that which would refer the language to such claims as the char-

ter authorized the city to audit and pay. The object was to give the city the option of examining into the merits of the claim and paying it without an action, if deemed proper. In view of the fact that § 200 of the charter expressly declares that the city shall not be liable for claims of the character herein described, it cannot be held that it was in the legislative mind to require the presentation to the council of a claim which it was expressly prohibited from paying. To do so would be to require the performance of a vain and useless ceremony. The authorities upon this subject are conflicting, and will be found collated in an exhaustive note in *Henry v. Lincoln*, 93 Neb. 331, 140 N. W. 664, as reported in 50 L.R.A.(N.S.) 174, and in *Miller v. Mullan*, 17 Idaho, 28, 104 Pac. 660, 19 Ann. Cas. 1107."

We adhere to the conclusion reached in that case by the Chief Justice. We do not believe that this section was ever intended by the framers of the charter to apply to actions ex delicto. In

**Municipal corporation—presentation of claim for damages—personal injuries.**

*Sheridan v. Salem*, 14 Or. 328, at page 333, 12 Pac. 926, of the opinion, Mr. Justice Thayer, in discussing this question, said: "The breach of payment in the action of assumpsit is a necessary allegation, but it does not figure at all in an action of trespass on the case. The city only agrees to pay a contracted indebtedness in case the claim is presented as mentioned, and the action is for a refusal to audit and allow it; but if it commit a tort, the action matures at once."

Section 281 of the Portland charter attempts to exempt the city of Portland from liability for damages sustained by reason of a defective condition of a street in the same manner as the Vale charter attempts to exempt the city of Vale. Section 281 clearly shows that the legislature did not have in mind that claims for such injuries should ever be presented to the city. The

plain language of the section quoted above, prohibiting the appropriation of money to pay "such claim" until the same has been referred to the proper department and reported to the council by such department, "unless judgment has been rendered on such claim," contemplates that a judgment will be rendered on certain claims against the city, without the presentation of such claims in the manner provided for in this section. This language indicates that the main object of this portion of the charter was to regulate the manner of conducting such affairs by the city government, and not to control the time for action by the courts. Therefore, it cannot be

Limitation of  
actions—statu-  
tory prohibition  
—presentation of  
claims.

said that such a claim comes within the provisions of § 282 of the city charter. The same

rule must be applied as when in a case where the position of the parties is reversed and the plaintiff did not file a claim for damages with the city officials, as in the Vale Case. There was no statutory prohibition against the plaintiff's action before filing her claim with the city authorities.

3, 4. Counsel for plaintiff invoke the provision of § 21, L. O. L., which reads thus: "If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die, and the cause of action survives, his heirs or personal representatives, may commence a new action within one year after the reversal."

The facts to which plaintiff would apply the law contained in this section are stated in plaintiff's brief in effect as follows: That Victoria I. Colby, plaintiff, prior to the institution of the present action, filed a joint action against the city of Portland, city commissioners, and city engineer, on the 2d day of October, 1916. The case was then pending in the court, until the 12th day of December, 1916, when the

trial court by verbal order, which was never entered of record, granted a nonsuit as against the city of Portland. The case went to the jury against the other joint defendants and it returned a verdict for plaintiff. Defendants appealed to the supreme court, and on the 3d day of July, 1917, this court reversed the judgment of the lower court, and remanded the cause for a new trial. *Colby v. Portland*, 85 Or. 359, 166 Pac. 537.

The conditions of the present case do not come within the provisions of § 21, L. O. L. In order to bring the case within the time prescribed in that section, plaintiff must have obtained a judgment against the defendant city of Portland in the former action, and the same have been reversed on appeal. The reason of the rule prescribed by such a statute is that if an action is commenced

—time for  
second action—  
judgment  
against agent.

by a plaintiff against a defendant while another action is pending between the same parties, the pendency of such prior action would be a ground for abatement of the second. The statute contemplates that

Abatement—  
former action  
pending.

where a judgment is rendered in an action in favor of the plaintiff, and against the defendant, which is reversed upon appeal, the plaintiff is allowed one year after such reversal in which to commence a new action against such defendant. In the present case, as the facts are stated by plaintiff, there was no action pending against the defendant city of Portland after the 12th day of December, 1916. No judgment in favor of plaintiff and against this defendant was rendered in the former action or reversed on appeal. After the nonsuit as to the city of Portland on December 12, 1916, there was nothing to prevent plaintiff from commencing a new action against such defendant. If the first action had been proceeded with against the present defendant after the nonsuit, and had been reversed and re-

manded for a new trial as to this defendant, then there would have been no necessity for the bringing of a new action. The running of the Statute of Limitations is not interrupted by the commencement of an action against the servant of the real party in interest. 25 Cyc. 1299 (b); Lattie-Morrison v. Holladay, 27 Or. 175, 39 Pac. 1100. The pendency of the action against the servants of the defendant city, after December 12, 1916, did not interfere with the right of the plaintiff to bring a new action, or toll the Statute of Limitations in the case at bar. The peculiar language of the statute must control in all cases, as the courts are without power to extend the provisions beyond the plain language of the enactment. 19 Am. & Eng. Enc. Law, 2d ed. 263, as stated in that volume at page 260: "(e) Must be against proper defendant.—A suit begun against a stranger or one who sustains no such relation to the proper defendant that a judgment against him would bind such

**Limitation of actions—action against servant.**

**Statute—construction—power of court to extend.**

defendant, can have no effect on the operation of the statute in favor of the party against whom the cause of action properly exists."

See also Wallace v. Swepston, 74 Ark. 520, 109 Am. St. Rep. 94, 86 S. W. 398; Laughlin v. Calumet & C. Canal & Dock Co. 13 C. C. A. 1, 24 U. S. App. 573, 65 Fed. 441; Robinson v. Thompson, — Tex. Civ. App. —, 52 S. W. 117; Meyer Bros. Drug Co. v. Fry, — Tex. Civ. App. —, 48 S. W. 752; Damon v. Leque, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485. It would not be suggested that the city would be bound by a judgment against the city commissioners, or engineer. Under our statute, a nonsuit does not have the effect to bar another action for the same cause, but the time for bringing such other action is not extended on account of such nonsuit. § 184, L. O. L.

The present action was not commenced within the time prescribed by the Code, viz., within two years after the cause of action accrued, and is barred.

The judgment of the lower court is therefore reversed, and the case dismissed.

## ANNOTATION.

**Applicability, as affected by parties, of statute permitting new action to be brought within specified time after failure of prior action for a cause other than the merits.**

### I. Introductory, 824.

#### II. Plaintiffs:

- a. In general, 825.
- b. Immaterial differences, 825.
- c. Transferees and grantees, 825.
- d. Differences as to some of parties plaintiff, 826.

#### I. Introductory.

Statutes of the class under discussion are said to have their origin in the common-law rule of "journeys' account." They are founded upon the statute of 21 James I. chap. 16, § 4, though they differ to some extent in terms.

This note does not include cases abated by death.

### III. Defendants:

- a. In general, 826.
- b. Differences as to some of parties defendant, 827.

### IV. Miscellaneous, 828.

It should be stated, in limine, that the statute is remedial, and should be liberally construed. *Givens v. Robins* (1847) 11 Ala. 156; *Cox v. Strickland* (1904) 120 Ga. 104, 47 S. E. 912, 1 Ann. Cas. 870; *Atlantic Coast Line R. Co. v. Knapp* (1912) 139 Ga. 422, 77 S. E. 568; *Coffin v. Cottle* (1835) 16 Pick. (Mass.) 383, per Shaw, Ch. J.; *Bent v. Read* (1918) — W. Va. —, 97 S. E. 286.

*II. Plaintiffs.**a. In general.*

It is a general rule that the new suit must be brought by the same plaintiff as in the first suit. If it is brought by a different plaintiff the statute does not apply. *H. B. Claffin Co. v. Middlesex Bkg. Co.* (1902) 113 Fed. 958; *Bynum v. Memphis & C. R. Co.* (1893) 100 Ala. 311, 13 So. 910; *Doyle v. Wade* (1887) 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516 (stating the rule); *Moss v. Keesler* (1878) 60 Ga. 44; *Ross v. Sims* (1854) 27 Miss. 359; *Tiffin v. Leabo* (1873) 52 Mo. 49; *Meddis v. Wilson* (1903) 175 Mo. 126, 74 S. W. 984.

Thus, it was held that the second suit was not within the benefit of the statute, when the first suit was by a trustee for creditors and the second by one of the creditors. *H. B. Claffin Co. v. Middlesex Bkg. Co.* (Fed.) *supra*.

So, where the first suit was by R. S. & H., constituting the firm of R. S. & Co., and the second was by R. S. & T., constituting the firm of R. S. & Co., suing for the use of J. Ross v. Sims (1854) 27 Miss. 359, *supra*.

So, where an administrator brought the first suit and the heirs the second. *Doyle v. Wade* (1887) 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516 (not necessary to decision).

Where a judgment for a woman was reversed on the ground that the cause of action belonged to her husband in his own right, he could not bring a new action under the statute by styling himself trustee of his wife. *Bynum v. Memphis & C. R. Co.* (1893) 100 Ala. 311, 13 So. 910, *supra*.

*b. Immaterial differences.*

Where the plaintiffs in both actions are substantially the same, the statute applies.

Thus, where the first action was brought by A, guardian of B, and the plaintiff in the second was B, by A, his guardian, the second action was protected by the statute. *Spear v. Brain-tree* (1875) 47 Vt. 729.

So, where on a note to the "administrator of" A, the administrator brought the first suit and his succes-

sor the second. *Moody v. Threlkeld* (1853) 13 Ga. 55.

So, where the second action was brought by a receiver of the plaintiff in the first action. *McWhirt v. McKee* (1870) 6 Kan. 412.

So, where the first suit against a county auditor was by the county board, and the second by taxpayers for the benefit of the county. *Zuelly v. Casper* (1910) 46 Ind. App. 430, 92 N. E. 785.

So, where husband and wife brought the first action for services, and the husband alone brought the second action, the wife not being a necessary party to the first action. *Whetstone v. Wilson* (1889) 104 N. C. 385, 10 S. E. 471.

(It may be noted that where a widow as administratrix of her husband brought her original writ and then remarried, and she as administratrix, and her husband, brought a new suit within two terms, it was held that the second suit was not barred by the Statute of Limitations. *Middleton v. Forbes, Willes*, 260, note, 125 Eng. Reprint, 1162, note.)

Where the first suit was brought by the trustees of a bank on a note which had been already assigned to part of them as residuary trustees, a second writ by such residuary trustees is within the benefit of the statute. *James v. Biscoe* (1849) 10 Ark. 184; *Biscoe v. Madden* (1856) 17 Ark. 533.

But it was held in *Ingraham v. Regan* (1851) 23 Miss. 213, that a bank's assignee for creditors cannot have the benefit of the statute when the former action was brought by the bank. The court said: "If the appellants stood in the same relation to the defunct bank which an administrator does to his intestate, or a husband and wife in a new suit, commenced under this construction of the law, do to the action originally instituted by the latter whilst a feme sole, there would be no question, according to such construction, that they are not barred."

*c. Transferees and grantees.*

A transferee of the plaintiff in the first action may bring the second action. *Shively v. Beeson* (1880) 24

Kan. 352; *Anthony Invest. Co. v. Law* (1900) 62 Kan. 193, 61 Pac. 745; *Premo v. Lee* (1884) 56 Vt. 60.

So, a grantee of the plaintiff in the first action may bring the second action. *Dressler v. Carpenter* (1913) 107 Ark. 353, 155 S. W. 108; *Thornburgh v. Cole* (1882) 27 Kan. 490; *Wintermute v. Montgomery* (1860) 11 Ohio St. 442.

Where W brought an action April 9, 1906, dismissed it May 4, 1907, brought a new action May 4, 1907, and dismissed it April 3, 1908, it was held that his grantee might begin an action March 16, 1908, that being within one year from May 4, 1907. *Dressler v. Carpenter* (Ark.) *supra*.

But it was held in *Quelch v. Futch* (1917) 174 N. C. 395, 93 S. E. 899, that a grantee of the plaintiff in the first action, claiming under deeds executed before the beginning of that action, was not enabled by the statute to bring a new action.

*d. Differences as to some of parties plaintiff.*

A second action brought by some of the parties plaintiff in the first action is not within the benefit of the statute. *White v. Moss* (1893) 92 Ga. 244, 18 S. E. 13; *Thompson v. Beeler* (1904) 69 Kan. 462, 77 Pac. 100.

Thus, where the first action was brought by partners, and one of them brought the second action, he was not protected by the statute. *Thompson v. Beeler* (Kan.) *supra*.

So, in *White v. Moss* (Ga.) *supra*, where the first suit in ejectment was by A and B, and the second by A alone, the court said: "No suit by two persons can be the same thing as a suit by one of them; and the law being that when an action of ejectment is brought by two persons claiming title jointly, a recovery cannot be had by either of them in severalty, it is absolutely clear that the suit in which the plaintiff is now seeking a recovery is not the same action as that in which she formerly sought to recover jointly with another person."

But in *Long v. Orrell* (1851) 35 N. C. (13 Ired. L.) 123, it was held that in ejectment it is sufficient if the second action be on the single demise

of one of several lessors in the former action.

In *Bercy v. Lavretta* (1879) 63 Ala. 374, where a bill brought by A and B was dismissed, and on appeal the decree was modified by dismissing the bill without prejudice to A to sue again, it was held that the statute did not enable (the heirs of) B to sue again, as it did not present a case of judgment rendered for the plaintiff and such judgment reversed on appeal.

The cases are not agreed as to whether the statute applies where there are additional parties plaintiff in the second suit.

In *Norton v. Reed* (1913) 253 Mo. 236, 161 S. W. 842, where the first suit in ejectment was by three heirs against R, the other heirs, and others, and the second suit was by four heirs against R, it was held that the case was within the benefit of the statute.

In *Martin v. Young* (1881) 85 N. C. 156, it was held on principle that where one partner alone brought the first action he might, under the statute, join his partners with him in the second action.

But in *Mark v. Chicago, R. I. & W. R. Co.* (1918) — Iowa, —, 169 N. W. 764, it was held that an action by a partnership was not within the benefit of the statute, where the former action was brought by a member of the firm.

In *Crow v. State* (1861) 23 Ark. 684, where judgment for the plaintiff in a suit in the name of the state for the use of A was arrested, it was held that a new suit in the name of the state for the use of A and B was not protected by the statute.

### III. Defendants.

#### a. In general.

While it has been said that there must be an exact identity of parties defendant (*Floyd v. Boyd* (1914) 16 Ga. App. 43, 84 S. E. 494), the rule is not so absolute.

Thus, for example, the second suit may be brought against the administrator of the defendant in the first

suit. See *Biscoe v. Madden* (1856) 17 Ark. 533.

Where, pending the first suit for a nuisance, the defendant corporation was merged with another and ceased to exist as a separate entity, the other company taking all of its property and assuming all of its debts and liabilities, a renewal of the suit against the company resulting from the merger, brought within six months after the grant of the nonsuit, was held to be a renewal against the original company within the meaning of the statute. *Atlantic Coast Line R. Co. v. Knapp* (1913) 189 Ga. 422, 77 S. E. 568.

In *Coffin v. Cottle* (1835) 16 Pick. (Mass.) 383, the plaintiff, having recovered a judgment against an administrator for a debt of the decedent, and an execution being returned unsatisfied, sued out a writ of scire facias suggesting waste, pending which the letters to the defendant were declared void, and new letters were granted to him, and on his plea the plaintiff's judgment was in effect decided to be void. It was held that the plaintiff might, within a year thereafter, bring a new suit against the defendant under the statute.

In ejectment the new action need not be against the same defendant. *Cox v. Berry* (1853) 18 Ga. 306; *Long v. Orrell* (1851) 35 N. C. (13 Ired. L.) 123; *Williams v. Council* (1856) 49 N. C. (4 Jones, L.) 206 (stating the rule).

Thus, where the first suit in ejectment against A as landlord and B as tenant failed for want of proof that B was in possession, a second suit against A as landlord and C as tenant was held to be protected by the statute. *Cox v. Berry* (Ga.) supra.

So, where the first action was in equity for land and the second action was in ejectment against the grantee of the defendant in the first suit, it was held that the case was protected by the statute. *Alexander v. Gordon* (1900) 41 C. C. A. 228, 101 Fed. 91.

Sometimes the statute particularly provides that the plaintiff shall have a certain time in which to bring a new suit, where the first suit is decided against him on the ground that his ac-

tion was against the wrong defendant. *Norfolk & A. Terminal Co. v. Roto* (1910) 103 C. C. A. 197, 179 Fed. 639.

*b. Differences as to some of parties defendant.*

Where the first suit was against all the makers of a note, and the second against part of them only, it was held that this was sufficient to give the plaintiff the benefit of the statute. *State Bank v. Sherrill* (1851) 12 Ark. 183; *State Bank v. Gray* (1852) 12 Ark. 760; *State Bank v. Roddy* (1852) 12 Ark. 766; *State Bank v. Davis* (1852) 12 Ark. 768; *State Bank v. Henderson* (1852) 12 Ark. 774; *Biscoe v. Madden* (1856) 17 Ark. 533; *Parker v. Dobson* (1908) 78 Kan. 62, 96 Pac. 472.

It was held that the statute applied where the first suit embraced the cause of action sued on in the second suit, even though it also "embraced other and distinct causes of action asserted against parties other than the defendant in the second suit." *Hawkins v. Scottish Union & Nat. Ins. Co.* (1915) 110 Miss. 23, 69 So. 710.

Where the first action was in tort against two defendants, and the second against one of them, the second action was held to be within the protection of the statute, but the point is not referred to by the court. *Pittsburgh, C. C. & St. L. R. Co. v. Bemis* (1901) 64 Ohio St. 26, 59 N. E. 745.

Where the first suit was against various defendants occupying various parts of the land sued for, and it was severed as to A as to his part of the land, and later there was a nonsuit in regard to him, it was held that the statute applied to a new suit against A. *East Tennessee Iron & Coal Co. v. Lawson* (1895) — Tenn. —, 35 S. W. 456. But where, in a similar case, the new suit added other necessary defendants, it was held that the statute did not apply. *East Tennessee Iron & Coal Co. v. Walton* (1895) — Tenn. —, 35 S. W. 459.

— See also *Norton v. Reed* (1913) 253 Mo. 236, 161 S. W. 842, supra, II. d.

But on the other hand, it was held in *Ford v. Clark* (1885) 75 Ga. 612, that if one sues a partnership and is



nonsuited, a new suit against one of the parties is not within the statute.

As a rule, where the second suit makes additional parties defendants, the statute does not apply. *Gray v. Trapnall* (1861) 23 Ark. 510; *Larwill v. Burke* (1900) 19 Ohio C. C. 449; *Hughes v. Brown* (1890) 88 Tenn. 578, 8 L.R.A. 480, 13 S. W. 286; *East Tennessee Iron & Coal Co. v. Walton* (1895) — Tenn. —, 35 S. W. 459.

And where the first suit was against A and B, and B was not served, it was held that a second suit against B was not protected by the statute. *Wann v. Pattengale* (1850) 14 Pa. 313; *Talcott v. Rosenblum* (1898) 21 Pa. Co. Ct. 494.

But where the first suit was against A, and the second against A and his partners, of whom A only was served, it was held that the statute applied. *Downing v. Lindsay* (1845) 2 Pa. St. 382.

The mere adding of an additional trustee as a party defendant would seem to be within the protection of the statute. Thus, where a suit instituted against an estate having more than one personal representative was abated for nonjoinder of one or more of the representatives of the estate, a new action against all of the representatives was held to be within the statute. *Greenfield v. Farrell Heating & Plumbing Co.* (1915) 17 Ga. App. 637, 87 S. E. 912.

#### IV. Miscellaneous.

It will be seen that in the reported case (*COLBY v. PORTLAND*, ante, 819) it is held that a new suit against the principal within one year after reversal is not within the benefit of the statute, where the first suit was against principal and agent, and there was a nonsuit against the principal, judgment against the agent, and a reversal of that judgment. It may be noted that the quotation in the opinion from the American and English Encyclopedia of Law relates to the Statute of Limitations generally, and not to the particular statute of "journeys' account."

Where the plaintiff sued three defendants, and the trial court continued the action against two and gave

judgment against the third, and this judgment was reversed upon the ground that the action of the trial court amounted to a discontinuance as to all the parties, it was held that the plaintiff might bring a new action against the three defendants under the spirit (but not the letter) of the statute, providing that "if . . . judgment be given for the plaintiff, and the same be reversed," he may commence a new action within one year thereafter. *Givens v. Robbins* (1847) 11 Ala. 156.

Where one judgment creditor, with a judgment against one only of two or more judgment debtors, makes parties to his suit to sell the lands of his judgment debtor, such other judgment debtors and some or all of the creditors having judgments against debtors jointly, but for want of pleadings, or sufficient pleadings, against such other judgment debtors, the bill is finally dismissed as against them and their lands, but reserving to such creditors all rights, such other creditors, having acted in good faith, will, in a second suit brought by them within one year after the dismissal of the first suit, be protected by the statute, where it appears that the court and the parties to the suit, including intervening creditors, through years of litigation, and by several orders of reference and reports of commissioners, and exceptions thereto by the parties to the cause, and up until final report and decree thereon, have treated the cause as one prosecuted for and on behalf of all creditors against all such judgment debtors; but the statute will not protect "judgment or other creditors not made parties to such former suit, or who fail to appear and prove and have their judgment or other liens allowed by the commissioner against such other judgment or other lien debtors." *Bent v. Read* (1918) — W. Va. —, 97 S. E. 286.

Where the liability of the defendants is joint and several, with no right of contribution, as in libel, a second action against all of the defendants to the first suit, served upon some of those jointly suable, but severally liable, is within the protection of the

statute. *Cox v. Strickland* (1904) 120 Ga. 104, 47 S. E. 912, 1 Ann. Cas. 870.

The statute does not apply in case of reversals of judgments for the defendant. *Robinson v. Robinson* (1848) 5 Harr. (Del.) 8.

Parties against whom a citation is asked in a special proceeding are in the position of defendants, and cannot bring a new proceeding under the statute. *Re Schlesinger* (1899) 36 App. Div. 77, 55 N. Y. Supp. 514.

In *Cummins v. Colgin* (1896) 3 Port. (Ala.) 398, where, in a chancery suit against him, the defendant, as an offset, set up a promissory note which was disallowed without prejudice, his new action on the note was held not to be within the benefit of the statute. So, in *Liebke v. Thomas* (1886) 24 Mo. App. 24, where, in an action which had been discontinued, the defendant had claimed a set-off, it was held that he could not bring a new action on the claim which he had tried to set off, and have the protection of the statute. But on the other hand, in *Hunt v. Spalding* (1836) 18 Pick. (Mass.) 521,

it was held that the defendant, who in the first action had claimed a set-off, was within the protection of the statute in bringing an action on the claim which he had tried to set off, as the general Statute of Limitations provided in substance that the filing of a set-off should be in effect the same as the commencement of an action. And in *Hevener v. Hannah* (1906) 59 W. Va. 476, 53 S. E. 635, where an equity suit was brought by executors against A for an adjudication as to the validity of his demand against them, and he answered, setting up his demand, and the answer was treated as a cross bill and dismissed, it was held that A might bring a new suit on his demand within a year under the statute.

(It was held in *Parsons v. Crabb* (1873) 34 U. C. Q. B. 136, that the plaintiff by discontinuing where there had been a set-off, and by bringing a new action, could not escape a new plea of set-off, on the ground that it was barred by the statute when the second suit was brought.) B. B. B.

EVALINE V. DOWLING et al.,

v.

ELLA E. M. GILLILAND et al.

HENRIETTA H. GUINNESS, Appt.

*Illinois Supreme Court — February 20, 1910.*

(286 Ill. 530, 122 N. E. 70.)

#### Will — revocation — writing upon face.

1. Merely writing upon the paper upon which a will is drawn of the words, "This is no good," which do not cross the words of the will, but merely touch the words, "Signed and sealed," in the attestation clause, does not effect a revocation where the statute provides that no will shall be revoked otherwise than by burning, canceling, tearing, or obliterating the same, or by a new will properly executed.

[See note on this question beginning on page 833.]

#### Definition — cancelation.

2. Cancelation of an instrument is a blotting out or striking out, and a

will cannot be canceled by writing upon the blank spaces on the paper on which the will is written.

APPEAL by Henrietta H. Guinness from a decree of the Circuit Court for Cook County sustaining the will of Lavinus B. Willden, deceased, in a suit to contest said will. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Frederick Sass for appellant.  
Mr. Jonas O. Hoover for appellee Gilliland.

Stone, J., delivered the opinion of the court:

This is an appeal by Henrietta H. Guinness from the decree of the circuit court of Cook county, sustaining the will of Lavinus B. Willden after a hearing before a jury upon bill filed by contestants to contest said will on the ground that it had been revoked by the testator.

The testator, Lavinus B. Willden, executed the will in question August 24, 1894, by which he devised and bequeathed all of his property to his sister, Ella E. M. Gilliland, and his half-brother, Lewis C. E. Lateer, share and share alike, and provided that Lateer should be the executor thereof. Some time thereafter there was written on the back of the will, which consisted of a single sheet of paper: "All I have I want to go to my sister, Miss Ella Willden." This notation is not dated. There also appears on the back of the will the following notation: "This is no good; will try to make another.—December 10, 1906." No signature of the testator appears in connection with either of the foregoing notations. There also appears on the face of the instrument, between the date and the attestation clause, the following: "Not any good.—December 11, 1907;" and, between the date and the original signature, "Changed my mind." No signature of the testator appears in connection with these notations. Uncontradicted extraneous evidence, over objections of appellees, was introduced at the trial to the effect that all of said notations were in the handwriting of the deceased. The words and figures, "December 11, 1907," are so indorsed that the "1" in units order in the number "11" is tangent to the letter "S" in the word "Signed," and the "9" in hundreds order in the number "1907" is tangent to the letter "d" in the word "Signed," and the "7" in units order in the number "1907" intersects one line in the

letter "s" in the word "sealed;" both words, "Signed" and "sealed," being a part of the attestation clause. None of the letters or words of the will or attestation clause were marked out, crossed out, obliterated, or written across by the said notation.

The evidence is conflicting as to the time and the place in which the will was found. Immediately after the death of the testator a search began for his will. At the time of his death he was constructing and had practically completed a small cottage or dwelling house. During the construction of this cottage he occupied a portion of a barn on the premises for sleeping purposes and a place in which to keep his linen and other personal effect. A brief search at this place was made, but no will was found. A search was then made in a safety deposit box at the bank, rented by the testator, but no will was contained therein. Erastus M. Willden, administrator with will annexed (one of the appellees herein), continued the search, and eventually found the will, inclosed in an envelop, in the trunk of the testator in this room in the barn. The testimony is conflicting as to when he found the will. At the time he found it the envelop which contained the will was open at one end. There were letters of little importance and some other papers in this trunk. There is some testimony to the effect that an abstract was among the papers found in the trunk with the will. Erastus M. Willden delivered the envelop and the will to the attorney for the appellee Ella E. M. Gilliland, upon whose petition it was admitted to probate on April 29, 1914. • The executor named in the will, Lewis C. E. Lateer, renounced, and Erastus M. Willden was appointed administrator with the will annexed.

The testimony tends to prove that the deceased and his sister, Ella E. M. Gilliland, thought a great deal of each other, and until her marriage they occupied the same home, and

that he on several occasions expressed himself to the effect that he wanted all his property to go to this sister. He died June 17, 1911, leaving him surviving his brother, Erastus M. Willden, his sisters, Ella E. M. Gilliland, Henrietta H. Guinness, and Evaline V. Dowling, his niece, Ruth E. Willden, and his half-brother, Lewis C. E. Lateer, his only heirs at law. He died seised in fee simple of certain real estate in Cook county.

The principal question involved in this case is whether or not there was a cancellation of the will. The record shows that there appeared on the face of the will this notation: "Not any good; changed my mind. —December 11, 1907." There was evidence in the record to the effect that this was in the handwriting of the testator, and it is contended on the part of the appellant that this shows an intent to revoke and cancel the will, and that it also shows actual cancellation of the same; that it is a cancellation, irrespective of any crossing of lines of the words of the will; and that, if the crossing of lines is necessary to cancellation, the slightest crossing is sufficient. Appellees contend that even though the notations were in the handwriting of the testator and show an intention on his part to cancel and revoke the will, yet such acts were not sufficient to constitute a revocation by cancellation.

Section 17 of the statute in relation to wills in this state is as follows: "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law."

The statute thus provides for the revocation of wills by burning, canceling, tearing, or obliterating, or by certain words which shall be written in the form of a new will, which, if written upon the instrument, must be signed by the testator in the presence of two or more witnesses, and by them attested in his presence. It further provides that no will shall be revoked in any other way, and that no words spoken shall constitute a revocation or annulment of any will, or testament, or codicil. Does the writing of said words on the face of the will in the manner referred to constitute a cancellation of the will? As we have seen, there was no striking out of any of the words of the will by the notation in question, and only in the instances cited does the notation touch any of the words of the will. The Standard Dictionary defines "cancel" as follows: "To mark out or cut off, as by the drawing of some letters across to signify that it is to be omitted; to blot or strike out, as to cancel figures or writing."

Cancellation has been also defined as the act of crossing out a writing. 6 Cyc. 281. Cancellation of an instrument, by most approved lexicographers, is defined

to be a blotting out or striking out, and has to do, necessarily, with the writing on the instrument. It could not be said that a will is canceled in the slightest degree by reason of marks or scratches made upon blank places on the will. In order to effect a cancellation there must be an erasure, blotting, or striking out of some portion of the will itself. 1 Redf. Wills, 4th ed. 138. A writing upon the face of the will which does not appear to be written across the language of the will merely amounts to an unattested instrument or revocation, and is inoperative. Gardner, Wills, 259.

Re Akers, 74 App. Div. 461, 77 N. Y. Supp. 643, was a case similar in point of fact to the case at bar. In that case the testator appeared to have written on the blank marginal

Definition—  
cancellation.

space on the first page of the will the words, "This will and codicil is revoked.—Jany. 14/96," and under this line was the signature of the testator, "Fredk. Akers." It appeared that none of the words or the signature was written across the writing of the will, nor did they come in contact with said writing, except that a small portion of some of the letters in the word "Fredk." crossed over the lower extremities of some of the letters on the third line. The words were not, however, obliterated. In that case the court found that the testator had evidently sought to revoke his will by writing, but as he had done no act except to express his intention upon the margin of the paper upon which the will was written, it was held that such act did not amount to a revocation of the will in writing, and that there could be no such thing as a cancelation of an instrument, either as a physical fact or in legal effect, unless the instrument itself is in some form defaced or obliterated.

But appellant relies upon the case of *Warner v. Warner*, 37 Vt. 356. In that case the will was written on a sheet of foolscap paper, covering the first page and about one third of the second page. On the last half of the second page was written: "This will is hereby canceled and annulled in full this 15th day of March, in the year 1859." Signed, "I. Warner." The court in that case held that such amounted to a cancelation. We do not adopt the view of the Vermont court in relation to the cancelation of wills, but hold it to be the rule that in order to constitute a revocation by cancelation such cancelation must be a blotting, or striking out, or writing over said will or an essential portion thereof,

and must be made with intent to revoke the will.

The great weight of authority is to the effect that the mere writing upon a will which does not in any wise physically obliterate or cancel the same is insufficient to work a destruction of a will by cancelation, even though the writing may express an intention to revoke and cancel. This appears to be the better rule. To hold

Will—revocation—writing upon face.

otherwise would be to give to words written in pencil, and not attested to by witnesses nor executed in the manner provided by the statute, the same effect as though they had been so attested. Where such notation does not in any way obliterate the writing of the will it cannot be said to cancel, and therefore such notation could only be held effective as a revocation of the will as a writing. As this notation is unsigned and unattested it does not comply with the statute in relation to the signing and attesting of a revocation of a will, as set out in said § 17 of the act relating to wills. We are of the view, therefore, that the testator did not effectually cancel his will, and that there was no revocation of it in writing, as required by the statute.

There are objections offered as to the admissibility of testimony, but we find no reversible error therein. Likewise the instructions given by the court and objected to by appellant, as well as those offered and refused by the court, appear to have been a fair presentation of the theories of appellant and appellees as to the law. The circuit court in its instructions to the jury adopted the theory of the appellees, which, as we have seen, was the correct one.

There being no reversible error in the record, the decree of the Circuit Court will be affirmed.

## ANNOTATION.

**Revocation of will by writing not testamentary in character.**

- I. Introductory, 833.
- II. Intent of testator, 833.
- III. Statutory requisites:
  - 1. In general, 834.
  - 2. Ordinary form of statute:
    - a. In general, 835.
    - b. Writing separate from will, 836.

*I. Introductory.*

The present note is confined, as indicated in the title, to a discussion of writings not testamentary in character as revocations of wills. For the purpose of the discussion, writings testamentary in character are treated as including all writings intended as testamentary dispositions of property, whether or not the same were effectual for that purpose. Accordingly, cases passing upon the question whether a testamentary disposition which fails for some reason can be treated as a writing, for the purpose of revoking the instrument, have been excluded. In other words, the discussion is confined to such writings as were intended solely as revoking instruments, or were urged to be such.

When it is alleged that a will duly executed has been revoked, two questions are raised: (a) Did the testator intend to revoke it? (b) did he comply with the statutory requisites prescribed for the revocation of wills? These questions will be discussed in the above order.

*II. Intent of testator.*

It is essential to the revocation of a will that the testator intended to revoke it. Not all writings that have been urged as a revocation have evidenced a clear intent to revoke the will. A letter written by the testator to his wife, who was the chief beneficiary of his will, advising and recommending certain dispositions of the property, was held not to be a revocation of any of the devises in the will, in *Thruston v. Prather* (1904) 25 Ky. L. Rep. 1137, 77 S. W. 354. A will is not revoked by an interlineation by the testator after its execution, stat-

3 L.R.A.—53.

## III. 2—continued.

- c. Writing on will:
  - 1. In general, 837.
  - 2. As a cancelation, 839.
  - 3. Writing in connection with some act of cancelation, 843.

ing that "this includes all insurance policies which are or may be upon my life," which is signed by the testator. *Re Ballard* (1916) — Okla. —, 155 Pac. 894. A letter sent to an attorney, directing the destruction or cancelation of a will, does not amount to a revocation unless the cancelation or destruction is carried into effect, where the testator did not intend by the letter an immediate exercise of his right to revoke his will by an instrument in writing executed in the same manner necessary for publishing a new will. *Tynan v. Paschal* (1863) 27 Tex. 287, 84 Am. Dec. 619. A power of attorney executed by the testator to his wife is a matter of no consequence, and can in no sense be given effect as a revocation of a prior duly executed will. *Re Kilborn* (1907) 5 Cal. App. 161, 89 Pac. 985.

An indorsement, without date, in the testator's handwriting, upon the blank leaf of a sheet upon which the will is written, in the following words: "This will is intended to be altered, and will be,—time is given. W.," is not a revocation of the will. *Ray v. Walton* (1819) 2 A. K. Marsh. (Ky.) 71. The court argues that the words, "this will," import, "not an extinction, but a recognition of it as a will; and the subsequent words, 'is intended to be altered,' that it is to remain in the character in which it is recognized by the words preceding, viz., as a will, until the alteration is made; and this import is strengthened by the words which follow, viz., 'and will be, time is given.' The fair import of the sentence is, we think, that the testator contemplated, not a revocation, but an alteration of some of the provisions of this will, but intended that it should

be considered his will until he should alter it."

In *Griffin v. Griffin* (1790) 4 Ves. Jr. 197, note, 81 Eng. Reprint, 107, note, a paper begun by the testator several days before his death,—days in which he was capable of business,—was held not to be a revocation of his will. It does not appear in the report of this case what the contents of the paper were; the court states that the presumption of law is that he never meant to finish the paper, or that it was intended only as a draft for consideration.

It does not appear in *Durance's Goods* (1872) L. R. 2 Prob. & Div. (Eng.) 406, 41 L. J. Prob. N. S. 60, 26 L. T. N. S. 983, 20 Week. Rep. 759, *infra*, whether the person to whom the testator wrote actually destroyed the will. In that case, the letter, directing the brother to "get my will from Mr. Denman, which please burn as soon as you receive, without reading it," was held to be a revocation of the will.

See the writing involved in *Brown v. Thorndike* (1834) 15 Pick. (Mass.) 388, which is held to be an actual instrument of present revocation, by which the will was legally revoked, and not a mere declaration of an intent to revoke by some future act.

The intent to revoke may be dependent upon the belief that another will has been executed, in which event, in case the subsequent will fails, there has been held to be no revocation. *Strong's Appeal* (1906) 79 Conn. 123, 6 L.R.A. (N.S.) 1107, 118 Am. St. Rep. 138, 63 Atl. 1089. In this case the revocation of a will was held not to be effected by tearing it and writing upon it, "Superseded by the written one," where the written one was ineffectual because not properly executed, and it was plain that the revocation proceeded upon the presumption that the written one was valid.

### III. Statutory requisites.

#### I. In general.

If the writing does evidence an intent to revoke the will, the question then arises whether it is a compliance with the statutory requisites. At com-

mon law, any act or declaration of the testator which evidenced an intent to revoke a will was effectual for that purpose. *Clark v. Eborn* (1813) 6 N. C. (2 Murph.) 234; *Billington v. Jones* (1901) 108 Tenn. 234, 56 L.R.A. 654, 91 Am. St. Rep. 751, 66 S. W. 1127. Even a parol declaration was held sufficient. *Card v. Grinman* (1823) 5 Conn. 164; *Burton v. Gowell* (1592) Cro. Eliz. pt. 1, p. 306, 78 Eng. Reprint, 557. But this note does not deal with methods other than writing, hence revocation by oral declarations have, in general, been excluded.

An unsigned writing was held sufficient in *Clark v. Eborn* (N. C.) *supra*. In *Billington v. Jones* (1901) 108 Tenn. 234, 56 L.R.A. 654, 91 Am. St. Rep. 751, 66 S. W. 1127, a will was held revoked by writing upon it in pencil, and signing a declaration to the effect that "this will is null and void," and stating to witnesses that it is killed, and filing it away where it remains for a number of years until the testator's death, without referring to it more than once, and then merely by stating that testator would never have any peace about it.

The statute governing the decision in *Witter v. Mott* (1816) 2 Conn. 67, is not set out. A will was there held revoked by a declaration written and subscribed by the testator on the back of his will, "This will is invalid." To the above statement the testator had added a reason for declaring the will invalid, but the court states that the reason which the testator had given could not change the nature of the act; that where the words are plain and unequivocal, there is no room for construction or conjecture as to the intent, on the question of statutory compliance. It is stated not to be necessary "that the revocation of a will should be attested by three witnesses. It is sufficient to be in writing; and then it may be proved like any other instrument." In *Card v. Grinman* (Conn.) *supra*, holding that a will may be revoked by an oral declaration of the testator that it is not his will, and an order that it be destroyed, although the devisees named therein took it out of his possession,

and induced him to believe that they had destroyed it, but fraudulently preserved it, the court, referring to the statement in *Witter v. Mott* (Conn.) supra, to the effect that it is sufficient for a revocation to be in writing, states that the expression as to writing must have been the individual opinion of the judge, as between a writing unwitnessed and unsealed, and a declaration proved by parol, there is no essential difference, neither of them being specialties, but both evidences precisely of the same grade.

It seems that the statute governing the case of *Brown v. Thorndike* (1834) 15 Pick. (Mass.) 388, required no attestation for the revocation of a will of personal property. In this case words written on the will, immediately under the attestation, to the effect that "it is my intention at some future time to alter the tenor of the above will; or rather to make another will; therefore, be it known, if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect," signed by the testator, were held to be a revocation of the will.

A will was held to be revoked in *Walcott v. Ochterlony* (1837) 1 Curt. Eccl. Rep. (Eng.) 580, where a letter was written for a testatrix to a relative, asking him to write the custodian of the will, "and request him to destroy" it; that she "wishes it might be destroyed without delay," and where shortly thereafter a letter was written for the testatrix directly to the custodian, mentioning the previous letter to the relative, and stating that the writer was desired to ask the relative "to write, and request you to destroy" the will, whereupon the custodian indorsed on the envelop of the will, "This will to be destroyed as per Mrs. Boyle's letter to Captain Walcott and J. George," and sent the will to the testatrix, who died before its arrival, in the intention to revoke the will and in the belief that it was revoked. The theory of the court is not altogether clear. After stating that the Statute of Frauds provides that no will in writing of personal estate shall be repealed, nor any clause or

bequest therein altered or changed by any words, the court asks the question, Is this a revocation by words? In answering this, the court states: "I apprehend not; the deceased did not say, 'I revoke my will,' but in effect says, 'Mr. George is in possession of my will; I am not able to destroy it myself, but I desire that he will destroy it,' and this amounted to a present intention absolutely to revoke, which was written down at the time, approved of by the deceased, and by her direction communicated to the person in whose custody the will was. It was an absolute direction to revoke, reduced to writing in the deceased's lifetime. There is nothing in the Statute of Frauds which prevents such revocation having effect, and it is clear that, prior to that statute, a will might be so revoked."

## 2. Ordinary form of statute.

### a. In general.

Three ways are provided in the most usual form of statute for the revocation of a will, viz.: (1) A subsequent will or codicil; (2) a writing executed with the formalities essential to the execution of a will; and (3) by burning, tearing, or canceling the will with intent to revoke the same. The language used in the provision as to the third method varies in different jurisdictions. The English Wills Act (§ 20) and the Ontario Act (Wills Act of Ontario, Rev. Stat. [Ont.] 1897, chap. 128, § 22) provide that "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some item declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence, and by his direction with the intention of revoking the same." The words, "otherwise than as aforesaid," in the first part of the above statute, refer to revocation by marriage or change of circumstances. Revocation by canceling is absent from this provision. The



variations in the statute emphasize the necessity of consulting the contemporary statute in the jurisdiction in which the question arises.

With the first of the above methods of revocation, that is, by subsequent will or codicil, this note has nothing to do; as above stated, the note is confined to writings not testamentary.

The writings which have been urged as revoking instruments have been divided, for the purpose of this discussion, into two classes, viz.: (a) Writings separate and apart from the will, and (b) writings upon the will.

*b. Writing separate from will.*

It is clear under the above statute, and it has been so held, that if there is a separate writing, showing an intention to revoke the will, which does comply with the necessary formalities, the will is revoked. *Seymour's Succession* (1896) 48 La. Ann. 993, 20 So. 217; *Bayley v. Bailey* (1849) 5 Cush. (Mass.) 245; *Re Backus* (1900) 49 App. Div. 410, 63 N. Y. Supp. 544; *Chestnut v. Capey* (1915) 45 Okla. 754, 146 Pac. 589; *Eyre's Goods* [1905] 2 Ir. R. 540.

Thus, it may be revoked in a deed of trust which contains express words of revocation. See *Re Backus* (1900) 49 App. Div. 410, 63 N. Y. Supp. 544. A will was held revoked in *Eyre's Goods* (Ir.) *supra*, by a letter directed to a daughter of the testatrix, stating: "My will is to be destroyed, and your father's kept safe," signed by the testatrix, and properly witnessed.

See *Bayley v. Bailey* (1849) 5 Cush. (Mass.) 245, *infra*.

If the writing does not comply with the statute it does not revoke the will. Thus, a separate paper declaring a revocation of the testator's will, signed by him, but not attested as required by statute, does not revoke the will. *Nelson v. Public Administrator* (1852) 2 Bradf. (N. Y.) 210.

In the execution of a separate writing, it is not necessary to declare it to be a last will and testament, although this is one of the formalities required by statute in the execution of wills. *Bayley v. Bailey* (Mass.) and *Re Backus* (N. Y.) *supra*. The court in *Re Backus* (N. Y.) *supra*,

dealing with a revocation in a deed of trust, says that "the statute permitting a revocation of a will by 'some other writing,' and requiring that it should be executed with the same formality as a will, is not to be construed as meaning that the other writing, which is not a will, should erroneously be characterized as such by the person executing it. In other words, it would be an unreasonable construction to give the statute, to hold that every literal and verbal expression required in the publication of a will should be applied to other paper writings, when it is evident that such language, when so used, would be an untrue statement, and not applicable or germane as indicative of the character of such other writing. . . . What is evidently meant by the statute is that the formality required in the making of a will shall be applied to a paper of revocation, so far as the latter, from its nature and character, is susceptible of having the same formality observed."

Under a statute authorizing the revocation of a will by a writing executed with the formality necessary for the execution of a will, it is not essential to a valid revocation that there be an affirmative disposition of property in the writing; a writing merely revoking the will is sufficient. *Seymour's Succession* (1896) 48 La. Ann. 993, 20 So. 217.

A separate writing need not be probated. *Rudy v. Ulrich* (1871) 69 Pa. 177, 8 Am. Rep. 238 (obiter). In fact it has been held not to be entitled to probate. *Fraser's Goods* (1869) L. R. 2 Prob. & Div. (Eng.) 40, 39 L. J. Prob. N. S. 20, 21 L. T. N. S. 680, 18 Week. Rep. 263. But there is some uncertainty about the probate of such writings. In *Hicks's Goods* (1869) L. R. 1 Prob. & Div. (Eng.) 683, 38 L. J. Prob. N. S. 65, 21 L. T. N. S. 300, letters of administration were issued with the revoking writing annexed, by the same judge who decided *Fraser's Goods* (Eng.) *supra*. In *Fraser's Goods* the judge states that, in the case of *Hicks's Goods*, the writing did, "perhaps, do something more than merely revoke the will, while in this case it stops at

a revocation." In *Durance's Goods* (1872) L. R. 2 Prob. & Div. (Eng.) 406; 41 L. J. Prob. N. S. 60, 26 L. T. N. S. 983, 20 Week. Rep. 759, a letter addressed to the testator's mother, and witnessed as required by law for a writing revoking a will, was held to be a revocation of the will, and also to be of a testamentary character, so that administration with the letter annexed was granted. In *Toomer v. Sobinska* [1907] L. R. P. (Eng.) 106, 76 L. J. Prob. N. S. 19, 96 L. T. N. S. 475, a grant of letters of administration was directed to go as upon intestacy, without annexing the paper revoking the will, but with the note that the grant was made in consequence of the execution of the revoking instrument. Administration was granted in *Hubbard's Goods* (1865) L. R. 1 Prob. & Div. (Eng.) 53, 35 L. J. Prob. N. S. 27, with a codicil annexed which purported to revoke previous wills. In this case, so far as appeared, there was no previous will to revoke.

A letter by a resident of Massachusetts while in the state of New York, directed to the custodian of his will, stating: "It is my wish that the will that I made be destroyed and my estate settled according to law," signed by the testator, and witnessed according to the law of New York relating to the execution of wills, so as to entitle it to probate in that state, was held to be a testamentary writing and entitled to probate in Massachusetts, where it operated as a revocation of the testator's will. *Bayley v. Bailey* (1849) 5 Cush. (Mass.) 245.

#### *c. Writing on will.*

##### *1. In general.*

It is clear that under the above statute a writing, even though it be on the will itself, which is not executed with the formalities requisite for the execution of wills, cannot revoke a valid will under the second method. This is conceded rather than decided in many cases. *Howard v. Hunter* (1902) 115 Ga. 357, 90 Am. St. Rep. 121, 41 S. E. 638; *Oetjen v. Oetjen* (1902) 115 Ga. 1004, 42 S. E. 387. A statement to the effect that such a writing cannot revoke the will some-

times appears. Opinion of surrogate in *De lafield v. Parish* (1857) 1 Redf. (N. Y.) 1, decision of surrogate affirmed by the supreme court in (1858) 42 Barb. 274, and by the court of appeals in (1862) 25 N. Y. 9. And in other cases this provision of the statute is stated to be mandatory. *Re Akers* (1902) 74 App. Div. 461, 77 N. Y. Supp. 643, affirmed in (1903) 173 N. Y. 620, 66 N. E. 1108.

Accordingly, it is held that a writing by the testator on the will, to the effect that it is "canceled," or is "void," or is "revoked," or is "obsolete," which is not executed with the formalities necessary for the execution of a will, does not, as a writing, revoke the will. *Howard v. Hunter* (Ga.) supra (writing across back of paper, and signing, the words: "This will is made void by one of more recent date"); *Oetjen v. Oetjen* (Ga.) supra (entry upon the last page of a will, and signing, of the words: "This my will and testament is of no avail and null and void"); *Re Akers* (N. Y.) supra; *Re Miller* (1906) 50 Misc. 70, 100 N. Y. Supp. 344; *Re Barnes* (1912) 76 Misc. 382, 136 N. Y. Supp. 940; *Re Hildenbrand* (1914) 87 Misc. 471, 150 N. Y. Supp. 1067; *Lewis v. Lewis* (1841) 2 Watts & S. (Pa.) 455 ("obsolete" on the margin of the first page); *Warner v. Warner* (1864) 37 Vt. 356; *Brewster's Goods* (1859) 6 Jur. N. S. (Eng.) 56, 29 L. J. Prob. N. S. 69; *Fischer v. Popham* (1875) L. R. 3 Prob. & Div. (Eng.) 246, 38 L. T. N. S. 281, 28 Week. Rep. 683; *Adamson's Goods* (1875) L. R. 3 Prob. & Div. (Eng.) 253; *Re Mulholland* (1915) 34 Ont. L. Rep. 242, 24 D. L. R. 785. See *De lafield v. Parish* (N. Y.) supra.

See *Gosling's Goods* (1886) L. R. 11 Prob. Div. (Eng.) 79, 55 L. J. Prob. N. S. 27, 34 Week. Rep. 492, 50 J. P. 263, *infra*.

In *Re Akers* (N. Y.) supra, there appeared upon a will, written upon legal cap paper to the left of the usual marginal line, words in the handwriting of the testator to the effect that "this will and codicil is revoked, Jany. 14/96," and under this line was the signature of the testator. None of

the words of this sentence and signature was written across, nor did they come in contact with any of the writing of the will, except that a small portion of the lower extremity of some of the letters in the signature crossed three of the lower extremities of the letters on three lines; the words and letters, however, were perfect in themselves and not in the slightest degree obliterated; there appeared two pages on which a codicil had been written, and on the left-hand margin of the second page of what purported to be the codicil, but in no wise crossing or canceling the writing thereon, appeared the following: "This codicil and will is revoked. Jany. 14/96," and this was signed by the testator. On the back of the first page of what purported to be a codicil were written the words, "Revoked, Jany. 14, 1896," and this was signed by the testator. This writing was held not to be a compliance with the statute, and therefore not a revocation of the will. In *Re Hildenbrand* (1914) 87 Misc. 471, 150 N. Y. Supp. 1067, the drawing of diagonal lines across a paragraph in a will, and writing the word "canceled" upon it in ink, are held not to amount to a revocation of this paragraph in writing within the meaning of such a provision in a statute. Drawing a pen through the various letters in his signature by a testator, and writing below the signature, "I hereby revoke this will, made by me, May 28th, 1885," and dating and initialing the same, which writing was witnessed by the testator's wife, do not constitute a writing executed in accordance with the Ontario Statute of Wills, and therefore cannot revoke the will. *Re Mulholland* (1915) 34 Ont. L. Rep. 242, 24 D. L. R. 785.

A writing upon the will itself, declaring that clauses of the will relating to a specified beneficiary should cease and be void, which writing was signed by witnesses, but not by the testator, has been held ineffectual as a revocation. *Hilton v. King* (1682) 3 Lev. (Eng.) 86.

Some cases have considered only in a general way whether the writing

effected a revocation, and not with reference to specific provisions of the statute. In *Brewster's Goods* (1859) 6 Jur. N. S. (Eng.) 56, there was held to be no sufficient act in law to effect a revocation where the testator wrote the words, "Canceled—Wm. B.," across each signature to the will, and, below the names of the attesting witnesses, had written the words: "Mem.—I hereby declare this will revoked, and altogether canceled, the bequest and other arrangements being rendered nugatory by the sale of my property. . . . I intend to make another will, whereupon I shall destroy this. Wm. Brewster." In *Fischer v. Popham* (1875) L. R. 3 Prob. & Div. (Eng.) 246, 33 L. T. N. S. 231, 23 Week. Rep. 683, a will and codicil were held not revoked where it appeared that the signature of the testatrix at the foot of the first, third, and last sheets of the will had been struck through with a pen, and a memorandum in her handwriting added on the last sheet, to the effect that "I, Elizabeth Hogg, declare this will to be null and void. Clewer Hill House, May 28, 1873," and the signature of the testatrix at the end of each sheet of the codicil had been crossed out, and a memorandum written under the last, to the effect that "this will is null and void. Elizabeth Hogg," neither memorandum being attested. A will as originally written was admitted to probate in *Adamson's Goods* (1875) L. R. 3 Prob. & Div. (Eng.) 253, although some passages had been struck through with a pen, and opposite to these was written, "Canceled. J. A." words which had also been written opposite to another passage, which was not struck through.

But in *Gosling's Goods* (1886) L. R. 11 Prob. Div. (Eng.) 79, where the testator had obliterated by means of thick black ink marks the whole of the first codicil to his will, including his own signature and the subscriptions of the attesting witnesses, and had written at the foot of the obliterated codicil the following words: "We are witnesses to the erasure of the above, October 10, 1881," this writing being signed by two witnesses, and the sig-

nature of the testator appearing in conjunction therewith. The court, in holding that the codicil was revoked upon a motion on behalf of the executors to declare that the words were a writing declaring an intention to revoke, within § 20 of the Wills Act, states: "The intention of the testator is so manifest, and the writing, though it does not come up quite to the letter of the statute, is so clearly within its intention that I grant the application and exclude the first codicil from probate."

### 2. As a cancelation.

In many of the cases in which there was a writing upon the will itself of some word or words indicating an intent to revoke the will, it has been urged that this amounts to a cancelation within the meaning of the statute providing for this method of revocation, and therefore revokes the will, although the writing is not executed with the necessary formalities for the execution of wills. As subsequently appears, a majority of courts deny this contention. It is held that a revocation by cancelation cannot result, even though there is an intent to revoke, unless some material portion of the will is obliterated or canceled. *Howard v. Hunter* (1902) 115 Ga. 357, 90 Am. St. Rep. 121, 41 S. E. 638; *Oetjen v. Oetjen* (1902) 115 Ga. 1004, 42 S. E. 387. Again, it has been stated that there can be no such thing as the cancelation of an instrument, either as a physical fact or as a legal inference, unless the instrument itself is in some form defaced or obliterated. This court continues: "A mere writing upon a will, which does not in any wise physically obliterate or cancel the same, is insufficient to work a destruction of the will by cancelation, even though the writing may express an intention to revoke and cancel." *Re Akers* (1902) 74 App. Div. 461, 77 N. Y. Supp. 643, affirmed in (1903) 173 N. Y. 620, 66 N. E. 1103. And see *DOWLING v. GILLILAND* (reported herewith) ante, 829.

Accordingly, a writing upon the will of words to the effect that the will is "revoked," or "made void," or is

"obsolete," in such a way that there is no obliterating or canceling or destroying of any words of the will itself, is held not to be a canceling and therefore not to be a revocation. *Howard v. Hunter* (Ga.) supra (the words: "This will is made void by one of more recent date," were written on the back of the will as folded and signed by testator); *DOWLING v. GILLILAND* (reported herewith); *Re Akers* (N. Y.) (see supra for facts); *Re Miller* (1906) 50 Misc. 70, 100 N. Y. Supp. 344 (holding a statement signed by testator, indorsed on the back of a will, to the effect that it is revoked, not a cancelation); *Lewis v. Lewis* (1841) 2 Watts & S. (Pa.) 455 (testator wrote word "obsolete" on margin of first page). But see *Evans's Appeal* (Pa.) infra; *Ladd's Will* (1884) 60 Wis. 187, 50 Am. Rep. 355, 18 N. W. 734, where testatrix, whose will was written on the first page of a double sheet of paper, wrote and signed on the fourth or outside page, the words, "I revoke this will."

It is stated, obiter, in *Re Shelton* (1906) 143 N. C. 218, 55 S. E. 705, 10 Ann. Cas. 531, to be clear that the words, "This will I this day make void and of no effect," dated, signed, and written in ink on the margin of the will, do not revoke the same by canceling, tearing, or obliterating it; but it was found as a matter of fact, in this case, that the writing alleged was not made by the testator.

In some cases the words were written across words in the will, and then the question has been held to be whether the words so written across were material.

There was held to be no cancelation of a material portion of a will, by writing across a word in a sentence in the last line of the will, which stated merely that a word in the will had been changed before signing, the words, "This my will and testament is of no avail, and null and void," even if the mere writing across a word in a will, leaving the same perfectly legible, can be said to be an obliteration or cancelation within the meaning of

the statute. *Oefjen v. Oefjen* (Ga.) *supra*.

See *Re Akers* (N. Y.) *supra*, and *DOWLING v. GILLILAND* (reported herewith) *ante*, 829.

But if the words indicating an intent to revoke the will are written upon the writing which composes the will in such a manner that many words of the will are crossed there is a cancellation. *Re Barnes* (1912) 76 Misc. 382, 136 N. Y. Supp. 940. In this case there were written with red pencil upon the face of the will the words, "Null and void," which were signed by the testator and dated. None of the words in red pencil extended to the margin of the page, but every sentence of the will which contained any disposition of property was in some part intersected by the legend of revocation, except that the new writing did not reach the words with which the first sentence closed, viz., "revoking all former wills by me at any time made." The signature upon the original writing was touched by a part of the signature to the revoking phrase. In holding that this amounted to a cancellation, the court states that the "marks intersecting the face of the will are such in extent and material that they would undoubtedly be regarded as an act of cancellation, if they did not take the form of written words, and the intent of revocation should appear. Have they any less or other significance if they are found to assume a legible character? . . . The only office which lines upon the face of a will need fulfil, in order to invoke the warrant of the statute quoted *supra*, is that they shall be a manual indication by the testator of the mental conception that he intends to annul his will. Their form and extent or other essence are all totally unimportant, so long as they are a physical token of the inward intent. If the marks, in the light of all surroundings, symbolize this purpose, their mission is performed, whether they be plain or fantastic, mechanical or verbally intelligible. Though traced in the form of letters, the lines in this case were drawn across the will with

the statutory intent that it should thereby become null and void."

In *Re Wellborn* (1914) 165 N. C. 636, 81 S. E. 1023, there seems to have been no question but that the words, "Canceled by Isaac C. Wellborn," in the handwriting of the deceased across the will, amounted to a cancellation, at least of the part over which it was written, the question being whether it did not amount to a cancellation of the entire instrument. The same words were written on two parts of the will. The latter place at which they appeared contained the clause designating the executors and including the date. There was also a tear, indicating an intention to revoke, in this case.

Interlineations and erasures, made in a will by direction of the testator with the purpose of revoking it, were held to amount to a canceling or obliterating of the will, sufficient to carry out the intention of the testator, in *Bohanon v. Walcot* (1836) 1 How. (Miss.) 336, 29 Am. Dec. 631.

As shown above, the Ontario Wills Act does not provide for revocation by cancellation, but does provide for revocation by "burning, tearing, or otherwise destroying the same." The acts done by the testator in *Re Mulholland* (1915) 34 Ont. L. Rep. 242, 24 D. L. R. 785, *supra*, were held not to amount to a revocation within the meaning of the words, "otherwise destroying the same," as used in the act.

The foregoing cases require that some part of the written words making up the will be defaced or obliterated. A contrary view has been taken, and it is held in Pennsylvania and Vermont that it is a cancellation within the meaning of the statute, for a testator to write, "canceled," or "canceled and annulled," or words of similar import in such a position as to become an inseparable part of the instrument, although none of the writing of the will is touched thereby. *Evans's Appeal* (1868) 58 Pa. 238; *Warner v. Warner* (1864) 37 Vt. 356.

Not all the cases adhering to the above theory, that the writing of such words upon the will in such a way as not to deface or obliterate the writing

does not constitute a cancelation within the meaning of the statute, involved facts which would bring them within the rule of the Pennsylvania and Vermont cases. This is true of the case of *Ladd's Will* (Wis.) *supra*, but the Wisconsin court expressly disapproves of the theory of *Evans's Appeal* and *Warner v. Warner*.

As stated, the writing involved in the Pennsylvania and Vermont cases was upon such parts of the will as to be inseparable from it, and this is a condition of such writing being a cancelation, according to both courts. Both the supreme court of Vermont and that of Pennsylvania distinguished the cases at bar from that of *Lewis v. Lewis* (1841) 2 Watts & S. (Pa.) 455, by saying that, in the *Lewis Case*, the word "obsolete" was so placed upon the paper that it might be separated and leave the written part of the will entire and intact, while, in the *Warner Case*, the supreme court of Vermont states that the act of the testator was done not only upon the paper on which the will was written, but upon such a part of it as always to go with that part of the will which contained the disposition of the property,—not indeed on the face, but on the back of such disposition.

The facts in the Pennsylvania case detract somewhat from that case as authority for the rule announced therein. The will there involved was signed twice by the testator, once in the ordinary position, and once after a provision added to the will. There was also a codicil signed by the testator. In canceling the will the testator tore the will in a number of places, drew a line through the last of his signatures to the will proper, also drew a line through his signature to the codicil, and wrote the word "Canceled" immediately under this signature, drew a line through the word "will," indorsed on the instrument, and wrote the word "Canceled" under this word. The court considers the case without reference to any act of tearing, and alone with reference to the effect of writing the word "Canceled" under the word "will," which

had been indorsed upon the instrument, and through which the testator had drawn a line when he had written the same word "Canceled" under a codicil to the will, and had drawn a line through his signature thereto, and also had drawn a line through the last of two signatures to the will. As just stated, the court considers the question of revocation without reference to any act of tearing, and, after referring to the facts as above stated, adds, "Was this cancelation? Were the question presented to the common mind the verdict would not be a moment in doubt. There are both the intent to cancel and the act done in pursuance of it. True, there was no revocation or repeal by mere force of the word 'canceled.' Neither that word, nor any other, would suffice if written on a separate paper. But I think a repeal is effected by the act of writing upon the will itself a word that manifests an intention to annul it. Such an act is a mode of repeal, of the second kind [that is, by 'burning, canceling, or obliterating, or destroying the' will] recognized by the legislature, a thing done to the paper on which the will is written. It would be strange if drawing ink lines across the will, without obliterating a word, should amount to cancelation, and writing on it words that leave no doubt of an intent to cancel should be anything less. It is plain that cancelation does not require a signature under the statute, nor is any form of cancelation required." The court, then, after referring to cases from other jurisdictions, refers to *Lewis v. Lewis* (Pa.) *supra*, and in distinguishing that case says that "it should be observed that though the word was written upon the paper on which the will was written, it was placed where it could have been detached without defacing the instrument. It might have been separated and the will itself remain intact. In this respect it differed from the case now before us. . . . It does not hold that a will cannot be canceled by making marks upon it, inseparable from the will, clearly with an intent to cancel, if the marks consist of letters and words rather than lines drawn

across the instrument. It does not rule that cancelation is necessarily erasure or defacement. What would have been the judgment if, instead of the word "obsolete," the word "canceled" had been written, and written where it could not be removed and leave the will entire, can hardly be gathered from the case." In defining the meaning of cancelation, the court, after stating that the statute does not declare what shall amount to a cancelation, continues: "The word is not a technical one, and therefore the legislature must be presumed to have used it in its ordinary and commonly understood sense. It amounts to nothing to show what the original etymological meaning of the word 'cancel' was. Long before the statute was passed it had acquired an accommodated meaning, plain to the common understanding. To most minds it did not suggest a thought of its primary signification. No one supposed that when a canceled bond or note or power of attorney was spoken of, it was intended exclusively a bond, note or power over which lattice-work lines had been drawn. No one would have doubted that drawing parallel lines or curved lines across the bond, or a single line through its signature, would amount to cancelation, if done with the intent to annul the instrument. Nor would anyone have doubted that writing the word 'canceled,' or the word 'annulled,' upon any other instrument than a will, would be an act of cancelation and effective as such, if done by one who had authority to destroy it, and with an intent to destroy. The reason is that the act puts the instrument into such a condition that it shows on its face its invalidity, the moment it is produced. It is a common ordinary mode in which writings are annulled, and the act of cancelation being palpable, and inseparable from the writing, there can be no mistake in regard to an executed intention to render it of no effect. How, then, can it be maintained that the word 'canceling' was used in the statute in any peculiar sense? Why, as it confessedly may be in case of a bond, note, check, letter

of attorney, or any other instrument, may not a will be canceled, not by words alone, not by words in writing alone, but by an act done to the will which stamps upon it an intention that it shall have no effect, though the act done be not complete obliteration or physical destruction? Can it be that a will may be repealed by straight or crooked lines drawn upon it, and yet not by lines in such form as to express words? Putting the one on the paper is as much an act done to it as is writing the other, and no more, but the latter may indicate the purpose of the act more clearly than the former can. It is true we have to do with the meaning of the words 'canceling,' 'obliterating,' and 'destroying,' as used by the legislature, but there is nothing in the statute that requires us to attach to them any unusual signification. . . . Revocation by cancelation, then, is not to be understood to mean exclusively drawing cross lines upon the paper, but it means any act done to it which, in common understanding, is regarded as cancelation when done to any other instrument." The court concludes that an act which would be a cancelation of a bond must be a cancelation of a will, that the court is "not at liberty to restrict the act by reading it, 'canceling by defacing some material and essential part of the script.' That would make cancelation synonymous with obliteration."

In *Warner v. Warner* (1864) 37 Vt. 356, the will was written upon a sheet of foolscap paper, and covered the first page and about one third of the second page. Upon the last half of the second page were written the following words: "This will is hereby canceled and annulled in full this 15th day of March, in the year 1859," and several lines lower down upon the page were the following words, erased: "In testimony whereof I here I have." Written lengthwise of the paper, as folded, and below the fling of the paper upon the back, being the outside on the fourth page, were these words: "Canceled and is null and void. I. Warner." The court states the case to be: "What amounts to

canceling,—how, with reference to the text of the instrument, must the act be done,—not as to the shape or character of the marks, but where must they be located, is the main point of debate in the present case." In discussing the meaning of cancellation the court states, generally, that "the net result of all the cases and all the textbooks, as well as the reason of the thing, and the appropriate analogies, seems to be this,—that when the instrument is so marked by the maker of it as to show clearly, whenever it is produced, that the act was designed by him to be a canceling, that act becomes effectual, by force of the statute, as a revocation of the will by canceling." Referring to the writing upon the will in the case at bar, the court states that "in the present case the act of the testator was done, not only upon the paper on which the will was written, but upon such a part of it as always to go with that part of the will which contained the disposition of the property, not indeed on the face, but on the back of such disposition. It is obvious that the act itself was designed to constitute a revocation by canceling. This is not a mere memorandum or declaration, which, as such, operates a legal effect by force of the terms, but it was the performing of an act upon the instrument itself, which act operates the legal effect. If cross lines had been drawn over the face of the writing of the will, they would have been effectual, because they would have constituted an act done to the instrument, showing the intent of the testator, by that act, to destroy the validity of it. Instead of thus drawing lines, he equally performed an act to the substance of the instrument, and as inseparable from the written text as cross lines over its face, showing with even clearer certainty the intent by that act to destroy its validity. Instead of leaving the significance of informal marks to be fixed by the location they occupy, he formed the marks into letters and words expressive of their significance, and as effectually placed them upon the instrument as if they had been made upon

the face of the script of the will. If he had drawn a slight mark from the top to the bottom of the writing, though that would not have been cancelli within the etymological and primary meaning of the term, still it is conceded that it would have been a canceling of the will, if done with that intent, within the legal meaning of that term. We think that writing upon the will, as was done in this case, as nearly answers to the primary sense of that term, as such mark would, and, having regard to the ground on which effect is given to an act of cancellation, such writing answers every reason and requisite of the law."

### *3. Writing in connection with some act of cancellation.*

Where words indicating an intent to revoke are written upon the will and, in addition thereto, there is some other act of cancellation, the written words are competent to show the intent with which the other act was done. *Semmes v. Semmes* (1826) 7 Harr. & J. (Md.) 388; *Kirkpatrick's Will* (1871) 22 N. J. Eq. 463; *Smith v. Runkle* (1915) — N. J. —, 97 Atl. 296, affirmed in (1916) 86 N. J. Eq. 257, 98 Atl. 1086; *Re Alger* (1902) 38 Misc. 143, 77 N. Y. Supp. 166.

Thus, in *Semmes v. Semmes* (Md.) *supra*, where a testator canceled his own signature and those of the subscribing witnesses, by drawing a pen a number of times and in different directions across such signatures, and also wrote at the foot of the paper the words, "In consequence of the death of my wife, it is become necessary to make another will," there is held to be a revocation of the will. In *Kirkpatrick's Will* (1871) 22 N. J. Eq. 463, a testatrix drew lines across two of the legacies in her will, and added on the margin memoranda to the effect that she wished to erase these parts. The words, "Canceled October 5, 1912, Wm. Runkle," written on the margin of a paragraph which is obliterated by lines drawn across the written provisions therein, may be accepted as a contemporaneous expression of intention to cancel



and revoke the bequest. *Smith v. Runkle* (1915) — N. J. —, 97 Atl. 296, affirmed in. (1916) 86 N. J. Eq. 257, 98 Atl. 1086. The words, "Canceled by death," written across the body of a will, and signed by the testatrix, were stated in *Cummins's Estate* (1908) 37 Pa. Super. Ct. 580, not to have been written to effect a cancellation, but to give a reason for her action in canceling by obliteration.

In some such cases there has been held to be a revocation, although the cancellation marks were not sufficient of themselves to indicate an intention to revoke the entire instrument, as distinguished from a part; an intention to revoke the entire instrument

is held to be shown by words written at the foot of the paper on which the will is written, stating that it was canceled by the testator. *Re Alger* (1902) 38 Misc. 143, 77 N. Y. Supp. 166.

But if the word "canceled" is written so as to indicate an intent to revoke only a part of the will, its effect must be determined by the rule as to validity of partial revocation by burning, tearing, canceling, etc., and where partial revocation in this manner is not allowable no revocation results. *Re Hildenbrand* (1914) 87 Misc. 471, 150 N. Y. Supp. 1067; *Gugel v. Vollmer* (1883) 1 Dem. (N. Y.) 484. W. A. E.

**FIRST MORTGAGE BOND HOMESTEAD ASSOCIATION, Trustee, etc.,  
of Roberta Porter et al., Appt.,**

v.

**HERMAN G. MEHLHORN and Wife.**

*Maryland Court of Appeals — January 14, 1919.*

(— Md. —, 105 Atl. 526.)

**Judgment — collateral security.**

1. A judgment may be taken as collateral security for an existing debt or as security for future advances.

[See note on this question beginning on page 851.]

**Loan association — credit of sinking fund on bond.**

2. Although a loan association is, under its contract, the agent of members in accumulating a sinking fund to pay off the bond securing the loan to a borrowing member, and not of the one to whom the bond has been assigned, yet if, under the contract, it becomes, on default in payment, the agent of the bondholder to enforce the security given for his protection, it should credit the amount which has accumulated in the sinking fund upon the bond and not seek judgment for the face of the bond.

[See 4 R. C. L. 381.]

**Judgment — incorporation of agreement.**

3. When a judgment is entered as collateral security the substance of the agreement between the parties, or at least a reference to it, should be inserted by the clerk in his memorandum.

[See 15 R. C. L. 653.]

**— confession — credits.**

4. A loan association cannot enter judgment by confession for the face of the bond given by a borrower from it, where it has accumulated money in a sinking fund to be credited on the bond, even though the court would have power to compel the allowance of credits on the judgment after it was entered.

[See 15 R. C. L. 653.]

**Costs — refusal of judgment by confession — failure to dismiss case.**

5. Where a loan association has attempted to enter a judgment by confession against a member borrower for the amount of the bond given to secure the loan, the court may, upon refusal of the association to enter the case dismissed upon the court's refusal to permit entry of the judgment, allow defendant his costs.

[See 7 R. C. L. 783.]

APPEAL by plaintiff from an order of the Baltimore City Court refusing to enter judgment against defendants by confession, for the amount of a bond given to secure a loan, and from a judgment for defendants for costs. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. S. S. Field, for appellant:

The power of attorney, under which the attorney for the mortgagors appeared and confessed judgment, is contained in the mortgage, immediately ahead of the ordinary consent to a decree for the sale of the mortgaged premises.

This stipulation, like the consent to a decree immediately following it, was a part of the security upon the faith of which the mortgagors obtained the money.

Cross v. Moffat, 11 Colo. 212, 17 Pac. 771; 23 Cyc. 704; Byles, Bills, 8th ed. § 239; Norris v. Aylett, 2 Campb. 329.

It is a contract, entered into by the parties under seal, acknowledged before a notary, and recorded among the land records, and is lawful and binding.

23 Cyc. 703; 2 Chitty, Pl. 234; Bush v. Hanson, 70 Ill. 480; Cross v. Moffat, 11 Colo. 210, 17 Pac. 771; McClish v. Manning, 3 G. Greene, 223; Toledano v. Relf, 7 La. Ann. 60; Insurance Co. v. Barley, 16 Gratt. 363; Johns v. Fritchey, 39 Md. 258; Tyrrell v. Hilton, 92 Md. 177, 48 Atl. 55.

The rule that the power to confess a judgment must be clearly given and strictly pursued must not be applied to defeat the obvious intentions of the party granting the power.

Keith v. Kellogg, 97 Ill. 147; Holmes v. Parker, 125 Ill. 478, 17 N. E. 759; Holmes v. Bemis, 124 Ill. 453, 17 N. E. 42; Sunderland v. Braun Packing Co. 119 Md. 125, 86 Atl. 126, Ann. Cas. 1914D, 156; Tyrrell v. Hilton, 92 Md. 176, 48 Atl. 55; Johns v. Fritchey, 39 Md. 258; 23 Cyc. 703.

If any attempt were made by the association to collect the whole amount of the judgment without crediting the amounts which have been paid into the association, the court of law has adequate and ample powers to prevent that from being done.

Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 453; Krippendorff v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Gorsuch v. Thomas, 57 Md. 334.

Mr. O. Parker Baker for appellees.

Thomas, J., delivered the opinion of the court:

On the 25th of April, 1912, the appellees executed what is termed in the record an "application," by which they subscribed to fifteen shares "of series A and B stock in the First Mortgage Bond Homestead Association, Incorporated," and agreed to comply with the by-laws, rules, and regulations of the association, and "to pay all payments in monthly instalments of \$16.67 each on said stock as dues on the first Monday of each month in advance," and further agreed, in case a loan was procured by the association for them, that they would not withdraw any portion of the amount deposited by them until the maturity of the stock, "or when the mortgage is released," when the association or trustee named in the mortgage to be executed by them was authorized to pay to the holder or holders of the bonds, in the names of the appellees, all moneys due the appellees under the by-laws and necessary to redeem the bonds and procure a release of the mortgage; "also in the meantime to pay all interest coupons on the mortgage indebtedness, taxes, water rent, ground rent, or other charges due or to become due on the property" therein referred to, and to deduct the same from any payments or deposits made by them to the association. Following a formal application to the association to procure for them a loan of \$1,500, at 6 per cent interest, and an offer as security therefor of all moneys paid by them to the association, at No. 2016 St. Paul street, in Baltimore city, they agreed to execute a mortgage to the association as trustee, and to execute coupon bonds in such denominations as might be desired, secured by the mortgage, and payable to bearer or registered holder thereof at the maturity of the stock, or upon

default, not later than ten years after date. After certain statements or representations in regard to the property to be conveyed by the mortgage and charges against the same, the application contained, among others, the following additional stipulations:

"We further agree that said association shall be our agent in the creation of the sinking fund to meet this loan, with no risk or responsibility on the part of the person or persons advancing the money for this loan in any manner, and that we will deposit in addition to the dues above mentioned on the first Monday of each month hereafter, the sum of \$7.50, as interest on said loan, to be paid by said association each six months to the holders of the securities, and the sum of \$16.25 as the expenses on said property to the parties legally entitled to receive the same, and such other sum as may be necessary.

"It is also understood and agreed that said association will invest and keep invested all moneys deposited by us, and after we have deposited as dues the sum of \$104 that the association will assume, if invested, the interest on this amount, and the same may be deducted from the monthly payments of the applicants, or added to the dues, or in such other manner as may be agreed upon from time to time.

"It is also understood and agreed that if we adopt the drop interest plan, we are not to share any of the profits of the association, and shall get credit for only such payments as we shall make as dues.

"It is further understood and agreed that if we should become in arrears in our monthly instalments of dues, interest, fines, expenses or any portion of either, or shall fail to pay any expense or public dues or charges on the property when due and payable, or shall fail to keep up the improvements on the property in their present condition, or make a false statement concerning said property herein, then the entire mortgage debt shall be deemed due

and payable, and any method may be pursued for the collection of the mortgage debt at the option of the trustee as may be enumerated in the mortgage."

On the same day the appellees executed a mortgage of their said property to the association as trustee, and also two bonds, one for \$1,000 and the other for \$500, payable to bearer or registered holder thereof, with interest at 6 per cent, payable semiannually from the 25th day of April, 1912, until the principal of the bonds was paid according to the terms of the application and mortgage, on surrender of the coupons at the office of the association.

The mortgage, after reciting that the appellees were members of the association; that they had subscribed to ten shares of series B stock and five shares of series A stock of the association; that they had filed with the association an application to secure for them a loan of \$1,500; that the association, relying upon the truth of the statements contained in the application, had procured the money applied for from divers persons; and that the mortgagors had executed their two coupon bonds for \$1,000 and \$500, No. 126 and No. 127, respectively, payable to bearer or registered holder thereof, with interest, at the maturity of the stock of the mortgagors, "not later than ten years from date, or upon default"—contained the following recital: "And in order to create a sinking fund with which to meet said bonds at maturity, the mortgagors have agreed in said application to deposit regularly on said stock monthly instalments of \$40.39 each, being principal, interest, and expenses, as particularly set forth in said application, which is hereby made a part of this mortgage, with said association as their depository, until their stock has matured (with no power of withdrawal in the mortgagors, and with no risk or responsibility on the part of the bondholders in any way), when it shall be paid by said association to the bondholders

upon presentation and cancelation of their bonds and coupons, or as hereafter provided; and in order to secure the prompt payment of said bonds and the interest coupons attached hereto, as they shall respectively become due and payable, the performance of the agreement to create a sinking fund and all other covenants and agreements contained in the application, the bonds, and this mortgage, these presents are executed."

The mortgage declared that the property thereby conveyed should be held by the association in trust for the benefit and security of the holders of the bonds and the enforcement of the payment of said bonds and interest thereon, "and the performance and compliance with the covenants and conditions of the mortgage, the application for this loan and the bonds which are secured hereby," and then provided "that if the said mortgagors, their heirs, personal representatives, and assigns, shall well and truly pay or cause to be paid, the aforesaid bonds, aggregating \$1,500, and all interest or coupons attached to said bonds, when and as they shall respectively become due and payable, and shall perform all the agreements contained in the application for this loan, the bonds, and the by-laws of said association, and all the covenants contained herein on their part to be performed, then this mortgage shall be void. And it is agreed that, until default be made in the premises, the mortgagors shall possess the aforesaid property upon keeping up the improvements on said property in their present condition, which they covenant to do; and paying in the meantime all fixed charges and expenses, which charges and expenses, mortgage debt, and interest the said mortgagors for themselves, their heirs, personal representatives, and assigns, do hereby covenant to pay when legally demandable, but should any of the statements contained in the application for this loan be untrue, or if default be made in the

payment of said bonds or the interest obligations attached thereto, or in the payment of the instalments of principal and interest in the creation of the sinking fund to meet the bonds and interest obligations attached thereto, as specifically set forth in the application for this loan and the by-laws at the time limited for the payment in said application or by-laws, or any part of either, or in any agreement, covenant, or condition contained in said bonds, application, by-laws, and this mortgage, then the entire mortgage debt shall be due and demandable."

The association was authorized by the mortgage in case of default to take possession of the property and to hold the same for a period not exceeding five years and to collect the rents, etc., and to deposit the net income therefrom, if any, with the association "the same as if the mortgagors had deposited under the terms of" the mortgage, and the mortgage also contained the following provisions for a judgment by confession and a decree for the sale of the property:

"And it shall be lawful for O. Parker Baker, Esq., or any attorney he may designate, of any court of record, to appear for the mortgagors in any court of law or equity having jurisdiction over mortgagors or their property, and waive all process and confess a judgment in favor of said trustee to the use of the holders of the bonds for the face value of all the bonds secured hereby, with accrued interest, and the cost of the proceedings.

"And the said mortgagors hereby consent that a decree may be passed for the sale of said property under the provisions of the law in such cases made and provided, or this mortgage may be foreclosed under any law or laws of the state of Maryland, either public, local, or general, or by the method usually practised by mortgagees in the city or county where this mortgage is recorded. In any method the attorney conducting the proceedings

shall be allowed a fee of \$25 in addition to usual commissions."

The bonds executed by the appellees referred to the application and to the terms of the mortgage, and also contained the following provision: "It is also understood and agreed by the mortgagors that they will create a sinking fund to meet the series of bonds and the coupons attached thereto, and will deposit with the First Mortgage Bond Homestead Association on the first Monday of each month the sum of sixteen sixty-seven one hundredths (\$16.67) as a part of the principal, and the sum of seven fifty-one hundredths (\$7.50) dollars as the accrued interest on this series of bonds, and also all other expenses and charges and costs to the trustee as are particularly set forth in the sworn application for this loan and the mortgage or deed of trust which secures this bond. This bond shall become due and demandable at a time when the mortgagors should have to their credit on account of the principal with the First Mortgage Bond Homestead Association, their agent or depository, a sum equal to the face value of all bonds issued in this series and secured by the mortgage or deed of trust aforesaid (if they continue to deposit regularly the instalments aforesaid with the association on the property aforesaid, with all interest charges and costs which have accrued thereon in accordance with the mortgage, or deed of trust, and the application for this loan now in the hands of the trustee, or upon default as prescribed by the mortgage or deed of trust, provided, however, the same may be paid off in other ways as prescribed by the mortgage, or deed of trust, and the application for this loan and upon the conditions therein recited, which application is hereby made a part of the entire obligation, the same as if it was recited in full herein). If default shall be made in the payment of any instalment of interest or principal or the charges and costs to the agent of the mortgagors aforesaid,

in the creation of the sinking fund to meet these bonds and coupons as aforesaid as they shall respectively be due and payable, or if said agent of the mortgagors aforesaid shall fail to turn over said funds when the coupons or bonds shall be due and payable under the terms hereof or either of them, then at the option of the holders or the trustee these bonds shall be due and demandable and may be enforced by sale of the property or otherwise as provided by the said mortgage or deed of trust and these bonds."

The bonds constituted and appointed Evelyn F. Belt agent and attorney for the appellees, with power and authority to appear for them and to confess a judgment in favor of the holder of the bonds for the amount due thereon, with interest and cost of suit.

On the 8th of March, 1918, the appellant, the First Mortgage Bond Homestead Association, trustee, filed in the Baltimore city court its declaration in a suit against the appellees, "to the use of Roberta Porter and Rachel E. Robey," the application, mortgage, and bonds executed by the appellees, an affidavit executed by George E. Robinson, attesting witness to the mortgage, that the debt created by the bonds was due to the holders thereof, and that the appellees had made default, and the following order signed by George E. Robinson, attorney for plaintiff, and O. Parker Baker, attorney for defendants: "Mr. Clerk: Docket this case by consent as of the February rule day, 1918; enter the appearance of O. Parker Baker for the defendants and enter a judgment by confession for the plaintiff (to the use of Roberta Porter as to \$1,000 and to the use of Rachel E. Robey as to \$500) for the sum of \$1,500 and the cost of the proceedings."

The declaration alleged that the defendants executed the bonds and the mortgage in which they agreed to pay the trustee \$40.39 per month with which to pay the interest on said bonds, the expenses on said

property, and to create a sinking fund to meet said obligations as they became due, and that by the terms of the mortgage and application upon default in the payment of said \$40.39 per month the whole of said obligations became due; that the defendants had defaulted, their last payment being on August 9, 1917; and that they had also failed to pay taxes for 1917 and the ground rent due September 1, 1917, and March 1, 1918, whereby the attorney for the defendants was authorized by the mortgage to confess judgment against them for the use of the holders of the bonds for the face value thereof, with accrued interest and costs, etc.

The court below passed an order refusing to enter the judgment by confession, and a docket entry shows that on the same day a judgment was entered for the defendants for costs. This appeal is from the judgment and from the order of court refusing to enter the judgment by confession.

By the terms of the application, mortgage, and bonds, the appellees were required to make monthly payments to the association as trustee, to provide a sinking fund for the redemption of the bonds, to cover the interest thereon and the expenses on the property conveyed to the trustee by the mortgage. According to the mortgage the aggregate amount to be paid monthly was \$40.30, and according to the application and bonds \$16.67 of that amount was to be applied to the sinking fund for the payment of the principal of the bonds, and \$7.50 was to be applied to the payment of the interest thereon as it became due. The application, mortgage, and bonds were executed on the 25th of April, 1912, and the narr. alleges that the appellees defaulted in the payment of the monthly dues of \$40.30, and that the last payment thereof was made by them on the 9th of August, 1917. It would seem, therefore, from the averments of the narr. that the appellees had complied with the terms of the application, mortgage, and

bonds until the default complained of, and had, during a period of five years from the date of the mortgage, etc., made the monthly payments required thereby, yet there was no account or statement filed with the declaration showing the credits to which the appellees were entitled, and the judgment by confession which the plaintiff sought to have entered was for the full amount of the principal of the bonds.

The appellant contends that the association, in receiving the monthly payments made by the appellees, acted as the agent of the appellees, and not as the agent of the holders of the bonds, and that the mortgage, as a part of the security for the loan, expressly authorized a judgment by confession in favor of the trustee for the use of the holders of the bonds for the face value of the bonds and accrued interest. Assuming that under the proper construction of the application, mortgage, and bonds, the association received the monthly payments provided for as the trustee and agent of the appellees, and that these payments, in so far as they were applicable to the payment of the principal of the bonds and interest thereon, were not, strictly speaking, credits on the bonds until so applied by the association under the arrangement and contract between the association, bondholders, and appellees, nevertheless, by the express terms of the mortgage, the entire mortgage debt became due and demandable upon default, and it is conceded by the appellant that thereupon the association became the trustee or agent of the holders of the bonds "to enforce the security given for their protection." One of the securities provided for the protection of the bondholders was the sinking fund to be created by the monthly payment to the association as trustee of the sums of \$16.67 and \$7.50. Therefore, when, upon default, the association became the trustee and agent of the holders of

the bonds "to enforce the security given for their protection," there is no reason why the appellees should not have been given credit for the amount in the sinking fund in the hands of the association available for the payment of the bonds.

Loan association—credit of sinking fund on bond.

In *Huston v. Ditto*, 20 Md. 305, Chief Judge Bowie said there were three kinds of judgments recognized by our courts, viz.: Interlocutory judgments, final and effective judgments, and judgments which were final, but not effective, and he quotes the statement in *Evans*, Pr. 339: "A judgment by confession is not, in our practice, considered an interlocutory judgment. . . . The confession is considered as an admission of the whole claim, unless it is made, as it frequently is, on terms. The terms, whatever they may be, are in that case reduced to writing and given to the clerk, who inserts them in his memorandum."

Mr. Poe states that a final and effective judgment was one where "nothing remained to be done to establish both the liability of the defendant and its precise extent," and he gives, as examples of judgments that were final, but not effective until the precise amount of the plaintiff's claim was ascertained: "A judgment by confession for the plaintiff without specifying the amount; a judgment by confession for the plaintiff 'on terms to be filed;' and a judgment for the plaintiff for so much as A. B. shall say is due." 2 Poe, Pl. & Pr. § 357.

But he says in § 357A that since the Act of 1864, chap. 311 (Code 1912, § 18, art. 26), "our common-law judgments are simply of two kinds, interlocutory and final."

Judgments, like mortgages, may be taken as collateral security for an existing indebtedness, or as security for future advances. Mr. Poe says that when a judgment is "entered for either of these purposes an express written

agreement should be filed in the case, to show the precise character and object of the judgment and prevent subsequent controversy," and, we may add, as suggested in *Evans's Practice*, supra, the substance of the agreement, or at least a reference to it, should be inserted by the clerk in his memorandum. 2 Poe, Pl. & Pr. § 401; *Neidig v. Whiteford*, 29 Md. 183, 184; *Robinson v. Consolidated Real Estate & F. Ins. Co.* 55 Md. 105.

—incorporation of agreement.

In the case at bar the judgment by confession which the appellant attempted to have entered was a final judgment determining the extent of the appellees' liability as of the date thereof to be the amount of the principal of the bonds; whereas, the application, mortgage, bonds, and declaration indicated that the appellees were entitled to credits not allowed in the judgment. If the judgment was intended merely as collateral security for whatever sum should be found, upon a proper accounting, to be due the association as the trustee and agent of the holders of the bonds, there should have been an agreement filed and a memorandum in the judgment to be entered to that effect.

The appellant contends that the entry of the judgment as proposed would not have exposed the appellees to the danger of any injustice to them, because, if the association had attempted "to collect the whole amount of the judgment without crediting the amounts which had been paid into the association, the court of law had adequate and ample powers to prevent that from being done." The power of the court in which a judgment is obtained to compel the entry of proper credits thereon, whether the defendant was entitled to the credits before or after the judgment was entered, is recognized in *Huston v. Ditto*, supra, and *Gorsuch v. Thomas*, 57 Md. 334. But the existence of such power furnishes no ground for entering

—confession—credits.

Judgment—collateral security.

the judgment by confession referred to in this case. On the contrary, if the court would have compelled the association to credit the amounts paid to it before attempting to collect the judgment, there is greater reason why the court should have refused to have the judgment entered when it appeared from the declaration and papers in the case that the plaintiff was not entitled to a judgment for the amount named in the order of counsel.

It follows from what has been said that the court below properly refused to enter the judgment by confession.

In regard to the judgment in favor of the defendants for costs, it is only necessary to say that the

application and bonds authorize the association, as trustee, in case of default to pursue such methods for the collection of the debt as were provided in the mortgage. The mortgage did not authorize the association to maintain a suit, for the use of the holders of the bonds, in a court of law for the amount due on the bonds. The case was on the docket, and as the court below properly refused to have the judgment by confession entered, in the absence of an order of plaintiff's counsel to enter the case dismissed, the defendants were entitled to a judgment for costs.

Costs—refusal of judgment by confession—failure to dismiss case.

Order and judgment of the court below affirmed, with costs.

## ANNOTATION.

### Entering judgment as collateral security.

- I. In general, 851.
- II. For existing indebtedness, 851.
- III. For future advances, 852.
- IV. For contingent liabilities, 856.

#### I. In general.

The note does not include assignment of judgment, and the title excludes the question of mortgages as collateral security.

As a practical proposition, the question of taking judgment as collateral security involves some phase of the method of taking judgment by confession in the particular jurisdiction in which the case arises, for the reason that, in actual practice, a judgment taken as collateral security is, almost of necessity, taken by confession. So in the reported case (FIRST MORTG. BOND HOMESTEAD ASSO. v. MEHLHORN, ante, 844), there was no serious question about the right to take the judgment as collateral security, but the real question was regarding the manner of confessing it under the statutes and according to the practice in vogue in the state of Maryland.

#### II. For existing indebtedness.

It is here assumed, as the courts in practically every case have assumed,

that as an abstract proposition of law, a judgment may be taken as collateral security for an existing indebtedness or responsibility, or for one that is created at the time the judgment is taken. As the court in *Integrity Title Ins. T. & S. D. Co. v. Rau* (1893) 153 Pa. 488, 26 Atl. 220, said: "As security, the creditor has a right to as large collateral, and as many different forms of it, as the parties chose to contract for. That is a matter with which the court cannot interfere. But the enforcement of satisfaction, by execution or otherwise, is a matter to be governed by the rights and equities of the parties, and comes within the jurisdiction of the court. In the present case, the creditor did nothing more than enter up his judgment on the bond, as part of the security agreed on. In so doing he was within his strict legal rights, and the court had no authority to interfere with his action." Judgment had been confessed upon a bond with power of attorney, as collateral security for several notes. This general proposition is supported a fortiori by the cases cited under the following headings.

Under a statute for the confession



of judgments the maker of a promissory note may, before the note is due, appear and confess judgment for the amount thereof, without having the note filed, which judgment takes precedence over later creditors of the maker of the note. *Stern v. Mayer* (1885) 19 Mo. App. 511; *Clapp v. Ely* (1854) 10 N. J. Eq. 178.

So, in *Strong v. Gaskill* (1891) — N. J. —, 59 Atl. 339, a valid judgment was confessed upon a bond with warrant of attorney, to secure the payment of notes given at the same time for an existing indebtedness.

And in *Keep v. Leckie* (1855) 42 S. C. L. (8 Rich.) 164, where a power to confess judgment as security for the payment of some notes was given, to be entered only on default of payment of the notes, it was held that the death of the maker did not prevent the confession of the judgment thereafter, when default was made.

### III. For future advances.

The right to take judgment as security for future advances has been the subject of considerable discussion, but as an abstract proposition of law, the right has been upheld or recognized as existing in the following cases (as the future advances, when made, are usually evidenced by some paper, the judgment may be regarded as collateral security):

**Illinois.** — *McDonald v. Chisholm* (1890) 131 Ill. 273, 23 N. E. 596; *Little v. Dyer* (1891) 138 Ill. 272, 32 Am. St. Rep. 140, 27 N. E. 905; *Fortune v. Bartolomei* (1896) 164 Ill. 51, 45 N. E. 274.

**Maryland.** — *Neidig v. Whiteford* (1868) 29 Md. 178, 96 Am. Dec. 510; *Robinson v. Consolidated Real Estate & F. Ins. Co.* (1880) 55 Md. 105.

**New Jersey.** — *Ely v. Parkhurst* (1855) 25 N. J. L. 188; *Sayre v. Hewes* (1880) 32 N. J. Eq. 652. But under a statute in New Jersey, it has been held that a judgment confessed to secure future advances is void. *Clapp v. Ely* (1858) 27 N. J. L. 555; *Warwick v. Petty* (1882) 44 N. J. L. 542; *Sterling v. Fleming* (1891) 53 N. J. L. 652, 24 Atl. 1001.

**New York.** — *Nichols v. Hewit* (1809)

4 Johns. 423; *Livingston v. M'Inlay* (1819) 16 Johns. 165; *Brinkerhoff v. Marvin* (1821) 5 Johns. Ch. 320; *Wilder v. Fonday* (1829) 4 Wend. 100; *Truscott v. King* (1852) 6 N. Y. 147; *Cook v. Whipple* (1873) 55 N. Y. 150, 14 Am. Rep. 202.

**Pennsylvania.** — *Holden v. Bull* (1830) 1 Penr. & W. 460; *Ter-Hoven v. Kerns* (1845) 2 Pa. St. 96; *Parmentier v. Gillespie* (1848) 9 Pa. 86; *Pennock v. Copeland* (1850) 1 Phila. 29; *Shenk's Appeal* (1859) 33 Pa. 371; *McClure v. Roman* (1866) 52 Pa. 458; *Merchants' Nat. Bank v. Mosser* (1894) 161 Pa. 469, 29 Atl. 1; *Weiskircher v. Volk* (1905) 29 Pa. Super. Ct. 611.

A judgment taken for future advances, or for responsibilities thereafter to be incurred, covers only such advances as are actually made, and the amount is limited to the amount of the judgment. *Livingston v. M'Inlay* (1819) 16 Johns. (N. Y.) 165; *Brinkerhoff v. Marvin* (1821) 5 Johns. Ch. (N. Y.) 320; *Wilder v. Fonday* (1829) 4 Wend. (N. Y.) 100; *Truscott v. King* (1852) 6 N. Y. 147; *Cook v. Whipple* (1873) 55 N. Y. 150, 14 Am. Rep. 202; *Ter-Hoven v. Kerns* (1845) 2 Pa. St. 96; *Shenk's Appeal* (1859) 33 Pa. 371.

And the judgment will be valid as against later encumbrances only up to the amount actually advanced at the time the later encumbrances intervened. *Brinkerhoff v. Marvin* (1821) 5 Johns. Ch. (N. Y.) 320; *Ter-Hoven v. Kerns* (1845) 2 Pa. St. 96.

The reasoning underlying this holding is set forth by the court in *Ter-Hoven v. Kerns* (Pa.) *supra*, as follows: "With respect to the validity of the judgment taken by the bank, of Kerns, there can be no question. A judgment or mortgage taken to secure the payment of an existing debt, and debts or liabilities to be created in future, has been held to be good and valid by numerous decisions. *Gordon v. Graham* (1716) 7 Vin. Abr. 52, pl. 3, 2 Eq. Cas. Abr. 598, 22 Eng. Reprint 502; *Lyle v. Ducomb* (1813) 5 Binn. (Pa.) 585; 4 Kent, Com. 175, and the cases there referred to. It may also be regarded as settled, when the prior encumbrancer in such case, especially

if his encumbrance be a judgment, makes future advancements upon the faith of his encumbrance, with actual notice of a new intervening encumbrance, that he will not be preferred for such subsequent advancements, to the intervening encumbrance; the latter will be entitled to a preference. But suppose he makes such advancement without any actual knowledge whatever, on his part, of the existence of the intervening encumbrance; shall he be postponed, or not, the same as if he had had actual notice? This question, I think, has not been definitely settled. And I am inclined to believe that there may be a diversity of opinion in regard to it. In *Gordon v. Graham* (Eng.) *supra*, where the prior encumbrancer took a mortgage to secure the payment of money already lent, as also such other sums as should thereafter be lent or advanced, and the second mortgagee took his mortgage with notice of the first, and the first mortgagee, after this, with notice of the second mortgage, lent a further sum of money to the mortgagor, *Cowper, C.*, was of the opinion that the second mortgagee could not redeem without paying all that was due to the first mortgagee. In *Shirras v. Craig* (1812) 9 Cranch (U. S.) 34, 3 L. ed. 260, Marshall, Chief Justice, gives it as the opinion of the court that a mortgage executed to secure the payment of an existing debt, and for debts subsequently contracted upon its faith, either by advancements made or liabilities incurred prior to the receipt of actual notice of the subsequent title of the defendants, was good, and entitled to a preference; see pages 50, 51. So, Chancellor Kent, 4 Com. 175, after stating that a mortgage or judgment may be taken and held as a security for subsequent advances and responsibilities to the extent of it, when this is a constituent part of the agreement, says the future advances will be covered by the lien, in preference to the claim under a junior intervening encumbrance with notice of the agreement. Indeed, Chancellor Kent seems to think the prior encumbrancer entitled to a preference, if the instrument under which he claims provides

for his making future advancements, whether he has notice or not at the time of the junior intervening encumbrance, and that the junior encumbrancer will only be preferred where he has no notice or means of knowing the agreement under which such future advancements have been made. Yet in *Brinkerhoff v. Marvin* (1821) 5 Johns. Ch. (N. Y.) 326, after referring to several cases where it had been held or laid down that a mortgage or judgment, taken as a security for future advances beyond the amount actually due, was good and valid, he observes: The limitation to this doctrine, 'I should think, would be that, when a subsequent judgment or mortgage intervened, further advances, after that period, would not be covered,'—thus leaving the question to be decided, without regard to notice, according to the fact whether the future advances were made prior or subsequently to the junior encumbrance coming into existence. To this, I apprehend, there can be no just or equitable objection made, where every encumbrance upon real estate, before it can become such, must be placed on record, or registered, or filed in some public office, where its being and extent may be fully ascertained by anyone whose interest it may be to know it. Such is the case as to encumbrances created upon real estate in Pennsylvania; no such encumbrance can exist without being placed on record, or registered, or filed in some public office appointed by law for the purpose, where anyone may be fully apprised of its existence or nonexistence by calling and making the necessary inquiry. But, it is said, a prior encumbrancer is not bound to look to the obtainment or entry of subsequent encumbrances; and, generally, this is true, and perhaps universally where the encumbrance is given to secure the payment of a debt in being, the amount of which is fixed and mentioned, or as an indemnity against future liabilities which may and shall arise from having become bail or surety for the encumbrancer, in some particular respect mentioned and referred to in the agreement. But where the encumbrance is given for a debt of a

certain amount already owing, and for future advances or responsibilities which cannot be made or incurred without the future will and consent of the party taking such encumbrance, there is no good reason why he, before he advances, or accepts of any new responsibility in future, should not examine the various offices for junior and intervening encumbrances, in the same manner as if he were to accept of a new and independent liability from the party, having no reference whatever to any prior encumbrance. Every future advancement or responsibility created is, in reality, a new debt, and such a responsibility is created by a new contract, having a reference merely to the prior encumbrance, for the purpose of making it a lien upon the debtor's real estate; so that, with respect to those who have acquired liens upon the real estate of the debtor in the meantime, there is no ground or just reason whatever, why such future advances or responsibilities should not be looked on and considered as having no connection with the prior encumbrance under which they may have been made. In the abstract, there is quite as much reason why the prior encumbrancer should look to the then-existing state of the encumbrances upon the party's real estate, or otherwise act at his peril and take the risk upon himself, as if he were about to make an advancement to, or create a liability with, the party for the first time. And if we look at the thing in practice, I think it will appear not only more practicable, but much more reasonable and just, that the prior encumbrancer should be regarded as bound to know the state of the encumbrances at the time, against the real estate of the person to whom he makes future advances, than that every junior or intervening encumbrancer shall be bound to run after and give him personal notice, or notice in fact of such subsequent encumbrance having been obtained, together with the amount of it. In some instances it may be almost, if not wholly, impracticable for the junior encumbrancer to do so, as where the prior encumbrancer may be a nonresident of the state

and residing abroad in parts unknown. To require such notice to be given to the prior encumbrancer, in such cases, by the junior encumbrancer, would most likely put it out of the power of the party whose estate is so encumbered to borrow or obtain money upon it, and his ruin be produced in consequence of it. But it is, in all cases, practicable for the prior encumbrancer, without much trouble or inconvenience, to ascertain, by inquiry and search at the several offices where encumbrances are to be found, if any junior exist; and to ascertain the extent of them. He is under no obligation to make future advances, and most likely, therefore, will never do so, unless he can make profit by it, and throw the expense attending the same upon the party to whom such advances are made. Taking everything, then, into consideration, there appears to be no good or just reason why he should be regarded otherwise, in making future advances, than if he were making advances to the party for the first time."

The question thus raised in *Ter-Hoven v. Kerns* as to a case in which the judgment creditor is under obligation to make the advance, and does so after the junior encumbrancer files his encumbrance, is answered in *Parmentier v. Gillespie* (1848) 9 Pa. 86, where it is held that under such circumstances the junior encumbrance is postponed in favor of the advancement. To the same effect is *Pennock v. Copeland* (1850) 1 Phila. (Pa.) 29.

And where the advancement is made upon the same day as the later encumbrance is entered, the two will be prorated out of the assets of the insolvent estate of the debtor, although the judgment securing the advancement is prior in time. *McClure v. Roman* (1866) 52 Pa. 458.

And an agreement, at the time a judgment is paid in full, that it shall not be satisfied of record, but shall be and constitute collateral security for other loans made and to be made, continues the lien of the judgment; and the judgment, to the extent of the new loans, takes precedence over subsequent creditors who later enter judg-

ment. *Merchants' Nat. Bank v. Mosser* (1894) 161 Pa. 469, 29 Atl. 1; *Weiskircher v. Volk* (1905) 29 Pa. Super. Ct. 611. But the rule cannot be made an instrument for fraud upon innocent third parties. *Weiskircher v. Volk* (Pa.) supra.

And in *Truscott v. King* (1852) 6 N. Y. 147, it was held that a judgment may, to its extent, be confessed to secure future advances, and will be an effectual security for such advances against subsequent encumbrancers having notice of the judgment. "But the adjudged cases show that if the debt amounted to the sum specified in the condition of the bond at the time of its execution, or advances were subsequently made as agreed upon at the time, to that amount the judgment could not be available as a security for any additional indebtedness, for other advances or liabilities, although in the end, by payments made or funds received by the creditor of the debtor, the amount of the moneys advanced from time to time should be satisfied, so that the balance did not exceed the sum specified in the security. It could not be regarded as a continuing security, covering the final balance which might be found due to the creditor from the debtor, after charging the original debt and subsequent advances and responsibilities, and crediting the moneys received from the debtor from time to time, although such balance should be no larger in amount than the sum specified in the security to be secured." By *Edmonds, J.*, concurring: "It is well settled that a judgment for future advances is good not only against the debtor, but also against subsequent encumbrances, at least, up to the time when a subsequent judgment or mortgage should intervene."

But it has been held that a judgment to secure future advances is valid as to subsequent encumbrancers only up to the amount actually advanced at the time the judgment creditor has notice of the later encumbrance. *Sayre v. Hewes* (1880) 32 N. J. Eq. 652; *Ely v. Parkhurst* (1855) 25 N. J. L. 188. But under a New Jersey statute, a confessed judgment for future advances

is void. *Clapp v. Ely* (1858) 27 N. J. L. 555; *Warwick v. Petty* (1882) 44 N. J. L. 542; *Sterling v. Fleming* (1891) 53 N. J. L. 652, 24 Atl. 1001.

And it has been held that a judgment confessed by a tenant to the landlord to secure money to be advanced by the latter to former, to be used in building houses upon the leased premises, takes precedence, to the amount actually advanced, over mechanics' liens filed by a third party against the property for material furnished to the tenant and used in building the houses, upon the distribution of the tenant's estate in insolvency proceedings. *Robinson v. Consolidated Real Estate & F. Ins. Co.* (1880) 55 Md. 105.

The indebtedness or advancement secured by a judgment must be in a definitely fixed amount, or in an amount that may be rendered definite by a calculation, for the reason that one cannot confess judgment for an unliquidated and uncertain sum. *Little v. Dyer* (1891) 138 Ill. 272, 32 Am. St. Rep. 140, 27 N. E. 905; *Fortune v. Bartolomei* (1896) 164 Ill. 51, 45 N. E. 274; *Nichols v. Hewit* (1809) 4 Johns. (N. Y.) 423.

Where notes in the sum of \$1,800, with power of attorney to confess judgment attached, were executed by a corporation to secure whatever amount of money the payee should advance to the corporation under a contract, the amount being at the time uncertain, since the money was to be used in completing a piece of work for the corporation itself, it was held, in *McDonald v. Chisholm* (1890) 131 Ill. 273, 23 N. E. 596, that a judgment for the full amount of the notes, regularly confessed, was valid and binding upon the corporation, although the payee had advanced in money only \$1,034, it appearing that he had incurred indebtedness on account of the completion of the piece of work under the contract, in addition to the amount of money actually paid, in a sum exceeding the amount of the judgment.

In *Curtice v. Scovel* (1791) 1 Root (Conn.) 327, it was held that a note for more than £4, given to bind a party to abide by the award of arbitrators,

is not evidence of a subsisting debt, and that a confession of judgment thereon before a justice of the peace "is not such a debt, nor such a confession of debt, as the statute contemplates and authorizes a justice to make a record of." Hence, any such judgment by a justice is void. This case was cited and followed in *Talcott v. Pulsifer* (1796) 2 Root (Conn.) 443.

But it has been held that a judgment entered upon a bond, in the penalty of \$100, with a warrant to confess the judgment, having a condition thereunder written that the obligor will pay a fine and bill of costs, then uncertain in amount, is valid, but no execution can be issued upon the judgment until the real amount due is ascertained. *Holden v. Bull* (1830) 1 Penr. & W. (Pa.) 460.

#### IV. For contingent liabilities.

A judgment, confessed to secure the judgment creditor against a contingent liability that he has incurred by becoming the judgment debtor's surety on other paper, is valid against the judgment debtor. *Farmers' & M. Bank v. Spear* (1893) 49 Ill. App. 509, affirmed in (1895) 156 Ill. 555, 41 N. E. 164; *Lansing v. Woodworth* (1843) 1 Sandf. Ch. (N. Y.) 43; *Marks v. Reynolds* (1860) 20 How. Pr. (N. Y.) 338 (reversed as to validity against subsequent creditors, in (1861) 12 Abb. Pr. 403); *Allen v. Norton* (1877) 6 Or. 344 (validated by statute); *Miller v. Howry* (1832) 3 Penr. & W. (Pa.) 374, 24 Am. Dec. 320; *Stewart v. Stocker* (1832) 1 Watts (Pa.) 135; *German-American Title & T. Co. v. Campbell* (1898) 184 Pa. 541, 39 Atl. 291; *Candee's Appeal* (1899) 191 Pa. 644, 43 Atl. 1093; *McKee v. Verner* (1913) 239 Pa. 69, 44 L.R.A. (N.S.) 727, 86 Atl. 646; *Ford v. Elkin* (1843) 29 S. C. L. (2 Speers) 146.

A judgment by confession entered upon a note with power of attorney to confess, given to secure the payee therein against loss from his having become indorser for the maker on other paper, is not void merely because entered before the payee had paid the obligations for which he became liable because of the indorsements. *Farm-*

*ers' & M. Bank v. Spear* (1893) 49 Ill. App. 509, affirmed on other points in (1895) 156 Ill. 555, 41 N. E. 164; *Stewart v. Stocker* (1832) 1 Watts (Pa.) 135; *Miller v. Howry* (1832) 3 Penr. & W. (Pa.) 374, 24 Am. Dec. 320.

And an execution issued upon such an absolute judgment, intended to compel the principal to pay in the first instance and relieve the surety, is neither erroneous nor irregular, and it is not fraudulent by the Statute of the 13th Elizabeth. *Miller v. Howry* (1832) 3 Penr. & W. (Pa.) 374, 24 Am. Dec. 320.

The reasoning upon which this ruling may be based is stated by the court in *Stewart v. Stocker* (1832) 1 Watts (Pa.) 135, as follows: "It is now settled in this state that a mortgage or judgment may be given to secure a creditor, not only for a debt due, but for responsibilities which are contingent, nay, for future advances. *Lyle v. Ducomb* (1813) 5 Binn. (Pa.) 585. This judgment to the Pittsburgh Bank was, as the judge rightly decided, to secure the bank, and also to secure the indorsers on the notes of *Bosler & Company*, then in bank, or which should be given to renew those notes as they fell due. There was no stipulation for any stay of execution. The fairness and validity of this judgment are not questioned. *Bosler & Company* are stated to have been in debt beyond all hope of extricating themselves. It was possible that they would on any day confess a judgment to some of their creditors, without stay of execution, and their large personal property might have been, in an hour, beyond the reach of this judgment. It was certain *Bosler & Company* would never pay the notes in the Pittsburgh Bank; that the indorsers must pay them; they would all fall due in June. It was certain that *Stocker* and others would take executions on or about the 20th of June. It was no stretch of their authority in any of the indorsers in the Pittsburgh Bank to call for execution on that judgment on the 10th of June, and to levy it instantly. If *Bosler & Company* had objected to this execution, it is not easy to discover on what grounds the

court could have set it aside. We had some cases before us at Lancaster last May not unlike this: Howry & Eshelman were largely in trade, and largely in debt; they had borrowed money on bond, with some of their friends as sureties in those bonds, and in bank with some of their friends indorsers, and, to secure those friends, had given them judgment without stipulating for any stay of execution. While those bonds and notes had still a short time to run, the creditors of Howry & Eshelman sued them, entered rules of arbitration, and obtained judgment, and in twenty days could take, and in fact did take execution on the twenty-first day. In the meantime their sureties and indorsers took out executions on their judgments, though none of them had paid the debts for which they were sureties, and were not liable to suit for those debts for some days yet to come. The property was sold, and money brought into court. The common pleas decided, and under the Act of 1827, an appeal to the supreme court, and the executions thus issued by the securities and indorsers took the money, by a decision of a majority of this court. In those cases the defendants, as here, made no objection to the first executions. I will add that in those cases the sureties had paid the money for which they were bound before the money was brought into court, so that there was no danger of the surety recovering money from his principal to pay a debt, and afterwards not paying it. So here, the bank recovering the debt, the indorsers are thereby at once discharged; and although I was not entirely satisfied with the decision at

Lancaster, yet, upon reflection, there is no actual injustice in collecting the debt from the principal in the first instance, instead of pressing the surety and turning him round to the principal. And when the form of the agreement will admit of its being collected from the principal, perhaps no court will interfere to throw it on the surety in the first instance. The authority of those cases would determine the same point in this case."

But such judgment is void if the confession states no facts and does not show, as required by the statute regulating the confession of judgments, for what cause of action the judgment is entered. *Adams v. Tator* (1890) 57 Hun, 302, 19 N. Y. Civ. Proc. Rep. 114, 32 N. Y. S. R. 120, 10 N. Y. Supp. 617; *Hammond v. Bush* (1859) 8 Abb. Pr. (N. Y.) 152.

And such a judgment has been held to be voidable by the judgment debtor's creditors. *Forrester v. Strauss* (1891) 21 N. Y. Civ. Proc. Rep. 166, 18 N. Y. Supp. 41.

And a judgment confessed upon a note given to the sureties on the maker's bond, without consideration, no previous indebtedness existing, neither of the payees being able to state that they would be called upon to pay anything on account of their suretyship, is a fraud upon the maker's existing creditors, and the claims of such creditors have priority over the judgment on money made by sale of the judgment debtor's goods on execution issued from the judgment. *Sprague v. Noble* (1878) 3 Ill. App. 521.

J. W. M.

## KEYSTONE MANUFACTURING COMPANY

v.

J. D. CLOSE et al., Plffs. in Err.

*West Virginia Supreme Court of Appeals — October 30, 1917.*

(81 W. Va. 205, 94 S. E. 132.)

**Lien — manufacturing lumber.**

1. The owners of a sawmill employed by the owner of timber to go upon

Headnotes by MILLER, J.

the land where the timber was located and to occupy a mill site and yard provided for in the deed to him for said timber, and manufacture the same into lumber, had a common-law lien on the lumber for the price of their work stipulated in the contract, and, under the facts and circumstances in this case, the same was not lost or waived by permitting or suffering a representative of the owner to take the lumber from the dock where it was placed as sawed, and putting it upon stick in said yard, even as against purchasers thereof from the owner of the lumber.

[See note on this question beginning on page 862.]

— artisan's statute.

2. By the common law a lien is given to every mechanic, artisan, or other workman for the value of the labor bestowed by him in the manufacture, improvement, or betterment of goods and chattels delivered to him therefor; but such lien continues only while the goods are retained in the possession of such bailee.

[See 17 R. C. L. 601, 602.]

— remedy for enforcement.

3. While at common law such lienor was given no right to enforce his lien except by retaining possession of the property until paid, our statute, § 12a, chap. 75, of the Code, enacted in 1909, enlarged this right by giving him the remedy by distress, prescribed thereby.

[See 17 R. C. L. 613.]

**ERROR** to the Circuit Court for Tucker County to review a judgment in favor of intervening petitioner in a proceeding to enforce a common-law lien on certain lumber claimed to have been purchased by it. *Reversed*.

The facts are stated in the opinion of the court.

Mr. A. Jay Valentine, for plaintiffs in error:

Defendants had a lien on said lumber for their services in manufacturing the same.

1 Jones, Liens, §§ 4, 998, 999, 1001.

Mr. Samuel T. Spears, for defendant in error:

Defendants lost possession of the lumber at the time it was delivered to Mr. Lentz to be placed on stick and from there hauled by him to the railroad for sale, and, having lost possession, they lost any common-law lien they might have had for labor performed, and had no right to enforce their distress warrant against the property.

1. Jones, Liens, §§ 20-22; Fishell v. Morris, 57 Conn. 547, 6 L.R.A. 82, 18 Atl. 717; 25 Cyc. 662-675; Burroughs v. Ely, 54 W. Va. 118, 102 Am. St. Rep. 926, 46 S. E. 371; Gregory v. Morris, 96 U. S. 619, 24 L. ed. 740.

Where one performs labor upon personal property for another upon the lands or leased premises of the other, he can have no lien upon this personal property because of lack of possession.

Jones, Liens, § 25.

Miller, J., delivered the opinion of the court:

Claiming a common-law lien on

certain lumber for a balance of \$300 due them for manufacturing the same under a contract with one M. B. Lentz, defendants, proceeding under § 12a, chap. 75, Barnes's Code, sued out of the office of a justice of the peace a distress warrant and caused the same to be levied on said lumber, then on stick at the mill site or yard on the lands of one Bright, from whom Lentz had previously purchased the standing timber out of which said lumber had been so manufactured by them.

Thereupon plaintiff, claiming as purchaser of said lumber from Lentz, executed to the officer a forthcoming bond, and also a suspending bond as provided by statute, and intervened by petition filed in the circuit court of Tucker county, where an issue was made up and tried by the court in lieu of a jury, and the finding and judgment of the court was that the plaintiff was the owner and in possession of the lumber so seized and levied on by the defendants, and that defendants were not entitled to enforce their common-law lien thereon for manufacturing the same

as claimed by them, and that the plaintiff was entitled to hold said lumber as its property, free and discharged from the lien so asserted by defendants, and that they recover costs, etc.

The deed from Bright to Lentz for the timber, introduced in evidence, also granted to the latter "a site for the mill and yards, etc., upon the cleared ground of the party of the first part," and gave him two years in which to remove the timber, and also provided that he should have "the right to use the mill site and yards, and everything necessary to run and operate said mill upon the land of the said party of the first part for a period of five years," etc.

The contract in writing between Lentz and defendants recited the acquisition of Lentz from Bright of said timber, and the desire of Lentz as therein specified to have the same manufactured into lumber, whereby defendants agreed to manufacture said timber into lumber, at certain stipulated prices per thousand feet and cross ties at a stipulated price per tie, and which was to include skidding, etc., all to be done in a workmanlike manner, the sawing to be done so as to raise the grade of the lumber. And for said sawing, skidding, and other work to be done by defendants Lentz thereby agreed as follows: "That the work done the previous month shall be paid for the following month, the end of the month being the 20th of each and every month, and all the lumber in the yard shall be estimated at that time, but in making the payments as aforesaid the said party of the first part shall hold and retain 10 per cent of the earnings of the said parties of the second part, at the price aforesaid until the completion of the work."

The evidence of the witnesses shows that defendants moved their mill upon the Bright land where the timber granted to Lentz was located, and there occupied the mill site and lot provided for in the deed; that as the lumber was cut it was

placed on a dock near the mill and from there taken by an employee of Lentz and put on stick in the yard, defendants' contract not providing for putting the lumber on stick; but where the contract provides it was to be estimated at the end of each month and paid for as stipulated, except the 10 per cent that was to be retained until the completion of the contract.

Defendants received on account of their work the note of plaintiff to Lentz of \$500, turned over to them, the proceeds, less discount, amounting to \$490, and when they completed the work about December 6, 1915, Lentz owed them a balance of \$300.

The deed from Bright to Lentz is dated August 20, 1915; the contract between Lentz and defendants is dated September 4, 1915; and the contract in writing whereby Lentz undertook to sell the lumber to plaintiff is dated November 27, 1915. In the view we take of the case, however, these dates are unimportant. It is significant that the lumber purporting to be sold by Lentz to plaintiff is described in the contract as that "manufactured and to be manufactured at the Close and Beavers mill on Pleasant run, Tucker county, West Virginia." And the contract further provided that Lentz was to deliver all of said lumber f.o.b. cars at Porterwood, West Virginia, as called for by plaintiff, and that should he fail, then they were to have the right to put on teams and deliver the same at his cost and expense. And one of the provisions of said contract was that the title to said lumber should pass to and be vested in plaintiff, as the same should be placed on stick at the mill where said lumber was then being manufactured, and that the possession thereof should also pass to them as placed on stick.

Defendants proved that on completion of the work they left three persons in charge and possession of the lumber, and that they continued in possession thereof until seized and taken into possession by the



officer under the distress warrant, and that they thereby continued to hold and retain a lien on the lumber for the balance due them for manufacturing the same.

On the other hand, plaintiff says, in support of the judgment, that defendants had no lease on the land, but were mere licensees of Lentz, and that, although they owned the mill and occupied the mill site and yard therewith as they contend, they had no such exclusive possession of the land, or of the lumber after it was taken from the dock and placed on stick in the yard, as to support any lien thereon for the work done thereon by them.

That the common law gives to every mechanic, artisan, or other workman a lien for the labor bestowed by him in the manufacture, improvement, or betterment of goods and chattels delivered to him therefor, is conceded by counsel for both parties, and besides is well supported by all the authorities on the subject of liens and bailments. 1 Jones, Liens, 3d ed. § 781; Burrough v. Ely, 54 W. Va. 118, 102 Am. St. Rep. 926, 46 S. E. 371. And this lien applies to lumbermen for manufacturing logs into lumber. 1 Jones, Liens, § 703. Such lien is in most, if not all, respects like a seller's lien for purchase money, and like that exists only so long as possession of the property is held. Respecting the seller's lien and the necessity of retaining possession, it was said in *Buskirk Bros. v. Peck*, 57 W. Va. 360, 370, 50 S. E. 432, and repeated in *Wiggin v. Mankin*, 65 W. Va. 219, 226, 63 S. E. 1094: "Although retention of the possession of the property until payment is essential to its existence, yet possession may be constructive or actual, and where goods are sold, counted out, and set apart for the purchaser, but not actually delivered into his possession, the title passes, and there is constructive delivery sufficient to execute the contract, yet the seller had a lien for the purchase money."

Lien—artisan's statute.

While the lien so given by the common law gave the lienor no right except to hold onto the property until his services were paid for (*Burrough v. Ely*, supra, 3 B. C. L. § 47, p. 125), nevertheless, since the decision in *Burrough v. Ely*, the legislature of this state, by § 12a, chap. 75, Code, supra, Acts 1909, chap. 43, has at least given the remedy by distress for enforcement of such lien, the remedy pursued in this case, and to that extent it no further enlarged the common-law right.

Whether defendants under the contract, or by the manner of executing the same, ever had or parted with the possession of the lumber in question, so as to give them a lien, or to lose it as claimed by plaintiff, are questions not entirely free from doubt. While it may be true they held no formal lease on the land for mill site and yard, yet we must assume they were let into possession thereof by Lentz under his deed from Bright, with the same rights which were given him for the purpose of sawing, manufacturing, and storing the lumber, contemplated in the deed and in the contract by defendants with him. The mill was there, and necessarily they must have had the exclusive right to and possession of the land occupied by the mill while engaged in cutting the timber into lumber; and while their contract did not call for sticking the lumber as sawed, neither did it specifically provide that it was to be stacked by Lentz. Necessarily, the contract implied some disposition of the lumber, and, as already observed, it specifically provided for its location on the yard and an estimate thereof, from month to month and payment therefor by Lentz. The only thing which Lentz did or was suffered to do was to put his man in the yard and to place the lumber on stick as it came from the mill. Can it be assumed from this that the parties contemplated, or that defendants, who provided in their contract for estimates

or measurements of the lumber while still in the yard and at the mill, intended that it should go out of their possession, or to waive or relinquish their lien thereon for the price of manufacturing the same? We cannot bring ourselves to the conclusion that such was the contract or the legal effect of their conduct towards the property. The evidence shows, on the contrary, that on completing the sawing defendants left representatives in charge of the lumber, and that within three days thereafter they sued out the distress warrant and caused the lumber to be taken into the possession of the officer, and thereby did everything in their power to preserve and enforce their lien. Nor do we think they lost the lien by the fact that the representative of Lentz took the lumber from the

—manufacturing  
lumber.

dock and placed it on stick in the yard.

That act is not inconsistent with possession thereof by defendants for the purpose of their lien. The case is not thereby brought within the principles laid down in 1 Jones on Liens, §§ 22 and 25, relied on by counsel. The case here is not like the instance noted in § 22, of the owners of a saw-mill who permitted boards sawed by them to be moved from the mill; nor like the brickmaker referred to in § 25, who was practically only an employee of the owner of the plant, as in the case from Massachusetts, King v. Indian Orchard Canal Co. 11 Cush. 231, cited for the text will show. Moreover, we find Moore v. Hitchcock, 4 Wend. 292, also a brickmaker's case, holding that the plaintiff had a lien for brick made at the plant and on the land of the owner, under a similar contract, and that he could maintain trover against one who wrongfully took the same from his possession under execution against the owner. The delivery of a portion only of the goods does not defeat the lien. 6 C. J. 1136, § 85(b). And in Robinson v. Larrabee, 63 Me. 116, 117, it is said: "There is no question but [that] the voluntary relinquishment

by the bailee, of possession of the subject of the bailment, discharges his lien, unless it is consistent with the contract, the course of business, or the intention of the parties."

The mere fact that Lentz's representative came on the mill yard and put the lumber on stick, where it was to remain until estimated or measured and payments made, does not evince intention on the part of the defendants to relinquish any right given them by law. Nor is the case here like that presented in Walker v. Cassels, 70 S. C. 271, 49 S. E. 862, holding that, "where the sawing of certain lumber had been completed, and the sawyers had left the ground without leaving any agent in charge, and plaintiff stacked the lumber, and used some of it, and sold a considerable portion of it," and where it was held the sawyer thereby lost or waived his lien. Nor is this case like McMaster v. Merrick, 41 Mich. 505, 2 N. W. 895, where the acts of the sawyers were inconsistent with their intention to assert a lien, and where they did nothing to preserve or enforce the same, and where, indeed, the contract did not contemplate such a lien, and which case is distinguished in Bank of Montreal v. J. E. Potts Salt & Lumber Co. 91 Mich. 342, 51 N. W. 890, the case of a salt manufacturer, and in which it was held that the contractor, under the circumstances of that case, not unlike those in this case, had not lost his lien.

From all which we conclude that the possession on the yard of the lumber in question was the possession of the defendants, and that they had not parted therewith at the time they sued out the distress warrant and caused the officer to seize the same for the debt due them, and that their lien thereon remained intact and enforceable by such distress.

We, therefore, reverse the judgment and remand the case to the Circuit Court to be therein further proceeded with in accordance with the principles herein enunciated, and further according to law.

## ANNOTATION.

**Common-law lien on personality for work performed thereon, upon the owner's premises.**

At common law, mechanics and artisans have a right to retain personal property delivered to them, upon which they have bestowed labor and services, until the charge thereby attaching to it is paid. Whether this common-law lien attaches to personal property where the work is done on the owner's premises is the question for investigation in this note. The court in the reported case (*KEYSTONE MFG. CO. v. CLOSE*, ante, 857) takes the view that under the circumstances of that case there was a common-law lien.

In *Bank of Montreal v. J. E. Potts Salt & Lumber Co.* (1892) 91 Mich. 342, 51 N. W. 890, one who manufactured salt at the owner's "salt lot" under an agreement with the owner by which he was to furnish all the barrels, nails, lime, butter, etc., to pay all needed repairs on said lot except certain specified warranties, and to deliver such salt piled in workmanlike manner on a dock erected and used exclusively in connection with this salt lot, and was to be responsible for the same until it should be delivered to the boat or vessel, from the said dock, was held to have a lien on salt located on the dock and on the salt lot, for the agreed price under the contract.

One employed by the owner of a brickyard to make brick, under a contract by which the possession of the yard was in the lien claimant, for the purpose of his contract, and who remained in the possession of the yard and of the brick at the date of the seizure thereof by an execution creditor of the owner of the yard, was held entitled to a lien on the brick in *Roberts v. Bank of Toronto* (1894) 21 Ont. App. Rep. 629. The court states that as between the lien claimant and the owner the lien claimant was there, at least, by license to do a specific work under contract, not as a mere servant or laborer. It seems that the owner of the brickyard had been selling portions of the brick, and

the court states, as to this fact, that the evidence fully warrants the conclusion that this was done with the lien claimant's consent and by arrangement with him, and to obtain money to pay the lien claimant and his men, as agreed upon.

In *Moore v. Hitchcock* (1830) 4 Wend. (N. Y.) 292, a brickmaker who manufactured a quantity of brick in a brickyard furnished by another, together with wood and all other necessities to carry on the work, under an agreement by which he was to receive a stated price per thousand for the brick, made and shipped, on the return of the vessel on which the same was carried to market, was held to have a lien for his labor on brick which were in the yard when seized under an execution against the owner of the yard, and purchased by the defendant. The court states that by the provision of the contract as to the shipment, the lien claimant agreed to waive his lien as against the owner, and was not to receive his pay until the vessel which carried the brick to market should return, but that this was a personal credit to the owner, founded on the confidence reposed in him, and did not interfere with the lien.

It seems to be assumed in *Oakes v. Moore* (1844) 24 Me. 214, 41 Am. Dec. 379, that one who cuts timber upon the land of another may have a lien at common law. But it is held in that case that, if he removes the timber and delivers it for the purpose of being sawed into lumber, his right to a lien is gone because of the surrender of possession.

See *Shaw v. Kaler* (1871) 106 Mass. 448, *infra*.

If the lien claimant has no right in respect to the land of the owner on which the work is done, it is quite well settled that there can be no lien at common law, because there is then no such unqualified possession of the

property as is necessary to support the lien.

Thus, one employed by the owner of timber to cut the timber into logs and put the logs in the owner's mill pond, who had cut and skidded the logs on the tract from which they were cut, was held to have no lien thereon, at common law, in *Fitzgerald v. Elliott* (1894) 162 Pa. 118, 42 Am. St. Rep. 812, 29 Atl. 346. Whether the owner of the timber owned the land from which they were taken did not appear in the evidence, and the court states that it is not material; that "the possession of the timber was in the owner of it, and that possession was not changed or affected by the arrangement under which the logs were cut and skidded by the plaintiff. The latter was not a bailee of the timber, or of the logs cut therefrom. He was employed to cut the timber into logs and put them in his employer's mill pond. There was nothing in the nature of his employment which gave him an independent and exclusive possession of the timber or logs at any time, but on the contrary the agreement under which he was to do the work was inconsistent with his claim of a right to the possession of them until he was paid for his labor. He cut and skidded the logs where his employer had the right to cut and skid them, preparatory to their removal to his mill. If the plaintiff had a common-law lien upon the logs for his work, then he who cuts firewood or splits rails from his employer's timber, and hauls, or agreed to haul, the firewood to his employer's house, or the rails to designated points on his farm for the purpose of fencing it, has a like lien." The court states that the "fundamental error in the plaintiff's contention lies in his assumption that he had an independent possession of the property, when in fact such possession as he had was that of his employer. Maxwell [the employer] was in possession of the Dixon tract for the work that plaintiff did for him there, whether he owned it or not; the land on which the timber lay and the logs were cut and skidded was in his possession for the purpose for which

his employee used it. It follows that the rights of the plaintiff in respect to lien and possession were the same as if his employer owned the land on which the work was done. In cutting and skidding the logs where he did, he was exercising his employer's right to cut and skid them there."

One who, under an agreement with the lessee of a brickyard, was to prepare a yard and kiln for manufacturing brick, to perform all labor connected therewith, the lessee to furnish all materials and apparatus, and to pay so much per thousand for their manufacture, was held not to be entitled to a lien upon the brick so manufactured. *King v. Indian Orchard Canal Co.* (1853) 11 Cush. (Mass.) 231. The court states that "upon the undisputed facts of this case it appears to us that the plaintiff fails to show any such possession of the property in question as will support the lien which he sets up in order to maintain this action. In the first place, he shows no right or interest in himself, either as owner, lessee, or tenant, to the possession of the yard in which the brick were made and burned. By virtue of the contract with the defendant corporation who owned the land, Stearns [the lessee] had the right to occupy the ground for a brickyard during the continuance of his contract, without charge, and for a year subsequent to the expiration of the contract at a moderate rent. This gave to Stearns the possession of the premises for the time specified, but it does not appear that Stearns, either by his written contract with the plaintiff for the manufacture of the brick, or by any verbal agreement or acts, surrendered the possession thereof to the plaintiff. On the contrary, it is especially provided by the written contract that Stearns shall prepare the brickyard and fit it for use, and that he shall furnish and deliver on the premises from time to time, as required, the materials for making and burning the brick, clearly implying that Stearns was to continue in possession, and it was proved at the trial that, in point of fact, the workmen of Stearns were employed in the yard, en-

larging and filling it up during the whole summer, while the plaintiff was engaged in striking the brick, and preparing and burning the kilns. Upon these facts it is manifest that the plaintiff never had any exclusive and unconditional possession of the property. It was, at most, only a mixed possession with Stearns, or rather a right in the plaintiff to enter upon and use the yard of Stearns, for the purpose of making and burning the brick. It is entirely clear that such a restricted and limited possession is insufficient to support a lien. It amounts to nothing more than the ordinary transaction of work done by one person in the manufacture or repair of articles for another, upon the premises of the latter. The workman in such a case has, to a certain extent, possession of the property upon which his labor and services are expended, but it is a qualified and mixed possession, which can form no valid basis for a lien." It is further stated that if the plaintiff ever had any possession of the brick, it was relinquished by him when his foreman left the yard to do work elsewhere, and that the lessee, after that time, was in the sole and exclusive possession and control thereof.

Under a statute making possession a necessary requisite of the lien, a laborer employed by one who purchased logs to cut, skid, and draw the logs has not, from the fact of such employment, shown such a possession of the logs as entitles him to a lien. *O'Clair v. Hale* (1898) 35 App. Div. 77, 54 N. Y. Supp. 388. The decision in this case is approved in an action in which one who had cut, trimmed, and prepared logs to be sawed, and hauled the same to a sawmill, was claiming a lien. *Brackett v. Pierson* (1906) 114 App. Div. 281, 99 N. Y. Supp. 770. The court states that while the lien law of this state had been codified, there had been no attempt to enlarge the lien given to the artisan beyond that given by common law.

One employed to head and stack wheat grown on the land of the owner, who performed the services for which he is employed, does not have such a

possession of the wheat as entitles him to a lien under a statute requiring possession as a condition precedent to a lien. The court states that there could be no greater absurdity than to hold that an employee of a farmer, to perform labor upon the farm, would be entitled to a lien for the work bestowed in cultivating the land or harvesting the crops, in the absence of a special contract creating it, to be followed by an actual and physical change of possession in the nature of a pledge; and, with reference to the facts of a particular case, states that the very fact that the wheat was stacked upon the owner's land, in the absence of a special agreement, precluded the possibility of an unqualified possession by the person who performed the work. *McDearmid v. Foster* (1887) 14 Or. 417, 12 Pac. 813.

In *Shaw v. Kaler* (1871) 106 Mass. 448, the supreme court of Massachusetts, however, held that one who made piano cases, at an agreed price for each upon the premises of the other party to the contract, the latter furnishing the material and also bench room for the lien claimant, was held to have such possession of the cases as entitled him to maintain an action against a wrongdoer who took possession of them. When the material was furnished by the owner of the shop it was taken and retained by the lien claimant in the portion of the shop assigned to him; the lien claimant owned the bench tools and employed and paid men to assist him in making the cases, and, during the time when he was making the cases, he retained the actual possession of them until, on being finished, they were delivered to the owner of the building; and the cases in question were retained by the lien claimant in the manner thus stated, and were in his possession at the time when the defendant, against the plaintiff's consent, took them. This decision, however, turns upon the insufficiency of the defendant's claim rather than upon the existence of a lien. The court, however, does hold that the lien claimant had possession, and states that in the action of trespass, as possession is *prima facie* evi-

dence of right, a mere stranger cannot deprive the party of that possession without showing some authority or right of the true owner to justify the taking. The case of *King v. Indian Orchard Canal Co. (Mass.) supra*, is stated to have very little bearing upon the question; that the plaintiff in that case wholly failed to make out his own actual possession, and the defendant claimed under a bill of sale from the true owner; that in both these particulars that case differed entirely from the case at bar.

In some cases the courts have denied a lien from a consideration of all the circumstances. In *McMaster v. Merrick* (1879) 41 Mich. 505, 2 N. W. 895, there was held to be no lien in favor of the lessee of the sawmill on lumber sawed by him for the owner, on the theory that no lien was contemplated by the contract of the parties, who had acted as if there was no lien until after the lessors had become bankrupt, the court stating that where no lien was claimed in the past one cannot be created in the future. The lessees had recognized the rights of

various creditors of the lessor, to part of the lumber, and it is stated that this recognition was inconsistent with the lessees' lien if they claimed one; that they took no steps to assert it distinctly, when all the facts appearing indicated its nonexistence; that upon the termination of the lease the lumber was on the premises of the general owner, and that no lien could exist without some distinct possession, and this was effectually negative of the recognition without denial or qualification of the right of possession and disposal in the assignees and transferees of the general owner.

For ordinary work done as a laborer on personal property on the premises of another there is no lien. One who agreed to remove fixtures for the owner from one store to another was held not to have a lien on the fixtures in the store of the owner, in *A. F. Engelhardt Co. v. Benjamin* (1896) 5 App. Div. 475, 39 N. Y. Supp. 31.

The laborers on a farm have been held to have no common-law lien upon the crops. *Hunt v. Wing* (1872) 10 Heisk. (Tenn.) 139. W. A. E.

LOUIS ETTLINGER, Respt.,

v.

NATIONAL SURETY COMPANY, Appt.

*New York Court of Appeals—November 13, 1917.*

(221 N. Y. 467, 117 N. E. 945.)

**Principal and surety — right of surety to set up fraud against principal.**

1. A surety on a stay bond, when sued alone for damages for its breach, cannot set up the defense that the principal was induced to give the bond by fraud.

[See note on this question beginning on page 868.]

— liability of surety — void contract.

2. A surety for one of the principals to a contract is not liable for a breach by his principal if the minds of the parties to the contract did not meet, or the alleged contract was void.

[See 21 R. C. L. 996.]

**Fraud — effect on contract.**

3. A contract induced by fraud is not void, but merely voidable at the option of the person defrauded, who must take affirmative action for relief.

[See 12 R. C. L. 405.]

3 A.L.R.—55.

— return of property.

4. One electing to avoid a contract for fraud must return what he has received under it.

[See 12 R. C. L. 405.]

— action for damages.

5. A defrauded party who elects not to avoid the contract induced by the fraud has an independent cause of action for damages arising from the fraud.

[See 12 R. C. L. 409.]

— action by surety.

6. A surety cannot maintain an action for damages occasioned to his principal by fraud in inducing the principal to contract.

Parties — action against surety — principal.

7. One seeking a money judgment against a surety is not bound to bring in the principal as a party to the action.

[See 21 R. C. L. 1081, 1082.]

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term, Part II., for New York County, granting plaintiff's motion for judgment on the pleadings, in an action brought to enforce a stay bond. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Mr. Henry L. Scheuerman, with Messrs. Mortimer H. Hess and Theodore F. Kuper, for appellant:

The trial court erred in granting plaintiff's motion for judgment on the pleadings.

*Bauer v. Dewey*, 166 N. Y. 402, 60 N. E. 30; *Charles F. Garrigues Co. v. Casualty Co. of America*, 220 N. Y. 588, 115 N. E. 1036; *Putnam v. Schuyler*, 4 Hun, 166; *Osborn v. Robbins*, 36 N. Y. 365; *Morehouse v. Brooklyn Heights R. Co.* 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377.

Messrs. Lehmaier & Pellet, for respondent:

A party, when sued upon his obligation, cannot avail himself of an independent cause of action existing in favor of his principal against the plaintiff, as a defense or counterclaim.

*Baird v. New York*, 96 N. Y. 567; *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355; *Lasher v. Williamson*, 55 N. Y. 619; *American Guild v. Damon*, 186 N. Y. 360, 78 N. E. 1081; *Elliott v. Brady*, 192 N. Y. 221, 18 L.R.A. (N.S.) 600, 127 Am. St. Rep. 898, 85 N. E. 69.

Andrews, J., delivered the opinion of the court:

The plaintiff brought an action in the city court in New York against one Theodore Kruger. The latter desired to obtain a stay of the trial of that action. To obtain such result he stipulated in open court to give to the plaintiff a surety company bond, providing that, in the event of the ultimate affirmance and final determination of a certain other action between the same parties then on appeal, the amount involved in the action in which he desired a stay should be paid to the plaintiff, with costs. Thereafter he obtained a bond from the National Surety

Company, and the action was, in fact, stayed. Subsequently, the action on appeal was affirmed and finally determined in favor of the plaintiff. The defendant Kruger did not pay the amount involved in the action stayed, and this action was brought against the surety company to enforce its bond.

The defense interposed is that the stipulation with regard to the stay was obtained from Kruger by the plaintiff through fraud; and the only question involved in this appeal is whether or not such defense is available to the surety.

In the past the answer to this question has not been altogether clear. *Putnam v. Schuyler*, 4 Hun, 166; *Morse v. Hovey*, 9 Paige, 197; *Parshall v. Lamoreaux*, 37 Barb. 189; *Strong v. Grannis*, 26 Barb. 122; *Morehouse v. Brooklyn Heights R. Co.* 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377; *Aeschlimann v. Presbyterian Hospital*, 165 N. Y. 296, 80 Am. St. Rep. 723, 59 N. E. 148; *Osborn v. Robbins*, 36 N. Y. 365; *Whitcomb v. Shultz*, 138 C. C. A. 510, 223 Fed. 268; *Patterson v. Gibson*, 81 Ga. 802, 12 Am. St. Rep. 356, 10 S. E. 9; *Griffith v. Sitgreaves*, 90 Pa. 161.

It should be observed, however, that in some of the cases cited whatever is said on the subject is purely obiter. In others the defense interposed by the surety was duress practised on the principal. These are not in point because they are based upon the proposition that the minds of the parties to the contract

(221 N. Y. 167, 117 N. E. 945.)

did not meet, and that, therefore, there was no contract. If so, or if the alleged contract was void, clearly the surety would not be liable.

Principal and surety — liability of surety — void contract.

Many of the duress cases may also be distinguished on the theory that the surety was closely related to the principal. Such is the distinction taken in *Plummer v. People*, 16 Ill. 358. There it was said that sureties upon a recognizance cannot plead the duress of the principal unless they bear some such relation to each other as father and son, or husband and wife. In such cases the relations between the parties are so intimate that the constraint upon one is supposed to act with equal force upon the other. To the same effect is *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188.

The rule that prevails in this state, however, is clearly laid down in *Elliott v. Brady*, 192 N. Y. 221, 226, 18 L.R.A. (N.S.) 600, 127 Am. St. Rep. 898, 85 N. E. 69. The opinion is by Judge Chase, and it was concurred in by all the court except Chief Judge Cullen, who concurred in the result. "A party when sued upon his obligation cannot avail himself of an independent cause of action [here, fraud inducing the contract] existing in favor of his principal against the plaintiff as a defense or counterclaim. It is for the principal to determine what use he will make thereof, and the surety has no control over him in this respect."

A contract induced by fraud is not void. It is voidable at the option of the party defrauded, and it requires affirmative action on his part to relieve him of the obligation. *Baird v. New York*, 96 N. Y. 567. If he elects to avoid the contract he can do so only on the condition of returning what he has received under it. If he elects not to avoid it he has an

Fraud — effect on contract.

—return of property.

independent cause of action for damages arising from the fraud. *Hazard v. Irwin*, 18 Pick. 95; *Henry v. Daley*, 17 Hun, 210.

—action for damages.

This cause of action belongs to him, not to the surety. The latter is not defrauded and cannot maintain an action for damages occasioned by the fraud. The surety could be allowed such damages as a defense or counterclaim only upon some principle that would make the recovery of them by him a bar to any future action or counterclaim by the principal. He might thus bar a large claim in favor of the latter by canceling a small one against himself.

—action by surety.

"If the principal could abide by the contract, and the surety repudiate it, the strange result would be produced that the principal would retain the fruits of the contract, whilst the surety would avoid the performance of his obligation on the ground of its invalidity, in direct opposition to the acts of his principal, admitting that the contract was valid." *Evans v. Keeland*, 9 Ala. 42.

In other words, what shall be done with a contract induced by fraud is purely a question for the determination of the party on whom the fraud is committed. He may repudiate it, and if he does so the surety may avail himself of the repudiation, as was done in *Bennett v. Carey*, 72 Iowa, 476, 34 N. W. 291. He may affirm it, in which case the surety cannot be heard to raise the question. He may suspend his action, at least for a time, and the surety may not compel him to elect. *Henry v. Daley*, 17 Hun, 210; *Evans v. Keeland*, supra; *Tucker v. State*, 72 Ind. 242; *Thompson v. Buckhannon*, 2 J. J. Marsh. 416; *Oak v. Dustin*, 79 Me. 23, 1 Am. St. Rep. 281, 7 Atl. 815; *Bowman v. Hiller*, 130 Mass. 153, 39 Am. Rep. 442; *Robinson v. Gould*, 11 Cush. 55.

Some of these cases are cases of duress and, as we have said, such cases, where it is held that the surety



may plead the duress, are not strictly in point. Where they reach the contrary conclusion, however, they are authority.

A distinction is sometimes made between cases where the surety is sued alone, and those where he is sued together with his principal. But it is difficult to see how the fact that the principal is joined with the surety is material. If so, the rights of the parties depend upon the form of the action and the will of the plaintiff. For

*Parties—action  
against surety—  
principal.*

the latter cannot be compelled to bring in the principal as a defendant in an action brought by him to obtain a money judgment. *Bauer v. Dewey*, 166 N. Y. 402, 60 N. E. 30.

Of course, if principal and surety are in fact sued, and the principal sets up the defense that the contract

should be set aside on the ground of fraud, the surety may undoubtedly avail himself of the same defense. If the principal succeeds there is nothing upon which to base the obligation of suretyship. But the principal may not choose to take any position. He may default in the action, or he may ratify the contract and counterclaim for the damages caused by the fraud. In no event can he be deprived of his right to ratify the contract or deprived of his independent cause of action to recover damages for the fraud.

*Principal and  
surety—right of  
surety to set up  
fraud against  
principal.*

The judgment appealed from should be affirmed with costs.

*Hiscock, Ch. J., Chase, Cuddeback, Hogan, and Pound, JJ., concur; McLaughlin, J., not sitting.*

## ANNOTATION.

### Right of surety to avoid contract for fraud on principal.

#### Generally.

Where the person bound as principal in a contract defends on the ground that it was procured by fraud, his surety is entitled to make the same defense against his liability thereon. *Hagar v. Mounts* (1832) 3 Blackf. (Ind.) 57; *Hazard v. Irwin* (1846) 18 Pick. (Mass.) 95; *Macey v. Heger* (1900) 195 Pa. 125, 45 Atl. 675.

In *Macey v. Heger* (Pa.) *supra*, the action was on a bond conditioned for the faithful performance by one of the defendants of his contract for excavating, grading, and concrete work. The president of the plaintiff company had represented to the subcontractor that only a certain amount of work was necessary. On that representation the principal signed the agreement. On finding that the statements were incorrect and untrue, the principal demanded a reformation of the contract, and, on the plaintiff's refusal to consent thereto, quit work. Both the principal and the surety defended on the ground of fraud. The court held that the fraud of the plain-

tiff was equally as effective as a defense in an action on a bond given to secure the performance of a contract as in an action to recover damages for a breach of contract.

In *Hagar v. Mounts* (Ind.) *supra*, it appeared that the defendant accepted a note from a member of a partnership for his individual debt, signed with the firm name and indorsed by a third person. The note was given without the knowledge of the other member of the partnership, and the indorser understood that he was indorsing a firm note. In an action on the note the defrauded member of the firm and the indorser set up the fraud of the other member of the partnership. The court held that a fraud was committed against the innocent member of the partnership, and also on the indorser, and that evidence should have been admitted tending to show this, saying: "This is a fraud on Hagar, and the note does not bind him. The note, appearing on its face to be the note of Wilson & Hagar, is executed by Hart with the intention of

being their surety. If it was fraudulent and void as to Hagar, it must be so also as to Hart. Hart might be willing to be surety for the firm of Wilson & Hagar, but not for Wilson alone. The evidence offered, therefore, constituted a good bar to the action, and ought to have been admitted by the circuit court."

In *Hazard v. Irwin* (1846) 18 Pick. (Mass.) 95, an action on a contract for the purchase of an engine, which the defendants had signed as sureties, the defendants set up the repudiation of the contract by their principal because of the fraud of the plaintiff. The court held that the sureties could plead such repudiation, saying: "Fraud in the terms of a contract of sale renders it not absolutely void, but voidable at the election of the party defrauded. The rule is designed for his security and protection. If he is desirous to retain the commodity, and carry the contract into effect, although he has been imposed upon and cheated in the terms of it, he undoubtedly has a right so to do. He may be so situated that, although conscious that he has been grossly defrauded, yet so urgent may be his necessity for the immediate use of the article purchased that he would rather submit to the imposition than repudiate the contract. In such case, neither the other contracting party nor a stranger can avoid the contract on that ground. But we think this argument is not warranted by the pleas; but the pleas do state, not perhaps in the most precise and formal manner, but with a certainty sufficient after verdict, that the principal, Penman, did repudiate and rescind this contract. . . . The effect of the plea, therefore, is not that the contract between the plaintiff and defendants is void on the ground of fraud, but that, taking it to be valid and in full force, there is nothing due upon it from the defendants as sureties, because, the original contract between the plaintiff and Penman having been justifiably repudiated by the principal, there is nothing due from him."

In *Bennett v. Carey* (1887) 72 Iowa, 476, 34 N. W. 291, it was held that a

guarantor of the performance of a contract by two persons was released where, by reason of the fraud practised on him, one of those persons was not bound by the contract. The court said: "When the original case was before us, we held that, if the facts as to the alleged mutual mistake were as claimed by Gunnison, no contract existed between him and defendant. See *Carey v. Gunnison* (1885) 65 Iowa, 702, 22 N. W. 934. And if Gunnison was induced to sign the writing by the fraudulent representation and concealment alleged the same result would follow. In either case, he was not bound by the writing; so that plaintiff is not seeking to avoid liability on the ground that he has been released by matters occurring subsequent to the execution of the contract, but the theory of his defense is that he was induced to guarantee the performance of certain undertakings by his principals, in the belief that they were both bound by the contract, whereas, by reason of the wrong or mistake of defendant, one of them, and the only one against whom he would have any adequate remedy in case of default, was not bound by the undertaking. His defense, in effect, is that there was no consideration for his undertaking, and such want of consideration was the result of defendant's wrong or mistake; and we think that proof of either the fraud or mistake alleged will establish that defense. Of course, this proof must be made in the original action. It must be established in that action that Gunnison is not bound by the written contract, or the defense will not be available to plaintiff."

Where the misrepresentation is insufficient to discharge the principal, the surety cannot avail himself of it. *Bryant v. Crosby* (1853) 36 Me. 562, 58 Am. Dec. 767, wherein it appeared that the defendant's testator signed a conditional bill of sale as surety. In an action on the contract the defendant set up, among other things, fraudulent representations on the part of plaintiff, the vendor, made to the principal. The court held that a surety could not avail himself of the defense

of fraud practised on his principal, except when his principal could. In that case it was said: "A surety cannot be discharged on the ground of fraudulent representations made to his principal, except when that principal would be. The plaintiff could not in law be considered as conducting fraudulently, unless he knew that the representations were false. To make him lose his security because his representations were untrue, when he did not know them to be so, is to impose upon him the risk of a warrantor. A fraudulent concealment of facts from his principal would not necessarily have the effect to discharge the surety; while he would be relieved so far as his principal would be."

Where the surety has given his note, taking up his principal's, he becomes the principal, and therefore loses any defense which he might have had under the old note by reason of fraud on the principal. *Fluker v. Henry* (1855) 27 Ala. 403, wherein the court said: "The giving of the note sued on by the defendant, 'in discharge of the balance remaining due on the original note,' changed the relation between him and J. G. Dent & Company. On the original note, he was their surety; but, by giving his own note 'in discharge' of it, he became their creditor. He cannot, in this suit, be regarded as their surety, or as entitled to make any defense which rests upon the existing relation of principal and surety. He is the principal, the sole principal, in the note sued on, and must be so treated in the present action. . . . If a defense, either total or partial, could have been made to the original note, in consequence of fraud in the sale of the negro for which it was given, or of the breach of the warranty of his soundness, the discharge of that note, by giving the note here sued on, destroys the right of the defendant to make that defense in this suit."

**In absence of repudiation of contract by principal.**

By the weight of authority, where a contract has been procured by fraud a surety for the performance thereof

is not entitled to set up that fraud in defense against his liability, unless the principal has, by reason of the fraud, repudiated the contract. *Stockton Sav. & L. Soc. v. Giddings* (1892) 96 Cal. 84, 21 L.R.A. 406, 81 Am. St. Rep. 181, 30 Pac. 1016; *Brown v. Wright* (1828) 7 T. B. Mon. (Ky.) 396, 18 Am. Dec. 190; *Walker v. Gilbert* (1846) 7 Smedes & M. (Miss.) 456. And see the reported case (*ETTLINGER v. NATIONAL SURETY Co.* ante, 865).

Thus, in *Walker v. Gilbert* (Miss.) supra, it appeared in an action to enjoin a judgment at law that the complainant was surety on a promissory note, which he contended had been obtained by fraud. The court held that a surety could not take advantage of a fraud perpetrated on his principal, where the principal did not complain, saying: "This contract of sale was made between Puckett, and Enloe, Johnson, & Company, and if there was fraud in the transaction it was perpetrated on Puckett, who was the purchaser, and to whom the deed was made. Walker sets out in his bill that he was a mere surety; the consideration did not pass to him, but to Puckett; but Puckett does not complain of fraud in the contract; he is no party to this proceeding, and, for anything that appears, is content with his bargain. Suppose, then, the injunction should be made perpetual, what is the consequence? It would not vacate the contract. Puckett may still insist upon the contract. The effect would be to take from the vendor a part of his security, and leave the contract in force. Can this be done? It is evident that no decree that could be made in this cause could affect Puckett, for he is no party; the court cannot, therefore, interfere with his contract. Puckett and Fall were both defendants to the judgment, and the injunction suspended the execution as to them as well as to complainant. No reason whatever is shown why they are not made parties, which should have been done if practicable. No relief could be given to the complainant without vacating the contract, which, under the circumstances, cannot be done. Walker cannot com-

plain that the contract was void for want of consideration. The consideration was received by Puckett, which was sufficient to make the contract binding on Walker. Puckett seems to be still satisfied with his bargain; he does not deny but what he has received a full consideration; he does not aver that any fraud was practised on him. If he were before us he might admit that he purchased with full notice of encumbrances."

In *Brown v. Wright* (1828) 7 T. B. Mon. (Ky.) 396, 18 Am. Dec. 190, a bill was instituted to obtain an injunction relieving the plaintiff from three judgments obtained against him at law, founded on three notes executed by him as surety. The plaintiff maintained that his principals were induced to enter into the contract by reason of the false and fraudulent representations of the vendor as to the lots which his principals were induced to purchase. The principals were made parties defendant. The court held that the surety could not obtain equitable relief from his obligation, on the ground of fraud in the sale, without showing that his principal and the vendor had combined to defraud him, since the principal had the right to waive any equities which he might have and proceed with the contract. The court said: "If we waive the objections against this decree of a perpetual injunction, without setting aside the contract in toto, we cannot perceive on what principle the court below could have given relief to the surety, on the equity set up, without that relief being asked by the principal. The principal, it is true, is made a defendant; but it is not even suggested in the bill that he resists the fulfilment of the contract, or desires relief from it. The grounds relied on are fraud, delusion, and failure of consideration, for the purpose of setting aside the contract. It must rest on the election of the principal whether he will or will not avail himself of these grounds, if they exist. He still has a right to waive this equity and insist on a fulfilment, and his surety has not a right to make that election for him. Indeed, so far as

the bill in this case shows, it is not even the surety forcing the principal into the measure of setting aside the contract, but it is an attempt on the part of the surety to relieve himself by the equity of a supposed fraud on his principal, leaving his principal hereafter to act as he chooses; and not only the principal, hereafter, but the cosurety, have a right each to their bill for relief, or a right to waive the equity. It is, in general, true, that a surety, where the defense rests in an equity against the contract, follows the fate of the principal, and is bound when the principal is bound, and released when the principal is released; and there are cases where, if the contract be voidable only in equity, and that at the election of the principal, the surety cannot make that election for him; and such we conceive this case to be. Whether in such cases, if the principal should refuse to make the defense by way of a fraud on his surety and combination with the opposite party, there might not still be relief granted to the surety, we need not now determine. For, if there be such, the fraud and collusion, or combination, ought to be charged in the bill and made out in evidence; and here there is no attempt to do so. We therefore conceive that, under the circumstances of this case, the complainant cannot avail himself of the equity which he has set up."

In *Stockton Sav. & L. Soc. v. Giddings* (Cal.) supra, the action was instituted on a note given for a certain machine which some of the defendants were induced to purchase by the fraudulent representations of an agent of the manufacturer. One of the defendants was not a party to the sale, but merely signed the note as a surety. The plaintiff held the notes as collateral security as against any overdrafts of the manufacturer. All of the defendants set up the fraudulent representations and breach of warranty. The court held, among other things, that a surety cannot avail himself of the defense of fraud on his principal, because, unless a person who has been defrauded elects to avoid a contract on the ground of

fraud, he is bound by the contract, saying: "It is sometimes said that fraud vitiates the contract, but ordinarily that only means that a party may avoid the contract on that ground; but if he does not elect to do so, he is bound by his contract, and in such case the surety cannot set it up as a defense. If the claim be for damages on account of fraud, the surety cannot avail himself of the defense, for the reasons already given."

Where there are two principals, both must avoid the contract before the sureties can avoid their obligation. *Kirby v. Spiller* (1887) 88 Ala. 481, 3 So. 700, wherein it appeared that the plaintiff and two of the defendants were joint owners of a steamboat. The plaintiff sold his interest to his co-owners, representing to the one that the boat was making money. The other four defendants were sureties on the balance of the purchase price. In an action to recover the balance of the purchase price, the defrauded defendant and all the sureties set up as a defense and grounds for recoupment the fraudulent representation of plaintiff. Demurrers to the several pleas were sustained. In affirming that judgment, the court held that the defense could not be split so as to allow a judgment against one of defendants and a recoupment for the others. Only one judgment could be rendered. It was said: "In actions at law, prosecuted against several joint contractors, no defense which does not go to the equal defense of all can be maintained, unless it be of the class called personal. Infancy, coverture, non est factum, discharge in bankruptcy, and some others are classed as personal defenses, and not only may, but must, be separately pleaded. As to the defense attempted in this case, it must be available to all alike—must be in total or partial bar of the entire action. The reason is obvious. Only one judgment can be rendered—a money judgment for the plaintiff, a general judgment for all the defendants, or a balance certified in their favor, and a judgment therefor in favor of all of them. To allow a judgment against

different defendants for different amounts would be to split up one joint action, founded on one and the same contract, into several distinct recoveries. Courts of common law, by reason of their established methods, are incapable of thus molding the relief they administer. To test the question: Let it be supposed that, in this case, it should be found that Samuel had not been defrauded, and was, therefore, liable for the whole amount of the claim sued for; that Kirby had been defrauded, and was entitled to recoup, or set-off, to the extent of one-half the notes; what judgment or judgments could be rendered? And what judgment should be rendered against the sureties, who had made themselves equally bound for Samuel's default and for Kirby's? It is no answer to this that Kirby claims the right to recoup for the entire amount claimed, and, therefore, if he makes his defense good, no judgment will be rendered against him. The rule, to be susceptible of administration, must be alike applicable to partial and to total recoupment. Otherwise, all the labor and strain of a trial must be gone through with, before it can be known whether the defense is total or partial, and, therefore, whether or not the court has jurisdiction to entertain it. Neither recoupment, set-off, nor failure of consideration, is available as a defense for Kirby, under the circumstances shown in this record, and the circuit court did not err in its rulings on the demurrers. If Kirby is entitled to any redress for the misrepresentation and deceit he complains of, he must seek it in a separate action."

But in *Putnam v. Schuyler* (1875) 4 Hun (N. Y.) 166, 6 *Thomp. & C.* 485, it appeared that two notes were made in favor of the plaintiff's testator. The defendant guaranteed the payment of the notes. The maker of the notes had since died. In an action on the notes against the sureties, the defendant offered to prove that the plaintiff's testator had induced defendant's principal to make such notes by fraudulent representations. The court held that such evidence

should be admitted, as an obligee who has been guilty of fraud stands in no better position against the surety than against the principal. It was said: "And I find no case which intimates that, when a person has obtained an obligation from a principal by fraud, he can wipe out the fraud by obtaining a surety to the obligation. Assuming that in justice and equity, the obligee, by reason of fraudulent acts on his part, has either no claim or a less claim against the principal, I see no reason why he should stand in a better position against the guarantor. The distinction which has been pointed out, viz., that inability on the part of the principal to contract is no defense to the guarantor, while fraud in the contract is, may be found in the civil law. This says that personal defenses do not pass to others, but that defenses inherent in the thing, such as, among others, fraud and duress, are available to sureties. If, in the principal obligation, there is any essential vice which may annul it, as, if it has been contracted by force, if it is contrary to law, or to good manners, if it be founded only on a fraud, or on some error which may suffice to annul it,—in all these cases the obligation of the surety is likewise annulled. The defendant offered to prove acts of the plaintiff's testator, tending to show that he obtained the notes improperly from the maker, that he took advantage of her confidence in him, and that she did not owe him. If these facts be true, he ought neither to recover of her representatives on the notes, nor of the defendant on her guaranties."

It has been held, however, that a surety may defend on the ground that the contract of his principal was procured by fraud, though the principal does not repudiate the contract. *Whitcomb v. Shultz* (1913) 138 C. C. A. 510, 223 Fed. 268, writ of certiorari denied in (1915) 238 U. S. 632, 59 L. ed. 1498, 35 Sup. Ct. Rep. 937; *Wile v. Wright* (1871) 32 Iowa, 451.

In *Whitcomb v. Shultz* (Fed.) *supra*, an action in equity for the release of a surety from his obligation because of an alleged fraudulent mis-

representation made to the principal, it was said: "If a contract had been obtained by fraud, the courts have held that that fact would be sufficient justification for a surety's release from his guaranty, even though his principal may have failed to bring suit to annul the original contract. No cause has been brought to our attention in which it is stated to be the law that when a person has obtained an obligation by fraud he can wipe out the fraud by obtaining a surety to the obligation. The contrary is declared to be the law in *Bryant v. Crosby* (1853) 36 Me. 562, 58 Am. Dec. 767, *supra*. The courts say it is always open to a surety to show that the contract which he has guaranteed was obtained from his principal by fraud or duress. And such was the rule of the civil law. *Strahan's Domet*, bk. 3, title 4, § 5, art. 2; *id.* bk. 3, title 4, § 1, art. 10; *Dig.* 44, l. de exceptionibus, chap. 7, § 1; *Cod.* 2, 24 (23), de fide juss, 2. We do not controvert this proposition. What we do say is that the fraud must relate to material matters."

In *Wile v. Wright* (Iowa) *supra*, it appeared that the principal was procured by fraud to purchase a patent right. A third person deposited with the seller a bond as security for the performance of the contract, which bond the seller converted to his own use. In sustaining a recovery by the surety against the seller, the court said: "After a careful consideration of the case, we are constrained to hold that the court below adopted the correct view. It may well be inferred that the supposed ability of Fear to pay his assumed liability out of the profits of his purchase constituted the inducement to plaintiff to deposit the bond as security for such payment. If the patent proved worthless, the deposit with defendant was made under circumstances different from those that were supposed to exist. If, then, the defendant be allowed to retain and appropriate this deposit, he is permitted to substitute for plaintiff's agreement one which he did not make and would not voluntarily have made.

It seems to us manifestly unjust that the perpetrator of a fraud should be allowed to avail himself of the proceeds of this bond, and the plaintiff be restricted to a remedy against Fear alone, who may be utterly insolvent. It is further claimed that Fear should, upon the discovery of the fraud, have tendered back a deed for the patent right and offered to rescind the contract, and that a failure to do this promptly defeats the plaintiff's right of recovery. If, however, the deposit was made on account of a belief in Fear's ability to pay the debt out of the profits of the patent, engendered

by the fraudulent representations of defendant, we cannot see how the laches of Fear should compromise the plaintiff's rights. Without an offer to rescind, Fear, when sued for the purchase money, could recoup the damages sustained through the fraud, and would be liable only for the real value of the patent purchased. And the deposit being made to secure the performance of Fear's contract, defendant could retain only so much of the avails of the bond as would equal Fear's liability to him. This view was presented by the instructions given."

R. C. L.

W. G. CAIN, Plff. in Err.,

v.

CHARLES T. BONNER et al.

*Texas Supreme Court — May 9, 1917.*

(108 Tex. 399, 194 S. W. 1098.)

**Usury — effect of usurious renewal.**

1. Antecedent indebtedness is not affected by subsequent usurious renewals or extensions where the transactions are distinct.

[See note on this question beginning on page 877.]

**Contract — subsequent agreement — effect.**

2. A contract originally valid is not rendered invalid by a subsequent agreement.

**Usury — application of rule.**

3. The rule that the holder of a debt of which there has been a usurious renewal may recover upon the debt notwithstanding the renewal has no application where, without the renewal, the debt is barred by the Statute of Limitations.

**Limitation of action — promise to remove bar — cause of action.**

4. When, in an action for debt, a new promise is relied on to avoid the Statute of Limitations, such promise, whether made before or after the bar is completed, constitutes the cause of action and must be declared on as such.

[See 17 R. C. L. 895.]

**Estoppel — pleading usurious contract — effect.**

5. A creditor cannot plead a usurious renewal of a contract for the

purpose of avoiding the bar of the Statute of Limitations against the original contract, and not be bound by its usurious character.

**Usury — application in reduction of principal.**

6. If a usurious renewal of a contract is pleaded to avoid the bar of the Statute of Limitations against the original one, any usurious interest collected under it should be applied in reduction of the principal of the debt.

**Appeal — cross writs of error.**

7. Cross assignments of error should be considered by the Texas court of civil appeals, although appellees do not prosecute an appeal.

**— absence of writ of error — effect.**

8. Failure of appellees, whose cross assignments of error were not considered by the Texas court of civil appeals, to apply for writ of error on account of the action of the court of civil appeals, precludes their consideration by the supreme court.

**ERROR** to the Court of Civil Appeals for the Sixth Supreme Judicial District to review a judgment in plaintiff's favor for part only of the amount claimed in an action brought to recover a balance due with interest upon a mechanic's lien contract. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Cone Johnson and B. B. Cain for plaintiff in error.

Messrs. Lasseter & McIlwaine for defendants in error.

Phillips, Ch. J., delivered the opinion of the court:

As originally brought, this suit was by W. G. Cain for a balance due, with interest, upon a mechanic's lien contract in the amount of \$3,000, executed by Charles T. Bonner and wife in favor of one James Bothwell. It was instituted more than four years after the maturity of the contract. Special exceptions urged by the Bonners to the petition on the ground of limitation were sustained. Thereupon, the plaintiff, on February 22, 1911, by an amended petition, set up respective written acknowledgments and renewals of the debt executed by the Bonners in his favor, and also its acknowledgment by Charles T. Bonner through a letter.

The original contract given Bothwell provided for interest at the conventional rate from its maturity. The renewal obligations given plaintiff stipulated for the payment of interest at a usurious rate. The defense of usury was made. The recovery, as a penalty, of double the amount of usurious interest paid the plaintiff, was also sought by the defendants. The judgment of the trial court denied the plaintiff any recovery. On his appeal the court of civil appeals rendered judgment in his favor for a balance, ascertained by applying as a credit the interest paid him under the usurious renewal obligations to the amount due upon the contract when he acquired it, with foreclosure of the mechanic's lien.

It is urged by the plaintiff that his suit was upon the original contract, which was free from usury, and that he was, therefore, entitled to recover thereon, principal

and interest, unaffected by the usurious interest collected by him upon the renewal obligations. This contention presents the question in the case.

A contract, originally valid, is not rendered invalid by a subsequent agreement. It is therefore recognized that antecedent indebtedness

Contract—  
subsequent  
agreement—  
effect.

is not affected by subsequent usurious renewals or extensions where the transactions are distinct. Webb, Usury, § 307; Cousins v. Grey, 60 Tex. 346; Krause v. Pope, 78 Tex. 478, 14 S. W. 616; Harn v. American Mut. Bldg. & Sav. Asso. 95 Tex. 79, 65 S. W. 176. This simply means that the holder of an indebtedness is not obliged to declare upon a contract of renewal not accepted in payment of the debt; that such a usurious renewal is no defense to an originally valid debt; and that the holder of such a debt may declare, and, where not subject to other defenses, recover upon it, notwithstanding the usurious renewal. The rule has no application, and can have none, to cases where, on account of limitation, there is, without the renewal, no maintainable cause of action, and it is made for that reason the sole foundation of the suit.

Usury—effect  
of usurious  
renewal.

—application  
of rule.

When in an action for debt a new promise is relied upon to avoid a plea of limitation, such promise, whether made before or after the bar is complete, constitutes the cause of action and must be declared upon for a recovery. Since the statute, when pleaded, makes a recovery upon the barred debt impossible, reliance upon the new promise to overcome limitation necessarily makes of it the cause of

Limitation of  
action—  
promise to  
remove bar—  
cause of action.



action. Otherwise there is no cause of action that may be enforced.

This has been the holding of the court since *Coles v. Kelsey*, 2 Tex. 542, 47 Am. Dec. 661. It is the settled law of the state, and there can be no occasion now for opening the question of whether the new promise is to be regarded as only a means of continuing the original indebtedness in life and vigor.

The renewal obligations were set up by the plaintiff in his amended petition for the evident purpose of avoiding the limitation to which the original contract was subject, and for which reasons the defendants' exceptions to the declaration upon it in the original petition had been sustained. There could have been no other reason for pleading them. The right of recovery, according to the amended petition, was based upon them and the letter. With a plea of limitation to the suit on the contract properly sustained, the plaintiff was left without any maintainable cause of action upon it. If the renewal agreements and the letter were not asserted as a means of enforcing his demand, and as therefore constituting a new cause of action, his suit was already at an end.

Having declared upon the renewal agreements, the plaintiff's right of recovery was measured by them. He could not avail himself of their benefits without subjecting his action to the defenses which they afforded. The ordinary principles of estoppel would deny to him the appropriation of only their favorable results. With the suit resting upon them, their usurious character was necessarily an available defense. It was therefore proper to apply the usurious interest collected by the plaintiff under them to the reduction of the principal of his debt, as was done by the court of civil appeals in its judgment.

*Cousins v. Grey*; *Krause v. Pope*,

and *Harn v. American Mut. Bldg. & Sav. Asso.* supra, relied upon by the plaintiff in error, were all cases essentially different in character from this one.

In each of them the cause of action, in whole or in part, was upon a contract or contracts of indebtedness which were untainted by usury, and to which the defense of limitation was either not available or was not pleaded. In such state of case, under the rule already noted, recovery under the original contract, unaffected by collateral or subsequent usurious agreements, was permissible.

In *Cousins v. Grey*, the usurious notes were set up by the defendant. The plaintiff's action was upon a note not usurious. It does not appear that it was barred by limitation when the action was filed. There is no mention of limitation in the case. The usurious notes were not only not relied upon by the plaintiff for the purpose of avoiding limitation, as is the case here, but they were not declared upon by him at all.

In *Harn v. American Mut. Bldg. & Sav. Asso.* the action was upon an original note not usurious, and upon a note given in extension of it which was usurious. No question of limitation was in the case. It was properly held that recovery could be had upon the note, as unimpaired by the usurious renewal.

*Krause v. Pope*, upon which stress is laid, was a suit upon two notes not usurious and upon subsequently executed renewal agreements, the original of which provided for usurious interest, and by which the others were affected. The opinion of Associate Justice Henry does not disclose whether the defense of limitation was urged against the cause of action asserted upon the notes, though it appears that they were barred when the action was filed. The writer has examined the original record to ascertain its state in this regard. Limitation was pleaded by John Hancock, to whom the notes were originally

**Estoppel—**  
**pleading**  
**usurious con-**  
**tract—effect.**

**Usury—applica-**  
**tion in**  
**reduction of**  
**principal.**

given and who was joined as a defendant, but the plaintiff dismissed him from the suit. It was not pleaded by the maker of the notes, nor by any other defendant. To be available, limitation must be specially urged either by exception or plea. With the plaintiff asserting a cause of action upon the notes, unchallenged by limitation, he was, of course, entitled to judgment upon them, unaffected by the usurious renewals. The question presented by this case was not involved.

Certain rulings by the trial court adverse to the defendants were made by them the subject of cross assignments of error in the court of

civil appeals. We think they were entitled to have them there considered, though they did not prosecute an appeal. *Duren v. Houston & T. C. R. Co.* 86 Tex. 287, 24 S. W. 258; *Carroll v. Carroll*, 20 Tex. 732; *Brown v. Hudson*, 14 Tex. Civ. App. 605, 38 S. W. 653. But a writ of error was not applied for on account of the court of civil appeals' disposition of these rulings; and we are therefore not called upon to determine the questions which they involve.

The judgment of the Court of Civil Appeals is affirmed.

## ANNOTATION.

### Effect on indebtedness originally valid of usurious forbearance, renewal, or extension.

- I. General rule, 877.
- II. Application of rule, 879.
- III. Rights and remedies:
  - a. In general, 882.
  - b. Limitation of actions, 884.

#### I. General rule.

It is universally recognized that if a transaction or an obligation is free from usury in its origin no subsequent usurious transaction respecting it can affect it with the taint of usury, the theory being that the question whether a contract is usurious or not must be decided with reference to the time when it was entered into.

**United States.**—*Gaither v. Farmers' & M. Bank* (1828) 1 Pet. 37, 7 L. ed. 43; *Burnhisel v. Firman* (1875) 22 Wall. 170, 22 L. ed. 766, see also *Rose's Notes* to these cases; *Re Fishel* (1911) 192 Fed. 412.

**Alabama.**—*Van Beil v. Fordney* (1885) 79 Ala. 76; *Allen v. Turnham* (1887) 83 Ala. 323, 3 So. 854; *Woodall v. Kelly* (1888) 85 Ala. 368, 7 Am. St. Rep. 57, 5 So. 164; *Nance v. Gray* (1904) 143 Ala. 234, 38 So. 916, 5 Ann. Cas. 55; *Bernheimer v. Gray* (1917) — Ala. —, 78 So. 840.

**Arkansas.** — *Jordan v. Mitchell* (1868) 25 Ark. 258; *Marks v. McGehee* (1879) 85 Ark. 217; *Humphrey v. McCauley* (1891) 55 Ark. 143, 17 S. W.

713; *Tillman v. Thatcher* (1892) 56 Ark. 334, 19 S. W. 968; *Johnson v. Hull* (1893) 57 Ark. 550, 22 S. W. 176; *Hynes v. Stevens* (1896) 62 Ark. 491, 36 S. W. 689; *Bank of Malvern v. Burton* (1900) 67 Ark. 426, 55 S. W. 483.

**Connecticut.**—*Hovey v. Shumway* (1775) 1 Root, 70; *Philadelphia Loan Co. v. Towner* (1839) 13 Conn. 249.

**District of Columbia.**—*Brown v. Clark* (1884) 3 Mackey, 185.

**Florida.** — *Mitchell v. Doggett* (1847) 1 Fla. 400; *Mitchell v. Cotten* (1848) 2 Fla. 136.

**Georgia.** — *Troutman v. Barnett* (1850) 9 Ga. 80; *Dotterer v. Freeman* (1891) 88 Ga. 479, 14 S. E. 863.

**Illinois.** — *Gates v. Hackenthal* (1871) 57 Ill. 534, 11 Am. Rep. 45.

**Indiana.**—*Indianapolis Ins. Co. v. Brown* (1843) 6 Blackf. 378; *Beauchamp v. Leagan* (1860) 14 Ind. 401; *Pratt v. Wallbridge* (1861) 16 Ind. 147; *Culph v. Phillips* (1861) 17 Ind. 209.

**Indian Territory.**—*McEwin v. Humphrey* (1898) 1 Ind. Terr. 550, 45 S. W. 114; *Smith v. Neeley* (1899) 2 Ind. Terr. 651, 53 S. W. 450.

**Iowa.**—*Kelly v. Gillespie* (1861) 12 Iowa, 55, 79 Am. Dec. 516; *Mallett v. Stone* (1864) 17 Iowa, 64, 85 Am. Dec. 545.

**Kentucky.**—*Pyke v. Clark* (1842) 3 B. Mon. 262.

**Louisiana.**—*Depau v. Humphreys* (1829) 8 Mart. N. S. 1; *Daquin v. Coiron* (1832) 3 La. 387; *Erwin v. Lowry* (1847) 2 La. Ann. 314, 46 Am. Dec. 545; *Lalande v. Breaux* (1850) 5 La. Ann. 505.

**Maine.**—*Lindsay v. Hill* (1876) 66 Me. 212, 22 Am. Rep. 564.

**Maryland.**—*Sangston v. Maitland* (1840) 11 Gill & J. 286.

**Massachusetts.**—*Gardner v. Flagg* (1811) 8 Mass. 101; *Thompson v. Woodbridge* (1811) 8 Mass. 256; *Johnson v. Johnson* (1814) 11 Mass. 359; *Stebbins v. Smith* (1827) 4 Pick. 97; *Ramsdell v. Soule* (1831) 12 Pick. 126; *Drury v. Morse* (1862) 3 Allen, 445.

**Minnesota.**—*Avery v. Creigh* (1886) 35 Minn. 456, 29 N. W. 154; *Barrows v. Thomas* (1890) 43 Minn. 270, 45 N. W. 443; *Morse v. Wellcome* (1897) 68 Minn. 210, 64 Am. St. Rep. 471, 70 N. W. 978.

**Mississippi.**—*Warmack v. Boyd* (1886) 63 Miss. 488; *Rozelle v. Dickerson* (1886) 68 Miss. 588.

**Nebraska.**—*Richards v. Kountze* (1876) 4 Neb. 200; *Dell v. Oppenheimer* (1880) 9 Neb. 454, 4 N. W. 51; *Chicago Lumber Co. v. Bancroft* (1902) 64 Neb. 176, 57 L.R.A. 910, 89 N. W. 780.

**New Jersey.**—*Sloan v. Sommers* (1834) 14 N. J. L. 509; *Varick v. Crane* (1837) 4 N. J. Eq. 128; *Donnington v. Meeker* (1857) 11 N. J. Eq. 362; *Ware v. Thompson* (1860) 13 N. J. Eq. 66; *Smith v. Hollister* (1861) 14 N. J. Eq. 153; *Giveans v. McMurtry* (1863) 16 N. J. Eq. 468; *Terhune v. Taylor* (1876) 27 N. J. Eq. 80; *Hann v. Dekater* (1890) — N. J. Eq. —, 20 Atl. 657; *Ruh v. Dwiggin* (1910) 77 N. J. Eq. 117, 76 Atl. 243.

**New York.**—*Swartwout v. Payne* (1822) 19 Johns. 294, 10 Am. Dec. 228; *Williams v. Allen* (1827) 7 Cow. 316; *Hughes v. Wheeler* (1827) 8 Cow. 77; *Merrills v. Law* (1828) 9 Cow. 65; *Rice v. Welling* (1830) 5 Wend. 595; *Bank of Troy v. Hopping* (1835) 13 Wend. 565; *Crane v. Hubbel* (1839) 7 Paige, 413; *Crippen v. Heermance* (1841) 9 Paige, 211; *Brown v. Dewey* (1849) 1 Sandf. Ch. 56; *Cook v. Barnes* (1867)

36 N. Y. 520; *Farmers' & M. Bank v. Joslyn* (1867) 37 N. Y. 358; *Winsted Bank v. Webb* (1868) 39 N. Y. 325, 100 Am. Dec. 435; *Emmons v. Barnes* (1873) 55 N. Y. 643; *Gerwig v. Sitterly* (1874) 56 N. Y. 214; *Leary v. Miller* (1875) 61 N. Y. 488; *Patterson v. Bird-sall* (1876) 64 N. Y. 294, 21 Am. Rep. 609; *Real Estate Trust Co. v. Keech* (1879) 69 N. Y. 248, 25 Am. Rep. 181, affirming (1876) 7 Hun, 253; *Church v. Maloy* (1877) 70 N. Y. 63; *Re Consalus* (1884) 95 N. Y. 840; *Fleischmann v. Stern* (1881) 24 Hun, 265; *Underhill v. Crennan* (1881) 25 Hun, 569; *Allison v. Schmitz* (1883) 31 Hun, 106; *Botsford v. Bean* (1899) 44 App. Div. 190, 60 N. Y. Supp. 735; *Sheppard v. Hamilton* (1859) 29 Barb. 156; *Central City Bank v. Dana* (1860) 32 Barb. 296; *Carson v. Ingalls* (1861) 33 Barb. 657; *Winsted Bank v. Webb* (1863) 46 Barb. 177; *Williams v. Fitzhugh* (1865) 44 Barb. 321; *McCraney v. Alden* (1866) 46 Barb. 272; *Abrahams v. Claussen* (1876) 52 How. Pr. 241; *Rosenbaum v. Silverman* (1898) 22 Misc. 589, 50 N. Y. Supp. 860; *Hagaman v. Reinach* (1905) 48 Misc. 206, 96 N. Y. Supp. 719; *Emmons v. Barnes* (1873) 4 Daly, 418; *Lyon v. Simpson* (1883) 12 Daly, 56; *Froese v. Prosnitz* (1890) 34 N. Y. S. R. 9, 12 N. Y. Supp. 88.

**North Carolina.**—*Collier v. Nevill* (1831) 14 N. C. (3 Dev. L.) 30; *Bost v. Smith* (1843) 26 N. C. (4 Ired. L.) 68; *Cobb v. Morgan* (1880) 83 N. C. 211; *Wharton v. Eborn* (1883) 88 N. C. 344; *Rountree v. Brinson* (1887) 98 N. C. 107, 3 S. E. 747; *Webb v. Bishop* (1888) 101 N. C. 99, 7 S. E. 698.

**Ohio.**—*Busby v. Finn* (1853) 1 Ohio St. 409.

**South Carolina.**—*Miller v. Reid* (1831) 2 Bail. L. 345; *Chastain v. Johnson* (1832) 2 Bail. L. 574.

**Texas.**—*Cousins v. Grey* (1883) 60 Tex. 346; *Krause v. Pope* (1890) 78 Tex. 478, 14 S. W. 616; *Harn v. American Mut. Bldg. & Sav. Asso.* (1901) 95 Tex. 79, 65 S. W. 176; *Cain v. Bonner* (reported herewith) ante, 874; *Collier v. Soule* (1892) 4 Tex. App. Civ. Cas. (Willson) 550, 19 S. W. 506; *Hennesy v. Clough* (1897) — Tex. Civ. App. —, 40 S. W. 157; *Seymour Opera*

House Co. v. Thurston (1898) 18 Tex. Civ. App. 417, 45 S. W. 815; Quinlan v. Smye (1899) 21 Tex. Civ. App. 156, 50 S. W. 1068; Nesbit v. Goodrich (1901) 25 Tex. Civ. App. 23, 60 S. W. 1017; State Nat. Loan & T. Co. v. Fuller (1901) 26 Tex. Civ. App. 318, 63 S. W. 552.

Utah.—Cobb v. Hartenstein (1915) 47 Utah, 174, 152 Pac. 424.

Vermont. — Edgell v. Stanford (1884) 6 Vt. 551; Farmers' Bank v. Burchard (1860) 33 Vt. 346.

Virginia.—Fox v. Taliaferro (1812) 4 Munf. 243; Pollard v. Baylor (1819) 6 Munf. 433; Brown v. Toell (1827) 5 Rand. 543, 16 Am. Dec. 759; Parker v. Cousins (1845) 2 Gratt. 372, 44 Am. Dec. 388; White v. Freeman (1884) 79 Va. 597; Ward v. Cornett (1895) 91 Va. 676, 49 L.R.A. 550, 22 S. E. 494.

Wisconsin. — Eastman v. Porter (1861) 14 Wis. 42; Meshke v. Van Doren (1862) 16 Wis. 320; Lee v. Peckham (1863) 17 Wis. 383.

England.—Pollard v. Scholy (1584) Cro. Eliz. pt. 1, p. 20, 78 Eng. Reprint, 286; Ferrell v. Shaen (1670) 1 Wms' Saund. 294, 85 Eng. Reprint, 400, 2 Keble, 577, 84 Eng. Reprint, 363; Rex v. Allen (1670) T. Raym. 196, 83 Eng. Reprint, 103; Radley v. Manning (1673) 3 Keble, 142, 84 Eng. Reprint, 642; Rex v. Sewell (1702) 7 Mod. 118, 87 Eng. Reprint, 1135; Abrahams v. Bunn (1768) 4 Burr. 2251, 98 Eng. Reprint, 173; Gray v. Fowler (1790) 1 H. Bl. 462, 126 Eng. Reprint, 268; Nichols v. Lee (1797) 3 Anstr. 940, 145 Eng. Reprint, 1088; Phillips v. Cockayne (1811) 3 Campb. 119.

In Richards v. Kountze (1876) 4 Neb. 200, in summing up the law on this question, it was said that the rule that "if the original contract is bona fide, and wholly free from the taint of usury, then no subsequent agreement to pay usury, or a usurious premium upon the debt, will invalidate the instrument given for the payment of the debt, or affect the original contract with the vice of usury . . . is well founded in principle and just in equity, for, if there was once a valid subsisting debt, bearing interest, the contract creating such debt cannot be

impaired or destroyed by a subsequent void agreement."

In connection with the above-cited English cases it is of interest that the English Usury Act was repealed by the Usury Laws Repeal Act (1854) (17 & 18 Vict. chap. 90), and that now there is no limit except that certain courts have statutory power to set aside or vary a transaction where the interest charge is excessive. See 21 Laws of England (Halsbury) p. 42.

## II. Application of rule.

The general rule that a contract originally valid is not affected by a subsequent usurious transaction applies to extensions and renewals, where the evidence of the original contract is given up.

Alabama. — Bernheimer v. Gray (1917) — Ala. —, 78 So. 840.

Arkansas.—Humphrey v. McCauley (1891) 55 Ark. 143, 17 S. W. 713.

Florida. — Mitchell v. Doggett (1847) 1 Fla. 400; Mitchell v. Cotten (1848) 2 Fla. 136.

Indiana.—Indianapolis Ins. Co. v. Brown (1843) 6 Blackf. 373.

Indian Territory.—McEwin v. Humphrey (1898) 1 Ind. Terr. 550, 45 S. W. 114; Smith v. Neeley (1899) 2 Ind. Terr. 651, 53 S. W. 450.

Massachusetts.—Ramsdell v. Soule (1831) 12 Pick. 126.

Minnesota.—Barrows v. Thomas (1890) 48 Minn. 270, 45 N. W. 443.

Mississippi. — Warmack v. Boyd (1886) 63 Miss. 488.

New York. — Swartwout v. Payne (1822) 19 Johns. 294, 10 Am. Dec. 228; Hughes v. Wheeler (1827) 3 Cow. 77; Farmers & M. Bank v. Joslyn (1867) 37 N. Y. 353; Winsted Bank v. Webb (1868) 89 N. Y. 325, 100 Am. Dec. 435, affirming (1863) 46 Barb. 177; Gerwig v. Sitterly (1874) 56 N. Y. 214; Leary v. Miller (1875) 61 N. Y. 488; Underhill v. Crennan (1881) 25 Hun, 569; Sheppard v. Hamilton (1859) 29 Barb. 156; Central City Bank v. Dana (1860) 82 Barb. 296; Froese v. Prosnitz (1890) 84 N. Y. S. R. 9, 12 N. Y. Supp. 88; Rosenbaum v. Silverman (1898) 22 Misc. 589, 50 N. Y. Supp. 860.

**South Carolina.**—*Chastain v. Johnson* (1832) 2 Bail. L. 574.

**Texas.**—*Harn v. American Mut. Bldg. & Sav. Asso.* (1901) 95 Tex. 79, 65 S. W. 176; *CAIN v. BONNER* (reported herewith) ante, 874; *Collier v. Soule* (1892) 4 Tex. App. Civ. Cas. (Willson) 550, 19 S. W. 506; *Hennessy v. Clough* (1897) — Tex. Civ. App. —, 40 S. W. 157.

**Vermont.** — *Edgell v. Stanford* (1834) 6 Vt. 551; *Farmers' Bank v. Burchard* (1860) 33 Vt. 346.

**Virginia.**—*Fox v. Taliaferro* (1812) 4 Munf. 243; *Parker v. Cousins* (1845) 2 Gratt. 372, 44 Am. Dec. 388.

**Wisconsin.** — *Eastman v. Porter* (1861) 14 Wis. 42.

**England.** — *Phillips v. Cockayne* (1811) 3 Campb. 119.

And an agreement to pay usurious interest in consideration of forbearance from enforcing payment of the principal for a time does not affect the validity of the original contract, which was not usurious, and which remained in force as originally made, without renewal, discharge, or cancelation.

**Alabama.**—*Van Beil v. Fordney* (1885) 79 Ala. 76; *Allen v. Turnham* (1887) 83 Ala. 323, 3 So. 854; *Woodall v. Kelly* (1888) 85 Ala. 363, 7 Am. St. Rep. 57, 5 So. 164; *Nance v. Gray* (1904) 143 Ala. 234, 38 So. 916, 5 Ann. Cas. 55.

**Indiana.** — *Beauchamp v. Leagan* (1860) 14 Ind. 401; *Culph v. Phillips* (1861) 17 Ind. 209.

**Iowa.**—*Mallett v. Stone* (1864) 17 Iowa, 64, 85 Am. Dec. 545.

**Kentucky.**—*Pyke v. Clark* (1842) 3 B. Mon. 262.

**Louisiana.** — *Lalande v. Breaux* (1850) 5 La. Ann. 505.

**Maine.**—*Lindsay v. Hill* (1876) 66 Me. 212, 22 Am. Rep. 564.

**Massachusetts.** — *Drury v. Morse* (1862) 3 Allen, 445.

**Minnesota.**—*Avery v. Creigh* (1886) 35 Minn. 456, 29 N. W. 154; *Morse v. Wellcome* (1897) 68 Minn. 210, 64 Am. St. Rep. 471, 70 N. W. 978.

**Nebraska.** — *Dell v. Oppenheimer* (1880) 9 Neb. 454, 4 N. W. 51.

**New Jersey.**—*Terhune v. Taylor* (1876) 27 N. J. Eq. 80; *Ruh v. Dwig-*

*gins* (1910) 77 N. J. Eq. 117, 76 Atl. 243.

**New York.**—*Real Estate Trust Co. v. Keech* (1877) 69 N. Y. 248, 25 Am. Rep. 181; *Abrahams v. Claussen* (1876) 52 How. Pr. 241.

**North Carolina.**—*Wharton v. Eborn* (1883) 88 N. C. 344.

**Virginia.**—*Brown v. Toell* (1827) 5 Rand. 543, 16 Am. Dec. 759.

**England.**—*Pollard v. Scholy* (1584) Cro. Eliz. pt. 1, p. 20, 78 Eng. Reprint, 286; *Ferrall v. Shaen* (1670) 1 Wms' Saund. 294, 85 Eng. Reprint, 400, 2 Keble, 577, 84 Eng. Reprint, 363.

And the same has been held as to a usurious extension indorsed on the original note. *Brown v. Clark* (1882) 3 Mackey (D. C.) 185; *Erwin v. Lowry* (1847) 2 La. Ann. 314, 46 Am. Dec. 545; *Richards v. Kountze* (1876) 4 Neb. 200. Likewise, where the original obligation was retained as collateral security for the new extension contract. *Chicago Lumber Co. v. Bancroft* (1902) 64 Neb. 176, 57 L.R.A. 910, 89 N. W. 780; *Allison v. Schmitz* (1883) 31 Hun (N. Y.) 106. And see *Giveans v. McMurtry* (1863) 16 N. J. Eq. 468.

And the general rule applies to usurious notes and obligations which include or were given to cover valid pre-existing debts not evidenced by a written security.

**Arkansas.** — *Marks v. McGehee* (1879) 35 Ark. 217; *Tillman v. Thatcher* (1892) 56 Ark. 334, 19 S. W. 968; *Johnson v. Hull* (1893) 57 Ark. 550, 22 S. W. 176.

**Connecticut.** — *Philadelphia Loan Co. v. Towner* (1839) 13 Conn. 249.

**Massachusetts.**—*Johnson v. Johnson* (1814) 11 Mass. 359; *Stebbins v. Smith* (1826) 4 Pick. 97.

**New York.** — *Williams v. Allen* (1827) 7 Cow. 316; *Re Consalus* (1884) 95 N. Y. 340; *Fleischmann v. Stern* (1881) 24 Hun, 265; *Carson v. Ingalls* (1861) 33 Barb. 657; *McCraney v. Alden* (1866) 46 Barb. 272.

**North Carolina.** — *Bost v. Smith* (1843) 26 N. C. (4 Ired. L.) 68; *Rountree v. Brinson* (1887) 98 N. C. 107, 3 S. E. 748; *Webb v. Bishop* (1888) 101 N. C. 99, 7 S. E. 698.

**Texas.**—*Nesbit v. Goodrich* (1901) 25 Tex. Civ. App. 28, 60 S. W. 1017.  
**Virginia.**—*Pollard v. Baylor* (1819) 6 Munf. 433.

**Wisconsin.**—*Meshke v. Van Doren* (1862) 16 Wis. 319; *Lee v. Peckham* (1863) 17 Wis. 383.

**England.**—*Gray v. Fowler* (1790) 1 H. Bl. 462, 126 Eng. Reprint, 268.

And an independent payment of usury, or a contract therefor, does not vitiate a note or other security, where the usurious interest was not originally contracted for.

**Massachusetts.**—*Gardner v. Flagg* (1811) 8 Mass. 101; *Thompson v. Woodbridge* (1811) 8 Mass. 256; *Drury v. Morse* (1862) 3 Allen, 445.

**New Jersey.**—*Sloan v. Sommers* (1834) 14 N. J. L. 509; *Donnington v. Meeker* (1857) 11 N. J. Eq. 362; *Ware v. Thompson* (1860) 13 N. J. Eq. 66; *Smith v. Hollister* (1861) 14 N. J. Eq. 153; *Terhune v. Taylor* (1876) 27 N. J. Eq. 80; *Hann v. Dekater* (1890) — N. J. Eq. —, 20 Atl. 657.

**New York.**—*Merrills v. Law* (1829) 9 Cow. 65; *Emmons v. Barnes* (1873) 4 Daly, 418; *Rosenbaum v. Silverman* (1898) 22 Misc. 589, 50 N. Y. Supp. 860.

**North Carolina.**—*Collier v. Nevill* (1831) 14 N. C. (3 Dev. L.) 30; *Cobb v. Morgan* (1880) 83 N. C. 211.

**South Carolina.**—*Miller v. Reid* (1831) 2 Bail. L. 345.

**Texas.**—*Cousins v. Grey* (1888) 60 Tex. 346; *Krause v. Pope* (1890) 78 Tex. 478, 14 S. W. 616; *Quinlan v. Smye* (1899) 21 Tex. Civ. App. 156, 50 S. W. 1068; *State Nat. Loan & T. Co. v. Fuller* (1901) 26 Tex. Civ. App. 318, 63 S. W. 552.

**Virginia.**—*Brown v. Toell* (1827) 5 Rand. 543, 16 Am. Dec. 759.

**England.**—*R. v. Allen* (1670) T. Raym. 196, 83 Eng. Reprint, 103; *Radley v. Manning* (1673) 3 Keble, 142, 84 Eng. Reprint, 642; *R. v. Sewel* (1702) 7 Mod. 118, 87 Eng. Reprint, 1135; *Nichols v. Lee* (1797) 3 Anstr. 940, 145 Eng. Reprint, 1088. But compare *Addington v. Cann* (1744) 3 Atk. 141, 26 Eng. Reprint, 885, where-in it was said that if a mortgage be

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drawn only for 5 per cent, and the mortgagee takes 6, it would be void; and as to which it was said in *Nichols v. Lee* (Eng.) supra, that the court could not have meant what it said.

And the taking of a separate usurious note for additional interest does not invalidate a pre-existing valid note. *Hovey v. Shumway* (1775) 1 Root (Conn.) 70; *Swartwout v. Payne* (1822) 19 Johns. (N. Y.) 294, 10 Am. Dec. 228. And see *Crane v. Hubbel* (1839) 7 Paige (N. Y.) 413.

And the validity of an indebtedness originally valid is not affected by the fact that it forms a part of the consideration for a subsequent usurious security which was substituted therefor. *Hammond v. Hopping* (1835) 13 Wend. (N. Y.) 505; *Cook v. Barnes* (1867) 36 N. Y. 520; *Patterson v. Bird-sall* (1876) 64 N. Y. 294, 21 Am. Rep. 609; *White v. Freeman* (1884) 79 Va. 597.

Nor is a mortgage given to secure a valid debt vitiated by a subsequent agreement that it shall also be security for a usurious debt. *Hynes v. Stevens* (1896) 62 Ark. 491, 36 S. W. 689.

And the rule that the usury has no retroactive effect applies to all cases where the subsequent transaction is a mere cover for a usurious contract of forbearance, the original obligation remaining untainted. *Crippen v. Heermance* (1841) 9 Paige (N. Y.) 211 (usurious bond and mortgage given on pretended repurchase of property at an advance). And see *Hagaman v. Reinach* (1905) 48 Misc. 206, 96 N. Y. Supp. 719.

And the rule is that a contract not usurious at the time it was entered into cannot become so by any future contingency. *York Bank v. Asbury* (1858) 1 Biss. 230, Fed. Cas. No. 18,142 (holding that a contract which was valid at its inception was not rendered invalid by the fact that it might or might not become usurious according to circumstances at the time of payment); *Gates v. Hackenthal* (1871) 57 Ill. 534, 11 Am. Rep. 45 (renewal note made subject to variations in value of gold and treasury notes).

*III. Rights and remedies.**a. In general.*

Valid security which has been given up and canceled upon the substitution therefor of securities fatally tainted with usury may be renewed and enforced as if the latter had not been given. *Burnhisel v. Firman* (1875) 22 Wall. (U. S.) 170, 22 L. ed. 766, see also *Rose's Notes* to this case; *Patterson v. Birdsall* (1876) 64 N. Y. 294, 31 Am. Rep. 609; *Underhill v. Crennan* (1881) 25 Hun (N. Y.) 569. And see *Rountree v. Brinson* (1887) 98 N. C. 107, 3 S. E. 747.

And in Virginia it has been held that the obligor may, in equity, have the usurious renewal obligation canceled. *Fox v. Taliaferro* (1812) 4 Munf. (Va.) 243.

And in New York it has been held that a court of equity, in canceling the new usurious agreement, should reinstate the valid securities which had been surrendered or canceled. *Brown v. Dewey* (1843) 1 Sandf. Ch. (N. Y.) 56; *Gerwig v. Sitterly* (1874) 56 N. Y. 214.

So, it has been said that where the complainant has declared upon the usurious renewal note he may amend his complaint so as to recover on the original note. *Bank of Malvern v. Burton* (1900) 67 Ark. 426, 55 S. W. 483; *Webb v. Bishop* (1888) 101 N. C. 99, 7 S. E. 698.

And it has often been held, generally, that the surrender of a valid obligation at the time of the execution of a usurious new one covering it is not a satisfaction of the debt and does not bar a recovery based on the original indebtedness.

**Arkansas.**—*Humphrey v. McCauley* (1891) 55 Ark. 143, 17 S. W. 713.

**Florida.**—*Mitchell v. Doggett* (1847) 1 Fla. 400; *Mitchell v. Cotten* (1848) 2 Fla. 136 (holding that the recovery may be under the common counts).

**Indiana.**—*Indianapolis Ins. Co. v. Brown* (1843) 6 Blackf. 378 (recovery allowed on count for money had and received).

**Massachusetts.**—*Ramsdell v. Soule* (1831) 12 Pick. 126 (recovery allowed in action for money had and received).

**New York.**—*Swartwout v. Payne* (1822) 19 Johns. 294, 10 Am. Dec. 228; *Williams v. Allen* (1827) 7 Cow. 316 (recovery allowed on common counts); *Hughes v. Wheeler* (1827) 8 Cow. 77; *Hammond v. Hopping* (1835) 13 Wend. 505; *Winsted Bank v. Webb* (1868) 39 N. Y. 325, 100 Am. Dec. 435 (holding that the taking of a usurious renewal note is not a satisfaction of the original note nor a discharge of a cause of action thereon, although upon the renewal the original note had been surrendered); *Leary v. Miller* (1875) 61 N. Y. 488; *Re Consalus* (1884) 95 N. Y. 340; *Sheppard v. Hamilton* (1859) 29 Barb. 156; *Central City Bank v. Dana* (1860) 32 Barb. 296; *Froese v. Prosnitz* (1890) 34 N. Y. S. R. 9, 12 N. Y. Supp. 88.

**South Carolina.**—*Chastain v. Johnson* (1832) 2 Bail. L. 574.

**Texas.**—*Harn v. American Mut. Bldg. & Sav. Asso.* (1901) 95 Tex. 79, 65 S. W. 176; *Collier v. Soule* (1892) 4 Tex. App. Civ. Cas. (Willson) 550, 19 S. W. 506; *Hennessy v. Clough* (1897) — Tex. Civ. App. —, 40 S. W. 157.

**Vermont.**—*Edgell v. Stanford* (1834) 6 Vt. 551 (holding that the original note is evidence under the money counts, and that if it has been destroyed evidence of its existence and contents may be given).

**Virginia.**—*Parker v. Cousins* (1845) 2 Gratt. 372, 44 Am. Dec. 388.

**Wisconsin.**—*Eastman v. Porter* (1861) 14 Wis. 42.

**England.**—*Phillips v. Cockayne* (1811) 3 Campb. 119.

And it has been held that, where the maker of a renewal note which is usurious interposes the defense of usury, recovery may be had on the original obligation, as to which no usury was attached. *Farmers & M. Bank v. Joslyn* (1867) 37 N. Y. 353. And see *Winsted Bank v. Webb* (1863) 46 Barb. (N. Y.) 177.

And a usurious contract to forbear enforcement of an original valid obligation, since it does not affect such validity, is itself no bar to an action on such original obligation. *Mallett v. Stone* (1864) 17 Iowa, 64, 85 Am. Dec. 545; *Pyke v. Clark* (1842) 3 B.

Mon. (Ky.) 262; *Stebbins v. Smith* (1826) 4 Pick. (Mass.) 97; *Crane v. Hubbel* (1839) 7 Paige (N. Y.) 413; *Wharton v. Eborn* (1883) 88 N. C. 344; *CAIN v. BONNER* (reported herewith) ante, 874. And a note or other security may be relied upon, although usurious interest has been received, provided such interest was not originally contracted for. *Thompson v. Woodbridge* (1811) 8 Mass. 256. And in Vermont it has been held that an indorser of a valid note cannot set up as a defense thereto that a subsequent note given in extension of or forbearance upon the prior note was usurious, the theory being that the taker of a usurious obligation is the wrongdoer, and that the usury laws are for the protection of the borrower personally. *Austin v. Chittenden* (1861) 33 Vt. 553.

And a valid mortgage may be foreclosed notwithstanding a usurious agreement for forbearance as to suit on the debt which the mortgage was given to secure. *Beauchamp v. Leagan* (1860) 14 Ind. 401; *Gardner v. Flagg* (1811) 8 Mass. 101; *Drury v. Morse* (1862) 3 Allen (Mass.) 445; *Richards v. Kountse* (1876) 4 Neb. 200; *Dell v. Oppenheimer* (1880) 9 Neb. 454, 4 N. W. 51; *Chicago Lumber Co. v. Bancroft* (1902) 64 Neb. 176, 57 L.R.A. 910, 89 N. W. 780; *Ruh v. Dwiggin* (1910) 77 N. J. Eq. 117, 76 Atl. 243; *Real Estate Trust Co. v. Keech* (1877) 69 N. Y. 248, 25 Am. Rep. 181; *Allison v. Schmitz* (1883) 31 Hun (N. Y.) 106; *Rosenbaum v. Silverman* (1898) 22 Misc. 589, 50 N. Y. Supp. 860; *Wharton v. Eborn* (1883) 88 N. C. 344.

And where a usurious note or bond has been given to cover a pre-existing valid indebtedness not evidenced by a written obligation, it has been held that the creditor is under no necessity of relying thereon, but may found his claim upon the clearly separable antecedent debt. *Johnson v. Hall* (1893) 57 Ark. 550, 22 S. W. 176; *Depau v. Humphreys* (1829) 8 Mart. N. S. (La.) 1; *Fleischmann v. Stern* (1881) 24 Hun (N. Y.) 265; *Bost v. Smith* (1843) 26 N. C. (4 Ired. L.) 68; *Meshke v. Van Doren* (1862) 16 Wis. 319; *Gray v. Fowler* (1790)

1 H. Bl. 462, 126 Eng. Reprint, 268; *Phillips v. Cockayne* (1811) 3 Campb. (Eng.) 119. And see *Johnson v. Johnson* (1814) 11 Mass. 359 and *Nesbit v. Goodrich* (1901) 25 Tex. Civ. App. 28, 60 S. W. 1017.

So, where the usurious note was founded upon an antecedent valid account, it has been held that the creditor may sue upon the account. *Tillman v. Thatcher* (1892) 56 Ark. 334, 19 S. W. 968. And see *Rountree v. Brinson* (1887) 98 N. C. 107, 3 S. E. 747.

However, it has also been held that where the suit is based upon the subsequent usurious agreement the plaintiff cannot recover therein on the original contract, at least, if such a right is not in issue or litigated. *Barrows v. Thomas* (1890) 43 Minn. 270, 45 N. W. 443; *Botsford v. Bean* (1899) 44 App. Div. 190, 60 N. Y. Supp. 737 (so holding where the pleadings contain no reference to the original indebtedness, and no amendment of the complaint was made or requested).

And where the suit is based upon the new and usurious contract and the statutes merely declare such contracts void except as to the principal, recovery may be had on such contract, but only in the amount specified by the statute, namely, the principal of the obligation. *Troutman v. Barnett* (1850) 9 Ga. 30; *Dotterer v. Freeman* (1891) 88 Ga. 479, 14 S. E. 863; *CAIN v. BONNER* (reported herewith) ante, 874; *Quinlan v. Smye* (1899) 21 Tex. Civ. App. 156, 50 S. W. 1068. However, for the purposes of this rule it has been held that the term, "principal," as used in the Indiana statute, is the amount of the principal of the original debt, with legal interest thereon up to the time of the making of the usurious contract, provided the debt was one which carried interest. *Pratt v. Wallbridge* (1861) 16 Ind. 147. And see, to the same effect, *Lalande v. Breaux* (1850) 5 La. Ann. 505. And that where the statute provides that, if excessive interest shall be stipulated for, "all interest shall be forfeited," the amount of the original indebtedness with legal interest down to the date of the usurious contract



may be recovered, was held in *Warrack v. Boyd* (1886) 63 Miss. 488, and *Rozelle v. Dickerson* (1886) 63 Miss. 538. And in Nebraska it has been held that the statute forfeits all interest subsequent to the making of the usurious contract, so that, in a suit based on an original note and mortgage, the recovery must be limited to principal and lawful interest accrued at the time a usurious extension was contracted for. *Chicago Lumber Co. v. Bancroft* (1902) 64 Neb. 176, 57 L.R.A. 910, 89 N. W. 780.

And it seems that in Vermont, where usurious contracts are valid to every intent except as to interest in excess of the legal rate, recovery may be had upon a usurious contract given for an obligation originally valid. See *Farmers' Bank v. Burchard* (1860) 33 Vt. 346. And in Virginia a similar rule has been laid down in *White v. Freeman* (1884) 79 Va. 597.

And it has been held that where the usurious contract is declared by statute to be valid, but that the recovery shall be limited to the principal, "without interest," the declaration "must" be thereon, and that the amount with interest cannot be recovered under a common count. *Justice v. Charles* (1848) 1 Ind. 32, *Smith* (Ind.) 67. In this connection the court said: "It would be a manifest evasion of the penalty which the statute intended to impose upon persons for attempting to take usurious interest, that is, the forfeiture of all interest and of the right to recover costs in a suit upon a usurious contract. If the plaintiff in such suit had only to fall back to the original consideration, and recover that with legal interest under the common counts, the attempt by statute to prohibit the recovery of any interest in such cases would be wholly nugatory."

*b. Limitation of actions.*

In Texas, it has been held that the rule that a usurious contract of forbearance does not prevent suit upon the original indebtedness has no application to cases where, on account of limitations, there is, without the

renewal, no maintainable cause of action, so that a suit brought after expiration of limitations as to an original valid obligation, but within the period as to a usurious renewal or extension, must be regarded as an action on the latter contract; and that, since such was the case, the recovery, in view of the Texas rule which allows recovery of the principal, but not the interest, of usurious contracts, must be limited to the principal less any payments of usurious interest which had been made, and credit for which must be given. See the reported case (*CAIN v. BENNER*, ante, 874). It will be observed that the theory adopted in this case, namely, that the original cause of action is barred by the Statute of Limitations, and that the action must be regarded as based upon the new and usurious contract, would preclude recovery altogether in jurisdictions where usury renders a contract absolutely void instead of void only as to the interest.

However, that result has been avoided in the only case which seems to have involved a similar state of facts. Thus, in New York, in *Re Consalus* (1884) 95 N. Y. 840, where the Statute of Limitations was set up as a bar to a claim based on an original valid obligation, the renewal of which was absolutely void for usury, it was held that where the rule is that the subsequent usurious agreement for forbearance, or in renewal or extension, wholly avoids such new agreement, but leaves the debtor liable on the original indebtedness, and that any payments of usurious interest on the new contract must be credited on the original one, such payments, although indorsed on the usurious obligation, are made for the money originally owed, and may be regarded as payments of interest on such indebtedness, so that the Statute of Limitations furnishes no bar to an action on the original debt, such payments having been made within the statutory period, although such original indebtedness was not incurred within that

usurious obligation may be resorted to, to take the case out of the statute. This point, upon which the New York case was made to turn, does not appear to have been raised or considered in the CAIN CASE. G. J. C.

W. C. PYLE, Admr., etc., of Michael Morris, Deceased,

v.

W. R. EAST et al., Appts.

*Iowa Supreme Court—December 16, 1915.*

(173 Iowa, 165, 155 N. W. 283.)

**Gift — delivery to third person.**

1. The indorsement by the payee upon a note taken for the purchase price of land of a statement that the note is to become the property of the maker at the payee's death, and its delivery to a third person to collect the interest during the lifetime of and turn it over to the payee, and at his death to deliver the note to the maker, constitutes a valid gift.

[See note on this question beginning on page 902.]

— testamentary — execution.

2. A mere gift which is testamentary in character will not be recognized or given effect by the courts unless it is made in writing and executed after the manner prescribed by the statute for the execution of wills.

[See 12 R. C. L. 941.]

**Evidence — conditions of sale.**

3. That a provision that a note taken for the purchase price of real estate was to become the property of the grantee upon the death of the grantor was indorsed upon the instrument at the very time it was made affords satisfactory evidence that it was one of the terms or conditions of sale.

**Gift — postponement of delivery — effect.**

4. Postponement of delivery and enjoyment of a gift does not necessarily prevent the passing of a present interest, even though possession by the donee is not obtained until after the donor's death.

[See 12 R. C. L. 936.]

**— delivery to third person — sufficiency.**

5. Delivery to a third person for the

benefit of another, the property to be retained by such third person until the death of the person so delivering it, and then to be turned over to the beneficiary, is a sufficient delivery.

[See 12 R. C. L. 934.]

**— refusal to accept — effect.**

6. That the beneficiary of a gift of a note handed to a third person for delivery after the death of the donor does not accept the note when tendered to him, on the ground that he preferred to have it surrendered to him by the administrator or by order of court, does not impeach his right to claim the gift as a defense to an action on the note.

**Appeal — dismissal of counterclaim — error.**

7. The dismissal of a counterclaim in an action on a promissory note, in defense of which the maker sets up a gift from the payee, is not reversible error, if the claim had been filed against the payee's estate and was pending in court at the time of the dismissal.

[See 2 R. C. L. 244.]

**APPEAL** by defendants from a judgment of the District Court for Hamilton County in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Statement by Weaver, J.:

Action at law upon a promissory note, made by the defendants in the

lifetime of the intestate. There was a judgment for plaintiff, and defendants appeal.

Mr. W. J. Covil, for appellants:

The note for \$1,000, upon which this action was based, was never delivered to Morris, and never intended by him or by the parties who signed the note to be his property. The only right he had in the note was the interest accruing annually. A valid delivery is necessary to give legal existence to a note.

Crawford, Neg. Inst. 2d ed. § 35, note C; Roberts v. McGrath, 38 Wis. 57; Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1.

The delivery of the note to Sogard to hold, collect the interest, and, at the death of Morris, return to defendant, was a delivery in escrow for him, and was not effectual to give title to the payee Morris.

Daggett v. Simonds, 173 Mass. 340, 46 L.R.A. 332, 53 N. E. 907; Re Podhajsky, 137 Iowa, 743, 115 N. W. 590.

The signing of the note by defendant East, the indorsement thereon by Morris, and the delivery to Sogard with instructions to pay Morris the interest annually and at his death deliver the note to East were all one transaction, an entirety, by virtue of which said note, at the death of Morris, became the unconditional property of East.

Hogan v. Sullivan, 114 Iowa, 460, 87 N. W. 447; Larimer v. Beardsley, 130 Iowa, 706, 107 N. W. 935; Mollison v. Rittgers, 140 Iowa, 365, 29 L.R.A. (N.S.) 1179, 118 N. W. 512; Abegg v. Hirst, 144 Iowa, 196, 138 Am. St. Rep. 285, 122 N. W. 838; Miles v. Miles, 168 Iowa, 153, 150 N. W. 21.

The transaction whereby the note was delivered to Sogard, to be by him given to East at the death of Morris, amounted to a gift by Morris to East, the delivery to him being only postponed until the death of Morris.

Ibid.

Mr. Wesley Martin for appellee.

Weaver, J., delivered the opinion of the court:

The defendants admit the making of the note in suit, but allege that at the time of its execution, and as a part of the same transaction, the payees therein named indorsed and signed upon the back of said instrument an agreement as follows: "This note is to be void and to become the property of W. R. East at the death of the undersigned.

(Signed) Michael Morris, and witnessed by J. E. Sogard." They further allege that at the time of making said note and the indorsement thereon said instrument was, by agreement of parties, placed in the hands of a third person, J. E. Sogard, to hold and collect the interest thereon during the lifetime of the payee, and then to surrender or deliver it to East; that Sogard did in fact receive and hold the note during all the remainder of the lifetime of Morris, and then offered to turn it over to East; but the latter, to avoid any ground for criticism, suggested that it would be better to let the delivery be made through the court or administrator. For the reasons stated, the defendants deny plaintiff's right to maintain the action. Jury being waived, the issues were tried to the court, which found for the plaintiff.

The record indicates that Morris, who was the uncle of East, had no direct heirs. At the date of the note he sold a tract of land to his nephew, and the note in suit represents a part of the purchase price. The papers in that transaction were drawn by the witness Sogard, a banker in that neighborhood, who at the time, and at the request of Morris, wrote and witnessed the indorsement which we have above quoted. Morris then deposited with Sogard the note so indorsed, directing him to turn it over to East at his (Morris's) death, and saying at the same time "that the income should go to him as long as he lived, and when he was dead it should be turned over to East." This testimony is in no manner disputed. The conclusion reached by the trial court appears to have been that the transaction witnessed by the indorsement on the note and by the testimony of Sogard shows no more than an imperfect attempt at testamentary disposition of property, or at best an incomplete gift by Morris to East, which never was consummated by delivery, and that, no title to the subject of the gift having passed to East in the life-

time of Morris, the note became, at the death of the latter, a part of the assets of his estate. In support of this theory, the court, in a written memorandum of its views, cites the following cases: *Crispin v. Winkelman*, 57 Iowa, 523, 524, 10 N. W. 919; *Schollmier v. Schoendelen*, 78 Iowa, 426, 16 Am. St. Rep. 455, 48 N. W. 282; *Furenes v. Eide*, 109 Iowa, 511, 77 Am. St. Rep. 545, 80 N. W. 539, and *Re Brown*, 113 Iowa, 351, 85 N. W. 617. We have examined each of these cases, as well as the citations therein made, and think they do not sustain the view of the trial court. The *Crispin* Case involved a claim by the father of the deceased that the son, before his death, had authorized the father to use so much of his property or estate as might be necessary to pay the debts of the deceased, and apply the remainder to the support of his children. This claim was contested by the son's administrator, and the court held that the agreement on which the father relied was testamentary in character and, not being executed according to the law of wills, was void—a decision the correctness of which can be conceded. It does not, however, rule this case, in fact or in principle. The father there made no claim that the title had passed in the lifetime of the son, or that there had been any completed gift to him or to the children of the deceased. The court expressly says: "The defendant does not claim that the title to the property passed to the children except as heirs. Prior to the decedent's death, the defendant, upon his own theory, was trustee of the property for the decedent. His trusteeship for the heirs commenced, if it commenced at all, with their inheritance. But to hold that it commenced then would be giving testamentary force to the agreement, which, as we have seen, is not allowable." The court does, however, hold and say—and this holding is in harmony with the claim of appellant in this case—that if the deceased had given the property in such a way that the title

thereto had passed in his lifetime to the children, or to his father as trustee for their benefit, then the law would uphold it. The *Schollmier* Case sustains the validity of a gift of a bank deposit, made by writing in the donor's bank book: "Pay to the order of Elizabeth Schoendelen and Dorothea Hasenmiller all within deposit after my decease." There was some evidence that the book was in the possession of one of the defendants at some time before the donor's death. Referring to the defense that her gift was of a testamentary character, the court says: "In our opinion, the proper effect to be given the assignment must depend upon the intent of the decedent with respect to it. In terms, it is a full assignment of the amount shown by the book to be due at the time it was made—not of the amount which should be due at the death of the assignor. No right to revoke or rescind it is shown to be reserved; and if it was treated by the assignor as a completed transaction, we think it passed a present interest in the bank account, and is not vulnerable to the objection made by plaintiff."

The court further held that the direction in the writing to make the payment after her death "related to the time when the interest transferred might be enjoyed, and not to its transfer." It is also there said that, if the book was delivered in the donor's lifetime, or if the assignment was delivered, or "in any other manner given effect," then the title could be said to have passed. As we shall later see, the deposit of the note in this case in the hands of Sogard was in legal effect a delivery, sufficient to validate the transaction. The *Furenes* Case relates to the alleged conveyance of land by three separate deeds to the grantor's grandchildren. These deeds were handed to a third person to be delivered, nothing being said about a delivery after the death of the grantor. One deed was delivered at once, while the other two

Gift—delivery to third person.

were not delivered until after the grantor had died. The first deed was held to constitute a good conveyance, while the other two were of no effect, for want of delivery in the grantor's lifetime. That case in no manner controls the one at bar, where the delivery was in fact made to a third person, upon the express condition that the person so receiving it should surrender it to the defendant after the death of Morris. The court, in the cited authority, expressly distinguishes the case then before it from those where a third party taking the papers may be considered as acting for the grantee, as well as where the papers are placed in the hands of a third person, to be delivered after the grantor's death. So also in *Brown's Case*, the court again expressly recognized the principle that where a present delivery is intended, or the instrument is left with a third party without reservation or right of recall, a present interest passes to the donee or grantee.

The additional precedents cited by counsel for appellee in this court are principally those announcing the rule that a mere gift which is testa-

mentary in character will not be recognized or given effect by the courts unless it be made in writing and executed after the manner prescribed by statute for the execution of wills. Of the soundness of the proposition so relied upon, there can be no question; and if the transaction in the case at bar, witnessed by the indorsement on the note and the deposit of the paper with Sogard, is no more than a mere undertaking to make a gift, which should take effect only upon the death of Morris, then the judgment below is right, and should be affirmed. But it is our opinion that the undisputed facts demonstrate that this is not a case of testamentary disposition of property, and that under rules of law well established in this and other courts the defendants have established a good defense.

In the first place, it does not seem to be necessary to the defense to show that a mere gift was intended. It appears in evidence that the note was given and this transaction had in the course of settlement for the purchase price of land sold by Morris to East, and that in making such settlement Sogard, who made the papers, was directed by Morris to prepare the indorsement, which was then and there signed. The defendant, as a party to the transaction, was not a competent witness there-to against the administrator of Morris's estate, and we know nothing of the terms and conditions agreed upon between defendant and deceased, except as already indicated. Why, then, are we not bound to presume that the release or discharge of the principal sum of \$1,000, subject only to the payment of interest to Morris during his lifetime, was one of the terms or conditions of the sale? Certainly, there is nothing shown to contradict that conclusion, while the fact that such pro-

vision was put into writing and indorsed upon the note given in consummation of the contract of sale, at the very time it was made, affords very satisfactory evidence in support of it. The writing also imports a consideration for the agreement.

In the next place, even if we proceed upon the theory that there was nothing in the terms of the sale of the land requiring Morris to do as he did with reference to this note, and that it was a voluntary act, prompted by his desire to favor or show his good will to his nephew, the facts shown require us to hold that the transaction effected a change of title in the subject of the gift, and that the note is not an asset in the hands of the administrator of Morris's estate. The fact that Morris placed the note in Sogard's hands for the benefit of East, and retained to himself no interest therein or control thereof, except to demand and receive the interest, is sufficiently established. Sogard says: "He said this was to go to East on his

Evidence—conditions of sale.

death. . . . Morris told me to turn that over to East on his death. He said the interest was to go to him as long as he lived,—that the income should go to him as long as he lived,—and when he was dead, it should be turned over to East. . . . He said it would be the best place to leave it, at the bank; to leave it at the bank in a third party's hands, the bank to be considered a third party."

The note was in fact so left, and was never withdrawn or demanded by Morris, though he lived for several years thereafter.

We have held that postponement of the delivery and enjoyment of a gift does not necessarily prevent the passing of a present interest, even though possession by the donee is not obtained till after the donor's death.

Schollmier v. Schoendelen, 78 Iowa, 426, 16 Am. St. Rep. 455, 43 N. W. 282; Hogan v. Sullivan, 114 Iowa, 456, 460, 87 N. W. 447; Abegg v. Hirst, 144 Iowa, 196, 198, 138 Am. St. Rep. 285, 122 N. W. 838. That a delivery to a third person for the benefit of another, the property to be retained by such third person until the death of the person so delivering it, and then to be passed over

—delivery to third person—  
—sufficiency.

to the beneficiary, is a sufficient delivery, has frequently been decided. Larimer v. Beardsley, 130 Iowa, 706, 107 N. W. 935; Hogan v. Sullivan, 114 Iowa, 456, 460, 87 N. W. 447; King v. Smith, 54 L.R.A. 708, 49 C. C. A. 46, 110 Fed. 95; Mollison v. Rittgers, 140 Iowa, 365, 29 L.R.A. (N.S.) 1179, 118 N. W. 512; White v. Watts, 118 Iowa, 549, 92 N. W. 660; Tucker v. Tucker, 138 Iowa, 344, 349, 116 N. W. 119; Re Podhajsky, 137 Iowa, 743, 115 N. W. 590; Jones v. Nicholas, 151 Iowa, 362, 130 N. W. 125; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313. And a gift may be so made that the grantor shall retain the use during life. Klehr's Will, 147 Wis. 653, 133 N. W. 1105; Tucker v. Tucker, 138 Iowa, 344, 116 N.

W. 119; McNally v. McAndrew, 98 Wis. 62, 73 N. W. 315; Martin v. Martin, 170 Ill. 18, 48 N. E. 694; Innes v. Potter, 130 Minn. 320, post, 896, 153 N. W. 604. The gift may be in the nature of a forgiveness or a release of a debt due from the donee to the donor, subject to payment of interest during the life of the donor, and a delivery of the note or evidence of debt to a third person, to be surrendered upon the death of the donor, is sufficient to complete the gift. See, as directly in point, Hagerman v. Wigent, 108 Mich. 192, 65 N. W. 756. See also Stewart v. Hidden, 13 Minn. 43, Gil. 29. Even where there is a right to revoke a deposit which has been made with a third person for delivery to the beneficiary after the death of the depositor, it has often been held that, if such right of revocation has never been exercised, it does not affect the beneficiary's title. Blanchard v. Sheldon, 43 Vt. 512; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Worth v. Case, 42 N. Y. 362; Belden v. Carter, 4 Day, 66, 4 Am. Dec. 185; Giddings v. Giddings, 51 Vt. 227, 31 Am. Rep. 682.

Whether we would be willing to go to the full extent of some of these cases, we do not here say, for it is unnecessary in disposing of this appeal; but the precedents are of value, as illustrating the strong tendency of the courts to look into the actual intent of the parties to any lawful contract or undertaking and give effect thereto, whenever it can be done without overriding well-established rules. The intent of Morris to surrender or relinquish to East the right to enforce payment of the principal sum named in the note, but to retain in himself the right to demand and receive the interest thereon during his lifetime, is clear. The intent was lawful. The delivery of the note to Sogard operated to carry that intent into execution, so far as it could be done, yet to protect Morris in his right to collect the interest. Nothing was postponed except the right of East to demand and receive a surrender

of the paper upon the death of Morris. In the matter of a conveyance of real estate, where the deed is deposited with a third person, to be delivered after the grantor's death, we have held it equivalent to the present delivery to the grantee of a conveyance which, by its terms, reserves a life estate to the grantor. *White v. Watts*, 118 Iowa, 549, 92 N. W. 660. If this be true, there would seem to be equally good reason for saying that the making of the quoted indorsement upon the note, and its deposit with Sogard, to be delivered after the death of the payee, was a present gift to East of the principal sum of \$1,000, with reservation of the interest, or use thereof, during life. This remark is, of course, applicable only upon the theory that proof of a gift is necessary to sustain the defense in this case. But, for reasons already stated, we think the defense is not thus restricted. The supreme court of Minnesota, passing upon a state of facts closely parallel with those in the case at bar, has announced a holding in accordance with the conclusions reached herein. See *Innes v. Potter*, 130 Minn. 320, post, 896, 153 N. W. 604.

The court below laid some stress upon the fact that after the death of Morris, when Sogard handed the note to East, he handed it back, with the suggestion that he did not wish to do anything which might cast suspicion upon him, and he preferred to have the paper surrendered to him by the administrator, or by order of court. It is suggested that the act was in the nature of an admission that he did not claim the note, or did not feel certain of his right in the matter. We can see no

reason for looking on his conduct in this respect as an impeachment of his —refusal to accept—effect. defense in this case.

That he was not forward or over-eager to insist upon his right is much less suspicious than if he had gone to the other extreme. He was named as executor of Morris's will, but refused to serve; and the fact that he did so, and was willing to have his claim pass the scrutiny of the administrator and the court, was to his credit, rather than otherwise. Upon the admitted facts, the defense to the note was well established, and defendant should have had judgment for costs.

There was a counterclaim pleaded, which the trial court dismissed on the theory that defendant should first establish it as a claim against the estate. As it was conceded that the claim had been filed and was then pending in court, the order of the court in dismissing it from this case could work the Appeal—dismissal of counter-claim—error. defendant no substantial prejudice, and the ruling, even if wrong, was not reversible error.

For reasons stated, the judgment of the District Court will be reversed, and the cause remanded for further proceedings in harmony with this opinion.

Deemer, Ch. J., and Evans and Preston, JJ., concur.

#### NOTE.

The question considered in the reported case (*PYLE v. EAST*, ante, 885) as to the effect of the delivery of personalty to a third person with directions to deliver after the donor's death to consummate a gift is the subject of the annotation following *INNES v. POTTER*, post, 902.

ELLEN D. SHARPE, Admr., etc., of Jefferson D. Sharpe,  
Deceased, Appt.,  
v.

J. BENJAMIN SHARPE, Respt.

*South Carolina Supreme Court—September 30, 1916.*

(105 S. C. 459, 90 S. E. 34.)

**Gift — agent of donee.**

1. The placing by a man on his deathbed of money in the hands of a kinsman of his wife, for delivery to her after death of the donor, constitutes a valid gift causa mortis, although the trustee may in a sense be regarded as the agent of the donor.

[See note on this question beginning on page 902.]

**Contract — execution — attestation after death.**

2. That the words, "his mark," were not attached to the paper executed by signature by mark, and that the names of the witnesses were not placed upon the paper until after death of the maker, do not render the execution invalid if the paper was executed by the maker touching the pen when the signature was made and the witnesses were present at the time,

[See 6 R. C. L. 640.]

**Check — validity — recognition by bank — effect.**

3. The action of a bank in honoring a check alleged to have been executed by a person since deceased is not binding upon the maker's next of kin.

[See 5 R. C. L. 529, 530.]

**— parol authority to attach signature.**

4. Authority to attach the maker's signature to a check may be given by parol.

**Gift — characteristics.**

5. A gift inter vivos does not differ in its essential elements from a gift causa mortis, except that in the latter the survival of the donor may defeat the gift.

[See 12 R. C. L. 930-932.]

**— what necessary.**

6. If a donor intends to confer on another ownership of his property, and if he proceeds so far as to do it, then the gift is complete.

[See 12 R. C. L. 932.]

**— placing in hands of donor's agent.**

7. A gift causa mortis is not completed by placing the article to be given in the hands of the donor's agent for delivery after his death.

[See 12 R. C. L. 959, 960.]

**— duty of court.**

8. It is the duty of the court to give effect to gifts causa mortis if they are satisfactorily proven.

[See 12 R. C. L. 956, 974.]

**APPEAL** by plaintiff from a judgment of the Common Pleas Circuit Court for Orangeburg County in favor of defendant in an action brought to marshal the assets of the estate of plaintiff's deceased husband. *Modified.*

The facts are stated in the opinion of the court.

The testimony in the record, referred to in the opinion, showing the circumstances and what was said and done in reference to the attempted gift of the \$1,500, is as follows:

Q. Did he say anything about some money he had in bank?

A. Yes, sir.

Q. What did Mr. Sharpe say to you, if anything, in relation to the money in bank?

A. He told me he had \$1,500 in the bank in Swansea, and if there was not something done about it, his widow would be left with nothing to go upon, and that he wanted me to go to Swansea and draw that money out, bring it to my home, and take care of it, until I seen what became of him, whether he would live or die. If he lived, why I could turn it over to him, and if he died, why I was to let the widow have it, turn it over



to her or take care of it; so he called her and told her to get the bank book and give it to me, and I told him I could not get money out of the bank that way, unless I had a check. He asked me if I had any blank checks, saying that he had none. I told him: "Yes; I had a check book in my pocket." He told me to write out a check for it, and I did so. I handed it to him to sign; I helped him up in bed and steadied him for to sign it, and he told me he felt so weak that he did not feel able to write his name; that he would just make his mark, which he done.

Q. Who does it belong to?

A. Well, it belongs to the widow, I suppose.

Q. Tell us that conversation now.

A. He told me that he had \$1,500 in the Bank of Swansea, and he wanted it to go to his wife, and he wanted me to go up there and get the money out of the bank that day, or as soon as I conveniently could, bring it home, keep it until he seen whether he lived or died; if he lived, turn it over to him, and if he died, to give it to his widow; that if he didn't make some provision for her, that she would be left without it, and no one to see after her; and I said: "Well, I would do the best I could for him."

Q. Did you have any more conversations with him, Mr. Justus, in reference to this matter until he died?

A. Yes, sir. Several times he talked to me about it. He tells me that he wanted me to attend to it, and he didn't think he would be able to get up. He wanted me to see that his wife got the money.

Q. Who did he give you the check or the money for?

A. For his wife.

Q. What was it that he told you that he wanted done with that check?

A. He wanted me to bring it home and keep it, and, if he lived, turn it over to him, and if he died, to give it to his widow.

Q. You were not his agent?

A. No, sir.

Q. He didn't make you his trustee?

A. No, sir.

The foregoing is the testimony of the witness, C. C. Justus, who was the brother-in-law of the intestate.

It appears in the record that Justus took the check in question to the Bank of Swansea the next day, and the check was marked paid by the cashier, and the amount placed to the account of the said C. C. Justus in the bank. Jefferson Sharpe died about a week afterwards, and Justus gave the plaintiff a check for this money, but the bank, on objection of the defendant, refused to pay the same.

Testimony of Watson Justus (son of C. C. Justus):

Q. What did Mr. Jefferson Sharpe say he wanted done with the money?

A. He said for Mr. Justus to get it, and, if Mr. Sharpe got well, to turn it back to him, and if he didn't, to give it to his widow, Mrs. Ellen Sharpe.

Q. What did your father say to him?

A. He told him, all right, that he would.

Q. After your father came there, did you hear any conversation in reference to any money in the Bank of Swansea?

A. Yes, sir; Mr. Jefferson Sharpe told Mr. Columbus Justus that Mr. Sharpe had \$1,500 in the Bank of Swansea, and he told him that "I want you to get it out, I don't know whether I am going to live or not;" and he said, "If I don't live, you give it to my wife;" and he said, "If I do live, you can give it back to me." Mr. Justus told him all right, that he would do the very best for him that he could.

Rev. T. L. Belvin testified:

Q. Did he mention anything about his property to you?

A. Yes, sir; he told me to help him, and after talking about some matters concerning his spiritual in-

terests, he then referred to some business matters.

Q. What did he say in respect to the business matters?

A. He said: "I am troubled about my little business;" he says: "I have fixed the money part; I had some money in the Bank of Swansea. I gave a check for that to my wife; but this property, this house and lot, is not fixed like I want it."

Q. Is that all he said?

A. Yes, sir. That is, I believe, absolutely all.

Mr. Webster King testified:

Q. During the night when you were there, did he talk with you?

A. Yes, sir; but he said nothing about his business affairs. Later during the night, Mr. C. C. Justus told Mr. Jefferson Sharpe in the presence of myself and Mr. Hooker that he had taken the check down to the bank, and that they didn't have the money, but just transferred it to his account, meaning Justus, and that he (Justus) understood that Ben Sharpe was complaining about it; then Mr. Jefferson Sharpe said: "Well, that is all right; it is a poor chance if a man cannot do what he wants to with what is his own;" that Ben was always too fast anyhow.

Mr. James Hooker testified:

Q. Do you recall any conversation being had in reference to Mr. Sharpe's property matters during the night?

A. Yes, sir.

Q. Please tell us what was said or done.

A. Mr. Justus said to Mr. Jefferson Sharpe, that he had attended to that matter, that he had told him that they didn't have the money to cash the check at Swansea, and he placed it to his credit at Swansea, and he said it was all right. He said that he understood that Mr. Ben Sharpe was cutting up about it, and he said that it was all right, that he had got all he aimed for him to have; that he was always too fast anyhow.

Messrs. Wolfe & Berry for appellant.

Messrs. Barrett Jones and William L. Glaze for respondent.

Gage, J., delivered the opinion of the court:

The plaintiff is widow of Jefferson Sharpe, and the defendant is his son by a former marriage. These two are at outs about \$1,500 in money which had belonged to Jefferson, and which he had in a bank. The plaintiff, in an action to marshal the assets of Jefferson's estate, made claim for that \$1,500, which she alleged her husband had given her on the eve of his death, *donatio causa mortis*. The defendant disputes the gift. The master sustained the gift; the circuit court concluded against the gift. And that is the issue.

There is no difference about the words used when the transaction was had. There is no difference about what in law constitutes a gift by reason of death. The only difference is the application of the law to the admitted transaction. If an intent may be proved beyond a reasonable doubt, the testimony here proves that the deceased intended for his wife to have this money after his death in the event of his death; all the testimony is that way, there is none contra. If that intention, as expressed, was in truth performed by the deceased, then the gift ought to be sustained. The court found that the transaction was had while the deceased was of sound mind, and that it was free from fraud, and to that there is no exception. The court also found that the transaction was had in view of the impending death of the deceased, and that the deceased died of the disorder which was then upon him; and to this there is no exception.

The only other factor going to constitute a *donatio causa mortis* is a delivery of the thing. All the real argument centers about that; the plaintiff's eleven exceptions and the defendant's one exception all go in the main to that issue.

The defendant, by proper exception, insists that Jefferson did not even sign the check, and there was,

therefore, no first step taken towards the execution of his intent. The court did not decide that issue, and it is renewed here.

It is true that Jefferson's hand did not direct the pen which marked his name. The hand of Watson Justus did that. But Jefferson was present and directed the act to be done, and touched the pen which made the X.

It is true that the words, "his mark," were not written until Jef-

**Contract—execu-  
tion—attestation  
after death.**

erson was dead; and neither were the names of the two witnesses to the check written on the check until Jefferson was dead; but they were present and saw Jefferson give the direction and touch the pen. The bank took no exception to the manner in which the check was executed, for it paid it, so marked it, and the amount of it was put to the credit of the payee,

**Check—validity  
—recognition by  
bank—effect.**

C. C. Justus. It is true that the bank's action is not conclusive against the defendant.

But when Watson Justus signed the name of Jefferson, in the presence of Jefferson, and by his direction, that was a signing by Jefferson, whether those who saw the transaction signed as witnesses or not. The authority of Watson to write Jefferson's name was confer-

**—parol authority  
to attach signa-  
ture.**

able by parol; and the proof of the power and the execution of it rests upon the words of those who stood by and saw the transaction, whether they were designated as witnesses on the check or not. See Story, Agency, chap. 5; 2 C. J. pp. 449-451.

The testimony is clear that Jefferson authorized Watson to sign his name; there is none contra. The circuit court concluded from the testimony that C. C. Justus, the payee of the check and he who collected the money on it, was the agent of Jefferson; or, at most, was the agent of both Jefferson and Ellen. And the court concluded that a man cannot deliver to himself; and for that

reason alone the court decreed against the gift. Let the three and a half pages of testimony quoted in the circuit opinion be reported.

A gift inter vivos does not differ, in its essential elements, from a gift <sup>Gift—character-  
istics.</sup> causa mortis, except that in the latter the survival of the donor may defeat the gift. Hall v. Howard, Rice, L. 314, 33 Am. Dec. 115.

In every gift, like in well-nigh every human act, there exist two elements. One of these involves the intent of the donor's mind; the other of these involves the act of the donor's hand. If a donor intends to confer on another ownership of his <sup>—what neces-  
sary.</sup> property, and if he proceeds so far as to do it, then the gift is complete.

The particular transaction, in the facts of it, may be muddled by the character of the thing given, to wit, a check on a bank, or by the agency through which the act is done, to wit, through the hands of another than the donee.

In the instant case, as we have held, the check was rightfully signed by Jefferson. The payee, Justus, drew the money from the bank and redeposited it in his own name. It is the same, then, as if Jefferson had put \$1,500 into Justus's hands, with the direction to him about which there is really no dispute. Nor can there be any question but that Jefferson intended to give to Ellen; all the testimony is that way.

The only issue of fact and of law is, Did he sufficiently do it? Jefferson, if alive, could not be interested in that question, for had he put the money into Ellen's hands under the admitted direction, yet upon recovery it must have come back to him. Jefferson's heirs alone are interested in whether Jefferson went so far as to do what he intended to do. Under our cases, it is true, Jefferson must have done that which he intended to do. If he did not do that,

that is, put the money into Ellen's hands, but instead of his agent to do that for him, then his act stopped short of a gift for it stopped short of a completed act. Plainly the putting of the money into Justus's hands was a putting it into Ellen's hands, if Justus represented Ellen. About that there will be no denial.

The court thought that the testimony made Justus the agent of Jefferson, or at least, the agent of both Jefferson and Ellen, and that, therefore, there was no delivery to Ellen. That is the narrow issue upon which the cause was decided, and we venture to think wrongly decided. In well-nigh every transaction of this sort where the donor acts in delivery through the agency of another, that other is in some sort his agent.

The action must be through another unless it be directly with the donee, because the donor acts in view of certain death. It is not likely to be exclusively with the donee, because his ownership is defeasible. And if the transaction be between the donor and the donee in their own persons, even in that case the donee is in some sense the agent of the donor to return the article to the donor in the event he shall survive. But that circumstance would not rob the delivery of its effectiveness. The emergencies of every such case press hard; a dying man, with mind freighted with memories of the past and apprehensions of the future; his friends gathered about the scene; no expert to advise what ought to be done to accomplish his intentions. Such a situation calls generally for the intervention of a third party, to hold the stake until the event be determined. We think too much nicety may be exercised in determining whom the third man exactly represents. If it be possible to do so, the law ought to be construed not too logically, but to meet the com-

mon transactions of our people in their homes. In the instant case the third person was the friend and kinsman of Ellen, his trust was to deliver to her, if the contemplated event shall happen, as it did.

It is true that had the donor recovered, it would have been the duty of the third person to return the money to the donor; but, as before suggested, that is not decisive of the question, for had the transaction been betwixt the donor and the donee, without the intervention of a third person, the same duty under the same circumstances would have rested on the donee. Enough was done to accomplish that which the donor intended; there was a sufficient delivery. —agent of donee.

The cases on the subject are not in harmony, of course. Our own case of *Gilmore v. Whitesides*, 1 *Dud. Eq.* 23, 31 *Am. Dec.* 563, was based largely on what the third person said; he said he acted for the donor. And that case involved the force and effect of a written instrument which was plainly not a gift *causa mortis*.

One case from Minnesota is on all fours with that at bar; and there the gift was sustained. *Varley v. Sims*, 100 *Minn.* 331, 8 *L.R.A. (N.S.)* 828, 117 *Am. St. Rep.* 694, 111 *N. W.* 269, 10 *Ann. Cas.* 473. And there are others of like import. The courts put the case upon a presumption of fact, that it will be presumed, nothing else appearing, that the third party acts for the donee. 12 *R. C. L.* 960. The respondent insists that gifts of this character ought to be looked in the mouth; that the courts ought to be jealously distrustful of them. Judge Butler said as much in *Hall v. Howard*, *supra*; but other judges have not expressed that view. *Trenholm v. Morgan*, 28 *S. C.* 278; 5 *S. E.* 721. Gifts *causa mortis* are older than the Republic; and if they be satisfactorily proved, it is the duty of the court to give effect to them. —duty of court.

We have not considered the sug-

gestion of the respondent that the transaction was of a suspicious character; the decree below settled that issue, and there is no appeal from it.

Our opinion is that the judgment below be modified, and the cause remanded to the Circuit Court to carry out our views herein expressed.

#### NOTE

The effect of delivery of personalty to a third person with directions to deliver after the donor's death to consummate a gift is considered in the annotation following *INNES v. POTTER*, post, 902, the status of the third person in respect of a gift *causa mortis* being considered at pages 912 et seq.

IRVINE INNES, Admr., etc., of Warren Potter, Deceased, Appt.,  
v.

HELEN MARCIA POTTER, Respt.

*Minnesota Supreme Court—July 9, 1915.*

(180 Minn. 320, 158 N. W. 604.)

#### Gift — direction to deliver after donor's death.

1. Similar rules apply to personal as to real property, and the owner of personal property may make a valid gift thereof with the right of enjoyment in the donee postponed until the death of the donor, if the subject of the gift be delivered to a third person with instructions to deliver it to the donee upon the donor's death, and if the donor parts with all control over it, reserves no right to recall, and intends a final disposition of the property given.

[See note on this question beginning on page 902.]

#### — delivery to stranger.

2. Defendant's father, now deceased, delivered to one Casey an envelop containing a certificate of corporation stock with an assignment to defendant indorsed thereon, with directions in writing to Casey to deliver the certificate to defendant "only in case of" his death. After his death Casey delivered the certificate to defendant.

[See 12 R. C. L. 942, 943.]

#### Deed — deposit for delivery after death.

3. Where a grantor executes a deed of real estate and deposits it with a third person to be delivered by him to the grantee after death of the grantor, and reserves to himself no right to control or recall the instrument, the transaction is a valid one, and full and complete title is vested in the grantee after the death of the grantor.

[See 12 R. C. L. 937.]

#### Gift — character.

4. The gift in this case is within the rule. The test of a "gift," as distinguished from a will, is, that in case

of a gift some interest vests at once in right. The gift in this case was not testamentary in character, and it was valid.

[See 12 R. C. L. 930.]

#### — testamentary character.

5. The direction to the trustee to deliver to the donee "only in case of the death" of the donor is not decisive of testamentary character. Nor is the statement of the donor that he wants to "leave" a certain property to the donee.

[See 12 R. C. L. 931.]

#### — necessity of delivery.

6. Delivery is necessary to give effect to a gift.

[See 12 R. C. L. 932 et seq.]

#### Will — testamentary character of instrument.

7. Whether or not an instrument is testamentary in character depends upon the intention of the maker; the fact that it postpones the enjoyment of the subject-matter until after the death of the grantor is not decisive.

[See 12 R. C. L. 931.]

APPEAL by plaintiff from a judgment of the District Court for Aitkin County in defendant's favor in an action brought to determine the ownership of a certificate of corporate stock which had been delivered by defendant's father to a third party, to be held by him and delivered to defendant after the father's death. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Fryberger, Fulton, & Spear, for appellant:

The facts in this case do not and cannot constitute in law a valid gift inter vivos.

Logenfiel v. Richter, 60 Minn. 49, 61 N. W. 826; 20 Cyc. 1198, 1199, 1211, 1213; Bowen v. Kutzner, 93 C. C. A. 83, 167 Fed. 281; Harris Bkg. Co. v. Miller, 190 Mo. 640, 1 L.R.A. (N.S.) 790, 89 S. W. 629; Burt v. Andrews, 112 Ga. 465, 37 S. E. 726.

There was no valid intent on the donor's part so as to constitute a gift inter vivos.

McFerrin v. Templeman, 102 Tex. 530, 120 S. W. 167.

The impression produced on the agent's mind was that the donor intended the gift to be revocable, and not to vest in presenti.

Wagner v. Kirchberg, 166 Mich. 411, 181 N. W. 1114; Cole v. Cole, 144 Mich. 676, 108 N. W. 101.

The words used show the delivery to have been conditional and revocable.

Thornton, Gifts & Advancements, § 167; Sterling v. Wilkinson, 83 Va. 791, 3 S. E. 533; Windows v. Mitchell, 5 N. C. (1 Murph.) 127; McCord v. McCord, 77 Mo. 166; Ragan v. Hill, 72 Ark. 307, 80 S. W. 150; Boyle v. Boyle, 6 Mo. App. 594; Trow v. Shannon, 78 N. Y. 446; Dunn v. German-American Bank, 109 Mo. 90, 18 S. W. 1139; Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415; Schultz v. Becker, 181 Wis. 235, 110 N. W. 214; Taylor v. Harmison, 79 Ill. App. 380; Augusta Sav. Bank v. Fogg, 82 Me. 538, 20 Atl. 92; Logenfiel v. Richter, 60 Minn. 49, 61 N. W. 826; Nelson v. Olson, 108 Minn. 109, 121 N. W. 609.

An assignment will not help an invalid delivery.

Knight v. Tripp, 121 Cal. 674, 54 Pac. 267; Allen-West Commission Co. v. Grumbles, 63 C. C. A. 401, 129 Fed. 287.

Messrs. Thwing & Rossman, for respondent:

The transaction was a valid gift inter vivos.

Haeg v. Haeg, 53 Minn. 83, 55 N. W. 1114; Wicklund v. Lindquist, 102 3 A.L.R.—57.

Minn. 321, 113 N. W. 631; Thomas v. Williams, 105 Minn. 88, 117 N. W. 155; Vessey v. Dwyer, 116 Minn. 245, 133 N. W. 613; Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094; Dickson v. Miller, 124 Minn. 346, 145 N. W. 112; Smith v. Wold, 125 Minn. 190, 145 N. W. 1067; Griswold v. Griswold, 148 Ala. 239, 121 Am. St. Rep. 64, 42 So. 554; Hutton v. Cramer, 10 Ariz. 110, 85 Pac. 483; Schuuer v. Rodenback, 133 Cal. 85, 65 Pac. 298; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 800; Grilley v. Atkins, 78 Conn. 380, 4 L.R.A. (N.S.) 816, 112 Am. St. Rep. 152, 62 Atl. 337; Doe ex dem. Guest v. Beeson, 2 Houst. (Del.) 246; Latimer v. Latimer, 174 Ill. 418, 51 N. E. 548; Munro v. Bowles, 187 Ill. 346, 54 L.R.A. 865, 58 N. E. 331; Thompson v. Calhoun, 216 Ill. 161, 74 N. E. 775; Thurston v. Tubbs, 257 Ill. 465, 100 N. E. 947; Stone v. Duvall, 77 Ill. 475; Baker v. Baker, 159 Ill. 394, 42 N. E. 867; Douglas v. West, 140 Ill. 455, 31 N. E. 403; Winterbottom v. Pattison, 152 Ill. 334, 38 N. E. 1050; De Graff v. Manz, 251 Ill. 531, 96 N. E. 516; Newman v. Newman, 177 Ind. 220, 97 N. E. 735; Martin v. Caldwell, 49 Ind. App. 1, 96 N. E. 660; Squires v. Summers, 85 Ind. 252; Wheeler v. Loesch, 51 Ind. App. 262, 99 N. E. 502; Re Bell, 150 Iowa, 725, 130 N. W. 798; Schurz v. Schurz, 153 Iowa, 187, 128 N. W. 944, 133 N. W. 683; Trask v. Trask, 90 Iowa, 318, 48 Am. St. Rep. 446, 57 N. W. 841; Norton v. Collins, 81 Kan. 33, 105 Pac. 26; Nolan v. Otney, 75 Kan. 311, 9 L.R.A. (N.S.) 317, 89 Pac. 690; Haydon v. Easter, 15 Ky. L. Rep. 597, 24 S. W. 626; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Foster v. Mansfield, 3 Met. 412, 37 Am. Dec. 154; Hoagland v. Beckley, 158 Mich. 565, 123 N. W. 12; Wallace v. Harris, 32 Mich. 380; Terry v. Glover, 235 Mo. 544, 139 S. W. 337; Seibel v. Higham, 216 Mo. 121, 129 Am. St. Rep. 502, 115 S. W. 937; Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 326, 16 S. W. 597; Hamilton v. Armstrong, 120 Mo. 497, 25 S. W. 545; Martin v. Flaharty, 13 Mont. 96, 19 L.R.A. 242, 40 Am. St. Rep. 415, 32

Pac. 287; *Cook v. Brown*, 34 N. H. 460; *Hass v. Wellner*, 90 Neb. 160, 133 N. W. 185; *Schlicher v. Keeler*, 61 N. J. Eq. 394, 48 Atl. 393; *Rowley v. Bowyer*, 75 N. J. Eq. 80, 71 Atl. 398; *Stonehill v. Hastings*, 202 N. Y. 115, 94 N. E. 1068; *Wilcox v. First M. E. Church*, 104 App. Div. 576, 93 N. Y. Supp. 423; *Gaskill v. King*, 34 N. C. (12 Ired. L.) 211; *Weaver v. Weaver*, 159 N. C. 18, 74 S. E. 610; *Arnegard v. Arnegard*, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797; *Ball v. Foreman*, 37 Ohio St. 132; *Hoffmire v. Martin*, 29 Or. 240, 45 Pac. 754; *Thrush v. Thrush*, 63 Or. 148, 125 Pac. 267, 126 Pac. 994; *Stephens v. Huss*, 54 Pa. 20; *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 533; *Wilson v. Wilson*, 32 Utah, 169, 89 Pac. 643; *Schreckhise v. Wiseman*, 102 Va. 9, 45 S. E. 745; *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756; *Klabunde v. Casper*, 139 Wis. 491, 121 N. W. 137; *Wells v. Wells*, 132 Wis. 73, 111 N. W. 1111; *McCalla v. Bane*, 45 Fed. 828; *Hagerman v. Wigent*, 108 Mich. 192, 65 N. W. 756; *Brown v. Stutson*, 100 Mich. 574, 43 Am. St. Rep. 462, 59 N. W. 238; *Shepard v. Shepard*, 164 Mich. 183, 129 N. W. 201; *Garrison v. Union Trust Co.* 164 Mich. 345, 32 L.R.A. (N.S.) 219, 129 N. W. 691; *Tucker v. Tucker*, 138 Iowa, 344, 116 N. W. 119; *Abegg v. Hirst*, 144 Iowa, 196, 188 Am. St. Rep. 285, 122 N. W. 888; *Schollmier v. Schoendelen*, 78 Iowa, 426, 16 Am. St. Rep. 455, 43 N. W. 282; *Goodrich v. Rutland Sav. Bank*, 81 Vt. 147, 17 L.R.A. (N.S.) 181, 69 Atl. 651; *Re King*, 115 App. Div. 751, 100 N. Y. Supp. 1089, affirmed in 188 N. Y. 626, 81 N. E. 1167; *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9; *Meriwether v. Morrison*, 78 Ky. 572; *Wyble v. McPheters*, 52 Ind. 398; *Jacobs v. Jolley*, 29 Ind. App. 25, 62 N. E. 1028; *Grant Trust & Sav. Co. v. Tucker*, 49 Ind. App. 345, 96 N. E. 487; *Seavey v. Seavey*, 30 Ill. App. 625; *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694, affirmed in 174 Ill. 371, 66 Am. St. Rep. 290, 51 N. E. 691; *McNally v. McAndrew*, 98 Wis. 62, 73 N. W. 315; *Second Nat. Bank v. Merrill*, 81 Wis. 142, 29 Am. St. Rep. 870, 59 N. W. 503; *Snyder v. Frank*, 53 Ind. App. 301, 101 N. E. 684; *Talbot v. Talbot*, 32 R. I. 72, 78 Atl. 535, Ann. Cas. 1912C, 1221; *Leitch v. Diamond Nat. Bank*, 234 Pa. 557, 83 Atl. 418; *Langworthy v. Crissey*, 10 Misc. 450, 31 N. Y. Supp. 85, affirmed in 36 N. Y. Supp. 1127; *Strelow v. Vonderhide*, 3 Ky. L. Rep. 472; *Ammon*

*v. Martin*, 59 Ark. 191, 26 S. W. 826; *Elmore v. Mustin*, 28 Ala. 809; *Gregory v. Walker*, 38 Ala. 26; *McGuire v. Bank of Mobile*, 42 Ala. 589; *Griffith v. Marsh*, 86 Ala. 302, 5 So. 569; *McGlaw v. McGlaw*, 17 Ga. 234; *Johnson v. Hines*, 31 Ga. 720; *Moye v. Kittrell*, 29 Ga. 677; *Seals v. Pierce*, 83 Ga. 787, 20 Am. St. Rep. 344, 10 S. E. 589; *Goff v. Davenport*, 96 Ga. 423, 23 S. E. 395; *Egerton v. Carr*, 94 N. C. 648, 55 Am. Rep. 630; *Jaggers v. Estes*, 2 Strobb. Eq. 343, 49 Am. Dec. 674; *Walls v. Ward*, 2 Swan, 648.

Where a deed or gift which is beneficial to the grantee or donee, and imposes no burden upon him, is delivered unconditionally by the grantor or donor, with intent that it will take effect immediately, to a third party, for the use and benefit of the grantee or donee, who has no knowledge of it, the latter's acceptance of it will be presumed, and the delivery will be complete and sufficient to pass the title to him.

*Barnard v. Thurston*, 86 Minn. 348, 90 N. W. 574; *Varley v. Sims*, 100 Minn. 331, 8 L.R.A. (N.S.) 828, 117 Am. St. Rep. 694, 111 N. W. 269, 10 Ann. Cas. 473; *Devol v. Dye*, 123 Ind. 321, 7 L.R.A. 439, 24 N. E. 246; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721; *Darland v. Taylor*, 52 Iowa, 503, 35 Am. Rep. 285, 3 N. W. 510; *White v. Watts*, 118 Iowa, 549, 92 N. W. 660; *Podhajzky v. Bednar*, 137 Iowa, 742, 115 N. W. 590; *Dunlap v. Dunlap*, 94 Mich. 11, 53 N. W. 788; *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430, 78 N. W. 647; *Halliday v. Basel*, 170 Mich. 489, 136 N. W. 854; *Goelz v. People's Sav. Bank*, 31 Ind. App. 67, 67 N. W. 232; *Robitaille v. Trudel*, Rap. Jud. Quebec 16 C. S. 39; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Church v. Gilman*, 15 Wend. 656, 30 Am. Dec. 82; *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185; *Whiting v. Hoglund*, 127 Wis. 135, 106 N. W. 391, 7 Ann. Cas. 224; *Holcombe v. Richards*, 38 Minn. 38, 35 N. W. 714; *Brown v. Westersfield*, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439; *Keller v. McConville*, 175 Mich. 479, 141 N. W. 652.

*Hallam, J.*, delivered the opinion of the court:

1. *Warren Potter* was the owner of 1,370 shares of stock, of the par value of \$100 a share, in the *Potter-Casey Company*, a business corpora-

tion of Aitkin county. In 1910, he was a man advanced in years. He had made a will some years before. In the meantime his business associate, Mr. Casey, had died and his estate had been probated. There was "considerable noise" about the amount of his property, and a substantial inheritance tax had been paid. On December 27, 1910, after some talk with J. A. Casey, son of his former associate, in which deceased stated that he wanted to leave a certain amount of property to his daughter, he took a certificate of 1,000 shares of stock of the Potter-Casey Company, indorsed upon it an absolute assignment to the defendant, and wrote a letter addressed to her in which he stated that he had transferred this stock to her, and making certain requests. The certificate, with the indorsement upon it, and this letter, he inclosed in an envelop, securely sealed it, and indorsed thereon the following:

The certificate No. 1 for 1,000 m shares to be sent by registered letter to H. Marcia Potter if not present, or handed to her, taking her receipt for the same. ———. These certificates to be held by J. A. Casey and delivered to the above parties only in case of the death of

Warren Potter.

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This he then delivered to J. A. Casey, and Casey held it until Mr. Potter's death. Deceased never mentioned the matter to Casey again, and never exercised or attempted to exercise any control over the stock. Warren Potter died in February, 1914. After his death, J. A. Casey delivered the envelop and its contents to the defendant. She opened the envelop, and took therefrom the letter and the certificate. Potter's will was admitted to probate, and plaintiff was appointed administrator with the will annexed. He commenced this action to recover possession of the certificate of stock, or its value. The trial

Gift—delivery to stranger.

court found that defendant owned the stock, that deceased intended to and did relinquish all control over the stock and all rights in it, that he intended to and did give the stock to defendant, and intended that the gift take effect at once on the delivery to Casey, but that the right of defendant to the beneficial enjoyment thereof was postponed until the death of deceased.

2. The first question is this: Is it competent for a person to make a gift of personal property by delivery of the subject of the gift to a trustee, where delivery by the trustee to the donee and beneficial enjoyment by the donee are postponed until the death of the donor?

As to deeds of real estate, the law in this state is well settled. Where a grantor executes a deed and deposits it with a third person, to be delivered by him to the grantee after the death of the grantor, and reserves to himself

Deed—deposit for delivery after death.

no right to control or recall the instrument, the transaction is a valid one, and full and complete title is vested in the grantee after death of the grantor. *Haeg v. Haeg*, 58 Minn. 38, 55 N. W. 1114; *Wicklund v. Lindquist*, 102 Minn. 321, 113 N. W. 631; *Dickson v. Miller*, 124 Minn. 346, 145 N. W. 112. This is true, even though the enjoyment of the estate granted is postponed until the death of the grantor, and even though the deed thereof expressly reserves a life estate in the grantor (*Ekblaw v. Nelson*, 124 Minn. 335, 144 N. W. 1094), and even though the grant is subject to the contingency that the grantee survive the grantor, or to any contingency, as long as it is one over which the grantor has no control (*Thomas v. Williams*, 105 Minn. 88, 117 N. W. 155).

3. Anciently there was no such thing recognized in law as an expectant estate in personal property. This was because of the perishable nature of such property, its movable characteristics, and its insignificance. An exception was early



made in favor of chattels real. *Manning's Case*, 8 Coke, 94b, 77 Eng. Reprint, 618; *Lampet's Case*, 10 Coke, 46b, 77 Eng. Reprint, 994. But in that case only as to interests created by will, and when merely the use of the chattel was given to the first legatee. 2 Bl. Com. 398. The exception was later extended from chattels real to chattels personal, under like restrictions. 2 Bl. Com. 398; 1 Eq. Cas. Abr. 360, 21 Eng. Reprint, 1102. These limitations one by one dropped away. In chancery, before the close of the seventeenth century, it was settled that a bequest of an expectant estate in goods to another was good, whether the goods or the use of the goods were given to the first legatee. *Hyde v. Parrat*, 1 P. Wms. 1, 24 Eng. Reprint, 269, 2 Vern. 331, 23 Eng. Reprint, 813. And in recent times it has not been necessary in England that limitations of this sort be made by will. They are equally good when made by deed of trust. *Child v. Baylie*, Cro. Jac. 459, 79 Eng. Reprint, 393; 2 Bl. Com. 398.

Perishable chattels are said to constitute an exception to the rule, particularly chattels the use of which consists in their consumption. But the reason given is one of construction, the theory being that the gift of such articles for life must have been intended as an absolute gift, since one could not use without consuming the property. *Andrew v. Andrew*, 1 Colly. Ch. Cas. 686, 63 Eng. Reprint, 598; *Randall v. Russell*, 3 Meriv. 190, 36 Eng. Reprint, 73, 17 Revised Rep. 56; *Evans v. Iglehart*, 6 Gill & J. 171; *Henderson v. Vaultx*, 10 Yerg. 30; *German v. German*, 27 Pa. 116, 67 Am. Dec. 451.

The doctrine that personal property may be limited by way of remainder after a life interest created at the same time was early recognized in the United States. 2 Kent, Com. 13th ed. \*352, 353, and notes; *Moffat v. Strong*, 10 Johns. 12; *Langworthy v. Chadwick*, 13 Conn. 42. The disposition of the later cases has been to dispense with all

fictitious distinctions between transfers of real and personal property, and to apply the same rules to both, except where distinctions are founded upon some substantial principle of law, or are required by some statutory enactment. In this state, expectant interests in personal property are recognized. *State ex rel. Tozer v. Probate Ct.* 102 Minn. 268, 291, 113 N. W. 888. Since it is competent for a person to create an expectant interest in personal property, we see no ground for saying that he may not do so either by will, by sale, or by gift. Nor do we see any reason why the rules as to delivery to a third person, with direction to deliver to the donee on the death of the donor, should not apply to personal as well as to real property. Delivery is, of course, necessary to give effect to a gift, but so it <sup>Gift—necessity of delivery.</sup> is to give effect to

a deed. If valid delivery may be made to a trustee in case of a gift of a deed of real property, why not in case of a gift of personal property? Not only do we think there should be no distinction between the two classes of property in this respect, but we are equally convinced that it is the settled law in most of the states of the Union that no such distinction does exist. *Grant Trust & Sav. Co. v. Tucker*, 49 Ind. App. 345, 96 N. E. 487; *Tucker v. Tucker*, 138 Iowa, 344, 116 N. W. 119; *Meriwether v. Morrison*, 78 Ky. 572; *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9; *Re King*, 115 App. Div. 751, 100 N. Y. Supp. 1089; see also *Smith v. Wold*, 125 Minn. 190, 145 N. W. 1067. The decision in *Logenfiel v. Richter*, 60 Minn. 49, 61 N. W. 826, as we understand it, does not hold to the contrary.

We accordingly hold that the owner of personal property may make a valid gift thereof, with the right of enjoyment in the donee postponed until the death of the donor, if the subject of the gift be delivered to a third person,

—direction to deliver after donor's death.

with instructions to deliver it to the donee upon the donor's death, and if the donor parts with all control over it, reserves no right to recall, and intends thereby a final disposition of the property given.

4. The next question is, Did this transaction constitute such a gift? Plaintiff's contention is that the transaction was not a gift at all, but that it is testamentary in character, and void. The gift, if sustainable at all, must be sustained as a gift *inter vivos*. It was in no sense a gift *causa mortis*. Effect should be given to the transaction if possible. *Thomas v. Williams*, 105 Minn. 88, 117 N. W. 155. If, as plaintiff claims, the documents were testamentary in character the transaction was void, for the formalities required for the execution of a will were not followed. It is only by construing the transaction as an executed gift that effect can be given to it at all. It is not always easy to determine whether or not an instrument is testamentary in character. It depends upon the intention of the maker.

Will—testamentary character of instrument.

The fact that the instrument postpones the enjoyment of the subject-matter until after the death of the grantor is not decisive that the instrument is testamentary in character. The test is whether the maker intended the instrument to have no effect until after the maker's death, or whether he intended it to transfer some present interest. If some interest vests at once in right, though the enjoyment of it be postponed, the instrument is not a will, and it is irrevocable. *Thomas v. Williams*, *supra*. We think the evidence sustains the finding of

Gift—character.

the trial court that the transaction constituted an absolute and irrevocable gift from deceased to defendant.

5. Plaintiff contends that the direction to deliver "only in case of death" of the donor signifies a condition attached to the delivery, and an intent that the gift shall become

operative only in the event that the donee survived the donor. There is some authority sustaining plaintiff's contention. *Sterling v. Wilkinson*, 88 Va. 791, 8 S. E. 533. We do not, however, agree as to this effect of the words, "in case of death." If the donor were at the time suffering with some illness, as in the case of *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415, such language might well be construed to imply a condition that the gift should be operative only in the event of death from such illness, and the survival of the donee. But *Warren Potter* was not ill, nor was there anything that suggested impending death. Under the circumstances, we think the language, "in case of death," which was —testamentary character, certain sooner or later to occur, meant nothing more or less than that delivery should be made upon the death of the donor. And this is sustained by authority. *Small v. Marburg*, 77 Md. 11, 19, 25 Atl. 920; *Goodell v. Pierce*, 2 Hill, 659; *Ewing v. Winters*, 34 W. Va. 23, 11 S. E. 718.

Plaintiff lays much stress upon the fact that J. A. Casey testified that if Potter had in his lifetime demanded a return of the envelop and its contents he would have returned it to him. It is not certain that this expressed anything more than Casey's mistaken view of the law applicable to such a case, or his submission to Potter's judgment. But in any event the evidence is not decisive. The intention of Potter, not of Casey, controls.

Nor do we attach great importance to the statement of Casey that Potter said that he wanted to "leave" a certain amount of property to his daughter Marcia. The word "leave" is often used in reference to property left by will, but the word is often loosely used, and its use should not be given controlling importance.

Plaintiff also urges strongly that deceased was endeavoring by this transaction to evade the payment of

the inheritance tax. We are not sure that he did not have such a purpose. But we cannot see that it is important whether he did or not. It seems to be conceded that he did not succeed, and that his property is subject to tax whether this be

construed as a gift or not. If the construction of this as a gift would result in a fraud upon the state, that circumstance might be a reason for not adopting that construction, but this is not such a case. Judgment affirmed.

### ANNOTATION.

#### Delivery of personalty to third person with directions to deliver after donor's death as valid gift.

##### I. Gift inter vivos:

- a. General principles, 902.
- b. Relinquishment by donor of title and control of property:
  1. Evidence held to show relinquishment:
    - (a) In general, 903.
    - (b) Reservation of life interest by donor, 906.
  2. Evidence held not to show relinquishment, 910.
- c. Status of third person:
  1. Agent of donor, 912.
  2. Trustee for donee, 914.

##### I. Gift inter vivos.

##### a. General principles.

It is, of course, competent for an owner of personal property to make, and he may make, a valid gift thereof, with the right of enjoyment in the donee postponed until the death of the donor, if the subject of the gift is delivered to a third person, with instructions to deliver it to the donee on the donor's death, and if the donor parts with all control over it, reserves no right to recall it, and intends thereby a final disposition of the property. *Robertson v. Robertson* (1905) 147 Ala. 311, 3 L.R.A.(N.S.) 774, 40 So. 104, 10 Ann. Cas. 1051; *Smith v. Youngblood* (1900) 68 Ark. 255, 58 S. W. 42; *Ruiz v. Dow* (1896) 113 Cal. 490, 45 Pac. 867; *Coward v. De Cray* (1918) — Cal. App. —, 176 Pac. 56; *Wyble v. McPheters* (1875) 52 Ind. 393; *Re Podhajsky* (1908) 137 Iowa, 742, 115 N. W. 590; *PYLE v. EAST* (reported herewith) ante, 885; *Green v. Tulane* (1893) 52 N. J. Eq. 169, 28 Atl. 9; *Woolley v. Taylor* (1914) 45 Utah, 227, 144 Pac. 1094. See the reported case (*INNES v. POTTER*, ante,

##### II. Gift causa mortis:

- a. General principles, 916.
- b. Relinquishment by donor of title and control of property:
  1. Evidence held to show relinquishment, 918.
  2. Evidence held not to show relinquishment, 920.
- c. Status of third person:
  1. Agent of donor, 922.
  2. Trustee for donee, 926.

896). And see the cases cited throughout this subdivision.

It is well settled that delivery to a third person as agent or trustee for the use of the donee, and under such circumstances as to indicate that the grantor relinquishes all control over the property, and intends to vest title in the donee, is quite as effectual as a delivery to the donee as a manual delivery directly to him. *Tucker v. Tucker* (1908) 138 Iowa, 344, 116 N. W. 119; *Jones v. Nicholas* (1911) 151 Iowa, 362, 130 N. W. 125.

In such a case, where the gift is absolute, postponement of the delivery and enjoyment of the gift does not necessarily prevent the passing of a present interest, even though possession by the donee is not obtained until after the donor's death. *Tucker v. Tucker* and *Jones v. Nicholas* (Iowa) supra; *PYLE v. EAST* (reported herewith) ante, 885. And see the cases cited throughout this subdivision of the note.

The gift may be in the nature of a forgiveness or a release of a debt due from the donee to the donor, sub-

ject to the payment of interest during the life of the donor; and a delivery of the note or evidence of debt to a third person to be surrendered on the death of the donor is sufficient to complete the gift. *PYLE v. EAST* (Iowa) *supra*; *Hagerman v. Wigent* (1896) 108 Mich. 192, 65 N. W. 756.

Even where there is a right to revoke a deposit which has been made with a third person for delivery to the beneficiary after the death of the depositor, it has been held that if the right of revocation has never been exercised, and the delivery has been made, the reservation does not affect the beneficiary's title. *PYLE v. EAST* (Iowa) *supra*; *Giddings v. Giddings* (1878) 51 Vt. 227, 31 Am. Rep. 682. See also *Blanchard v. Sheldon* (1871) 43 Vt. 512.

Where personal property is thus delivered to a third person with directions to deliver it to the donee after the donor's death, and the delivery is absolute and unconditional, so that the gift takes effect at once, the gift being beneficial to the donee, the law presumes the assent of the donee to and his acceptance of the gift. *Taylor v. Harrison* (1899) 179 Ill. 137, 58 N. E. 584, affirming (1896) 79 Ill. App. 380; *Langworthy v. Crissey* (1894) 10 Misc. 450, 31 N. Y. Supp. 85, affirmed in (1895) 92 Hun, 608, 26 N. Y. Supp. 1127; *Blanchard v. Sheldon* (Vt.) *supra*. And the acts of the trustee or third person receiving the property for the benefit of the donee are deemed to be in the interest of the latter, and the acceptance of the gift is presumed. *Re Podhajsky* (1908) 137 Iowa, 742, 115 N. W. 590; *Jones v. Nicholas* (Iowa) *supra*. The acceptance of the donee being presumed until such presumption is removed, where nothing appears to remove the presumption it is conclusive for the purposes of the case. *Grant Trust & Sav. Co. v. Tucker* (1911) 49 Ind. App. 345, 96 N. E. 487.

Where there is an absolute gift *inter vivos*, and the effect of the delivery is to vest a present title in the donee, no subsequent act of the donor, such as retaking of the property given, can detract from the title which has al-

ready vested in the donee. *Coward v. De Cray* (1918) — Cal. App. —, 176 Pac. 56.

*b. Relinquishment by donor of title and control of property.*

*1. Evidence held to show relinquishment.*

*(a) In general.*

In order to constitute a valid gift *inter vivos* of personal property delivered by a donor to a third person, with instructions to deliver it to the donee at the death of the donor, there must be an immediate transfer of the title, and the donor must relinquish all present and future right, possession, dominion, or control over the property given.

Thus, in each of the following cases, the evidence was held to be sufficient to show that, by his delivery of personal property to a third person to be delivered to the donee after his death, the donor relinquished all present and future control, possession, and dominion over the property given, and hence that there was a valid gift *inter vivos*:

*Ruiz v. Dow* (1896) 113 Cal. 490, 45 Pac. 867. It appeared that a husband executed an instrument conveying all his personal property to his wife, which instrument was subsequently delivered to the cashier of a bank, with an indorsement on the envelop containing it, directing that at his death it should be recorded.

*Coward v. De Cray* (1918) — Cal. App. —, 176 Pac. 56. It appeared that a donor delivered certain certificates of bank stock owned by her and indorsed to her niece, to her attorney for the indorsee, and directed him to hold them until her death, and then to give them to the indorsee. Some six weeks later she procured the certificates from the attorney for the purpose of surrendering them and obtaining new ones, the change being necessary, she claimed, because the bank intended to change from a state to a national bank, and she stated that when the change was made she would replace the certificates with the attorney. This, however, she did not do, but kept them until her death.

*Wyble v. McPheters* (1875) 52 Ind. 393. It was alleged that certain bonds and money were, in the lifetime of the donor, delivered by him to the defendant, with directions to deliver them to the donor's children on his death, and that the defendant received them, and agreed to execute the trust thus reposed in him.

*Grant Trust & Sav. Co. v. Tucker* (1911) 49 Ind. App. 345, 96 N. E. 487. It appeared from the special finding of facts that the donor, the owner of certain bonds, inclosed them in an envelop and left them with a bank for safe-keeping, indorsing on the envelop the following: "April 7, 1899. In case of my death deliver to Cora Breed. H. S. Mark,"—and delivered the package to the bank, and it was placed in its vault. Thereafter the donor procured additional government bonds, and in each instance he directed George Webster, Jr., who was cashier of the bank, to place the bonds in the envelop with the bonds already placed therein, to which he referred as "Cora's other bonds." Webster on such occasions asked him if he desired to continue his previous instructions, to which he replied, in substance, that he did, and on each occasion, at his direction, the cashier indorsed on the envelop the following: "May 5, 1905. Renewed this instruction. G. W., Jr." "May 9, 1906. This instruction continued. G. W., Jr." "February 14, 1908. This instruction continued. G. W., Jr." All bonds placed in the envelop on April 7, 1899, and those subsequently placed therein, remained continuously in the vault of the Marion Bank and its successor, Marion State Bank, until after the death of the donor, with the exception that on one occasion, at the donor's request, the cashier forwarded to Washington a portion of the registered bonds, to have an error in the use of the name "Marks" instead of "Mark" corrected. After such correction had been made the bonds were returned directly to the bank, and again placed in the envelop so indorsed as aforesaid. The vault in which the package containing the bonds was kept was at all times under the exclusive control of the officers of

the bank, and was used by them for the safe-keeping of the funds and valuable papers of the bank, and also the papers of its customers, the donor never having known the combination to the safe, nor ever having any means of access to the vault. Webster acted as cashier of the banks during all the time the bonds were so held by them, and, at the request of the donor, when each quarterly instalment of interest fell due on the bonds he detached the interest coupons, and they were by the donor deposited to his own credit in the bank; and on one occasion he caused the cashier to place in the envelop a sum of money, and subsequently called for and received it. After April 7, 1899, on divers occasions and to numerous persons, including the husband of the plaintiff, and to other close friends and business acquaintances of his, the donor, in substance, stated that he had given the bonds in question to "Cora" (meaning the plaintiff); and on different occasions, while the bonds were in the keeping of the bank, he stated to the husband of the plaintiff, that he had deposited the bonds with the bank for "Cora," but that he had reserved the interest during his lifetime. When requested by the donee's husband, Breed, to use the bonds in purchasing real estate, he replied that the bonds did not belong to him, and that if he should make an arrangement to exchange them for the real estate he could not put the real estate under the same conditions that the bonds were, without making an absolute deed; that he had given the bonds to the plaintiff, but had placed them in the bank so they would be easily accessible for the clipping of the coupons from which he derived enough money to live on. He did not at any time after April 7, 1899, assert ownership of the bonds, or seek to regain possession or control of them.

*Snyder v. Frank* (1913) 53 Ind. App. 301, 101 N. E. 684. It appeared that a donor executed deeds to his real estate and assigned notes, certificates of deposit, and certificates of stock in various banks and other corporations, and placed these in separate envelops

addressed to each of his children, and then delivered the envelopes to the cashier of a bank to be delivered to his children after his death.

*Re Podhajsky* (1908) 137 Iowa, 742, 115 N. W. 590. It appeared that the owner of certain lots executed a deed of conveyance thereof to his wife, and placed the deed in the hands of a third person, with an instrument in writing appointing the third person trustee and directing the latter, on his wife's paying \$1,000 to the latter for the property so deeded to her, after his death, to distribute the money to the beneficiaries named therein.

*PLYE v. EAST* (reported herewith) ante, 885. It appeared that the note in suit was given by a nephew to his uncle as part of the purchase price of land sold by the latter to the former, the latter indorsing and signing an agreement on the back of the note to the effect that it was to be void and to become the property of the nephew on the uncle's death. The instrument was then, by agreement of the parties, placed in the hands of a third person to hold and collect the interest thereon during the life of the payee, and, on his death, then to surrender or deliver it to the maker.

*Meriwether v. Morrison* (1880) 78 Ky. 572. The undisputed facts were as follows: The owner of certain promissory notes indorsed them as follows: "I transfer the within note as a gift to Miss Agnes Morrison." He told the donee of the fact, and gave the notes to his nephew, directing the latter to put them back in his (the donor's) desk, and after his death to give them to the donee.

*Burge v. Burge* (1903) 25 Ky. L. Rep. 979, 76 S. W. 873. It appeared that a father, a few days before his death, gave a third person a certificate for \$600, directing the latter to use \$300 of it for the purpose of paying the expenses of his last illness and his funeral expenses, and to pay the remaining \$300 to his son.

*Davis v. Ney* (1878) 125 Mass. 590, 28 Am. Rep. 572. It appeared that a depositor assigned her deposits and delivered her bank books to the treasurer of the bank on the agreement

that he was to draw for her whatever she wanted during her lifetime, and to pay the balance, if any, left at her death, to her son.

*Scrivens v. North Easton Sav. Bank* (1896) 166 Mass. 255, 44 N. E. 251. It appeared that a father deposited a sum of money in the bank, telling the treasurer that he wanted his son to have it after his death, and on the bank book an entry was made stating that the account was "payable, in case of my death," to the son. About four months after the deposit was made, the father handed the book to his son, and told him to take it and keep it safe. The son took the book, looked it over, saw what it was but handed it back, saying that he would leave it there until called for. On several occasions thereafter the father told him that when he wanted the money he could have it.

*INNES v. POTTER* (reported herewith) ante, 896. It appears that the donor, after stating that he wanted to leave a certain amount of property to his daughter, took a certificate of stock, inclosed in it an absolute assignment to her, and wrote a letter to her in which he stated that he had transferred this stock to her. The certificate, with the indorsement on it, and this letter, he inclosed in an envelop, securely sealed it, and indorsed thereon the following: "The certificate No. 1 for 1,000 m shares to be sent by registered letter to H. Marcia Potter if not present, or handed to her, taking her receipt for the same."

These certificates to be held by J. A. Casey and delivered to the above parties only in case of the death of Warren Potter." He then delivered it to the trustee named, who kept it until after the donor's death, the latter never having exercised or attempted to exercise any control over the stock while in the trustee's hands.

*Greene v. Tulane* (1893) 52 N. J. Eq. 169, 28 Atl. 9. It appeared that the owner of certain bonds deposited them with a third person and at the same time handed to the latter a paper signed by himself, stating that: "Having deposited in the hands of [naming the person] three \$1,000

bonds of the state of New Jersey, I hereby authorize and direct him, in case of my death, to deliver said bonds to [the donees named], to be equally divided between them."

*Langworthy v. Crissey* (1894) 10 Misc. 450, 31 N. Y. Supp. 85, affirmed in (1895) 92 Hun, 608, 36 N. Y. Supp. 1127. It appeared that a donor delivered a promissory note to a third person, without indorsing it, and directed the latter to take care of it, and when she died to give it to the donee.

*Blanchard v. Sheldon* (1871) 43 Vt. 512. It appeared that the donor delivered to the defendant \$300, and took from him the following instrument in writing: "For value received I promise to pay Aurilla Ballou \$300, with annual interest, if she called for it before she deceased; if not, to be paid to Daniel M. Blanchard by her order. Henry L. Sheldon. Miranda Hines. January 12, 1867." She put the instrument with her other papers and kept it awhile, but before her decease sent it with her other papers in a box to defendant, who retained them in his custody till after her decease.

(b) *Reservation of life interest by donor.*

Where there has been an absolute and completed gift of personal property to a third person to be delivered to the donee after the donor's death, the fact that the donor has reserved to himself during his lifetime the earnings of the property, such as the interest on bank deposits, or the dividends on stock, will not show such a failure to relinquish dominion and control over the property, as will defeat a gift inter vivos, otherwise valid.

*Alabama.*—*Robertson v. Robertson* (1905) 147 Ala. 811, 3 L.R.A.(N.S.) 774, 40 So. 104, 10 Ann. Cas. 1051.

*Arkansas.*—*Smith v. Youngblood* (1900) 68 Ark. 255, 58 S. W. 42.

*Illinois.*—*Seavey v. Seavey* (1888) 30 Ill. App. 625.

*Indiana.*—*Grant Trust & Sav. Co. v. Tucker* (1911) 49 Ind. App. 345, 96 N. E. 487.

*Iowa.*—*Larimer v. Beardsley* (1905) 130 Iowa, 706, 107 N. W. 935; *Tucker v. Tucker* (1908) 138 Iowa, 344, 116 N. W. 119; *Jones v. Nicholas* (1911)

151 Iowa, 862, 130 N. W. 125; *Pyle v. East* (reported herewith) ante, 885.

*Michigan.*—*Hagerman v. Wigent* (1896) 108 Mich. 192, 65 N. W. 756.

*New Jersey.*—*Green v. Tulane* (1893) 52 N. J. Eq. 169, 28 Atl. 9.

*Utah.*—*Woolley v. Taylor* (1914) 45 Utah, 227, 144 Pac. 1094.

See also *Abegg v. Hirst* (1909) 144 Iowa, 196, 138 Am. St. Rep. 285, 122 N. W. 838. Compare *Baker v. Baker* (1914) 123 Md. 32, 90 Atl. 776, set out at length infra, in subdivision I. b, 2, "Evidence held not to show relinquishment;" *Re Soulard* (1897) 141 Mo. 642, 43 S. W. 617.

The test seems to be whether any interest in the property itself has been retained, as distinguished from the mere use or enjoyment. *Tucker v. Tucker* (1908) 138 Iowa, 344, 116 N. W. 119; *Jones v. Nicholas* (1911) 151 Iowa, 362, 130 N. W. 125.

In *Robertson v. Robertson* (Ala.) supra, it appeared that a donor gave by a written agreement certain bonds to a trustee, charging the trustee with the payment to him of the interest on the bonds for his life, and directing that on his death they should be delivered to persons named. It was held that this was an irrevocable disposition of the property conveyed by the assignment, by which the title passed immediately out of the grantor, and was not testamentary in its character as against the wife.

In *Green v. Tulane* (1893) 52 N. J. Eq. 169, 28 Atl. 9, it appeared that the owner of certain bonds deposited them with a third person, and at the same time handed to the latter a paper signed by himself, stating: "Having deposited in the hands of [naming the person] three \$1,000 bonds of the state of New Jersey, I hereby authorize and direct him, in case of my death, to deliver said bonds to [the donees named], to be equally divided between them." It was held that the delivery of the bonds to the third person invested the latter with the title at law to them, and put it in the latter's power to dispose of them and make title to them without any further act on the part of the donor. The

donor having died without resuming possession of the bonds, or having revoked his direction in writing that they should be delivered to the beneficiaries named, it was held that the gift was complete, and the donees were entitled to the subject of it. The court also held that the mere fact that the third person paid the donor the interest that accrued on the bonds up to the latter's death went no further than to show, *prima facie*, that he held the bonds for the donor's benefit during his lifetime, but did not contradict the donor's declaration in writing as to who were to be the *cestuis que trust* of the bonds at and after his death.

In *Grant v. Trust & Sav. Co. v. Tucker* (1911) 49 Ind. App. 345, 96 N. E. 487, it appeared that a donor delivered certain bonds to a bank, to be delivered to the donee after his death, but reserved to himself the interest accruing thereon during his lifetime. The court held that the fact that the bonds were under the control of the donor to the extent of enabling him to obtain the interest coupons as they matured, was not inconsistent with the idea that the bank held the bonds as trustee for the donee, and that the owner had unconditionally parted with the control and ownership thereof, but only tended to show that the bank was also trustee for the donor for the purpose of securing to him the interest thereon during his lifetime, and which he had reserved to himself. The court held that if he desired to retain the interest during his lifetime and to give to the donee the principal of the bonds, with interest thereon after his death, the bank could consistently act as trustee for both the donor and the donee for the accomplishment of the ends in view.

In *Seavey v. Seavey* (1888) 30 Ill. App. 625, it appeared that a father indorsed certain notes and delivered them to his son, who in effect retained possession thereof until the donor's death, for the benefit of the donee's daughters. The donor reserved the right to have the interest accruing on the notes, or so much as he should need for support during his natural life, and at his death the notes were

to be delivered to and divided between the beneficiaries. It was held that the trial court did not err in holding that the disposition of the notes was a valid gift *inter vivos*.

In *Smith v. Youngblood* (1900) 68 Ark. 255, 58 S. W. 42, the lower court found that the donor gave to the defendant a sum of money for the plaintiffs, to be held by him for them for and during the term of the donor's natural life, and to be paid over to the plaintiffs in equal proportions at her death, the donor reserving the interest for her life for the support and maintenance of herself and the plaintiffs. The evidence supporting this finding, the court held the following principle of law was applicable: "The delivery of property to a third person as trustee for the donee, and not as the agent of the donor, where the latter relinquishes all dominion of the property to the trustee for the purposes of the trust, is a sufficient delivery to complete the gift, which in such case is not revoked by the subsequent death of the donor before the property has been actually delivered to the donee. And the validity of the gift is not affected by the fact that the trustee is not to deliver the property to the donee until after the donor's death." The court stated that the transaction as shown constituted a gift *inter vivos*.

In *PYLE v. EAST* (reported herewith) ante, 885, the note in suit was given by a nephew to his uncle as part of the purchase price of land sold by the latter to the former, the latter indorsing and signing an agreement on the back of the note to the effect that it was to be void and to become the property of the nephew on the uncle's death. The instrument was then, by agreement of the parties, placed in the hands of a third person to hold and collect the interest thereon during the life of the payee, and, on his death, then to surrender or deliver it to the maker. The court held that, the evidence sufficiently establishing these facts and that the uncle retained to himself no interest therein or control thereof except to demand and receive the interest, the



deposit of the note in the third person's hands was, in legal effect, a delivery sufficient to validate the transaction.

In *Hagerman v. Wigent* (1896) 108 Mich. 192, 65 N. W. 756, it appeared that the donor frequently expressed her intention of giving the donees a mortgage executed by them to her, stating that she only expected and desired to recover interest on it while she lived. To effectuate this intention, she delivered the mortgage to her husband, with instructions to deliver it to the donees after her death. It was held that this was a sufficient delivery to constitute a valid gift *inter vivos*.

In *Larimer v. Beardsley* (1905) 130 Iowa, 706, 107 N. W. 935, it appeared that a donor delivered to the defendant, his attorney, a certificate of national bank stock, assigning the same to him as trustee, with the oral agreement that the defendant should hold the same as trustee until the death of the donor, when the stock was to be equally divided between the defendant and the donee, with a reservation to the donor during his lifetime of the right to use the dividends from the shares of stock. Later the donor wrote a letter to the defendant, expressing in definite terms the purpose of the assignment previously made. Later still, he wrote a letter to the donee, to whom he was engaged to be married, in which he related the fact that, after having had an attack of pneumonia, he had, when sufficiently recovered to get about, made an assignment to her for \$5,000 of the stock, and left it in the hands of the defendant with instructions to surrender the stock to the bank and have new stock issued to the donee in her name, and to send the same to her in case of his death. The donor and donee subsequently entered into an antenuptial contract, wherein it was stipulated that the donor should pay the donee on demand \$15,000, and the donee, in consideration of the promise and payment, relinquished all her claims and demands on all other real or personal property of the donor. Subsequently, and after the marriage of the donor

and donee, a new certificate of stock was issued for reasons not indicating any change of relations between the parties, and was held by the defendant as a substitute for the original certificate. It was held that facts showed that the gift became effectual as a completed gift *inter vivos* by the unconditional assignment and delivery of the certificate of stock to the defendant as trustee, and that the subsequent antenuptial contract could not operate by its terms as a waiver or relinquishment thereof on the part of the donee.

In *Tucker v. Tucker* (1908) 138 Iowa, 344, 116 N. W. 119, it appeared that a donor deposited two sums of \$4,500 in a bank, the second sum two months after the first, receiving certificates of deposit from the bank, bearing interest on return after the lapse of a year. The cashier of the bank testified that some time later, at the donor's request, he called at the latter's house and wrote across the back of the first certificate, "Pay to George F. Tucker," and on the back of the last, "Pay to John A. Tucker" (sons of the donor), and signed each indorsement. As George was then out of the state, he handed the one indorsed to him to John, with the request that the latter take care of it for his brother, and John placed it in a safety box in the bank, where it remained until a year later, when the donor removed it therefrom, and, in order to draw the interest thereon, surrendered it to the bank. The bank issued another, which was placed in the safety box, where it remained until the donor's death. The same procedure was followed with respect to obtaining the interest on the second certificate. The court held that the evidence showed a valid gift *inter vivos*, saying: "The intention that his sons should have them, and that in executing the assignments thereof, and their manual delivery with such assignments to John A. Tucker with the expressed purpose of giving them, leaves no escape from the conclusion that the gifts were consummated. If the certificates of deposit were surrendered, this was the sole object of

complying with the requirements of the bank in procuring the interest. They were evidences of the funds in the bank which then belonged to the sons, and their title thereto was not affected by the substitution of other certificates without their consent. The second certificate indorsed to John was like the first, save in the matter of date, but the certificate issued in the place of that assigned to George was payable 'to order of A. C. Tucker, or to George F. Tucker in case of death of A. C. Tucker.' Neither George nor the person in whose care the certificate had been left was consulted as to this change, and the evidence is conclusive that it was made only to enable the donor to draw his interest, and without any purpose on the part of deceased to revoke the gift or assert title to the fund. After the fund had passed irrevocably to George, it is idle to contend that the donor could acquire it again without some act of the donee indicating a purpose to revest him therewith."

In *Jones v. Nicholas* (1911) 151 Iowa, 362, 130 N. W. 125, the facts were as follows: The donor deposited \$1,000 in a bank to be held and used for the benefit of the donee, and declared at the time of the deposit, and frequently thereafter, that she wished the deposit to vest in the donee, payable to her at the donor's death, without any reservation whatsoever, save as to the interest on the money. A certificate of deposit was issued by the bank for that amount, payable to the donor, and, in the event of her death, to the donee, the principal being deposited for the benefit of the donee, interest thereon being payable to the donor, and the principal payable to the donee at the death of the donor, but the certificate of deposit was never delivered to the donee. Subsequently the donor directed her attorney in fact to cash the certificate made payable to the donee, and told him to use the money as he saw fit, preferably, however, investing it in the purchase of a lot for a granddaughter. It was held that the evidence established an irrevocable voluntary trust or gift in favor of the donee, which the subse-

quent acts of the settlor or trustee could not affect.

In *Abegg v. Hirst* (1909) 144 Iowa, 196, 138 Am. St. Rep. 285, 122 N. W. 838, the question was whether the assignment of a note and mortgage to a husband and wife jointly, and the delivery of the instruments to him, and the subsequent retention thereof in his possession during his lifetime, accompanied by the collection of the interest thereon by him, apparently in his own right, showed a gift of a one-half interest therein to his wife. The court stated that, had the assignment been to the wife, accompanied by delivery to a trustee to hold for the wife until her husband's death, collecting the interest in the meantime for the benefit of the husband, there would have been no doubt as to the complete consummation of the gift; for knowledge of such a gift, purely beneficial, need not have been shown to have been brought home to the donee during the lifetime of the donor, and it was immaterial that there was a postponement of the time of enjoyment of the property until after the donor's death.

In the case of *Re Soulard* (1897) 141 Mo. 642, 43 S. W. 617, it appeared that a donor executed an instrument in writing which provided in part as follows: "I hereby give to [the donees named] the following described notes and bonds, or any reinvestment of the principal of the same that may be hereafter made, . . . reserving, however, for my own use during my life, the income or interest from said notes, and restraining them from making any disposition of the principal of said notes during my life, and also reserving the right to reinvest any money from the payment of these notes as to me may seem fit." This instrument, and also the notes and bonds, were delivered to one of the donees, who also acted as agent for the donor under a power of attorney, on the understanding "that he would not have any of the income, or anything of that sort, during" the donor's life. The interest on the notes and bonds was collected by the donor or his agent until his death. Several of the notes matured during the life-

time of the donor, and they were collected, and the proceeds thereof reinvested, under the direction of himself or his agent. It was held that though the evidence showed a delivery of the notes and bonds to one of the donees, who was also the agent of the donor, and also a clearly expressed intention to give them to the donees named, yet the transaction did not amount to an executed gift, under the rules of law applicable to gifts *inter vivos*. The court held that the transfer to the donees was not absolute and unqualified; that the right of control reserved by the donor was inconsistent with absolute ownership by the donees, the latter taking no present, unconditional title to the notes so long as the donor retained control over them and their proceeds; and that it was clear that the donor intended that the gift should not become perfect until his death.

Where there has been a completed gift, the mere fact that naked possession has been acquired by the donor for the temporary purpose of enjoying the use thereof only, as for the collection of interest on deposits in a bank, or the dividends on stock therein, without intent to reinvest himself with the title, will not disturb it. *Tucker v. Tucker and Jones v. Nicholas* (Iowa) *supra*; *Woolley v. Taylor* (1914) 45 Utah, 227, 144 Pac. 1094.

In *Woolley v. Taylor* (Utah) *supra*, it appeared that a donor indorsed in blank certain stock, placed them in an envelop, indorsed thereon a description of its contents, stating the number and kind of shares of stock, and that they were the property of his daughter, naming her, signed the indorsement, and delivered the envelop containing the stock to his banker, with directions to deliver it to his daughter after his death. He similarly placed other shares of stock in another envelop, with similar indorsements, and delivered it also to the banker, with directions that it be delivered after his death to his son. Because the father directed the banker not to deliver the stock to his daughter until after the father's death; because he, after he had deliv-

ered it to the banker, and until his death, collected and used the dividends paid on the stock; because, when changes were made in one of the companies and new certificates were issued for old, he took the stock from the envelops, exchanged it and replaced it with the new,—the claim was made of nondelivery of the stock and want of a sufficient transfer beyond the control and dominion of the father, and hence that there was no consummated gift *inter vivos*. It was held, however, that the evidence showed that the father, the donor, when he delivered the stock to the banker, made an unconditional delivery and parted with all present and future control and dominion over the property. It was held that the exchange of the stock was made necessary by a change in the company, and that the donor's action was but to protect and safeguard the property, and neither that, nor the fact that after delivery he collected and used the dividends on the stock, was inconsistent with an absolute delivery and parting of title.

## 2. Evidence held not to show relinquishment.

In each of the following cases, the evidence was held to be insufficient to show an absolute and unconditional delivery of personal property by a donor to a third person, to be delivered to the donee after the former's death, the donor having retained dominion and control over the property given, and hence that there was no valid gift *inter vivos*:

*Taylor v. Harminson* (1899) 179 Ill. 137, 53 N. E. 584, affirming (1898) 79 Ill. App. 380. It appeared that the owner of certain notes had them renewed in his name, and then, dividing them into five lots, put them in five separate envelops, and had the names of his children severally written on the envelops, but did not indorse or assign the notes. He then handed them to a third person, telling the latter that he wanted to make the latter their custodian, and "if anything happened to him, and he was planted," he wanted the custodian to de-

liver them in person, telling the children that the gift was from the donor. It also appeared that when the donor was asked, when he had the notes renewed, why he did not have them made payable to the children, his reply was that he did not wish to do so; that he might live during the life of the notes, and then might want to collect the notes or the interest on them.

*Trustees of Permanent Fund v. Hall* (1892) 48 Ill. App. 536. It appeared that a donor procured from a missionary convention, a blank form for a note, for the payment of money to it. This he signed, but instead of delivering it to the convention as a binding obligation, he deposited it with one who was to act for him, and retain it during his lifetime. To the same effect see *Foreign Christian Missionary Soc. v. Hall* (1892) 48 Ill. App. 546.

*Smith v. Ferguson* (1888) 90 Ind. 229, 46 Am. Rep. 216. It appeared that the owner of certain promissory notes delivered them to the defendant, directing him to take them and do the best he could with them, and to furnish her with what means she needed to live, and, after death, to pay her debts and erect a monument for her, and to give what was left to the defendant's wife.

*Augusta Sav. Bank v. Fogg* (1890) 82 Me. 588, 20 Atl. 92. The evidence showed that a testator retained possession of his bank book, representing a deposit made in his sister's as well as in his own name, and which it was his intention should become her property, until a few days before he died. He then delivered the key of a trunk containing the book to the executor named in his will, for his sister, "at his decease."

*Jones v. Crisp* (1908) 109 Md. 30, 71 Atl. 515. It appeared that the following entry was made on a book of deposit of the savings department of the bank at the time the deposit was made: "Frederica Crisp, in case of death payable to Evan Jones." Mrs. Jones, the wife of the person to whom the money was payable on the death of the depositor, testified that

Mrs. Crisp brought the book to her house, and had her sew it in a muslin bag, and that she then gave the book to her husband.

*Baker v. Baker* (1914) 123 Md. 32, 90 Atl. 776. The evidence did not show whether the money in suit was actually drawn and redeposited, or whether the change in the account was made by writing the names of the children and the respective amounts to be paid to them above the entry of their parents' names, and adding the words, "payable at our death to above children." The evidence did show, however, that the intention of the parents was to reserve for themselves the interest on the deposits during their lives and the life of the survivor, and, at the death of the survivor, that the money should be paid by the bank to the persons named in the deposit books, as therein indicated; and also that the father kept the bank books and collected the interest during his life.

*Sherman v. New Bedford Five Cents Sav. Bank* (1885) 138 Mass. 581. It appeared that a deposit was entered by the supposed donor to the credit of the donee church, and the pass book was in its name, the following condition being annexed: "Interest to be paid on order of Urial Sherman [donor]. Principal to be drawn by board of managers of said church after decease of Urial Sherman." The depositor retained the pass book, and never informed the donee of the deposit.

*Bailey v. New Bedford Inst. for Sav.* (1906) 192 Mass. 564, 116 Am. St. Rep. 270, 78 N. E. 648. It appeared that at the time the donor deposited a sum of money in the bank, she made a written statement to the effect that the deposit was to be paid to her if she lived, but in case of her death it was to be payable to a person named.

*Re Soulard* (1897) 141 Mo. 642, 43 S. W. 617. It appeared that a donor executed an instrument in writing, which provided, in part, as follows: "I hereby give to [the donees named] the following described notes and bonds, or any reinvestment of the principal of the same that may be

hereafter made, . . . reserving, however, for my own use during my life, the income or interest from said notes, and restraining them from making any disposition of the principal of said notes during my life, and also reserving the right to reinvest any money from the payment of these notes as to me may seem fit." This instrument, and also the notes and bonds, were delivered to one of the donees, who also acted as agent for the donor under a power of attorney, on the understanding "that he would not have any of the income, or anything of that sort, during" the donor's life. The interest on the notes and bonds was collected by the donor or his agent until his death. Several of the notes matured during the lifetime of the donor, and they were collected and the proceeds thereof reinvested, under the direction of himself or his agent.

*Keyl v. Westerhaus* (1890) 42 Mo. App. 49. It appeared that the owner of a promissory note left it, indorsed in blank, with the plaintiff, and along therewith a power of attorney, constituting and appointing the plaintiff the attorney of the owner for the collection of the note, and directing him to pay the proceeds of the note, in case of the owner's death, to a named church.

*Godard v. Conrad* (1907) 125 Mo. App. 165, 101 S. W. 1108. It appeared that the owner of certain property accompanied its delivery into the hands of the plaintiff to hold for the donee with the declaration: "If I pass in my checks, I want her to have the diamond." "I asked him what I should do with his watch and chain, and he replied with some effort, that he wanted Mrs. Searcy [the donee] to have them, too, as she had been so good to him."

*Stevenson v. Earl* (1904) 65 N. J. Eq. 721, 103 Am. St. Rep. 790, 55 Atl. 1091, 1 Ann. Cas. 49. It appeared that an employee of a company conducting a savings fund for its employees made written application for permission to become a depositor in the fund, and in and by his application agreed to be bound by the rules and

regulations under which it was managed, and particularly "that in the event of my death all deposits standing to my credit in said savings fund, and all interest due thereon, shall be paid to my wife." The pass book delivered to him by the company he gave to his wife. Subsequently, he increased the amount of his deposits, and also drew against them, the balance varying at different times from \$2,286 to \$56, and amounting to \$1,578 at the time of his death.

*Williams v. Guile* (1889) 117 N. Y. 348, 6 L.R.A. 366, 22 N. E. 1071. It appeared that about six weeks before his death, a donor executed an instrument in the form of a bill of sale to his niece, of a policy of life insurance. In the instrument was a clause empowering him to revoke the transfer at any time during his life. This instrument and the policy the donor delivered to his attorney, telling him to deliver it to the niece if anything happened to him.

*Re Rose* (1901) 35 Misc. 21, 71 N. Y. Supp. 172, affirmed in (1902) 75 App. Div. 615, 77 N. Y. Supp. 1139, which is affirmed in (1903) 176 N. Y. 587, 68 N. E. 1124. It appeared that some nine months before his death, the testator deposited a sum of money in a bank in his name, "in the event of death payable to" his brother, and signed an order on the bank which stated, "In the event of my death, please pay deposits" to the brother, and gave the book to him. The testator stated at the bank that he did not want the money put in a joint account.

*Walsh's Appeal* (1888) 122 Pa. 177, 1 L.R.A. 535, 9 Am. St. Rep. 83, 15 Atl. 470. It appeared that the day before her death the donor handed to a third person her deposit book, saying: "The money there is for my sister in Ireland, but if I don't die I want it back."

### *c. Status of third person.*

#### *1. Agent of donor.*

Where personal property is delivered to a third person to be delivered to the donee after the donor's death, the ultimate question, whether the third person occupies the position of an agent of the donor or a trustee

for the donee, is one of fact to be determined from the intentions of the donor, the situation and relation of the parties, the kind and character of the property, and the things said, written, and done in regard thereto,—all as disclosed by the evidence. *Grant Trust & Sav. Co. v. Tucker* (1911) 49 Ind. App. 845, 96 N. E. 487.

So, where the evidence shows that the third person is only an agent of the donor, with directions to complete an unexecuted gift on the death of the donor, the death of the latter operates as a revocation of the agency, and the gift is defeated. *Wright v. Bragg* (1901) 45 C. C. A. 204, 106 Fed. 25; *Duryea v. Harvey* (1903) 183 Mass. 429, 67 N. E. 351; *Taylor v. Harmison* (1899) 179 Ill. 137, 53 N. E. 584, affirming (1898) 79 Ill. App. 380; *Keyl v. Westerhaus* (1890) 42 Mo. App. 49.

In *Wright v. Bragg* (Fed.) supra, it appeared that the most that the evidence showed was that a note, mortgage, and assignment of them were deposited with the donor's agent, to be by him delivered to the donee in case of the donor's death; and this, it was held, was not a good and complete delivery, in law, to pass title, there having been no delivery to the donee, or anyone representing him or in his confidence. The court held that the agent was the donor's agent, and the assignment, with the note and mortgage, was still under her custody, her agent's custody being her custody. Therefore, the court held that there was no more a delivery to the donee, with the essentials of a valid gift inter vivos, of an immediate transfer of the title, and the relinquishment of all present right to, or control over, the thing given by the donee, than as though she had kept the papers in her own personal possession.

In *Duryea v. Harvey* (1903) 183 Mass. 429, 67 N. E. 351, it appeared that a donor, fearing that his physician would advise him that a surgical operation would be necessary to prevent a fatal result from a disease, from the effects of which he believed himself to be suffering, and thinking that he might commit suicide rather

than submit to such an operation, put in an envelop an order on another for the payment of a certain sum per month to the donee, with a request to the drawee to pay the same. He placed the envelop in the hands of a third person, with an indorsement on the outside that it was to be opened by the third person or the donee, only by his direction or on his death. It was held that the third person held the papers during the life of the donor as his depositary, subject to his orders, and not for the donee, it being plainly the donor's intention to keep to himself during his lifetime the power to make a delivery of them. Hence, there having been no delivery to the donee, or to anybody for her, it was held that there was no valid gift inter vivos.

In *Taylor v. Harmison* (1899) 179 Ill. 137, 53 N. E. 584, affirming (1898) 79 Ill. App. 380, it appeared that the owner of certain notes had them renewed in his name, and then, dividing them into five lots, put them in five separate envelopes, and had the names of his children severally written on the envelopes. He then handed them to a third person, telling the latter that he wanted to make the latter their custodian, and "if anything happened to him, and he was planted," he wanted the custodian to deliver them in person, telling the children that the gift was from the donor. It also appeared that when the donor was asked, when he had the notes renewed, why he did not have them made payable to the children, his reply was that he did not wish to do so; that he might live during the life of the notes, and then might want to collect the notes or the interest on them. The court held that, if the notes were given to the third person as agent or trustee for the children, and he was accountable only to them, the delivery would have been valid, the donor having thereby parted with all control over them, reserving no right to reclaim or repossess himself of them; but that if he was only the agent of the donor, authorized to hold the notes as custodian, and to deliver them after the donor's death, there

was no gift of the property. The court held that the evidence justified the conclusion that the third person held the notes as the agent of the donor, with directions to distribute them after his death, for the purpose of obviating an administration of his estate, the view that the donor did not part with the title and all interest in the notes being strengthened by the important fact that he did not indorse or assign them.

In *Keyl v. Westerhaus* (1890) 42 Mo. App. 49, it appeared that the owner of a promissory note left it, indorsed in blank, with the plaintiff, and along therewith a power of attorney, constituting and appointing the plaintiff the attorney of the owner for the collection of the note, and directing him to pay the proceeds of the note, in case of the owner's death, to a named church. The court held that, construing the blank indorsement of the note and the power of attorney together, as one transaction, the sum and substance was that the owner left the note with the plaintiff for collection, "constituted and appointed" the plaintiff his agent to collect it, and if he, the owner, was then dead, the agent was authorized to pay over the proceeds of the note to the church named; but if, when the money was collected, the owner of the note should not be dead, then the agent was clearly bound to pay it to him. The court held that the plaintiff's relation to the owner, in the matter of this note, was simply that of agent to principal,—nothing more. Hence, the court held, in denying that there was a valid gift *inter vivos*, that the death of the principal had the effect of dissolving this relationship, and especially in this case, where the agent was to act in the name of his principal.

## 2. *Trustee for donee.*

Where the evidence shows that the third person, to whom personal property has been delivered to be given to the donee after the donor's death, is a trustee holding the property for the benefit of the donee, the control and title to which have been surrendered by the donor, subject only to

conditions not inconsistent with the passing of an absolute and present interest, the gift is complete, and the death of the donor does not revoke it. *Grant Trust & Sav. Co. v. Tucker* (1911) 49 Ind. App. 345, 96 N. E. 487; *Re Fenton* (1917) — Iowa, —, 165 N. W. 463; *Jarrell v. Crow* (1902) 30 Tex. Civ. App. 629, 71 S. W. 397; *Giddings v. Giddings* (1878) 51 Vt. 227, 31 Am. Rep. 682.

In *Grant Trust & Sav. Co. v. Tucker* (Ind.) supra, it appeared from the special finding of facts that the donor, the owner of certain bonds, inclosed them in an envelop and left them with a bank for safe-keeping, indorsing on the envelop the following: "April 7, 1899. In case of my death deliver to Cora Breed. H. S. Mark,"—and delivered the package to the bank, and it was placed in its vault. Thereafter the donor procured additional government bonds, and in each instance he directed George Webster, Jr., who was cashier of the bank, to place the bonds in the envelop with the bonds already placed therein, to which he referred as "Cora's other bonds." Webster on such occasions asked him if he desired to continue his previous instructions, to which he replied, in substance, that he did, and on each occasion, at his direction, the cashier indorsed on said envelop the following: "May 5, 1905. Renewed this instruction. G. W., Jr." "May 9, 1906. This instruction continued. G. W., Jr." "February 14, 1908. This instruction continued. G. W., Jr." All bonds placed in the envelop on April 7, 1899, and those subsequently placed therein, remained continuously in the vault of the Marion Bank and its successor, Marion State Bank, until after the death of the donor, with the exception that on one occasion, at the donor's request, the cashier forwarded to Washington a portion of the registered bonds, to have an error in the use of the name "Marks," instead of "Mark," corrected. After such correction had been made the bonds were returned directly to the bank, and again placed in the envelop so indorsed as aforesaid. The vault in which the package containing the

bonds was kept was at all times under the exclusive control of the officers of the bank, and was used by them for the safe-keeping of the funds and valuable papers of the bank, and also the papers of its customers, the donor never having known the combination to the safe, nor having had any means of access to the vault. Webster acted as cashier of the banks during all the time the bonds were so held by them, and, at the request of the donor, when each quarterly instalment of interest fell due on the bonds, he detached the interest coupons, and they were, by the donor, deposited to his own credit in the bank; and on one occasion he caused the cashier to place in the envelop a sum of money, and subsequently called for and received it. After April 7, 1899, on divers occasions and to numerous persons, including the husband of the plaintiff, and to other close friends and business acquaintances of his, the donor, in substance, stated that he had given the bonds in question to "Cora" (meaning the plaintiff); and on different occasions, while the bonds were in the keeping of the bank, stated to the husband of the plaintiff, that he had deposited the bonds with the bank for "Cora," but that he had reserved the interest during his lifetime. When requested by the donee's husband to use the bonds in purchasing real estate, he replied that the bonds did not belong to him, and that if he should make an arrangement to exchange them for the real estate he could not put the real estate under the same conditions that the bonds were without making an absolute deed; that he had given the bonds to the plaintiff, but had placed them in the bank so they would be easily accessible for the clipping of the coupons, from which he derived enough money to live on. He did not at any time after April 7, 1899, assert ownership of the bonds, or seek to regain possession or control of them. The court held that if the property remained under the control of the donor, though in the keeping of the bank, and the bank was subject to his further direction as to its final disposition, then its

relation was that of an agent. If, however, the bonds were delivered to the bank by the donor with the intention that the present title and ownership should pass to the donee, subject only to the donor's right to the accruing interest thereon during his lifetime, and this intention was carried into effect by the language employed and the things done in relation thereto, then the gift was executed, and the bank became and was a trustee for the donee. The ultimate question whether the bank occupied the position of agent or trustee, the court held, being one of fact to be determined from the intentions of the donor, the writing on the envelop containing the bonds, the situation and relation of the parties, the kind and character of the property, and the things said and done in regard thereto,—all as disclosed by the evidence,—the court sustained the conclusion of the lower court that the bank held the bonds as trustee for the donee. The court also stated that the fact that the bonds were under the control of the donor, to the extent of enabling him to obtain the interest coupons as they matured, was not inconsistent with the idea that the bank held the bonds as trustee for the donee; but only tended to show that the bank was also trustee for the donor for the purpose of securing to him the interest during his lifetime. If he desired to retain the interest during his lifetime, and give to the donee the principal of the bonds, with interest thereon, after his death, the bank could, the court held, consistently act as trustee for both donor and donee for the accomplishment of the ends in view.

In *Giddings v. Giddings* (1878) 51 Vt. 227, 31 Am. Rep. 682, a referee found that a donor executed three promissory notes in writing, payable one to each of a brother's three sons, respectively, one year after the maker's death. He intended, as the referee found, to leave these notes in the hands of some third person, subject to his own control, to be delivered after his death, if he should not retake them or otherwise direct. He informed his brother and the payees



of his intention, and they all assented to the arrangement. After that, he put the notes into a letter envelop and sealed it up, and wrote on it this address: "Henry F. Giddings, of Ellisburg, Jefferson County, N. Y., and others, in care of Barnes Frisbie, Esq., of Poultney,"—and delivered it to Barnes Frisbie of Poultney, at Poultney, with directions about the custody of it, which Frisbie, as the referee found, indorsed correctly, in substance, on a wrapper that he put around it, in these words: "Letter left in my care by Benj. Giddings, to be handed to Mr. Giddings if he calls for it; otherwise not to be opened in his lifetime." The donor did not retake the package; and after his death, Frisbie opened it, and delivered the notes, respectively, to the payees named in them. It was held that the acts of the maker constituted Frisbie a trustee for the donees and that the gift was good.

In the case of *Re Fenton* (1917) — Iowa, —, 165 N. W. 463, it appeared that the plaintiff's intestate was taken to a hospital in a condition regarded as very grave. At the time of her removal to the hospital, her pass books and certificates in savings and loan associations, entitling her to dividends on the earnings of the companies, were all contained in her "purse." The deposits represented by the pass books were joint accounts, payable to the survivor on the death of either, and the certificates were assigned on their backs. When taken to the hospital, the plaintiff's intestate turned over to a third person her purse and its contents, but, on the third person's hesitating, a written instrument providing for the disposition of the property, and purporting to be a bill of sale thereof, was drawn up, naming another person as trustee. The court held that in delivering the papers to the third person the donor intended that this should be a delivery for the benefit of the donees.

In *Jarrell v. Crow* (1902) 30 Tex. Civ. App. 629, 71 S. W. 397, the evidence showed that a wife turned certain notes and accounts over to her husband, with instructions to convert

them into money and to divide it between the donees named, part of which he performed before her death, part after, and part was yet to be performed at the date of trial. It was objected that there was no valid gift as to the part of the property thus given, which did not go into the possession of the donees until after the death of the donor; as to hold it effective would be to allow the husband to execute a verbal and unprobated will. The court held, however, that the delivery of the property to the husband, the donor parting entirely with possession and control, rendered the gift effective, and that the evidence showed that the husband accepted the task, became trustee for the donees, and proceeded with its execution.

## II. *Gift causa mortis.*

### a. *General principles.*

The concurrence of three things is essential to the consummation of a gift causa mortis: (1) The thing given must have been of the personal goods of the donor; (2) it must have been given while the latter was in peril of death, or while he was under the apprehension of impending dissolution from an existing malady; and, (3) the possession of the thing given must have been actually, or constructively, delivered to the donee, or to someone for his use, with the intention that the title should then vest conditionally on the death of the donor, leaving sufficient assets in addition to pay his debts. *Devol v. Dye* (1890) 123 Ind. 321, 7 L.R.A. 439, 24 N. E. 246, and see the cases cited throughout this subdivision.

A mere unexecuted purpose, however clearly or forcibly expressed, so long as it rests merely in intention, is not effectual. The intention must not only have been manifested, but in addition, in order to consummate the gift, the donor must have transferred the possession of the thing to the donee in person, or to someone for his use, under such circumstances that the person to whom delivery is made is thenceforth affected with a trust or

duty in the donee's behalf. *Devol v. Dye* (Ind.) *supra*.

So, if the gift is not to take effect as an executed and completed transfer to the donee of possession and title, either legal or equitable, during the life of the donor, but the property is intrusted, merely, with other persons, to be disposed of at his death, as he may direct or shall have directed, it becomes a testamentary disposition, dependent for its validity on being made, executed, and proved as a will. If, however, the donor, being in ill health, and apprehensive of death, in view of such condition and apprehension, delivers the property to a third person absolutely, thereby relinquishing all right to the possession and dominion over it, for the use of the donee, under such circumstances as to indicate a present intention of transferring the title to the latter, the gift will be upheld as a valid one *causa mortis*. *Deneff v. Helms* (1902) 42 Or. 161, 70 Pac. 390. And see the cases cited throughout this subdivision.

The chief distinction between gifts *inter vivos* and those *causa mortis* is that, while the former are consummated by delivery, the title to the property is irrevocably vested, while in the latter the title is ambulatory and inchoate until the death of the donor occurs. *Devol v. Dye* (Ind.) *supra*. And see the cases cited throughout this subdivision.

But notwithstanding this, when the nature of the gift admits of it, a complete manual transfer of the possession of the subject should take place, and the transaction should be accompanied by words, signs, or a writing, adequately expressive of the donor's intention. And while the rule requiring delivery, either actual or constructive, in cases of gifts *causa mortis*, must be maintained, its application is to be mitigated and applied according to the situation of the subject of the gift, and the condition of the donor; for the intention of a donor in peril of death, when clearly ascertained and fairly consummated, within the meaning of well-established

rules, is not to be thwarted by a narrow and illiberal construction of what may have been intended for and deemed by him a sufficient delivery. *Ibid*.

It is not necessary that the donee should have constituted the third person his bailee, or trustee, nor that he should have known of the intended gift, or of the delivery, in order to make it an effectual delivery to the third person as the trustee of the donee. *Ibid*. For, if the person to whom delivery is made is not to act thereafter as the agent of the donor, he is regarded as the trustee for the donee, and his acts in holding the property for the donee are deemed to be in the donee's interest. *Hogan v. Sullivan* (1901) 114 Iowa, 456, 87 N. W. 447; *Re Podhajsky* (1908) 137 Iowa, 742, 115 N. W. 590.

The matter of acceptance by the donee is of slight importance. Where the gift is beneficial, and imposes no burdens on the donee, acceptance will be presumed as a matter of law. *Devol v. Dye* (Ind.) *supra*; *Hogan v. Sullivan* and *Re Podhajsky* (Iowa) *supra*; *Varley v. Sims* (1907) 100 Minn. 331, 8 L.R.A. (N.S.) 828, 117 Am. St. Rep. 694, 111 N. W. 269, 10 Ann. Cas. 473.

In *Walker v. Foster* (1900) 30 Can. S. C. 299, however, the court said: "It is inaccurate to say that the delivery must be to an agent or trustee for the donee. No one can be an agent or trustee for another without that person's assent. Then the cases show that the delivery to the third person is sufficient without the assent or even the knowledge of the donee, provided it is for the use of the donee. Indeed, the very sense and object of a delivery to a third person is, in some cases, because the donee is not at hand to give the assent. Therefore the assent of the donee, or even his knowledge of a delivery to a third person for his behoof, is not an essential requisite, provided the donor parts with both the possession and dominion over the subject of the gift in order that the depositary may hold it for the use of the donee."

**b. Relinquishment by donor of title and control of property.**

**1. Evidence held to show relinquishment.**

In order to constitute a valid *donatio causa mortis* of personal property to a third person for delivery to the donee after the donor's death, there must be an actual or symbolical tradition or delivery of the property to the third person for the donee, and a relinquishment of all control or dominion of the property by the donor, never revoked by him during his lifetime, sufficient to transfer the present, though inchoate, title to the property to the donee.

Thus, in each of the following cases, the evidence was held to be sufficient to show an actual or a symbolical delivery by the donor, of personal property, to a third person, to be delivered to the donee after the donor's death, and a relinquishment by the latter of all control or dominion over the thing given, and hence that there was a valid gift *causa mortis*:

*Sorrells v. Collins* (1900) 110 Ga. 518, 36 S. E. 74. It appeared that some time before she died the donor came to the petitioner and stated that she had a package which she wanted the petitioner to deliver to her (the donor's) mother, in case of her death, and delivered the package to the petitioner for that purpose, not stating its contents. Subsequently, during her last illness, she frequently spoke to the petitioner about the package, and enjoined the latter, in case of her death, to deliver the package to her mother.

*Woodburn v. Woodburn* (1887) 123 Ill. 608, 14 N. E. 58, 16 N. E. 209. It appeared that a testator handed a note to the executor of his will, directing the latter to deliver it to the testator's son in case he did not contest the will, and, if he did, then to collect it for the benefit of the widow. It appeared that the executor took the note and handed it over to the widow to care for, she putting it back in the pocket-book from whence it had been taken, among the papers of the testator.

*Seavey v. Seavey* (1888) 30 Ill. App. 625. It appeared that a father indorsed certain notes and delivered

them to his son, who in effect retained possession thereof until the donor's death, for the benefit of the donor's daughters. The donor reserved the right to have the interest accruing on the notes, or so much as he should need for support during his natural life, and at his death the notes were to be delivered to and divided between the beneficiaries.

*Hogan v. Sullivan* (1901) 114 Iowa, 456, 87 N. W. 447. It appeared that the donor, about two years before his death, took the defendant to a bank and deposited a sum of money, having the certificate made payable to the defendant, and stating that the doctors had told him that there was danger of his death, and that he wanted the defendant to be able to draw the money out. About two weeks before his death, the donor gave directions to the defendant with regard to the disposal of the money which he had previously deposited to the defendant's credit, causing the latter to make a brief memorandum of the beneficiaries and the amounts to be paid to them, and which was read over but not signed by him.

*Sessions v. Moseley* (1849) 4 Cush. (Mass.) 87. The evidence showed that the donor, being sick and apprehensive of death, gave into the hands of a third person the note in suit, with directions to give it, after his death, to the donee for his own, and that she kept the note until after the death of the donor and then gave it to the donee, who accepted it.

*Clough v. Clough* (1875) 117 Mass. 83. The evidence offered in support of a claim of a *donatio causa mortis* was to the effect that the defendant's deceased brother, during his last sickness, gave and delivered to him in trust for his minor son, \$400, with instructions to invest and hold the same until the son became of age, and then to pay it over to him, and to pay it to other persons if the son died before reaching the age of twenty-one years. The defendant accepted the trust and took the money and deposited it in a savings bank, in his own name, as trustee for the minor son of his deceased brother, where it remained.

*Pierce v. Boston Five Cents Sav. Bank* (1889) 129 Mass. 425, 37 Am. Rep. 371. It appeared that a person who was about to go to the hospital to have an operation performed, from which she feared she would not recover, gave the plaintiff a package sealed with wax, having informed the plaintiff that it contained money and savings-bank books, and also directions as to what was to be done with them. On her death, the plaintiff opened the package, finding therein a sum of money and certain bank books, and a sealed envelop superscribed: "In case of death, the inclosed requests are to be carried out." This envelop contained a written request that the donor be buried in a certain place, and that whatever was left, after paying all bills and expenses, be divided among the persons named.

*Bostwick v. Mahaffy* (1882) 48 Mich. 342, 12 N. W. 192. It appeared that a father left money in charge of a third person with whom he boarded, with directions to deliver it to his daughter in case of his death.

*Shackleford v. Brown* (1886) 89 Mo. 546, 1 S. W. 390. The testimony relied on to prove a gift causa mortis was as follows: "She [the donor] was reading the Bible, but put it up, and went and got her basket; she came and sat down by me and said: 'I have something to tell you; now pay attention to what I am saying;' on taking a paper from her basket she said: 'This is my will; if anything happens to me I want you to take charge of it;' and she said: 'Here are two articles;' taking a notebook in her hand, she said: 'This is for Samuel;' she then took up a pocketbook and said: 'This is for William, and I want you to see that they get them; take them all to Clark Brown, and deposit them with him for safe-keeping; these articles and my will make all my children equal.' On Saturday morning, the day of Mrs. Wetherholt's death, I again visited her, and Mrs. Wetherholt said to me: 'I sent for you; I am going to die; do you remember what I told you about my papers?' I replied, I did. She then said: 'Take possession of and leave them with Clark Brown for

safe-keeping, and do with them as I have told you.' She did not take them in her hand, but pointed to the basket and told me to 'take them;' and in her presence I took them and put them in my valise and locked it up, and took it to another room."

*Emery v. Clough* (1885) 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796. It appeared that a donor, while very sick, delivered to the defendant a sum of money, as gifts to several persons, to be by her distributed to the parties designated by him, after his death.

*Grymes v. Hone* (1872) 49 N. Y. 17, 10 Am. Rep. 318. It appeared that the donor, being the owner of 120 shares of bank stock, included in one certificate, made an absolute assignment in writing of twenty shares thereof, to his favorite granddaughter, and appointed her his attorney irrevocable to sell and transfer it to her own use. He afterwards handed the paper to his wife to put with the will and other papers, in a tin box she had. When he gave it to his wife, he said: "I intend this for Nelly. If I die, don't give this to the executors; it isn't for them, but for Nelly; give it to her, herself." She asked: "Why not give it to her now?" "Well," he said, "better keep it for the present; I don't know how much longer I may last, or what may happen, or whether we may not need it." At the time of the execution of this instrument, the donor was about eighty years of age, and in failing health, and so continued until his death some five months later.

*Williams v. Guile* (1889) 117 N. Y. 343, 6 L.R.A. 866, 22 N. E. 1071. It appeared that about six weeks before his death, a donor, who had suffered two paralytic strokes, executed an instrument in the form of a bill of sale to his niece, of a policy of life insurance. In the instrument was a clause empowering him to revoke the transfer at any time during his life. This instrument and the policy the donor delivered to his attorney, telling him to deliver it to the niece if anything happened to him. After his death, the attorney delivered the papers.

*Callanan v. Clement* (1896) 18 Misc.

621, 42 N. Y. Supp. 514, affirmed in (1898) 82 App. Div. 631, 53 N. Y. Supp. 1101, which was affirmed in (1900) 162 N. Y. 618, 57 N. E. 1105. It appeared that the donor, having made a will under which nothing was to pass to the donee, stated a number of times that she had given the latter her bank book. A few days after receiving the injury which caused her death, the donor called for her bank book, and gave it to an old friend to take care of, stating that it was the donee's property. Subsequently, however, she sent for the friend and requested her to bring the bank book, and then, in the presence of two other witnesses, stated that she wanted them as witnesses, to show that the bank book belonged to the donee, and that she gave it to her. She then handed it to the donee, and told the donee to let her (the donor's) friend take it back with her until the donee called for it. There was no dispute in the evidence as to whether the book was actually delivered to the friend.

*Gass v. Simpson* (1867) 4 Coldw. (Tenn.) 288. It appeared that the donor was compelled to leave his home in consequence of the rebel conscription, and was resolved to join the Union Army. In view of the dangers to which he would be exposed, both in such service and in attempting to join it, he made a gift of the money, notes, etc., in controversy, to his nephew, to take effect on condition that he never returned; and delivered them to his sister, the nephew's mother, to be delivered to the donee on the happening of his death.

*Johnson v. Colley* (1903) 101 Va. 414, 99 Am. St. Rep. 884, 41 S. E. 721. It appeared that a donor, the day before his death, handed a friend and neighbor a bundle of money, with the injunction that if he died, or anything happened to him, the friend was to give it to the donee.

*Walker v. Foster* (1900) 30 Can. S. C. 299. It appeared that a donor placed certain promissory notes in envelopes addressed to each of his five children, and kept them and their contents in a desk at his bedside for some years, locked up and under his control.

Shortly before his death, when he believed that he would die, the donor had the envelopes, in which the notes were, taken from the desk and handed to a third person, who was directed by him to seal up the envelopes and replace them in the desk and lock it. Then he delivered the keys to the third person to retain until after his death, when he instructed him to deliver to each of his children one of the envelopes so addressed. After his death, the third person delivered the envelopes to the respective donees, as directed.

*2. Evidence held not to show relinquishment.*

In each of the following cases, the evidence was held to be insufficient to show either an actual or a symbolical delivery of the property to the third person for delivery to the donee after the death of the donor, which divested the donor of the present title to the property and invested it in the donee, or that the donor had relinquished all control and dominion over the property given, and hence that there was no valid gift *causa mortis*:

*Daniel v. Smith* (1883) 64 Cal. 346, 30 Pac. 575. A witness testified that a short time before the donor's death the latter requested the witness to take charge of his effects, including his pass book, and to hold them in trust for him until he got well, and, if he should die, then to transfer them to his daughter, all of which the witness did. The witness did not, however, state any manual tradition of the pass book to him, nor that the book was locked in a drawer or trunk, and the keys delivered to him that he might possess himself of the book.

*Noble v. Garden* (1905) 146 Cal. 225, 79 Pac. 883, 2 Ann. Cas. 1001. It appeared that certificates of stock in a building and loan association, issued to the donor, were assigned by her to certain persons, the donor then giving the certificate to the secretary of the association and requesting him to deliver them to the persons to whom they had been assigned, on her death. This decision was followed in *Noble v. Learned* (1906) 7 Cal. Unrep. 297, 87 Pac. 402, a similar action with respect

to another of the certificates described in the previous case. *Knight v. Tripp* (1897) 5 Cal. Unrep. 785, 49 Pac. 838; *Knight v. Tripp* (1898) 121 Cal. 674, 54 Pac. 267. It appeared that the donor, who was about to undergo a surgical operation, transferred all her property to the defendant, the real estate being conveyed by a deed and the furniture by a bill of sale. On the same day, she assigned her bank books to him, and on the next day indorsed to him certain promissory notes and assigned to him certain certificates of stock. At the same time, it appeared that the defendant made a written memorandum, not signed by the donor, wherein the disposition of her property to the persons named was limited to the event of her death, the defendant to have the balance remaining after the instructions were carried out, she evidently expecting to remain in the house and to have the use of the furniture so long as she lived. The promissory notes and the certificates of stock were kept by the donor in a locked tin box and placed in a secretary, which was also kept locked, in her room, the key of which she gave to the defendant, without any words of gift.

*Barnum v. Reed* (1891) 186 Ill. 388, 26 N. E. 572, reversing (1890) 86 Ill. App. 525. It appeared that a testatrix sent certain notes and certificates of deposit to a third person, who had acted as her agent, a week before her death, with a letter directing him to take enough of the interest money arising from the notes, which, added to the cash sent in the letter, and the amounts of the certificates of deposit, would be sufficient, and to purchase a new certificate of deposit for a stated amount in lieu of the certificates sent him, and, if the testatrix was then dead, to draw the certificate in her sister's name, "and send the interest and the notes, and the interest on them, to her so long as they continue, and, when they are paid, put them in the bank, and send the interest to her."

*Smith v. Ferguson* (1883) 90 Ind. 229, 46 Am. Rep. 216. It appeared that the owner of certain promissory notes delivered them to the defendant, di-

recting him to take them and do the best he could with them, and to furnish her with what means she needed to live, and, after her death, to pay her debts and erect a monument for her, and to give what was left to the defendant's wife.

*Bowers v. Hurd* (1813) 10 Mass. 427. It appeared that a donor, feeling himself under obligation to another, and desiring to avoid the expense of making and proving a will, made a promissory note payable to that person, and left the note in the keeping of a third person, to be delivered, after his decease, to the person to whom it was payable.

*McCord v. McCord* (1882) 77 Mo. 166, 46 Am. Rep. 9. It appeared that a father, in his last illness, delivered to a son a certain sum of money to keep as his own in case of the donor's death, and a like sum for each of his children, to be delivered to them, respectively, in the event of his death. After the father's death the son made the distribution as directed.

*Dunn v. German-American Bank* (1891) 109 Mo. 90, 18 S. W. 1189. The evidence all tended to show that the certificate of deposit in litigation was only delivered by the owner to his brother for safe-keeping, and to be held by him as the agent of the owner, until he got well or died, accompanied by a request that if the owner died the brother should see that the owner's children got the money.

*Bieber v. Boeckmann* (1897) 70 Mo. App. 503. The trial court found that the donor in her last illness, and in the belief that she would not recover from that sickness, gave the money in question to the defendant and told him to put it in his safe, and if she died to divide it in certain parts among certain relatives of hers, but that if she did not die, to return it.

*Godard v. Conrad* (1907) 125 Mo. App. 165, 101 S. W. 1108. It appeared that the owner of certain property accompanied its delivery into the hands of the plaintiff to hold for the donee, with the declaration: "If I pass in my checks, I want her to have the diamond." "I asked him what I should do with his watch and chain, and he

replied, with some effort, that he wanted Mrs. Searcey [the donee] to have them, too, as she had been so good to him."

*Partridge v. Kearns* (1898) 32 App. Div. 483, 53 N. Y. Supp. 154. It appeared that a third person was holding a certain promissory note for safekeeping, subject to the order of the owner. Two days prior to the death of the owner, the holder was directed to give the note to the named person after the owner's death.

*Hillman v. Young* (1913) 64 Or. 73, 127 Pac. 793, 129 Pac. 124. It was alleged that the donor, being desirous that the donee should receive any portion of his estate which should remain after his death, duly assigned and transferred to a third person, as trustee, the promissory notes mentioned, and also duly assigned and transferred, in writing, a mortgage securing them to the third person. It was alleged that the donor instructed the third person to collect the proceeds thereof so far as the same should belong to the donor, and pay them over to the donee as they should be needed, and at the death of the donor, if any portion thereof remained in the hands of the trustee, he should deliver the same to the donee, except such sum as should be necessary to pay him a reasonable compensation for his services as trustee.

*Walsh's Estate* (1888) 122 Pa. 177, 1 L.R.A. 535, 9 Am. St. Rep. 83, 15 Atl. 470. It appeared that the day before her death the donor handed her deposit book to a third person, saying: "The money there is for my sister in Ireland, but if I don't die I want it back."

*Hemphill's Estate* (1897) 180 Pa. 87, 36 Atl. 406. The trial judge held that, assuming that the donor's wish that the claimant would take certain boxes, accompanied by the directions to the servant to hand them, after her death, to the claimant, together constituted a completed gift *causa mortis*, and assuming, further, that the gift of the boxes was meant to carry with it their contents, as to the boxes, the donor had manifested no more than an intention to give them to the claim-

ant, and that her direction to the servant to hand them over after her death did not constitute a delivery, because the articles, being delivered while she was unconscious, did not, with her knowledge, leave her possession, nor did she at any time relinquish knowingly her dominion over them. The opinion was affirmed by the appellate court.

*O'Gorman v. Jolley* (1914) 34 S. D. 26, 147 N. W. 78. It appeared that a donor, while in poor health, caused a certain sum of money to be deposited in a bank, receiving therefor a certificate of deposit reciting that it was "payable as per instruction on back of this certificate." On the back of the certificate was pasted an instrument in the following words: "This certificate and the interest thereon is my property during the remainder of my life. In the event of my death, I hereby authorize and instruct the First National Bank of Vermillion, S. D., to pay and distribute the amount of said certificate of deposit as follows." Then followed the names of fifteen persons to whom payments were to be made, in various amounts set opposite their names respectively, aggregating the sum of \$4,000. . . . "I direct that the certificate be handed to Father Flood, immediately after my death, and the above conditions be fulfilled."

*Sheegog v. Perkins* (1874) 4 Baxt. (Tenn.) 273. It appeared that a donor deposited a tin lock box of gold coin in the bank, with instructions to keep it on special deposit, and to deliver it to no one but his wife, he contemplating a journey, though his state of health was feeble. He delivered the key of the tin box to his wife.

#### *c. Status of third person.*

##### *1. Agent of donor.*

It has been held that if delivery is made to a third person, with instructions to deliver to the intended donee at the death of the donor, the latter retaining dominion over it meanwhile, the delivery is ineffectual, because the third person in such a case becomes merely the agent or bailee of the donor, and his agency is revoked by

the death of the principal or donor. Such a transaction is regarded as an attempted testamentary disposition, unless accompanied by writing executed as a will, and is nugatory for the purpose designed. *Knight v. Tripp* (1898) 121 Cal. 674, 54 Pac. 267; *Barnum v. Reed* (1891) 136 Ill. 388, 26 N. E. 572, reversing (1890) 36 Ill. App. 525; *Barnes v. People* (1887) 25 Ill. App. 136; *Duryea v. Harvey* (1903) 183 Mass. 429, 67 N. E. 351; *Walter v. Ford* (1881) 74 Mo. 195, 41 Am. Rep. 312; *Bieber v. Boeckmann* (1897) 70 Mo. App. 508; *Partridge v. Kearns* (1898) 32 App. Div. 483, 53 N. Y. Supp. 154; *Craig v. Craig* (1848) 3 Barb. Ch. (N. Y.) 79; *Hillman v. Young* (1913) 64 Or. 73, 127 Pac. 793, 129 Pac. 124. Compare *Callanan v. Clement* (1896) 18 Misc. 621, 42 N. Y. Supp. 514, affirmed in (1898) 32 App. Div. 631, 83 N. Y. Supp. 1101, which was affirmed in (1900) 162 N. Y. 618, 57 N. E. 1105.

In *Duryea v. Harvey* (1903) 183 Mass. 429, 67 N. E. 351, it appeared that a donor, fearing that his physician would advise him that a surgical operation would be necessary to prevent a fatal result from a disease, from the effects of which he believed himself to be suffering, and thinking that he might commit suicide rather than submit to such an operation, put in an envelop an order on another for the payment of a certain sum per month to the donee, with a request to the drawee to pay the same. He placed the envelop in the hands of a third person, with an indorsement on the outside that it was to be opened by the third person or the donee, only by his direction or on his death. It was held that the third person held the papers during the life of the donor as his depositary, subject to his orders, and not for the donee, it being plainly the donor's intention to keep to himself during his lifetime the power to make a delivery of them. Hence, there having been no delivery to the donee, or to anybody for her, it was held that there was no valid gift *causa mortis*.

In *Barnes v. People* (1887) 25 Ill. App. 136, it appeared that the day after the donee had started to go to

another state, the donor called a daughter of the donee, and directed her to get a package in her trunk, and, when it was brought to her, handed it to the girl after looking at it, saying: "Now, Myrtle, take this package and take care of it, and if I die before your father comes back, give it to him." It also appeared that she told the girl that she "should" or "could" put the package back in a small paper box in the trunk from which it was taken. The package was put in this box by the young girl, and the same day, by directions of her mother, wife of the donee, Myrtle took the package out of the donor's trunk and placed it in her mother's trunk, where it remained until a few days after the donor's death, when the daughter gave it to her father. The package consisted of two promissory notes. By the expression quoted, the court held, the delivery by the daughter to her father was to be made only on the condition of the donor's death occurring before the donee returned to his home. Had he returned before her death, the court held, the daughter clearly would have had no authority to deliver the package to him, and it was equally clear from the same language, the court held, that the donor intended to reserve to herself the control and possession of it in case the donee should return during her lifetime, so that she might herself make the gift to him. The court held that the expression was equivalent to saying: "If I die before your father comes back, give it to him; if I am alive when he returns, I will attend to the matter myself." Hence, the court held that the delivery to the daughter was not absolute, but conditional; that she held it as the agent of the donor, and not of the donee; that the death of the donor prior to the donee's return was a condition precedent, which must have happened before the daughter would either hold the package absolutely for her father or be authorized to deliver it to him.

In *Barnum v. Reed* (1891) 136 Ill. 388, 26 N. E. 572, reversing (1890) 36 Ill. App. 525, it appeared that a testatrix sent certain notes and certificates of deposit to a third person who had



acted as her agent, a week before her death, with a letter directing him, with the money derived from the interest, when paid, on the notes and the certificates, to procure a new certificate of deposit for a stated amount, and if the testatrix was then dead, to draw the certificate in her sister's name, "and send the interest and the notes, and interest on them, to her as long as they continue, and, when they are paid, put them in the bank, and send the interest to her." The letter did not profess, by any proper or apt words, to convey the legal or equitable title, either to the agent or the sister. It was held that the facts failed to show that the donor constituted the agent trustee of the property for the benefit of her sister.

In *Walter v. Ford* (1881) 74 Mo. 195, 41 Am. Rep. 312, it appeared that a donor requested a third person to fill up four checks for a specified sum payable to four persons, and the checks were then signed by the donor and delivered to the third person, with directions to him to deliver them to the persons in whose favor they were drawn, if he, the donor, should die, but, if he recovered, to return the checks to him. The third person held the checks until the death of the donor, and then delivered them to the payees thereof. The court held that there was no valid delivery of the checks, as gifts causa mortis, during the lifetime of the donor. The donor's injunctions to the third person having been that the checks were not to be delivered unless he died, and were to be held by the third person to be re-delivered to him if he recovered, the court held that the third person was the agent of the donor and bound to obey his instructions, and, so doing, could not have delivered the checks to anyone while the donor lived. Hence, the gift was in the nature of a testamentary disposition.

In *Bieber v. Boeckmann* (1897) 70 Mo. App. 508, the trial court found that the donor, in her last illness and in the belief that she would not recover from that sickness, gave the money in question to the defendant, and told him to put it in his safe, and

if she died to divide it in certain parts among certain relatives of hers; but that if she did not die, to return it. The trial court drew the conclusion from these facts that the defendant held the money as the agent of the donor during her life, with directions to return it to her if she recovered, and, if she died, to divide it as directed. It was held that this finding of the facts was supported by the evidence, and the appellate court affirmed the judgment that there was no good donatio causa mortis.

In *Knight v. Tripp* (1898) 121 Cal. 674, 54 Pac. 267, it appeared that the donor, who was about to undergo a surgical operation, transferred all her property to the defendant, the real estate being conveyed by deed, and the furniture by bill of sale. No delivery of the furniture was made, but the donor continued to occupy the house and use all that she had any use for, as before. By an unsigned written memorandum made at the same time, it appeared that a disposition of her property to persons named therein was to be made only in event of her death, she evidently expecting to remain in the house and have the use of the furniture and property so long as she might live. She also assigned three bank books to the defendant.

In *Partridge v. Kearns* (1898) 32 App. Div. 483, 53 N. Y. Supp. 154, it appeared that the promissory note in suit was given into the custody of a third person, for safe-keeping, at a time when the owner of the note contemplated, not her death, but a visit to her relatives. Subsequently, and two days prior to her death, the owner of the note told the third person to give it to the donee after her death. It was held that this direction to deliver was not accompanied by any delivery to the third person, who was, at best, but a mere agent of the donor, and that the transaction was utterly lacking in the essentials of a valid gift causa mortis.

In *Craig v. Craig* (1848) 3 Barb. Ch. (N. Y.) 79, it appeared that the note in question, payable to his son, was signed by the testator and placed in

the envelop with his will, and delivered to a third person, the testimony also showing that they were to be kept together, and not to be delivered to anyone without the testator's assent, until his death. The court held that it was perfectly evident from the testimony that the testator never intended to place the note beyond his control during his lifetime, any more than his will. Since the court held that if the third person was the mere agent of the maker of the note, to keep it for him with his will, and subject to his control, and not merely as the trustee of the son to hold it for the use of the latter, in case the disease under which the testator was then laboring should terminate fatally, so as to place it beyond the reach of the maker of the note unless he should recover, it wanted one of the essential requisites of a good *donatio causa mortis*,—an absolute delivery, and contingent change of possession.

In *Callanan v. Clement* (1896) 18 Misc. 621, 42 N. Y. Supp. 514, affirmed in (1898) 82 App. Div. 681, 53 N. Y. Supp. 1101, which was affirmed in (1900) 162 N. Y. 618, 57 N. E. 1105, it appeared that the donor, having made a will under which nothing was to pass to the donee, stated a number of times that she had given the latter her bank book. A few days after receiving the injury which caused her death, the donor called for her bank book and gave it to an old friend to take care of, stating that it was the donee's property. Subsequently, however, she sent for the friend and requested her to bring the bank book, and then, in the presence of two other witnesses, stated that she wanted them as witnesses to show that the bank book belonged to the donee, and that she gave it to her. She then handed it to the donee, and told the donee to let her (the donor's) friend take it back with her until the donor called for it. There was no dispute in the evidence as to whether the book was actually delivered to the friend, and on this state of facts, it was held that all the essentials of a valid gift *causa mortis* were present. It was insisted, however, that there had been no delivery of the

subject-matter, in other words, that the friend was the agent, not of the donee, but of the donor; and the delivery of the bank book, not having been made by the agent in the lifetime of the principal, could not thereafter be made, for the reason that the death of the principal revoked the agency. The court held, however, that delivery to an agent was sufficient; that the title to the fund did not absolutely vest in the donee until the death of the donor, but when that occurred, it became absolute, and by operation of law was deemed to have vested from the time of the delivery of the bank book to the third person.

In *Hillman v. Young* (1913) 64 Or. 73, 127 Pac. 793, 129 Pac. 124, it was alleged that the donor, being desirous that the donee should receive any portion of his estate which should remain after his death, duly assigned and transferred to a third person as trustee the promissory notes mentioned, and also duly assigned and transferred a mortgage securing them to the third person. It was alleged that the donor instructed the third person to collect the proceeds thereof so far as the same should belong to the donor, and pay them over to the donee as they should be needed, and at the death of the donor, if any portion thereof remained in the hands of the trustee, he should deliver the same to the donee, except such sum as should be necessary to pay him a reasonable compensation for his services as trustee. In holding that the averment did not support a gift *causa mortis*, the court declared that it was manifest on the face of the pleading that the third person was to act as the agent, and according to the instructions, of the donor, and not according to the directions, or for the interests, of the donee, except incidentally. The court held that the former agency of the trustee was continued, with directions to manage the property in his possession as before, and expend possibly all of it during the lifetime of the donor, on condition that if anything remained he was to pay it to the donee. The court held that the transaction was simply a perpetuation of the for-

mer relationship between the agent and the donor, and of course, as an agency, terminated at the death of the latter.

## 2. *Trustee for donee.*

Where one, in view of impending dissolution, clearly and intelligibly manifests an intention to make a present gift of personal property to another, and, in consummation of his intention, makes such a delivery to a third person for the use of the intended donee as he is then capable of making, considering the character and situation of the property, and under such circumstances as indicate that the donor relinquishes all right to the possession or control of the thing given, and intends to vest a present title in the donee, the person to whom delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as the trustee of the intended donee, and not merely as the agent of the donor. *Devol v. Dye* (1890) 123 Ind. 321, 7 L.R.A. 439, 24 N. E. 246; *Sessions v. Moseley* (1849) 4 Cush. (Mass.) 87; *Varley v. Sims* (1907) 100 Minn. 331, 8 L.R.A. (N.S.) 828, 117 Am. St. Rep. 694, 111 N. W. 269, 10 Ann. Cas. 473; *Deneff v. Helms* (1902) 42 Or. 161, 70 Pac. 390; *SHARPE v. SHARPE* (reported herewith) ante, 891; *Johnson v. Colley* (1903) 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721; *Walker v. Foster* (1900) 30 Can. S. C. 299.

In *Deneff v. Helms* (1902) 42 Or. 161, 70 Pac. 390, it appeared that a donor, who was dangerously ill, announced to those at his bedside that he gave to a third person all and everything that he had; that the third person should care for him as long as he lived, so that he could have what was necessary; that after his death the third person was to pay all charges, pay himself liberally, and, if anything remained, he was to send it to the donor's sister in a foreign country—all of which the third person assented to, and agreed to comply with. Thereupon the donor inclosed a certain certificate of deposit to the third person, and delivered it to him, and instructed another person to pay over a certain sum of money held by him

for the donor, to this third person. It was contended that the transactions were effective merely to constitute the third person agent for the donor to carry out his will respecting the money thus intrusted to him; that was to say, to pay all his lawful debts, and to send the balance, if any remained, to the donor's sister. The court held, however, that the donor had disposed himself of the property absolutely, parting with all control and dominion over it, and died the next day. The court held that it was clearly manifest from what he said that it was his present purpose to part with the title to the money, and bestow it on his sister, after the payment of the specified expenses and charges, to which he directed the third person to attend. These directions, the court held, were without reservation, and their performance depended on no conditions. The sister, the court held, was constituted the real beneficiary, or donee, and the third person a trustee for her, to execute the trust or gift *causa mortis* reposed in him.

In *Johnson v. Colley* (1903) 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721, it appeared that a donor, the day before his death, handed a friend and neighbor a bundle of money, with the injunction that if he died, or anything happened to him, the friend was to give it to the donee. This third person took complete physical possession of the money, and removed it to his own house for safe-keeping. The court stated that, the object of the donor's bounty being a child of tender years, he doubtless knew that it was too young to be intrusted with the large sum of money he desired to give her, and for this reason he turned to his friend and adviser, and placed the money in his hands as the surest method of securing it for the use and benefit of the child. There being no countervailing circumstances, the court held that one who thus received property for another must be held to be the trustee of the intended donee, and not the agent, merely, of the donor.

In *Walker v. Foster* (Can.) *supra*, it appeared that a donor placed certain promissory notes in envelopes ad-

dressed to each of his five children, and kept them and their contents in a desk at his bedside for some years, locked up and under his control. Shortly before his death, when he believed that he would die, the donor had the envelopes in which the notes were, taken from the desk and handed to a third person, who was directed by him to seal up the envelopes and replace them in the desk, and lock it. Then he delivered the keys to the third person to retain until after his death, when he instructed him to deliver to each of his children one of the envelopes so addressed. After his death, the third person delivered the envelopes to the respective donees as directed. In holding that the evidence was sufficient to show a valid *donatio causa mortis*, the court declared that there was no proof of any agency or trusteeship for the donor, or of anything short of an actual delivery of the notes and a parting with the dominion over and possession of them to the third person for the use of the donees after the donor's death.

In *Varley v. Sims* (1907) 100 Minn. 331, 8 L.R.A. (N.S.) 828, 117 Am. St. Rep. 694, 111 N. W. 269, 10 Ann. Cas. 473, it appeared that the plaintiff's mother, being about to undergo a serious surgical operation, drew her check on a bank for the entire amount of her deposit therein, payable absolutely to the plaintiff, and left it with her sister, instructing her to deliver it to the plaintiff, who was not then present, in the event the operation resulted fatally. She also stated to her sister that, if she survived the operation, the check should be returned to her. The operation, however, resulted fatally, and the check was delivered to the plaintiff after his mother's death. The court held that the delivery of the check by the mother to her sister, to be by the latter in turn delivered to the plaintiff on the occurrence of death, was a sufficient delivery, with the other attendant circumstances, to constitute a valid gift *causa mortis*, and transfer of the title to the fund. The court held that the sister was, in contemplation of law, the agent or trustee of the donee, and the deliv-

ery to her was as effectual as though it had been made personally to the donee.

In *Sessions v. Moseley* (1849) 4 Cush. (Mass.) 87, the evidence showed that the donor, being sick and apprehensive of death, gave into the hands of a third person the note in suit, with directions to give it, after his death, to the donee for his own, and that she kept the note until after the death of the donor, and then gave it to the donee, who accepted it. It was held that the transaction constituted a good *donatio causa mortis*, there having been an actual delivery to a person for the use of the donee.

In *Devol v. Dye* (1890) 123 Ind. 321, 7 L.R.A. 439, 24 N. E. 246, it appeared that a donor, some time before his death, intrusted the key of his box and private drawer in the vault of a bank safe to the cashier of the bank, in whose custody they remained from that time until the donor's death. Three days before his death the donor, who was aware of his condition, told the cashier of the bank that it had always been his purpose to give a cousin \$5,000, either in cash or in bank stock, and that he had put \$2,000 in gold, in a bag, and marked the name of his cousin on it, and left it in the tin box in the vault. He then directed the cashier to go to the bank and count out \$3,000 more in gold coin, and put it in a sack, and mark it as the other sack was marked, and that he should also count out \$1,000 in currency, and place it in an envelop for another person, and put her name on it. He then directed that, in case of his death, the sacks and the package should be delivered by the cashier to the parties indicated by the writing thereon. The cashier did as directed, and informed the donor that his directions had been carried out, to which he replied approvingly. The sacks containing the gold coin and the package with the currency remained in the box and drawer until after the donor's death, the cashier of the bank retaining the keys. The court held that there had been a valid delivery to the cashier for the use of the donees.

In *SHARPE v. SHARPE* (reported herewith), ante, 891, it appeared that a donor placed a check in the hands of a relative of the donee, with a direction to deliver it to the donee if he died, but to return to the donor if the latter lived. It was held that there was a sufficient delivery to constitute a valid gift *causa mortis*, under the presumption of fact that the third person was the agent of the donee, and that, therefore, there was a delivery to her.

In *Hogan v. Sullivan* (1901) 114 Iowa, 456, 87 N. W. 447, it appeared that the donor, about two years before his death, took the defendant to a bank and deposited a sum of money,

having the certificate made payable to the defendant, and stating that the doctors had told him there was danger of his death and that he wanted the defendant to be able to draw the money out. About two weeks before his death, the donor gave directions to the defendant with regard to the disposal of the money which he had previously deposited to the defendant's credit, causing the latter to make a brief memorandum of the beneficiaries and the amounts to be paid to them, which was read over but not signed by the donor. It was held that there was such a delivery as to make a valid gift *causa mortis*.

H. D. B.

EDSON F. ADAMS, Exr., etc., of Thomas Prather, Deceased, Appt.,  
v.

MERCED STONE COMPANY, Respt.

*California Supreme Court (In Banc) — October 31, 1917.*

(176 Cal. 415, 178 Pac. 498.)

**Gift — of account — what necessary to effect.**

1. That the president of a corporation to whom an account against it is given has the means of transferring it upon the books of the corporation is not sufficient to effect a delivery within the meaning of a statute making invalid a verbal gift, unless the means of obtaining possession or control of the thing given are delivered to the donee.

[See note on this question beginning on page 933.]

— thing in possession of donee.

2. That the subject-matter of a gift is in possession of the donee at the time the gift is made is not sufficient to satisfy the requirements of a statute that a verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless

there is an actual or symbolical delivery of the thing to the donee.

[See 12 R. C. L. 935, 936.]

— of chose in action.

3. To effect a valid gift of a chose in action not capable of manual delivery, the only recognized means of obtaining control is an assignment in writing, or some equivalent thereof.

[See 12 R. C. L. 938 et seq.]

**APPEAL** by plaintiff from a judgment of the Superior Court for Alameda County in favor of defendant, and from an order denying a new trial, in an action brought to recover the balance of an indebtedness alleged to be due from defendant to plaintiff's decedent. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Corbet & Selby, Milton S. Hamilton, and Snook & Church, for appellant:

The mere possession by the donee

before and at the time of the attempted gift is not the equivalent of and cannot serve for the giving.

Denigan v. Hibernia Sav. & L. Soc.

(178 Cal. 415, 178 Pac. 498.)

127 Cal. 141, 59 Pac. 389; Smith v. Zumbro, 41 W. Va. 624, 24 S. E. 653; Drew v. Hagerty, 81 Me. 231, 3 L.R.A. 230, 10 Am. St. Rep. 255, 17 Atl. 63; Allen v. Allen, 75 Minn. 116, 74 Am. St. Rep. 442, 77 N. W. 567; Chambers v. McCreery, 45 C. C. A. 322, 106 Fed. 367.

The attempted gift is invalid.

Pullen v. Placer County Bank, 138 Cal. 170, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83; Foxworthy v. Adams, Ann. Cas. 1912A, 330, note; Hart v. Ketchum, 121 Cal. 428, 53 Pac. 931; Knight v. Tripp, 121 Cal. 678, 54 Pac. 267; Thompson v. Jones, 167 Cal. 748, 141 Pac. 366.

The indebtedness due from defendant to Thomas Prather was not susceptible of being disposed of as a gift causa mortis, excepting by an instrument in writing duly signed by him or by his authority.

20 Cyc. 1202, 1237; 14 Am. & Eng. Enc. Law, 1022, and notes 2 & 3; Giselman v. Starr, 106 Cal. 656, 40 Pac. 8; Brewster v. Hartley, 37 Cal. 25, 99 Am. Dec. 237; Driscoll v. Driscoll, 143 Cal. 534, 77 Pac. 471; Cook v. Lum, 55 N. J. L. 373, 26 Atl. 803; Miller v. Jeffress, 4 Gratt. 480; Ewing v. Ewing, 2 Leigh, 344; Shepard v. Shepard, 164 Mich. 183, 129 N. W. 201; McMahon v. Newtown Sav. Bank, 67 Conn. 78, 34 Atl. 709; Allen-West Commission Co. v. Grumbles, 63 C. C. A. 401, 129 Fed. 293; Sorlien v. Rolla, 126 Minn. 500, 148 N. W. 301; Beaver v. Beaver, 117 N. Y. 421, 6 L.R.A. 403, 15 Am. St. Rep. 531, 22 N. E. 940; Fisher v. Ludwig, 6 Cal. App. 148, 91 Pac. 658; Re Hall, 154 Cal. 531, 98 Pac. 269; Hahn v. Dean, 108 Me. 555, 82 Atl. 204.

Thomas Prather was at the time of his death "the legal owner of the indebtedness, account, and credit balance" of \$112,965.84, and plaintiff in his representative capacity is such legal owner of said indebtedness, account, and credit balance.

Cook v. Lum, 55 N. J. L. 373, 26 Atl. 803; Re Hall, 154 Cal. 531, 98 Pac. 269; Driscoll v. Driscoll, 143 Cal. 534, 77 Pac. 471; Hart v. Ketchum, 121 Cal. 428, 53 Pac. 931; Knight v. Tripp, 121 Cal. 678, 54 Pac. 267; Thompson v. Jones, 167 Cal. 748, 141 Pac. 366; Fisher v. Ludwig, 6 Cal. App. 148, 91 Pac. 658; Smith v. Zumbro, 41 W. Va. 623, 24 S. E. 653; Drew v. Hagerty, 81 Me. 231, 3 L.R.A. 230, 10 Am. St. Rep. 255, 17 Atl. 64; Hahn v. Dean, 108 Me. 555, 82 Atl. 204; Chambers v. McCreery, 3 A.L.R.—59.

45 C. C. A. 322, 106 Fed. 367; Brewster v. Hartley, 37 Cal. 25, 99 Am. Dec. 237; Allen v. Allen, 75 Minn. 116, 74 Am. St. Rep. 442, 77 N. W. 567; Miller v. Jeffress, 4 Gratt. 480; Ewing v. Ewing, 2 Leigh, 344; 20 Cyc. 1202, 1237; Giselman v. Starr, 106 Cal. 656, 40 Pac. 8; Shepard v. Shepard, 164 Mich. 183, 129 N. W. 201; McMahon v. Newtown Sav. Bank, 67 Conn. 78, 34 Atl. 709; Allen-West Commission Co. v. Grumbles, 63 C. C. A. 401, 129 Fed. 293; Sorlien v. Rolla, 126 Minn. 500, 148 N. W. 301; Beaver v. Beaver, 117 N. Y. 421, 6 L.R.A. 403, 15 Am. St. Rep. 531, 22 N. E. 941.

The fact that Thomas Prather and Samuel D. Prather were copartners in business established a confidential and trust relationship between them. Any gift was constructively fraudulent and void.

Bacon v. Soule, 19 Cal. App. 434, 126 Pac. 384; Nobles v. Hutton, 7 Cal. App. 19, 98 Pac. 289; Brison v. Brison, 75 Cal. 529, 7 Am. St. Rep. 189, 17 Pac. 689; Ross v. Conway, 92 Cal. 635, 28 Pac. 785; Piercy v. Piercy, 18 Cal. App. 755, 124 Pac. 561.

Mr. J. P. O'Brien also for appellant. Messrs. A. L. Frick, William S. Wells, Jr., Chapman & Trefethen, and R. H. Countryman for respondent.

Shaw, J., delivered the opinion of the court:

The plaintiff appeals from a judgment in favor of the defendant, and from an order denying his motion for a new trial.

The complaint states a cause of action against the defendant, in favor of the decedent, Thomas Prather, upon an indebtedness alleged to be the sum of \$112,965.84. The defendant in its answer denied the existence of any indebtedness from it to said Thomas Prather at the time of his death, and on information and belief alleged that prior to his death said Thomas Prather made a gift of said indebtedness, due from the defendant to Thomas Prather, to one Samuel D. Prather, and that said Samuel then became and ever since has been the owner of said indebtedness.

The court found that during the last sickness of Thomas Prather, to wit, on April 17, 1913, said Thomas Prather made a gift to his brother,

Samuel D. Prather, of all of the indebtedness due from the defendant to said Thomas, being the indebtedness sued for by the plaintiff herein. That at that time Samuel was the president, the general manager, and a member of the board of directors of the defendant, said defendant being a corporation, and Thomas Prather knew that Samuel held said offices and by reason thereof had full and exclusive charge and control of defendant's books of account, including power to make or direct the making of entries and transfers in said books, and knew that by reason thereof Samuel D. Prather had the means of obtaining possession and control of the said indebtedness so given to him. The court further stated that by reason of the fact that Thomas Prather had this knowledge at the time he gave the indebtedness to Samuel, he therefore at that time gave to said Samuel the means of obtaining possession and control of the thing given, that is, of the said indebtedness. This last statement is, of course, a mere conclusion from the facts previously stated. The appellant contends that the transaction as stated in the findings did not constitute a valid gift of the indebtedness in question, and that the finding, so far as it states the ultimate fact of such gift, is contrary to the evidence.

It is conceded that at the time of the asserted gift Thomas Prather knew that Samuel D. Prather held the offices above mentioned, and that it was within his official power by reason thereof to make sufficient changes upon the books of account of the defendant to make them show that the said indebtedness had been transferred by Thomas Prather to Samuel D. Prather, and was owing by the defendant to Samuel D. Prather, instead of Thomas Prather. It is admitted that the asserted gift was made during the last sickness of Samuel Prather, two days before his death, which event occurred on April 19, 1913, and was therefore a gift in view of death. Civ. Code, § 1150. It is also admit-

ted that no change was made upon the books of the defendant regarding said indebtedness, up to the time of the trial of this action, and that when the action was begun the account books of the defendant showed it to be indebted to the said Thomas Prather in the sum claimed in the complaint. The only evidence of the gift asserted in the answer is found in the testimony of Samuel D. Prather, and is as follows: "In talking business my brother said to me; 'Now, in reference to the account of Thomas Prather in the Merced Stone Company, I want to give you that account, all that is due me from that account. I don't know just how to do this, but I give it to you.' . . . A little further in the conversation my brother said to me; 'I give you the keys to my office, the combination of my safe and keys to my desk, and with these I give you all accounts, books, papers, letters, documents, furnishings, pictures, everything that belongs to me in that office. It is yours.'"

This, he said, occurred on April 17, 1913.

The case depends upon the meaning and effect of § 1147 of the Civil Code, which reads as follows: "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

The contention of the respondent is that this section is complied with in every case of gift of a chose in action, where, at the time the donor makes such gift, he knows that the donee has it within his power to secure the possession and control of the thing given, and that in such a case no delivery or transmission from the donor to the donee of the means of obtaining possession and control of the subject of the gift is necessary. We do not think this is the correct construction of the section quoted. It contemplates that the donor shall do something at the time of making the gift which

Gift—of account  
—what necessary  
to effect.

has the effect of placing in the hands of the donee the means of obtaining the control and possession of the thing given. That the

—thing in  
possession of  
donee.

fact that the thing was already in possession of the donee at the time of declaring the gift is not enough is well settled by the authorities. *Denigan v. Hibernian Sav. & L. Soc.* 127 Cal. 141, 59 Pac. 389; *Smith v. Zumbro*, 41 W. Va. 623, 24 S. E. 653; *Drew v. Hagerty*, 81 Me. 231, 3 L.R.A. 230, 10 Am. St. Rep. 255, 17 Atl. 63; *Allen v. Allen*, 75 Minn. 116, 74 Am. St. Rep. 442, 77 N. W. 567.

In order to comply with the section the "means" must be "given." In the connection in which these words occur the effect is that such means must be given by the donor to the donee. This giving of the means is authorized, where the thing given is not capable of delivery, as a substitute for the actual or symbolical delivery of the thing by the donor to the donee required in cases where such thing is capable of delivery. No good reason can be given for supposing that a transmission or delivery by the donor to the donee of the means was not intended to be as essential in the case of intangible property, as the delivery, actual or symbolical, of the thing itself, where it is tangible.

In the case of a chose in action not evidenced by a written instrument, the only means of obtaining control that is recognized by the authorities is an assignment in writing, or some equivalent thereof.

—of chose  
in action.

"According to the weight of authority, in order to make a valid gift inter vivos of a chose in action not evidenced by a written instrument, there must be a written assignment, or some equivalent instrument." 20 Cyc. 1202.

"A written assignment of the demand by the donor to the donee is essential to complete the delivery" in the case of gifts causa mortis. 20 Cyc. 1237; 14 Am. & Eng. Enc. Law, 1022.

"If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property. If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed." 2 Kent, Com. \*439.

This passage from Kent was quoted and approved in *Driscoll v. Driscoll*, 143 Cal. 534, 77 Pac. 471, and in *Giselman v. Starr*, 106 Cal. 657, 40 Pac. 8.

In *Cook v. Lum*, 55 N. J. L. 373, 26 Atl. 803, the court said that the test of an effectual gift was this: "That the transfer was such that, in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given, whether that thing was a tangible chattel or a chose in action."

To the same effect was *Ewing v. Ewing*, 2 Leigh, 344; *Shepard v. Shepard*, 164 Mich. 183, 129 N. W. 201; *McMahon v. Newtown*, 67 Conn. 79, 34 Atl. 709, and many other cases. That § 1147 was not intended to change the law respecting the necessity of an assignment, or its equivalent, to make a valid gift of a chose in action, not itself evidenced by a writing, is shown by the fact that in the annotated edition of the Code, edited by the committee that prepared it, there is cited to support the section *Hunter v. Hunter*, 19 Barb. 631, in which case the above passage from Kent is quoted and approved.

In the present case it is true that Samuel D. Prather was possessed of the physical power and of the official authority, by reason of his relation to the defendant, to make the necessary changes on its books to show that the indebtedness was due to him and not to the decedent. But this power did not emanate from the decedent. Samuel possessed it before the asserted gift as well as after. The decedent did not even authorize him to make such



changes, nor suggest that the gift might be effected in that way. It was not shown that such method was in the mind of the donor. The fact that it was a book account, or that a change might be made in the name of the debtor, was not even mentioned in the conversation. The law intends something more than a mere power to make physical entries in the books of the debtor in such a case. The authority to make the change, or cause it to be made, must be vested in the debtor by reason of some act or direction of the creditor. If verbal gifts could be made in such loose manner as this it would open the door to innumerable frauds and perjuries. For this reason the authorities hold that something more than mere physical power is necessary; something more than the previous possession of the property or of the means of obtaining it; something emanating from the donor which operates to give to the donee the means of obtaining such possession and control.

The case is not different in principle from *Pullen v. Placer County Bank*, 138 Cal. 170, 94 Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83. In that case a father gave to his son a check for \$1,000 upon the bank, with the intention of making to him a gift of that amount of money. After delivering the check to the son the father stated that he wished he would not present it until after his death. The son awaited his death and then presented the check, which the bank refused to pay, on the ground that the death of the father revoked it. The court said: "In the present case the gift was verbal, and the property which the father intended to give to his son was money on deposit in the bank. The check was not itself the property which the father intended to give, but was merely a direction to the defendant to pay \$1,000 to the son. It indicated the amount to be given and the place at which the money was to be delivered. The check was not a symbolic delivery of the money, but it was a delivery of the

means by which the son could obtain possession of the money. It was, however, subject to revocation by the father at any time before its presentation to the bank, and was in fact revoked by his death. The request of the father that the son would not present the check until after his death did not affect the sufficiency of the gift. If the gift were complete by his delivery of the check, such subsequent request would not destroy its validity, and if not then complete, this request would not have the effect to dispense with its presentation for the purpose of making it complete. By the failure of the son to present the check, there was no delivery of the money during the lifetime of the father, and the gift was therefore not complete."

The mere delivery of an order for the payment of a debt is therefore not sufficient to make a complete gift thereof. In the present case there was not even the delivery of an order, nor any suggestion thereof. All that was done was to declare the present intention to give the indebtedness to Samuel D. Prather. No means whatever were delivered by the donor to the donee by which the latter could obtain payment of the indebtedness. The fact that Samuel D. Prather was the managing officer of the defendant and had power to change its books did not make the gift effectual. The indebtedness was due from the defendant and not from Samuel D. Prather, and it was necessary that the defendant should have some authority from Thomas Prather before it could legally make a change upon the books of the company to show the change in the indebtedness. Thomas Prather gave no such authority to his brother or to any other person.

The conclusion of the court below upon the facts found was not in accordance with the law, and its finding of the ultimate fact that Thomas Prather transferred the debt to Samuel D. Prather by way of a verbal gift is not supported by the ev-

idence. Consequently the judgment and order cannot be upheld.

The judgment and order are reversed and the cause is remanded, with directions to the court below

to enter judgment upon the findings in favor of the plaintiff for the amount prayed for.

We concur: Angellotti, Ch. J.; Sloss, J.; Henshaw, J.; Melvin, J.

## ANNOTATION.

### Gift of debts of third person not evidenced by commercial instrument.

- I. Introductory, 933.
- II. General rules, 933.
- III. Application of rules:
  - a. Gift inter vivos, 934.
  - b. Gift causa mortis:
    - 1. In general, 936.
    - 2. Indebtedness not evidenced by writing, 938.

#### I. Introductory.

In the present note, discussing gifts of the indebtedness of third persons, the gift of debts evidenced by commercial instruments is excluded, and this exclusion is deemed to embrace not only promissory notes, checks, bonds, and drafts, but mortgages and insurance policies. Gifts of bank deposits have also been excluded.

#### II. General rules.

"The general legal principle regulating the subject of gifts of choses in action has long been established. It is to the effect that, with respect to things both tangible and intangible, mere words of donation will not suffice. With regard to the former class—that is, things corporeal—there must be, in addition to the expression of a donative purpose, an actual tradition of the corpus of the gift, whenever, considering the nature of the property and the circumstances of the actors, such a formality is reasonably practicable. In some instances, when the situation is incompatible with the performance of such ceremony, resort may be had to what has been called a symbolical delivery of the subject. Touching things in action, as there can be no actual delivery of them, the legal requirement is that the donor's voucher of right or title must be surrendered to the donee. Such surrender is deemed equivalent to an actual handing over of things corporeal. To this extent the law of the subject is neither doubtful nor obscure. The diffi-

culty supervenes as soon as the attempt is made to apply these rules to the ever variant conditions of the cases that are being presented for judicial examination. Even when the thing given has been a personal chattel, whether certain acts show a purpose to give, consummated by a delivery of it, has often been, and doubtless will be, a vexed question. The uncertainty in construing the circumstances is even greater when we have rights of action to deal with." *Cook v. Lum* (1893) 55 N. J. L. 373, 26 Atl. 803.

Kent (2 Com. \* 439), speaking of the delivery essential to a gift, says that in this as in every other case, delivery must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing given be not capable of actual delivery, there must be some act equivalent to it. The donor must part, not only with the possession, but with the dominion of the property. If the thing given is a chose in action, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed.

So, it necessarily follows that the delivery by a donor of the evidence of any debt against a third person, with intent to transfer to the donee the possession, control, and title thereto, will transfer the debt to the donee. In such cases, the thing given is the debt, not the evidence; and yet a delivery of the latter, with intent to give the former, will effect that result. *Cronan's Estate* (1875) Myrick, Prob. Ct. Rep. (Cal.) 72; *Jones v. Moore* (1898) 102 Ky. 591, 44 S. W. 126; *Davie v. Davie*

(1907) 47 Wash. 231, 91 Pac. 950; Claytor v. Pierson (1904) 55 W. Va. 167, 46 S. E. 935. See also Gray v. Barton (1873) 55 N. Y. 68, 14 Am. Rep. 181 (wherein the rule is stated by way of dictum).

Mere delivery, however, without more, to the donee, of the evidence of the indebtedness of a third person to the donor, is not sufficient to institute a valid gift. Hill v. Sheibley (1880) 64 Ga. 529; Prickett v. Prickett (1869) 20 N. J. Eq. 478.

Likewise, delivery by a donor of an indebtedness of a third person to him, to another, to hold during the lifetime of the donor and subject to the latter's orders, but not for the donee, does not constitute a delivery to the donee or to anyone for her, and hence there is no valid gift. Duryea v. Harvey (1903) 183 Mass. 429, 67 N. E. 351.

In the case of a gift of the indebtedness of a third person, not evidenced by a written instrument, the rule is that; in order to constitute an effectual delivery and therefore a valid gift, there must be an assignment in writing or some equivalent thereof. Hawn v. Stoler (1904) 208 Pa. 610, 65 L.R.A. 813, 57 Atl. 1115. And see the reported case (ADAMS v. MERCED STONE CO. ante, 928).

But this is not necessary where the transfer is such that, in conjunction with the donative intent, it completely strips the donor of the dominion of the indebtedness given. Cook v. Lum (1893) 55 N. J. L. 373, 26 Atl. 803.

And where the order or request of the donor to pay the debt to the donee is accepted by the debtor during the lifetime of the donor, this is a good delivery, and neither the order nor request, nor the acceptance, need be in writing. Castle v. Persons (1902) 54 C. C. A. 133, 117 Fed. 835.

So, where the debtor, who has promised to pay the debt (a promise evidenced by no writing) at the request of the donor, to whom the promise was made, has agreed with the donee for whose benefit the debt was to be paid that it should be paid to her, there was all the delivery possible under the circumstances, and a delivery sufficient to answer the requirements of the law.

Ebel v. Piehl (1903) 184 Mich. 64, 95 N. W. 1004.

### III. Application of rules.

#### a. Gift *inter vivos*.

In Ebel v. Piehl (1903) 184 Mich. 64, 95 N. W. 1004, it appeared that a father transferred to his son, the defendant, property consisting of a house, lots, notes and cash, and, according to the testimony of a daughter (the plaintiff), the defendant received the property on the promise that on the father's death, he would pay \$400 to the plaintiff. Subsequently the three—the father, the plaintiff, and defendant—had a conversation about the matter at the plaintiff's residence. At this time the defendant asked his father: "What do you want me to give Kate [the plaintiff] when you are dead?" The father replied: "I told you you were to give her \$400 at my death. That was understood. . . . I want you to give her writings." The defendant thereupon said: "I didn't think you told me, but I should have done it any way. . . . That will be all right, father. I will see to that," and, turning to plaintiff, said in English (the former conversation having been in German): "I don't see what you want to bother father about that money for. I am good for it; I am worth the money; and I told you I would pay it." The court held that if the plaintiff's testimony was credited, the defendant's promise created a chose in action belonging to the father and for the plaintiff's benefit, though not enforceable by her. The father might, however, transfer it to her, and if so transferred, the court declared she could, as his assignee, enforce it. The court said that a fair construction of the conversation which occurred between the parties to the suit and the father, after the property was received by the defendant, warranted, if it did not compel, the conclusion that the father had transferred to the plaintiff this cause of action; that while between the defendant and his father it was an existing cause of action, between the plaintiff and the father it was a gift of a promise to pay money in the future, of an existing cause of action, the gift

itself being a gift in præsentī. Therefore, the court held, when the defendant, who had promised to pay the money (a promise evidenced by no writing) at the request of the father, to whom the promise was made, agreed with the sister, for whose benefit the money was to be paid, that it should be paid to her, there was all the delivery possible under the circumstances, and a delivery sufficient to answer the requirements of the law.

In *Kerr v. Read* (1876) 23 Grant, Ch. (U. C.) 525, it appeared that a husband, on receiving a sum of money bequeathed to his wife, made an entry in an account book denoting that it was money bequeathed his wife. He then used the money along with money of his own in the erection of buildings on land seemingly his own, but treating them as moneys to the usufruct of which his wife was entitled. Later, his son having become indebted to him in a sum equivalent to the amount of the legacy to the wife, he, with the assent of his wife, transferred that indebtedness of the son from himself to his wife, avowedly on the ground that he had that much money of hers in his hands. The court held that, assuming that the money bequeathed to the wife became the husband's by virtue of his marital right on reaching his hands, under the transaction in question there was a good gift *inter vivos* from the husband to his wife of the money bequeathed to her which came into his hands.

In each of the following cases, however, it was held that there was not a sufficient delivery of the indebtedness of a third person to constitute a valid gift *inter vivos*:

The requirement of the Georgia Code of an intention by the donor to give, acceptance by the donee, and delivery of the article given, or some act in lieu thereof, was held in *Hill v. Sheibley* (1880) 64 Ga. 529, not to have been sufficiently satisfied by the evidence in support of the gift, which consisted chiefly of the testimony of the alleged donee,—who after the death of the alleged donor (his son) gave the claim to the latter's wife—to the effect that his son gave him the re-

ceipt which evidenced the claim, to collect; that he could not say whether the son intended to give it to him for his own use or not, as he gave it without saying anything, but witness thought it was the donor's intention to give it to him for his own use; and the testimony of the wife that at the time of the gift to her the father had the receipt in his possession, claiming it as his own, and delivered it to her, it further appearing that the receipt was found among the son's papers after his death, which the wife sought to explain by testifying that, having no place to keep it, she put it among her husband's papers; and that upon making a statement to the administrator to that effect the latter delivered the paper to her.

In *Duryea v. Harvey* (1903) 183 Mass. 429, 67 N. E. 351, it appeared that the donor, fearing that his physician would advise him that a surgical operation would be necessary to prevent a fatal result from a disease from the effects of which he believed himself to be suffering, and thinking that he might rather commit suicide than submit to the operation, placed in an envelop with other papers, a request on the lessee and purchaser of the donor's interest in a business, that he pay a certain sum per month of the amount due the donor each month to the donee, till the expiration of the lease. He sealed the envelop and caused it to be placed in the hands of one Jacob Scheider. On the outside of the envelop he wrote: "To be opened by Jacob Scheider, . . . or Miss May Duryea [the donee] . . . only by my direction or on my death." The court stated that, from the language used by the donor, it was plain that he did not intend that the envelop should be opened during his life without further direction from him. There was no delivery, the court held, to the donee or to Scheider for her, as the latter held the papers during the life of the donor subject to his orders, and not for the plaintiff donee. Hence, the court held that, there having been no delivery during the donor's life to the donee or to anybody for her, there was no valid gift *inter vivos*.

In *Priester v. Hohloch* (1902) 70 App. Div. 256, 75 N. Y. Supp. 405, it appeared that a lease provided that, in case of the death of the lessor before the expiration of the lease, the rent for the unexpired term should be paid to the wife of the lessor. It was held that this provision could not be construed as a gift to the wife of the rent for the unexpired term, for the sufficient reason that there was no delivery to her of the thing given, either actual or constructive.

*b. Gift causa mortis.*

*1. In general.*

In each of the following cases it was held that there was a sufficient delivery by the donor to the donee of the indebtedness of a third person, evidenced by a written instrument, to constitute a valid gift causa mortis:

In *Cronan's Estate* (1875) Myrick, Prob. Ct. Rep. (Cal.) 72, it appeared that a donor, having occasion to use some money, during his last illness sold a lot for \$1,000. He said to his wife, in substance: "You will need some money; get the \$1,000 from Carter (the purchaser), pay sickness and burial expenses, and keep the rest yourself." At the same time, he gave her a paper, but what it was, whether the deed or an order on the purchaser, or the purchaser's note, did not appear; the widow could neither read nor write. The following day the donor died, and the day after the widow went to the purchaser, gave him the paper, and received the money. It was held that the money was a gift. The court said that while it was true that the widow did not actually handle the money in the lifetime of her husband, she did receive from him a paper which authorized her to receive the money from the purchaser, and on which the latter paid the money to her. It was not the fact of receiving the money from him, but it was the delivery of the paper to her by her husband, the court held, which passed the ownership of the money.

In *Jones v. Moore* (1898) 102 Ky. 591, 44 S. W. 126, the plaintiff brought an action against the administrator of his deceased uncle to recover a book of

accounts, alleged to have been given to him by his uncle in consideration of love and affection, and services rendered, and also the proceeds of accounts collected by the administrator, part before the death of the uncle and part after his death, as administrator. The evidence showed that the gift was made in consideration of love and affection, and that it was completed by delivery of possession, and acceptance by the donee. The court held that the contention that an account or book of accounts could not be the subject of a transfer as a gift was untenable, for, while a mere account, or even a book of accounts, might not be, per se, evidence of indebtedness by the person against whom they were drawn, there might exist a property right of an equitable nature, enforceable against the debtor on the proof of their correctness; and this property right was subject to transfer, either in writing or by parol, and either as a gift or on contract.

In *Davie v. Davie* (1907) 47 Wash. 231, 91 Pac. 950, the evidence showed that some four or five days before his death, the donor and his wife executed a contract for the sale of certain real estate, and at the same time executed a deed of conveyance of the real estate to the purchaser, which deed was to be held in escrow until the payments called for by the contract had been made. The donor stated that he gave the papers to his wife, and that they were to be placed in escrow for her, so as to provide for her; and the papers were delivered to the wife, and by her put in escrow. It was held that there was a sufficient delivery of a gift causa mortis, the donor having given the proceeds from the sale of the land to be paid on, and according to the terms of, the contract, and the donee having been placed in possession of the written contract and the escrow deed, the only way of making a delivery, the gift not being void as an oral gift of real estate, but virtually of the proceeds coming from the sale thereof, an interest in real estate which ordinarily was treated as personal property.

In *Clayton v. Pierson* (1904) 55 W.

Va. 167, 46 S. E. 935, it appeared that the donor deposited and left \$1,100 belonging to him with the defendant for safe-keeping, the defendant thereafter executing and delivering to the donor a receipt in the following form: "Sewell, W. Va., August 26th, 1899. \$1,100. Eleven hundred dollars. Received of William Claytor for safe-keeping. L. C. Claytor." Subsequently the donor, while ill and when he was being prepared for his removal from his home to the hospital, gave the receipt to the plaintiff. The evidence touching this transaction, as given by a witness, was that donor said: "Here, I will give you this; here is a note I have \$1,100. I will make you a present of this;" and Ed told him, 'All right.' The witness also stated that the plaintiff took the receipt and put it in his pocket, and that the donor then said to the plaintiff "to take it (the receipt) and keep it; and go and draw the money on it; that it was his (plaintiff's); he made him a present of it; and Ed told him, 'All right.' He (decedent) told him (plaintiff) not to let any body else have it, his wife or any body else. . . . He further told him (plaintiff): 'Don't let my wife get hold of it, because she hasn't treated me right; I don't want her to have it.' He said he was going to the hospital, and the way the disease worked on him, he didn't think he would get well; and: 'I will give it (the receipt) to you before I go, so you will be sure to have it.'" Two days before his death, the donor reiterated his gift to the plaintiff, and the latter kept the receipt in his possession until after the donor's death. It was held that the facts showed all the elements of a valid gift causa mortis. The gift was made by the donor in the peril and contemplation of death; it was of personal property such as, under the law, might be the subject of a gift causa mortis; possession of the receipt by the donee was taken at the time of the gift; the donor died of his then illness in a month thereafter, without making any change in relation to the gift, and it was accepted by the donee at the

time it was made, and became absolute at the donor's death.

It was held in each of the following cases, however, that there was not a sufficient delivery by the donor to the donee of the indebtedness of a third person, evidenced by writing, to constitute a valid gift causa mortis:

In *Prickett v. Prickett* (1869) 20 N. J. Eq. 478, it appeared that a father, shortly before his death, handed to his son a bill for grain sold, and told him to collect it and take care of it. The son, who had the management of the father's farm, and sold the produce and received the price thereof and paid it over to his father, collected the money on this bill after his father's death, but did not charge himself with it in his account. It was held that the words used by the father in handing over the bill for collection clearly did not import a gift, nor was there anything in the circumstances or habit of dealing of the parties previously which could convert the expression into a gift.

In *Duryea v. Harvey* (1903) 183 Mass. 429, 67 N. E. 351, it appeared that the donor, fearing that his physician would advise him that a surgical operation would be necessary to prevent a fatal result from a disease from the effects of which he believed himself to be suffering, and thinking that he might commit suicide rather than submit to the operation, placed in an envelop with other papers a request on the lessee and purchaser of the donor's interest in a business, that he pay a certain sum per month of the amount due the donor each month to the donee, till the expiration of the lease. He sealed the envelop and caused it to be placed in the hands of one Jacob Scheider. On the outside of the envelop he wrote: "To be opened by Jacob Scheider, . . . or Miss May Duryea [the donee] . . . only by my direction or on my death." The court held that Scheider held the papers during the life of the donor subject to the latter's orders, and not for the donee, and that there was no delivery to the donee, or to Scheider for her, passing title to her during the lifetime of the donor. Hence, the

court held that there was no delivery, and therefore no valid gift *causa mortis*.

It has been said, however, that the test is whether the transfer is such that, in conjunction with the donative intent, it completely strips the donor of the dominion of the indebtedness given. *Cook v. Lum* (1893) 55 N. J. L. 373, 26 Atl. 803, wherein the court said: "The rule does not require that the title of the donee should be formally perfect, although in the earliest decisions this appears to have been indispensable; but now the law is otherwise settled. Thus, the delivery, with donative intention, of non-negotiable notes or bonds affords an apt illustration of the rule in both of its aspects. Such gifts are admittedly valid, although the title of the donee is not ceremoniously perfect, as it wants the finishing touch of a written assignment; but the transaction is validated on the ground that it is possessed of the all-important quality of depriving the donor of all control over the property. After the delivery of such bond or note, the donor can exercise not a single act of ownership with respect to it; he cannot sue upon it, nor collect it, nor regain its possession. And it is this absolute abnegation of power that, in a legal point of view, makes the transaction enforceable." In that case the following facts were found in a special verdict: The deceased donor deposited with one Kase the sum of \$2,316, who thereupon gave her a dated paper containing in column eight several sums, amounting, when footed up, to the sum specified. There was no other writing on the paper. It was found that Kase never gave the donor any evidence of indebtedness from himself to her for the deposit. This paper, it was found, the donor actually delivered into the hands of the donee shortly before the former's death, with the intention of giving to the donee the money in the hands of Kase. It was found that Kase was not informed of the gift until several weeks after the death of the donor. In holding that there was no absolute abnegation of power over the gift by the donor that constituted a delivery

and made the transaction enforceable, the court said: "This is the crucial test, and if it be applied to the case in hand this donation is not to be sustained. The reason is that the donor parted with nothing that was essential to his own dominion over the moneys in question. After she had transferred the slip of paper in question her dominion over her deposits remained plainly intact. The paper was in no sense a voucher of the receipt of the moneys; they could have been collected without its production; nor was it necessary to a suit for their recovery. It is impossible to believe that the parties intended this slip of paper, which contained nothing but a line of figures and an addition of them, as a testimonial showing the transaction to which it immediately appertained. It does not appear how the donor became possessed of this paper, but, construed intrinsically, it has the appearance of having been used for the temporary purpose of showing the aggregate of the several sums on deposit, and it carries on its face no indication whatever that it was drawn or given as a voucher of the indebtedness of the person making it. The delivery of so insignificant a paper as this cannot, in our opinion, operate to legalize the transaction in question."

*2. Indebtedness not evidenced by writing.*

In the case of a gift of a chose in action, as the indebtedness of a third person not evidenced by a written instrument, it is held that, in order to constitute an effectual delivery so as to consummate a gift *causa mortis*, there must be an assignment in writing of the debt by the donor to the donee, or some equivalent thereof. *Hawn v. Stoler* (1904) 208 Pa. 610, 65 L.R.A. 813, 57 Atl. 1115.

And see the reported case (*ADAMS v. MERCED STONE CO.* ante, 928).

In *Hawn v. Stoler* (Pa.) *supra*, it appeared that a donor, while very ill, sent for a neighbor and committed to the latter's keeping a sum of money. This money was taken by the neighbor to her home, and given to her husband, who took it to a bank and deposited

it, taking therefor a certificate of deposit in his own name, which he apparently retained. The next day the donor entered a hospital, and died the day after. The afternoon of the day she died, the donor told the neighbor, on the latter's inquiry as to what to do with the money, to give a specified sum to the donee, the sister of the donor. The donee was not present at this time, and the fund from which the gift was to be made was not then in the possession of the donor or of the neighbor, but was on deposit in the name of the latter's husband, and they did not have the certificate, which was the evidence of the deposit, with them. When the money was given to the neighbor by the donor, it was for safe-keeping only, and there was nothing to indicate that the donor had then in mind any thought of making a gift of it to anyone. The court held that it passed completely out of the donor's possession, and out of that of the party to whom she gave it, and found its way into a bank, where it was deposited in the name of a third person, and was thus transformed from a chattel in the possession of the donor, presumably with her consent, into a chose in action. Therefore, the court held, the right which remained in the donor was nothing more than a right of action to recover the amount of the money from the party who held it, and that to transfer this the law required an assignment or some equivalent instrument, and an actual transfer, in the absence of which there was no delivery. Nor, the court held, was the delivery of the money to the neighbor, two days previous, sufficient as a delivery, for when it was so delivered, it was not for the use of any intended donee; though if the neighbor had retained the money specifically in her possession and under her control, so that actual delivery of it as a chattel could have been made when the intention to make a gift was manifested, the court held that the case would have been very different.

A California statute (Civ. Code, § 1147) provides as follows: "A verbal gift is not valid, unless the means of obtaining possession and control of

the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of thing to the donee." Thereunder, in the reported case (*ADAMS v. MERCED STONE CO.*), it is held that this section is not complied with in every case of a chose in action, where, at the time the donor makes such a gift, he knows that the donee has it in his power to secure the possession and control of the thing given, and that in such a case no delivery or transmission from the donor to the donee of the means of obtaining possession and control of the subject of the gift is necessary. The court holds, however, that the correct construction of the statute contemplates that the donor shall do something at the time of making the gift which has the effect of placing in the hands of the donee the means of obtaining the control and possession of the thing given, the fact that the thing given is already in the possession of the donee at the time of the declaration of the gift not being enough, under the authorities. And in the case of a chose in action not evidenced by a written instrument, the only means of obtaining control that is recognized by the authorities, the court states, is an assignment in writing, or some equivalent thereof. In this case it appears that the donor made a gift to his brother of all of the indebtedness due on an account to the donor from the defendant company. At that time the brother and donee was the president, the general manager, and a member of the board of directors of the defendant company and, as the donor knew, it was within his official power by reason of the offices held by him to make sufficient changes on the books of account of the company to show that the indebtedness of the company to the donor had been transferred by him to the donee. It also appears that the gift was made during the last illness of the donor, two days before his death, when he told the donee, his brother, that he wanted to give him the account, stating that he did not know just how to do this, but that he gave it to him. The court holds that all that was done was to declare the



present intention to give the indebtedness to the donee. No means whatever having been delivered by the donor to the donee by which the latter could obtain payment of the indebtedness, the fact that the donee was the managing officer of the company and had power to change its books did not make the gift effectual. The court holds that the indebtedness was due from the company and not from the donee, and that it was necessary that the company should have had some authority from the donor before it could legally make a change in its books to show the change in the indebtedness. Hence, the court holds that the evidence failed to support a finding of a transfer of the debt to the donee by way of a verbal gift.

While a mere request by a donor on his debtor to pay money to a donee is not a sufficient delivery of a chose in action so as to validate a gift *causa mortis* (*Castle v. Persons* (1902) 54 C. C. A. 133, 117 Fed. 835, and see the reported case (*ADAMS v. MERCED STONE Co.* ante, 928), yet where the request or order is accepted by the person on whom it is made during the lifetime of the donor, this is a good delivery. And there is no difference

between a verbal order or request, and a written order or request, there being no law requiring either to be in writing; neither need the acceptance be in writing. *Castle v. Persons* (Fed.) supra. In that case it was held that the evidence in regard to the order or request which the donor and creditor made to the defendant debtor, to pay the indebtedness owing by the latter to the donee, when considered with the evidence in regard to the acceptance of the order, the promise to pay the indebtedness to the donee by the debtor, was sufficient to go to the jury on the question of delivery. The court said: "If the defendant in error owed Thomas Persons, and Thomas Persons requested him to pay the debt to Maria Persons, and he, upon such request, promised to pay it to Maria Persons, thereby extinguishing his debt to Thomas Persons, Maria Persons could sue and recover upon that promise, and, if this could be done, then all control over the chose in action would be in Maria Persons. She had complete power to reduce it to possession. In other words, all the delivery of which the chose in action was capable had been made." H. D. B.

H. P. COOK et al., Plffs. in Err.,  
v.

J. M. SMITH.

*Texas Supreme Court — March 31, 1915.*

(107 Tex. 119, 174 S. W. 1094.)

#### **Deed — character — quitclaim.**

1. An instrument which assumes to convey the property described, and upon its face has that effect, is a deed, but if it merely professes to convey the grantor's interest it is a quitclaim.

[See note on this question beginning on page 945.]

#### **Contract — construction — intention.**

2. The intention of an instrument is to be confined to what its terms reveal.

[See 6 R. C. L. 835, 836.]

#### **Deed — quitclaim.**

3. An instrument may make use of the word "quitclaim," and still have

the effect of a conveyance of the property.

[See 8 R. C. L. 1024-1026.]

#### **Real property — effect of quitclaim in chain of title.**

4. One in whose chain of title is a quitclaim deed cannot claim the position of an innocent purchaser, although the deed to him is a warranty.

**Deed — absolute.**

5. A deed of property in a certain town, which is in form a quitclaim, is converted into an absolute conveyance by a provision that it is my intention here now to convey to the said grantee all the real estate that I own in said town, whether it is set out above or not.

[See 8 R. C. L. 1025, 1026.]

**Evidence — to explain meaning of instrument.**

6. If the use of a particular clause in a deed renders the instrument ambiguous, proof of the attendant cir-

cumstances of its execution is admissible for the purpose of determining the true meaning of the parties.

[See 8 R. C. L. 1041.]

**Appeal — finding of facts — binding effect.**

7. A finding on conflicting evidence that a purchaser of real estate did not have notice of an adverse claim before he paid the purchase money, which was not disturbed on intermediate appeal, is binding on the supreme court.

[See 2 R. C. L. 204.]

**ERROR to the Court of Civil Appeals for the Seventh Supreme Judicial District to review a judgment reversing a judgment of the District Court for Cottle County in favor of defendants, in a suit in trespass to try title for the recovery of a certain lot. *Reversed.***

The facts are stated in the opinion of the court.

Messrs. R. D. Browne and O. T. Warlick for plaintiff in error Cook.

Messrs. Whatley & Hawkins and E. B. Perkins for plaintiff in error Neff.

Messrs. Fires & Diggs, for defendant in error:

The deed under which defendant Cook claims the property in controversy is nothing more than a mere quitclaim, or a mere chance at the property.

Threadgill v. Bickerstaff, 87 Tex. 523, 29 S. W. 757; Finch v. Trent, 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679; Woody v. Strong, 45 Tex. Civ. App. 256, 100 S. W. 801; Hudman v. Henderson, 58 Tex. Civ. App. 358, 124 S. W. 186; Hunter v. Eastham, 95 Tex. 653, 69 S. W. 66; McMurray v. Columbia Lumber Co. 56 Tex. Civ. App. 199, 120 S. W. 246; Richardson v. Levi, 67 Tex. 361, 3 S. W. 444; Shepard v. Hunsacker, 1 Posey, Unrep. Cas. (Tex.) 583; Tram Lumber Co. v. Hancock, 70 Tex. 312, 7 S. W. 724; Harrison v. Boring, 44 Tex. 255.

Where plaintiff shows title to the land and is entitled to recover the same, he is also entitled to recover the reasonable rents on said property from the defendant, he not having been in possession for one year prior to the filing of the suit, and hence not entitled to offset said rents by improvements made on the property.

Overton v. Meggs, — Tex. Civ. App. —, 105 S. W. 208; Gilley v. Williams, — Tex. Civ. App. —, 43 S. W. 1094; Estell v. Cole, 62 Tex. 698.

Where an intending purchaser of

real property has knowledge of any facts or circumstances sufficient to put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would have led to actual notice of an outstanding title, he is charged with notice that might be thereby acquired.

LaBrie v. Cartwright, 55 Tex. Civ. App. 144, 118 S. W. 787.

Defendant Cook was not an innocent purchaser from Neff of the premises in controversy, and hence had notice of superior outstanding title of plaintiff at the time he received the deed from Neff, for the reason that he did not pay Neff the purchase money for said property at the time he received the deed, and did not pay him until after he had actual knowledge of the title to said property being in plaintiff.

Evans v. Templeton, 69 Tex. 375, 5 Am. St. Rep. 71, 6 S. W. 843; Murrell v. Mandelbaum, 85 Tex. 22, 34 Am. St. Rep. 777, 19 S. W. 880; Tate v. Kramer, 1 Tex. Civ. App. 427, 23 S. W. 255; Fraim v. Frederick, 32 Tex. 308; Hutchins v. Chapman, 37 Tex. 615.

Messrs. Crosby & Hamilton also for defendant in error.

**Phillips, J.**, delivered the opinion of the court:

The suit was instituted by the defendant in error, J. M. Smith, against H. P. Cook, one of the plaintiffs in error, in trespass to try title for the recovery of a lot in the town of Paducah. Cook answered with

a plea of not guilty; that he was a bona fide purchaser of the lot, for value, without notice of any adverse claim; and improvements in good faith, vouching in A. A. Neff, the other plaintiff in error, his grantor, upon his warranty, and seeking recovery over against Neff on account of his improvements. Neff answered by a plea of not guilty, and that he was an innocent purchaser of the property from R. Potts, the common source of title. The trial of the case before the court resulted in a judgment denying any recovery to Smith, quieting Cook's title to the property, and denying the latter any relief on his cross action against Neff. This judgment was reversed by the honorable court of civil appeals, upon the ground that the deed from Potts to Neff was merely a quitclaim deed, and, therefore, incapable of sustaining the defense of an innocent purchase of the property; and judgment rendered in Smith's favor for the lot and the recovery of a certain amount as rents, the cause being remanded for trial as between Cook and Neff, upon the issues arising on the former's cross bill.

R. Potts duly conveyed the lot to Smith by warranty deed, dated September 21, 1906, but not recorded until September 29, 1909. The deed from Potts to Neff was of date August 31, 1909, and recorded the same day. Cook holds under that deed by subsequent conveyance from Neff, by deed of date September 3, 1909, recorded the same day.

The case turns upon the legal effect of the deed from Potts to Neff, since, if that was merely a quitclaim deed, Cook's plea of innocent purchaser failed, and Smith was accordingly entitled to recover the property. Omitting the description, the deed from Potts to Neff was in the following terms:

State of Texas,)  
County of Cottle,)

Know all men by these presents: That I, R. Potts, a single man, of the county of Cottle and state of Texas, for and in consideration

of the sum of \$2,500 to me cash in hand paid, by A. A. Neff, of San Bernardino county, state of California, the receipt whereof is hereby duly acknowledged and confessed, have bargained, sold, released, and forever quitclaimed, and by these presents do hereby bargain, sell, release, and forever quitclaim, unto the said A. A. Neff of San Bernardino county, state of California, and his heirs and assigns, all my right, title, and interest in and to that certain tracts or parcels of land lying and being situated in the county of Cottle and state of Texas, and known and described as follows, to wit: (Here follows description by block and number of a large number of lots, including the lot in controversy; also several small tracts by metes and bounds) and all other real estate that I now own and am possessed of in the town of Paducah, in Cottle county, Texas. All of the above town property is situated in the town of Paducah, in Cottle county, Texas, as shown by the original recorded plat of said town, of record in volume 5, page 81, in the deed records of Cottle county, Texas; and it is my intention here now to convey to the said A. A. Neff all the real estate that I own in said town of Paducah, in Cottle county, Texas, whether it is set out above or not.

To have and to hold the said premises, together with all and singular the rights, privileges, and appurtenances thereto in any manner belonging to the said A. A. Neff and his heirs and assigns forever, so that neither I, the said R. Potts, nor my heirs, nor any person or persons claiming under me, shall at any time hereafter have, claim, or demand any right or title to the aforesaid premises or appurtenances, or any part thereof.

Witness my hand at Paducah, Texas, on this the 31st day of August, A. D. 1909.

(Signed) R. Potts.

The character of an instrument, as constituting a deed to land or merely a quitclaim deed, is to be de-

terminated according to whether it assumes to convey the property described, and upon its face has that effect, or merely professes to convey the grantor's title to the property. If, according to the face of the instrument, its operation is to

convey the property itself, it is a deed.  
**Deed—character—quitclaim.**

If, on the other hand, it purports to convey no more than the title of the grantor, it is only a quitclaim deed. *Richardson v. Levi*, 67 Tex. 364, 3 S. W. 444; *Threadgill v. Bickerstaff*, 87 Tex. 520, 29 S. W. 757. The intention of the instrument is to be confined, of course, to that which its terms re-

veal; but it should be considered in its entirety, and if, taken as a whole, it discloses a purpose to convey the property itself, as distinguished from the mere title of the grantor, such as it may be, it should be given the effect of a deed, although some of its characteristics may be those of a quitclaim deed. The use of the term "quitclaim" is not, of itself, a conclusive test of its character. It may make

use of that term, and yet have the effect of a conveyance of the property. *Garrett v. Christopher*, 74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67; *Richardson v. Levi*, supra.

**Deed—quitclaim.**

The granting clause of the deed from Potts to Neff, "have bargained, sold, released, and forever quitclaimed, and by these presents do hereby bargain, sell, release, and forever quitclaim, and by these presents do hereby bargain, sell, release and forever quitclaim, unto the said A. A. Neff . . . all my right, title, and interest in and to that certain tracts or parcels of land," and the habendum clause as well, "to have and to hold the said premises, together with all and singular the rights, privileges, and appurtenances thereto in any manner belonging, to the said A. A. Neff and his heirs and assigns forever, so that neither I, the said R. Potts, nor

my heirs, nor any person or persons claiming under me, shall at any time hereafter have, claim, or demand any right or title to the aforesaid premises, or appurtenances or any part thereof," are essentially in the terms of a quitclaim deed. If the character of the instrument were dependent alone upon the construction of these parts of it, there could be no doubt, under the authority of *Threadgill v. Bickerstaff*, supra, and *Hunter v. Eastham*, 95 Tex. 648, 69 S. W. 66, of its being simply a quitclaim deed, since these clauses are in substantially the same terms as the granting and habendum clauses of the respective instruments reviewed in those decisions, and there held to be quitclaim deeds.

Furthermore, if the deed from Potts to Neff was only a quitclaim deed, Cook's title, deraigned through that deed and resting upon it, was not such, under the rule of decision in this state, as would sustain the defense of an innocent purchase of the property, though the deed from Neff to himself was a general warranty; for in such case the record, or apparent title to the property, was clearly only such as Potts possessed, which, because of his previous conveyance to Smith, was no title at all. *Taylor v. Harrison*, 47 Tex. 460, 26 Am. Rep. 304; *Garrett v. Christopher*, and *Threadgill v. Bickerstaff*, supra.

**Real property—effect of quitclaim in chain of title.**

But the presence in the deed from Potts to Neff of the clause, "and it is my intention here now to convey to the said A. A. Neff all the real estate that I own in said town of Paducah, whether it is set out above or not," cannot be overlooked. It discloses very plainly, we think, that the grantor's intention in the execution of the instrument was to convey all of the property situated in the town previously described, and any other property there owned by him which was not described.

It is very earnestly insisted by the defendant in error that this

clause is not to be construed as a declaration of the grantor's intention to convey any of the property described *which he did not own*, but it should be held to have reference only to such real estate in the town of Paducah as he *actually owned*, notwithstanding his inclusion in the instrument of specific property by express description. According to this contention, the clause should be construed as though it read: "And it is my intention here now to convey to the said A. A. Neff *only* such real estate as I own in said town of Paducah, although I have included herein certain specific real estate there situated." But the clause is not so written, and such is not, in our opinion, its natural sense. To give it that meaning requires a complete change in the form of its expression. Such a construction would give it all the force of a clause of limitation or restriction, when plainly that was not its intended operation. Its manifest purpose was to enlarge both the granting clause of the instrument and the preceding terms of description. This is shown by the use of its ampler phrase. The instrument had previously dealt with only the grantor's *title* to particular property. But to make plain that it had a larger purpose than merely to release the grantor's title to the particular property in the town which had been described, it is distinctly announced in this clause that the grantor's intention in the execution of the instrument was to *convey all the real estate* that he owned in the town, whether specifically described or not. This could mean nothing less than an intention to convey all the town property described; for the expression in the clause, "whether set out above or not," carries the evident implication that the grantor *owned*, or treated as *owned*, the particular town property "*set out*," and it was, therefore, intended to be conveyed.

As has been indicated, the test of the character of the instrument is not whether it was in fact effectual

to convey any property, but whether it purported to convey this property. If its terms, upon their face, had the legal effect to convey the lot, that determines its character as a deed to the lot, and ends the present inquiry. If, upon its face, it amounted to a deed to the lot, its actual operation was dependent upon its right to prevail against the rival conveyance,—another question, governed by other rules of law and the facts of the case upon that issue.

There is an obvious distinction between the meaning of the clause in this instrument, declaring, "and it is my intention to here now convey to the said A. A. Neff all the real estate that I own in the said town of Paducah, in Cottle county, Texas, whether it is set out above or not," and one following a description of particular property in a town which says that the intention of the grantor "is to here now convey *only* such property in said town as he owns, notwithstanding the description of particular property." The difference is that while both clauses would express an intention to convey only such property as the grantor owned, the first, as before stated, carries the further equally plain profession that he owned the property in the town which he had described, and, therefore, intended to convey it. This clause in the instrument clearly assumed to convey this lot; and the instrument should accordingly be construed as a deed to the lot. If there were any doubt as to the purport of the deed being that this lot was "owned" by the grantor, it is relieved by the clause immediately following the description, "and all other real estate that I own and am possessed of in the town of Paducah," which amounts to an affirmation that he owned the town property before described.

If the result of the use of this clause was to render the instrument ambiguous,—and it was not capable

Deed—  
absolute.

of producing a more favorable effect for the defendant in error,—permitting the introduction of proof of the attendant circumstances for the purpose of determining the true

**Evidence—  
to explain  
meaning of  
instrument.**

meaning of the instrument (Harrison v. Boring, 44 Tex. 255; Threadgill v.

Bickerstaff, 87 Tex. 520, 29 S. W. 757), the record contains sufficient evidence to support the conclusion that a conveyance of the town property described was in fact intended in the execution of the deed. It was accordingly capable of sustaining the defense of an innocent purchaser, interposed by both Neff and Cook, as held by the trial court.

Cook was clearly a bona fide purchaser for value. Whether he had notice of Smith's claim before he paid the consideration for the lot was a question of fact, which, in the state of the rec-

ord, is concluded by the judgment of the trial court.

It is proper that we should call attention to the manifest conflict between the holding in Garrett v. Christopher that, notwithstanding the other features of the instrument may be those peculiar to a quitclaim deed, the use of the term "premises" in the habendum clause will enlarge the effect of the instrument into that of a deed, and the later decisions of the court in Threadgill v. Bickerstaff and Hunter v. Eastham; since in neither of those cases is it recognized that the mere use of that term in such connection has, of itself, any such force. Garrett v. Christopher is not referred to in either opinion, but it cannot be otherwise regarded than as distinctly qualified by the ruling announced in each of these later cases.

The judgment of the Court of Civil Appeals is reversed and that of the District Court is affirmed.

## ANNOTATION.

### Test of conveyance as quitclaim or otherwise.

- I. In general, 945.
- II. Instances in which conveyance has been held to be merely a quitclaim, 950.
- III. Instances in which conveyance has been held to be not a quitclaim, 952.

#### I. In general.

The question whether a conveyance is a mere quitclaim, or something more, is of importance only because of its bearing on some other question, such as whether one claiming under or through a particular conveyance is entitled to the protection of the Registry Act, as in the reported case (COOK v. SMITH, ante, 940), or whether the conveyance constitutes the color of title which will fix the extent of an adverse possession, or whether title subsequently acquired by the grantor will inure to the benefit of the grantee. So also, the scope of a covenant of warranty may depend upon whether the thing granted is the land itself, or merely the grantor's claim of title thereto.

3 A.L.R.—60.

The decisions as to the character of the conveyances therein under consideration seem to have been considerably influenced by the nature of the ultimate question involved. Thus, it is apparent that the courts, in seeking to escape from the effect of the rule that one claiming under a quitclaim deed is not a bona fide purchaser, and therefore is not entitled to the protection of the Registry Act, have sometimes declared conveyances not to be quitclaims upon very slight evidence.

The distinguishing characteristic of a quitclaim deed is that it is a conveyance of the interest or title of the grantor in and to the property described, rather than of the property itself. See

United States.—Gallup v. Huling (1917) 154 C. C. A. 560, 241 Fed. 858.

Alabama.—Derrick v. Brown (1880) 66 Ala. 162.

Alaska.—First Nat. Bank v. Timmins (1910) 4 Alaska, 242.

Arkansas.—Reynolds v. Shaver

(1894) 59 Ark. 299, 43 Am. St. Rep. 36, 27 S. W. 78.

Illinois.—Frank v. Darst (1853) 14 Ill. 304, 58 Am. Dec. 575.

Iowa.—McBride v. Caldwell (1909) 142 Iowa, 228, 119 N. W. 741.

Massachusetts.—Adams v. Cuddy (1833) 13 Pick. 460, 25 Am. Dec. 380.

New York.—Veit v. Dill (1894) 78 Hun, 171, 28 N. Y. Supp. 937.

Texas.—Richardson v. Levi (1887) 67 Tex. 359, 3 S. W. 444; Garrett v. Christopher (1889) 74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67; Lindsay v. Freeman (1891) 83 Tex. 263, 18 S. W. 727; Threadgill v. Bickerstaff (1895) 87 Tex. 520, 29 S. W. 757; Hunter v. Eastham (1902) 95 Tex. 648, 69 S. W. 66; COOK v. SMITH (reported herewith) ante, 940; Shepard v. Hunsacker (1880) 1 Posey, Unrep. Cas. 578; Laughlin v. Tips (1894) 8 Tex. Civ. App. 649, 28 S. W. 551; Culmell v. Borroum (1896) 13 Tex. Civ. App. 458, 35 S. W. 942; Daugherty v. Yates (1896) 13 Tex. Civ. App. 646, 35 S. W. 937; Baldwin v. Drew (1915) — Tex. Civ. App. —, 180 S. W. 614; Pridgen v. Cook (1916) — Tex. Civ. App. —, 184 S. W. 713.

Washington.—West Seattle Land & Improv. Co. v. Novelty Mill Co. (1903) 31 Wash. 435, 72 Pac. 69.

But if, though in the granting clause only the right, title, and interest of the grantor are purported to be conveyed, an adequate consideration is recited, and if expressions occur elsewhere in the instrument indicating an intention to convey the land itself, the intention of the parties is to be ascertained by considering all the provisions of the deed as well as the situation of the parties, and then to give effect to such intention, if practicable. Balch v. Arnold (1899) 9 Wyo. 17, 59 Pac. 434.

For other instances in which a deed purporting to convey only the grantor's right, title, and claim was held not to be a mere quitclaim, see Baylor v. Scottish-American Mortg. Co. (1895) 13 C. C. A. 659, 30 U. S. App. 761, 66 Fed. 631; Wilson v. Irish (1883) 62 Iowa, 260, 17 N. W. 511; and Southern Iron & Coal Co. v. Schwoon

(1910) 124 Tenn. 176, 135 S. W. 785, elsewhere set forth.

The use of the word "quitclaim" does not restrict the conveyance, if other language employed in the instrument indicates the intention to convey the land itself.

United States. — Wise v. Watts (1917) 152 C. C. A. 195, 239 Fed. 207.

Iowa.—Sibley v. Bullis (1875) 40 Iowa, 429; Wilson v. Irish (1883) 62 Iowa, 260, 17 N. W. 511.

Texas.—Richardson v. Levi (1887) 67 Tex. 359, 3 S. W. 444; Garrett v. Christopher (1889) 74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67; Cook v. SMITH (reported herewith) ante, 940; Dycus v. Hart (1893) 2 Tex. Civ. App. 354, 21 S. W. 299; Moore v. Swift (1902) 29 Tex. Civ. App. 51, 67 S. W. 1065; Baldwin v. Drew (1915) — Tex. Civ. App. —, 180 S. W. 614; Pridgen v. Cook (1916) — Tex. Civ. App. —, 184 S. W. 713.

Washington.—West Seattle Land & Improv. Co. v. Novelty Mill Co. (1903) 31 Wash. 435, 72 Pac. 69.

Whether a deed is a conveyance of the land itself, or merely a release of such title as may be lodged in the grantor, depends upon the intention of the parties. First Nat. Bank v. Timmins (1910) 4 Alaska, 242; Morrison v. Wilson (1866) 30 Cal. 344; Shepard v. Hunsacker (1880) 1 Posey, Unrep. Cas. (Tex.) 558; Taylor v. Harrison (1877) 47 Tex. 454, 26 Am. Rep. 304; Garrett v. Christopher (1889) 74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67; Carleton v. Lombardi (1891) 81 Tex. 855, 16 S. W. 1081; Threadgill v. Bickerstaff (1895) 87 Tex. 520, 29 S. W. 757; Laughlin v. Tips (1894) 8 Tex. Civ. App. 649, 28 S. W. 551; Culmell v. Borroum (1896) 13 Tex. Civ. App. 458, 35 S. W. 942; Kempner v. Beaumont Lumber Co. (1899) 20 Tex. Civ. App. 307, 49 S. W. 412; Baldwin v. Drew (1915) — Tex. Civ. App. —, 180 S. W. 614; Pridgen v. Cook (1916) — Tex. Civ. App. —, 184 S. W. 713; Balch v. Arnold (1899) 9 Wyo. 17, 59 Pac. 434.

Ordinarily, such intention is to be gathered from the face of the instrument (see Garrett v. Christopher (1889) 74 Tex. 453, 15 Am. St. Rep.

850, 12 S. W. 67; *Pridgen v. Cook* (1916) — *Tex. Civ. App.* —, 184 S. W. 713), and it is not material whether such intention appears in the granting clause, in the covenants, or elsewhere in the instrument. *Balch v. Arnold* (Wyo.) *supra*.

But while a deed may be so plain and explicit as to require the courts to construe it to be a quitclaim of the grantor's interest, or an absolute conveyance of the land, as the case may be, upon the other hand, its wording may be such as to raise the question whether it is the one or the other, and in that event the circumstances under which it is made, and the purposes for which it is made, may be considered, to fix its true character as being the one or the other. *Ibid.*; *Shepard v. Hunsacker* (1880) 1 *Posey, Unrep. Cas. (Tex.)* 578; *Threadgill v. Bickerstaff* (1895) 87 *Tex.* 520, 29 S. W. 757. And see also, as so holding in effect, *First Nat. Bank v. Timmins* (Alaska) *supra*; *Taylor v. Harrison* (1877) 47 *Tex.* 454, 26 *Am. Rep.* 304; *Kempner v. Beaumont Lumber Co.* (1899) 20 *Tex. Civ. App.* 307, 49 S. W. 412; *Baldwin v. Drew* (1915) — *Tex. Civ. App.* —, 180 S. W. 614.

The adequacy of the price paid is a circumstance to be taken into consideration. *First Nat. Bank v. Timmins* (Alaska) *supra*; *Taylor v. Harrison* (1877) 47 *Tex.* 454, 26 *Am. Rep.* 304; *Carleton v. Lombardi* (1891) 81 *Tex.* 355, 16 S. W. 1081; *Moore v. Swift* (1902) 29 *Tex. Civ. App.* 51, 67 S. W. 1065; *Baldwin v. Drew* (1915) — *Tex. Civ. App.* —, 180 S. W. 614; *Pridgen v. Cook* (1916) — *Tex. Civ. App.* —, 184 S. W. 713.

Thus, if the deed is not only a quitclaim, but it appears that the consideration was merely nominal, it may ordinarily be inferred that the purpose of the deed was only to release the existing interest of the grantor for the purpose of clearing the title, or the like. *Balch v. Arnold* (1899) 9 *Wyo.* 17, 59 *Pac.* 434.

But although, in determining the question whether a deed was intended to convey the land or a mere chance of title to the land, the fact that an inadequate consideration was paid

may be looked to as a circumstance, it is error to make the determination of the question depend upon whether the grantee paid the full market value or not. *Eastham v. Hunter* (1908) 102 *Tex.* 145, 132 *Am. St. Rep.* 854, 114 S. W. 97.

Whether a deed is a mere quitclaim, or a conveyance of the title, or chance for title, which the grantor may be supposed to have, is not to be determined merely by the omission of the covenant of general warranty of title, but may be inferred, not only from the terms of the deed, but from the adequacy of the price given and other circumstances attending the transaction, calculated to show the real intent and purpose of the instrument. *Taylor v. Harrison* (1877) 47 *Tex.* 454, 26 *Am. Rep.* 304.

#### Use of word "grant."

The use of the term "grant" does not necessarily determine the character of the deed, but whether it is a quitclaim deed, or a deed of grant, bargain, and sale that purports to convey the property itself, is to be determined from the whole of the granting clause contained in the deed. *State v. Kemmerer* (1900) 14 S. D. 169, 84 N. W. 771, affirmed on rehearing in (1902) 15 S. D. 504, 90 S. W. 150.

A deed, the granting clause in which states that the grantors "do convey, grant, remise, release, and quitclaim all their right, title, estate, interest, property, and equity in and to the following real property," is not within a statute which provides that, from the use of the word "grant" in conveyances of an estate in fee simple, covenants that the grantor has not previously conveyed the same estate will be implied, and that if such grantor subsequently acquires title to such property the same shall pass by operation of law to the grantee. *Ibid.*

#### Use of words, "bargain and sell."

It has been held that the use of the words, "bargain and sell," although such words are declared by statute to be words of implied warranty if used without qualification, will not alter the character of a deed which also employs the word "quitclaim," and



expressly limits its granting effect to the "right, title, interest, estate, claim, and demand" of the grantor. *Derrick v. Brown* (1880) 66 Ala. 162.

And in *Gibson v. Chouteau* (1866) 39 Mo. 536, it was likewise held that the words "bargain, sell, release, quitclaim, and convey" are words of release and quitclaim merely, which carry the grantor's interest and estate in the land described, whatever it may be, but do not of themselves purport to do anything more, and do not even raise the statutory covenant implied in the words, "grant, bargain, and sell."

But in *D'Wolf v. Haydn* (1860) 24 Ill. 525, it was held that, in view of the provisions of the Illinois statute that the words, "grant, bargain, and sell," are equivalent to an express covenant to the grantee that the grantor is seised of an indefeasible estate in fee simple, free from encumbrances done or suffered from the grantor, and for quiet enjoyment against the grantor, his heirs and assigns, a deed containing such words is not a quitclaim deed, within the rule that a quitclaim deed does not operate to transfer a subsequently acquired title.

In *Touchard v. Crow* (1862) 20 Cal. 150, 81 Am. Dec. 108, it was held that a deed in which the words, "bargain, sell, and quitclaim," are employed, is not strictly a quitclaim, inasmuch as they operate not merely to release, but also to transfer, any interest which the grantors possess at the execution of the deed.

But a different view has prevailed in other cases. Thus, a deed purporting to "bargain and sell" as well as to "quitclaim" may, for the purpose of fixing the status of the grantee therein as that of one who is not a bona fide purchaser without notice, be treated as a mere quitclaim. *Webb v. Elyton Land Co.* (1894) 105 Ala. 471, 18 So. 178.

The character of the grantee under a quitclaim deed is not affected by the fact that the deed also contains the words, "bargain and sell." *Wightman v. Spofford* (1881) 56 Iowa, 145, 8 N. W. 680.

A deed which uses as words of conveyance the words, "grants, bargains, sells, aliens, releases, quitclaims, and conveys," and which contains no claim or covenants of seisin, or right to convey, or warranty of title or possession, is a mere quitclaim which will not estop the grantor from afterwards asserting an after-acquired title. *Bruce v. Luke* (1872) 9 Kan. 201, 12 Am. Rep. 491.

A deed which recites that the grantors "have bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim all our right, title, interest, estate, claim, and demand, both in law and in equity, as well in possession as in expectation, with all and singular the hereditaments and appurtenances thereunto belonging, and we do also promise to defend the property against all claims, if any should come up against said property," is only a quitclaim deed; and an after-acquired title does not inure to the benefit of the grantee. *Young v. Clippinger* (1875) 14 Kan. 148.

A deed purporting to grant, bargain, sell, and quitclaim in fee certain lands, but containing no covenant or warranty, is a mere bargain and sale and quitclaim, which will not estop the grantor from setting up an after-acquired title. *Jackson ex dem. McCrackin v. Wright* (1870) 14 Johns. (N. Y.) 194; *Jackson ex dem. Weidman v. Hubble* (1824) 1 Cow. (N. Y.) 613.

A deed purporting to "grant, bargain, sell, alien, remise, release, and convey" to the second party certain described property, "together with the appurtenances, and also all the estate, right, title, interest, property, possession, claim, and demand, as well in law as in equity, of the said parties of the first part in and to the above-described premises," is simply a deed of release and quitclaim which will not estop the grantor from asserting an after-acquired title. *Taggart v. Risley* (1872) 4 Or. 235.

The use, in addition, of other words, such as "give, grant, bargain, or sell," will not change the character of the conveyance, if the interest sold is still described as the "right and title"

of the grantor. *Richardson v. Levi* (1887) 67 Tex. 359, 3 S. W. 444; *Tram Lumber Co. v. Hancock* (1888) 70 Tex. 312, 7 S. W. 724; *Culmell v. Borroum* (1896) 13 Tex. Civ. App. 458, 35 S. W. 942.

**Effect of language used in habendum clause.**

It has been broadly stated that the habendum cannot transform a deed, purporting in the premises to convey only the interest of the grantor, into a conveyance of the fee simple absolute. *Frank v. Darst* (1853) 14 Ill. 304, 58 Am. Dec. 575. But a more liberal rule is applied in the more recent cases.

Thus where, although the granting clause purports only to convey "all my right, title, and interest," the habendum is, "to hold all and singular the above-described lands," the deed may be regarded as something more than a quitclaim. See *Baylor v. Scottish-American Mortg. Co.* (1895) 13 C. C. A. 659, 30 U. S. App. 761, 66 Fed. 631, elsewhere set forth.

It has been held in a series of Texas cases, beginning with *Garrett v. Christopher* (1889) 74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67, and including *Finch v. Trent* (1893) 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679; *Laughlin v. Tips* (1894) 8 Tex. Civ. App. 649, 28 S. W. 551; *Merriman v. Blalack* (1909) 57 Tex. Civ. App. 270, 122 N. W. 403; *Merriman v. Blalack* (1909) 56 Tex. Civ. App. 594, 121 S. W. 552; *Stanley v. Hamilton* (1895) — Tex. Civ. App. —, 33 S. W. 601, that the word "premises" in a habendum clause means the land, and that such word, therefore, determines the instrument to be a deed of the land, as distinguished from a quitclaim deed. But this rule has been repudiated by the supreme court in *Hunter v. Eastham* (1902) 95 Tex. 653, 69 S. W. 66, as indicated by Justice Phillips in the reported case (*COOK v. SMITH*, ante, 940).

And in *Smith v. Pollard* (1847) 19 Vt. 272, and *Cummings v. Dearborn* (1884) 56 Vt. 441, it was held that the effect of a deed in the common form of a quitclaim, conveying to the grantee simply the right, title, and interest

which the grantor then had in the land, is not enlarged by an habendum, "to have and to hold the premises so that neither the [grantor] nor anyone claiming under him shall thereafter have claim or right to the premises aforesaid," since, although the word premises does indeed often mean the land, it is equally well adapted to designate the interest or estate intended to be conveyed; and the deed will therefore not estop the grantor from subsequently asserting an after-acquired title.

Even where the use of the word "premises" in the habendum clause has been deemed to evince an intention to convey the land itself, it has been held that the clause will not have such effect where it concludes: "So that neither the said [grantor] or my heirs, nor any person or persons claiming under me, shall at any time hereafter have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part thereof." *Finch v. Trent* (1893) 3 Tex. Civ. App. 568, 24 S. W. 679.

And a deed which purports to convey to the grantee "no more than the right, title, and interest" of the grantors in the land is merely a quitclaim, and is given no other effect by the incorporation of the words, "to have and to hold the same unto him, the said [vendee], forever." *Threadgill v. Bickerstaff* (1895) 87 Tex. 520, 29 S. W. 757.

The language of an habendum, reciting that the grantee was to have not only the right, title, and interest of the grantor, but was "to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining, and all the right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said second party, his heirs and assigns forever," when taken in connection with the granting clause, is inconsistent with an intention to release only the right, title, and interest of the grantor, whether small

or great. *Balch v. Arnold* (1899) 9 Wyo. 17, 59 Pac. 434.

**Effect of language used in warranty clause.**

Language used in the warranty clause has sometimes been relied on as evincing an intention to convey the property itself, rather than a claim thereto. See, for instance, *Merriman v. Blalack* (1909) 57 Tex. Civ. App. 270, 122 S. W. 403; *Merriman v. Blalack* (1909) 56 Tex. Civ. App. 594, 121 S. W. 552; *Baldwin v. Drew* (1915) — Tex. Civ. App. —, 180 S. W. 614; *Borque v. Chappell* (1900) 2 N. B. Eq. 187, elsewhere set forth.

The fact that the deed contains a covenant of warranty is not, however, conclusive that it is not a quitclaim. See *Hunter v. Eastham* (1902) 95 Tex. 648, 69 S. W. 66; *Culmell v. Borroum* (1896) 18 Tex. Civ. App. 458, 35 S. W. 942; and *Cummings v. Dearborn* (1884) 56 Vt. 441, elsewhere set forth.

**Retention of vendor's lien.**

The fact that a vendor's lien is retained in the instrument should be considered, together with all other parts of the instrument, to determine whether or not the parties intended to convey the property itself, or merely a chance of title. *Harrison v. Boring* (1875) 44 Tex. 265; *Barksdale v. Benskin* (1917) — Tex. Civ. App. —, 194 S. W. 402.

But since a vendor's lien can be retained on any interest or estate in land, though less than the fee, it follows that retaining a vendor's lien in an instrument does not, expressly nor by implication, contradict and nullify the granting and habendum clauses of the instrument. *Barksdale v. Benskin* (Tex.) *supra*.

**II. Instances in which conveyance has been held to be merely a quitclaim.**

An instrument which in the granting clause purports to quitclaim, and recites that the grantors as "heirs" will never make any further claims of property, is a quitclaim deed within the rule that one who takes such a deed is not a bona fide purchaser. *Hastings v. Nissen* (1887) 31 Fed. 597.

A deed will be considered as one of

quitclaim rather than as one of bargain and sale, where the consideration therefor was a mere moral obligation, and it appeared that the grantor had informed the grantee, previous to the execution of such conveyance, that the title to the property had never come into his actual possession. *First Nat. Bank v. Timmins* (1910) 4 Alaska, 242.

A conveyance purporting to "grant, bargain, and sell" all the grantor's "right, title, claim, and interest in and to" the land described therein is in effect a quitclaim deed. *Reynolds v. Shaver* (1894) 59 Ark. 299, 43 Am. St. Rep. 36, 27 S. W. 78.

A deed containing in its granting clause words appropriate to a deed of bargain and sale will be considered as a mere quitclaim, where it expressly stipulates: "It is fully understood that as to title this is only a quitclaim deed." *Morrison v. Wilson* (1866) 30 Cal. 344.

A conveyance of all the grantor's rights and title to certain premises will not pass title as against the holder of a prior unregistered deed. *Adams v. Cuddy* (1833) 13 Pick. (Mass.) 460, 25 Am. Dec. 330.

A conveyance granting, releasing, conveying, and quitclaiming all the rights of the grantor in and to the described premises is in effect a quitclaim deed. *Veit v. Dill* (1894) 78 Hun, 171, 28 N. Y. Supp. 937.

A deed which recites that the grantor grants, bargains, sells, and conveys "all my right, title, claim, and interest in and to the following described tract of land, . . . to have and to hold all and singular the same the above-described tract of land unto him the said [grantee]. And I do forever quitclaim all my claim and interest in and to the above-named tract of land," is not such a conveyance as will support the plea of innocent purchaser. *Shepard v. Hunsacker* (1880) 1 Posey, Unrep. Cas. (Tex.) 578.

A deed reciting that "whereas we, . . . fully satisfied and convinced that one Davis Files had a good and valid deed to the land hereinafter described from and through the late A. C. Allen, and that the said original

deed to said Files has been lost, and that the record thereof in the county of Jasper was burned," "for and in consideration of preventing a suit and the payment of \$10 for the heirs of Davis Files," "bargain, sell, remise, release, and quitclaim all our rights, title, interest, estate, claim, and demand in and to" certain described lands, is simply a quitclaim, and one claiming title thereunder cannot be an innocent purchaser. *Tram Lumber Co. v. Hancock* (1888) 70 Tex. 312, 7 S. W. 724.

A deed reciting that, in consideration of a certain amount paid to him by the grantee, the grantor has "bargained, sold, and by these presents" does "grant, bargain, sell, convey, and release unto the said [grantee] all my right, title, and interest in and to the following described tract of land," "to have and to hold, all and singular, the premises above described, unto the said [grantee] his heirs and assigns forever," and containing a covenant of warranty, shows, prima facie at least, in the absence of proof of the circumstances attending it and as to the adequacy of consideration to give a different character to the transaction, that the grantee bought only such title as his grantor had. *Hunter v. Eastham* (1902) 95 Tex. 648, 69 S. W. 66.

An instrument reciting that the grantor has "bargained and sold" "all my right, title, and interest in and to" certain lands, "to have and to hold unto him, the said [vendee], his heirs and assigns forever," and containing a warranty of title of the said land, is a quitclaim and not an absolute conveyance of the land, and cannot form the basis of a claim of innocent purchaser without notice. *Culmell v. Borroum* (1896) 18 Tex. Civ. App. 458, 35 S. W. 942.

Deeds purporting to convey only the grantors' "right, title, interest, and claim" as heirs of a certain person are merely quitclaims, under which the grantee cannot hold as a purchaser in good faith. *Daugherty v. Yates* (1896) 18 Tex. Civ. App. 646, 35 S. W. 937.

In *McMurray v. Columbia Lumber Co.* (1909) 56 Tex. Civ. App. 199, 120

S. W. 246, a deed conveying "all of our right, title, and interest in and to all of the lands we have in San Jacinto county, Texas, and to have and to hold all and singular the said premises under the said [grantee], his heirs and assigns forever, and we do hereby quitclaim and acquit unto the said [grantee] all interest we have in said San Jacinto county," was held to be merely a quitclaim, and not to support the plea of innocent purchaser.

An instrument reciting that the grantor does, "by these presents, bargain, sell, release, and forever quitclaim unto the said [vendee], his heirs and assigns, all of my right, title, and interest in and to" certain described lands, "to have and to hold the said premises, together with all and singular the rights, privileges, and appurtenances thereto in any manner belonging, unto the said [grantee], his heirs and assigns forever," is not a conveyance of the land, but merely of the grantor's right, title, and interest, and will not support the plea of innocent purchaser. *Hudman v. Henderson* (1910) 58 Tex. Civ. App. 358, 124 S. W. 186.

An instrument in form a warranty deed, but containing a recital immediately following the description of the land and preceding the habendum clause: "The intention of the parties thereto is to convey any and all rights, title, and interest they may have either from purchasing, gifts, devise, or inheritance, in and to the above land,"—is a quitclaim deed within the meaning of the rule that one claiming through such a deed cannot be considered as an innocent purchaser. *Schmittou v. Dunham* (1912) — Tex. Civ. App. —, 142 S. W. 941.

An administrator's deed, purporting only to convey whatever interest the estate might have, is only a quitclaim deed, which will not support the plea of innocent purchaser unless the proceedings in the probate court and the facts of the entire transaction show that it was the purpose of the vendor to sell, and the intention of the purchaser to buy, the land described in the deed, and not a mere chance of title. *Louisiana & T. Lumber Co. v.*

Southern Pine Lumber Co. (1914) — Tex. Civ. App. —, 171 S. W. 537.

A deed witnessing that for and in consideration of the sum of \$5 and the trust reposed in the grantor by a certain person in his lifetime, "by which I hold in trust for the benefit of the said David Brown, his heirs and assigns, the lands granted to the following persons as their head, which lands have been conveyed to me by the said David Brown or procured by him to be conveyed to me, though absolutely in the deeds, but in fact in trust for the said David Brown, his heirs and assigns, to wit: . . . Now in consideration of the premises I, the said Edwin O. Le Grande, have this day bargained, sold and conveyed, released and forever quitclaimed, the aforesaid lands or the lands granted to the aforesaid persons as their headrights so far as any title now is or ever has been vested in me, unto the heirs of the said David Brown," is a quitclaim deed, and will not support the plea of innocent purchaser. *Niles v. Houston Oil Co.* (1916) — Tex. Civ. App. —, 191 S. W. 748.

A deed reciting that, in consideration of a cash payment and the execution and delivery of a promissory note for an additional sum, the grantor does, "by these presents, bargain, sell, release, and forever quitclaim unto the said" grantee, his heirs and assigns, "all of my right, title, and interest in and to that certain tract and parcel of land" as described, "to have and to hold the said premises, together with all and singular the rights, privileges, and appurtenances thereto in any manner belonging unto the said [grantee], his heirs and assigns forever, so that neither I, the said [grantor], nor my heirs, nor any person or persons claiming under me, shall at any time hereafter have, claim, or demand any right or title to the aforesaid premises or appurtenances, or any part thereof," is shown to have been intended as a quitclaim deed by a clause therein, stipulating that the note given as part of the consideration "is payable only upon the condition that the said J. J. Ellis makes to the said J. M. Benskin, a

warranty deed to section 53 below with clear title thereto" (such section being a portion of the premises described in the deed), and a further stipulation retaining a vendor's lien on the premises until such note should be fully paid, "when this deed shall become absolute as a quitclaim deed." *Barksdale v. Benskin* (1917) — Tex. Civ. App. —, 194 S. W. 402.

A deed by which the grantor did "freely give, grant, sell, convey, and confirm unto" the grantee "all my right, title, and interest in and unto" certain lands, describing them, habendum, "the above entered and bargained premises," etc., with covenants "that until the ensembling of these presents we are the sole owners of the premises, and that they are free from every encumbrance, and we hereby engage to warrant and defend the same against all lawful claims made or suffered by us," is nothing more than a quitclaim, since the word "premises" may and should in the instant case be construed to have reference to such title and interest as the grantors had in the land at the time of the conveyance; and the covenant of warranty must be, therefore, taken in a limited sense as restricted to the grantor's title and interest. *Cummings v. Dearborn* (1884) 56 Vt. 441.

### *III. Instances in which conveyance has been held to be not a quitclaim.*

A deed, the granting clause of which is in these words: "The said parties of the first part have aliened, released, granted, bargained; sold, and by these presents, they do alien, release, grant, bargain, sell, and convey, unto the said parties of the second part, their heirs and assigns, in proportions hereafter specified, the equal undivided one half of all and singular" certain described lands, habendum "to have and to hold all and singular the lands and premises hereby conveyed, to wit, said undivided one half of all the above-described grant of lands, listed and to be listed, and all the right, title, and interest of the party of the first part therein,"—is clearly something more than one of quitclaim and release; it is a deed of bargain and

sale, and will convey an after-acquired title. *United States v. California & O. Land Co.* (1892) 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458, affirming (1892) 1 C. C. A. 330, 7 U. S. App. 120, 49 Fed. 496.

A deed reciting that the grantor has "granted, bargained, sold, and quitclaimed, and by these presents" does "sell, quitclaim, and transfer and deliver . . . all my right, title, and interest . . . to hold all and singular said above-described land, together with all and singular the rights and appurtenances thereto or in any wise belonging unto [the grantee] his heirs and assigns forever," is not a quitclaim, but a conveyance of the land, and will therefore support the plea of innocent purchaser. *Baylor v. Scottish-American Mortg. Co.* (1895) 13 C. C. A. 659, 30 U. S. App. 761, 66 Fed. 631.

A deed, the granting clause of which employs the words, "remit, release, and quitclaim," but which undertakes to convey not only all the right, title, and interest of the grantor, but the land itself, is not a mere quitclaim, and title afterward acquired by the grantor will inure to the benefit of the grantee. *Wise v. Watts* (1917) 152 C. C. A. 195, 239 Fed. 207.

A deed by which the grantor grants, bargains, releases, aliens, and conveys "all of the title, interest, and estate of ourselves, heirs, and assigns, in and to the following described tract or parcel of land," "to have and to hold the said 3,321 acres of land as herein set forth . . . to the said" grantees, their heirs and assigns, "and do hereby warrant and defend said land to said [grantees] from ourselves, heirs, or assigns, and each and every person claiming the same," is a conveyance of the land as distinguished from a mere chance of title, and will support the plea of innocent purchaser. *Gallup v. Huling* (1917) 154 C. C. A. 560, 241 Fed. 858.

A conveyance which purports to "hereby sell and convey unto," as well as to quitclaim, is not a mere quitclaim deed. *Sibley v. Bullis* (1875) 40 Iowa, 429.

A deed is not a mere quitclaim,

passing, not the title of the land but simply the grantor's interest therein, which employs the words, "have bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim . . . all our right, title, and interest, estates, claim, and demand, both at law and in equity, and as well in possession as in expectancy." *Wilson v. Irish* (1883) 62 Iowa, 260, 17 N. W. 511.

A deed is not a mere quitclaim deed conferring no color of title, where it purports to "sell and convey" certain described land, notwithstanding the warranty therein was of the "title to our respective estates therein." *McBride v. Caldwell* (1909) 142 Iowa, 228, 119 N. W. 741.

A deed made by one as executor of another who had a fee-simple title, purporting to be "by virtue of the authority in me vested as said executor," and stating that he has "this day bargained and sold" and does "hereby quitclaim and transfer to" the grantee, his heirs and assigns forever, "all the right, title, and claims that I as said executor have in and to" the lands described, is not a mere quitclaim deed, and hence may constitute color of title. *Southern Iron & Coal Co. v. Schwoon* (1910) 124 Tenn. 176, 185 S. W. 785.

The use of the word "quitclaim" in the granting clause of a deed purporting to "grant, bargain, sell, demise, release, and forever quitclaim . . . the following lot of land," does not make it any the less a conveyance of the lot described, or restrict it so as to make it upon its face convey no more than the interest of the grantor in the property, and one holding such deed may be protected as a bona fide purchaser. *Richardson v. Levi* (1887) 67 Tex. 359, 3 S. W. 444.

A deed purporting to "sell, convey, remise, release, and quitclaim unto" the second party, his heirs and assigns forever, "all our right, title, claim, interest, and demand in and to and for" certain described lands, which, had it stopped there, would have been regarded as a quitclaim, is shown to have been intended to convey the land itself and not merely the

vendor's chance of title, where it contained the words, "to have and to hold the above-described premises unto the said [grantee], his heirs and assigns forever." *Garrett v. Christopher* (1889) 74 Tex. 453, 15 Am. St. Rep. 850, 12 S. W. 67.

But see comment on this case and the decisions which follow it, under heading, "Effect of language used in habendum clause," in I. *supra*.

A deed purporting to "sell, alienate, convey, and quitclaim unto the said [vendee], his heirs and assigns forever, all and singular, the following described tract of land, . . . and all right, title, and interest which I have and devise to the above-described tract of land, by virtue of the survey aforesaid, I sell, convey, and quitclaim unto the said [vendee], from me, my heirs and assigns forever," is a deed for the land, and not a mere quitclaim, and will therefore preclude the assertion of a subsequently acquired title. *Abernathy v. Stone* (1891) 81 Tex. 430, 16 S. W. 1102.

A deed purporting to convey the land and land certificates, and not merely to quitclaim or release the grantor's right, title, and interest in the land, is not a quitclaim deed within the rule that such a deed does not estop the grantor to set up a subsequently acquired title. *Lindsay v. Freeman* (1891) 83 Tex. 263, 18 S. W. 727.

A deed is not a mere quitclaim which contains the clause, "and it is my intention here now to convey to the said [grantee] all the real estate that I own in said town of Paducah, whether it is set out above or not." *Cook v. Smith* (reported herewith) ante, 940.

A deed purporting to convey, not simply the "right, title, interest, or claim" of the grantor to the tract of land, but her entire interest in the tract, and containing a clause of general warranty, is not a mere quitclaim deed, and therefore estops the grantor from setting up an after-acquired title. *Jenkins v. Adcock* (1898) 5 Tex. Civ. App. 466, 27 S. W. 21.

A deed conveying "all that certain real and personal property, to wit, my

right, title, and interest in and to" certain described lands, "to have and to hold the above-described premises" unto the grantees and their heirs forever, is not a mere quitclaim, but conveys the land itself, and hence precludes the grantor from asserting an after-acquired title. *Laughlin v. Tips* (1894) 8 Tex. Civ. App. 649, 28 S. W. 551.

A deed, the granting clause of which is, "I . . . hereby bargain, sell, and convey unto [the grantee] . . . the following property, to wit:" "It being intended to convey all of the surveys now belonging to me as the sole heir of said M. P. King, according to the records of the several counties in which the land lay. To have and to hold unto him the said [grantee], his heirs and assigns forever," is not a mere quitclaim, and will support the plea of innocent purchaser. *Stanley v. Hamilton* (1895) — Tex. Civ. App. —, 33 S. W. 601.

A deed executed for the purpose of partition, being intended to pass the land itself and not merely a claim thereto, is not a quitclaim deed, and one who acquires the land for value thereunder and without notice is an innocent purchaser. *Kempner v. Beaumont Lumber Co.* (1899) 20 Tex. Civ. App. 307, 49 S. W. 412.

A deed made by persons describing themselves as the heirs of a deceased owner, reciting that they "have bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim" "all our and each of our right, title, interest, estate, claim, and demand in and to a certain tract of land" described, "to have and to hold the above-released premises to the said [grantees] their heirs and assigns forever," and made upon payment of full value, is not a "quitclaim" deed in the sense necessary to preclude the defense of innocent purchaser. *Moore v. Swift* (1902) 29 Tex. Civ. App. 51, 67 S. W. 1065.

A deed is not a quitclaim deed though it contains the term, "all my right, title, and interest," where the habendum clause is, "to have and to hold the above-described premises," etc., and there is a general warranty

of "all and singular the said premises." *Merriman v. Blalack* (1909) 57 Tex. Civ. App. 270, 122 S. W. 403; *Merriman v. Blalack* (1909) 56 Tex. Civ. App. 594, 121 S. W. 552.

A deed will not be regarded as a mere quitclaim, under which the grantee is not entitled to protection against a prior conveyance, where, although the term "quitclaim" is employed in the granting clause, the deed undertakes to convey the land itself instead of the "right, title, and interest" of the grantor, with the further recital: "It being understood that the intention of this instrument is to convey to the grantee all the land in either of the leagues above mentioned, which was at any time owned or claimed or stood in the name of D. D. Moore, no matter what the description by metes and bounds . . . might be," and contains a warranty clause, binding the grantor to warrant and forever defend "all and singular the said premises," instead of all his right, title, interest, and claim in and to said premises. *Baldwin v. Drew* (1915) — Tex. Civ. App. —, 180 S. W. 614.

A deed purporting to convey the land itself, although it uses the technical words, "remit, release, and quitclaim," is something more than a quitclaim deed, and estops the grantor to set up an after-acquired title. *West Seattle Land & Improv. Co. v. Novelty Mill Co.* (1903) 31 Wash. 435, 72 Pac. 69.

A deed remising, releasing, and quitclaiming certain lands, and containing a covenant by the grantor that the land was free from all encumbrances made or suffered by him, and that he would warrant and defend the same to the grantee, his heirs and assigns, against the claims and demands of all persons claiming by, through, or under the grantor, must, considering the habendum clause and the covenant as to the title, be regarded as more than a mere release or quitclaim, it being clearly the intention of the parties to convey by the deed all the right, title, and interest of the grantor in the land; and the purchaser accordingly does not take, subject to existing equities. *Bourque v. Chappell* (1900) 2 N. B. Eq. 187. E. S. O.

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ROLL OSBORN  
v.  
CITY OF SHREVEPORT, Appt.

*Louisiana Supreme Court — May 27, 1918.*

(143 La. 932, 79 So. 542.)

**Municipal corporation — undertaking business — restrictions.**

1. The authority conferred upon a municipal corporation to prevent and prohibit the location, construction, or maintenance of all buildings and all establishments where any nauseous or unwholesome business may be carried on, and to restrict the same within certain limits, includes the authority to prohibit the establishment and maintenance of an undertaking business on a residential street where such business has not theretofore been conducted.

[See note on this question beginning on page 966.]

**Injunction — interest to maintain.**

2. An agreement containing features of a promise of sale, an option to purchase, and a lease, but which is not a sale, of a residence on a residen-

tial street within the limits of a municipal corporation, conveys no such property right to the grantee as will entitle him to an injunction restraining the municipal authorities from



prosecuting him for carrying on an undertaking business upon such street, in violation of an ordinance prohibiting the same.

[See 14 R. C. L. 439-442.]

**Nuisance — undertaking business.**

3. In the absence of any prohibitive ordinance, an undertaker may be prevented, agreeably to the maxim, "Sic utere tuo ut alienum non lœdas," from establishing his business among residences where such business has not theretofore been conducted.

[See 20 R. C. L. 455.]

**Injunction — against invalid penal ordinance.**

4. Where rights of property are threatened with invasion by prosecutions under unconstitutional or invalid statutes or ordinances, individuals and officers from whom such threats proceed may be enjoined from attempting to execute them.

[See 14 R. C. L. 365-367.]

**Courts — ousting courts of jurisdiction.**

5. A criminal court actually in the exercise of its jurisdiction cannot be ousted of that jurisdiction by order

of a civil court, possessed of no supervisory jurisdiction over it.

[See 7 R. C. L. 1067 et seq.]

**Injunction — against interfering with right to conduct business.**

6. The right to conduct a particular business in a particular place is not a property right the violation of which by penal municipal ordinance can be prevented by injunction.

[See 14 R. C. L. 365-367.]

**Judicial notice — inconvenience from foul odors.**

7. Courts may take it for granted that, with rare exceptions, human beings are in a greater or less degree made uncomfortable by foul odors, such as those emitted from a badly decomposed corpse.

[See 15 R. C. L. 1101.]

**— effect of undertaking establishment.**

8. The court takes judicial notice that the introduction of an undertaking business into a residence neighborhood where none has previously been established will inevitably depreciate the value of the property, as well as discommode the owners.

[See 15 R. C. L. 1122 et seq.]

**APPEAL** by defendant from a judgment of the Judicial District Court for the Parish of Caddo (Bell, J.) in favor of plaintiff, in an action brought to enjoin the enforcement of an alleged illegal ordinance. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Lewell C. Butler, for appellant:

A citizen who is threatened with arrest for the violation of a city ordinance cannot enjoin the mayor and city commissioners from enforcing an ordinance which he admits is about to be violated by him, merely on the ground that such ordinance is claimed by him to be unconstitutional.

*Mathews v. Farmerville*, 121 La. 313, 46 So. 339; *Murat v. New Orleans*, 119 La. 506, 44 So. 279; *New Orleans Baseball & Amusement Co. v. New Orleans*, 118 La. 228, 7 L.R.A. (N.S.) 1014, 118 Am. St. Rep. 366, 42 So. 784, 10 Ann. Cas. 757.

Messrs. Levy & Crane and Alexander & Wilkinson, for appellee:

The ordinance in question is ultra vires, unconstitutional, null, and void.

*Patout Bros. v. New Iberia*, 188 La. 697, 70 So. 616; *Dobbins v. Los Angeles*, 195 U. S. 241, 49 L. ed. 177, 25 Sup. Ct. Rep. 22; *Crowley v. West*, 52 La. Ann. 527, 47 L.R.A. 652, 78 Am. St.

Rep. 355, 27 So. 53; *Shreveport v. Robinson*, 51 La. Ann. 1314, 26 So. 277.

**Monroe, Ch. J.**, delivered the opinion of the court:

An ordinance of the city of Shreveport (No. 27 of 1915) declares it unlawful "to maintain or operate any undertaking shop or parlor, where bodies are embalmed, kept, or prepared for interment, except on the business streets of the city." It then names, or designates by localities, the business streets and sections, and declares that all others are residential. The petition herein, filed in September, 1917, alleges that, on August 20th of that year, plaintiff had entered into a contract . . . to purchase the Logan residence on Christian street in the residential section of the city, for \$18,500, of which \$500 were paid in cash, and the contract, made part

of the petition, purports to show an agreement whereby he is to pay the balance in eighty-seven monthly instalments, (eighty-six of them for \$208.33 each) or, say \$2,500 per annum; to have right of entry upon the premises in December, 1917, and make the first payment on January 1, 1918; to make certain changes therein, at his own expense; to keep the property insured and deliver the policies to the "vendor;" to have the right to a deed upon paying one half of the purchase price, provided the interest, taxes, and insurance premiums shall have been paid and all other conditions complied with; the vendor, thereafter, to retain a mortgage and lien for the balance; whereby, should the vendee default in the performance of any of the terms agreed on, or alter the property contrary thereto, the vendor, at his option, may declare the contract forfeited and retain all payments made, "as liquidated damages and as rent," and all improvements placed thereon; default, after execution of deed, to mature all payments; and vendee to take reasonable care of property and bear expense of repairs. It appears to have been the intention to execute the instrument in the form of a notarial act, as its recitals begin, "Be it known that before me, Sidney N. Cook, a notary public," etc.; but it bears neither notarial signature nor seal, nor date, save the year 1917, nor does it appear to have been witnessed or registered. There is, however, an admission concerning it to which we will refer a little later. The petition further alleges that plaintiff is an undertaker, conducting one of the largest establishments of that kind in Shreveport, on Texas street (within the business area), and that he has made the purchase in question with the intention of removing and permanently establishing that business on the premises so acquired; that, after making known his intention, he received a communication from the commissioner of public safety, advising him that, if he carried it into

effect, he would be arrested and prosecuted under the ordinance No. 27 of 1915; that the ordinance is void, because ultra vires of the city; and, should the court hold that the city charter purports to convey such authority, is unconstitutional, in that it is "unreasonable, unjust, discriminatory, partial, and in contravention of common right," invades plaintiff's property rights and deprives him of his property without due process of law; and it prays for an injunction, prohibiting the city authorities from arresting and prosecuting petitioner or otherwise enforcing the ordinance, and for judgment decreeing it to be void. A preliminary injunction was issued, after which the city filed an exception to the jurisdiction of the court *ratione materię*, on the ground that the civil remedy of injunction cannot be used to oust the jurisdiction of the criminal court of prosecutions under the ordinance. The exception having been overruled, the city answered, and the case went to trial on the merits and upon certain admissions and oral testimony, to wit: It was admitted that plaintiff purchased the residence on a residential street upon the date and for the purpose alleged; that he was then, and had been for years, conducting his business on a business street; and that he received the notice that, if he established it on the premises alleged to have been acquired by him, he would be prosecuted under the ordinance. It was further admitted that two sanitariums and a hospital, grocery stores, livery stables, laundries, blacksmith shops, garages, restaurants, fruit stands, etc., are already established on residential streets; that hotels, where families reside, and a telephone exchange, in which sixty young women are employed, are established on business streets; and that undertaking establishments are permitted on residential streets in New Orleans, Denver, St. Louis, Cleveland, Dallas, and many other cities in the United States. Seven witnesses were called for the plain-

tiff and none for defendant. Plaintiff himself (as one of the witnesses called on his behalf), gave the following, with other, testimony:

On his examination in chief:

Q. Mr. Osborn, I believe that you testified in this case when it was first up, did you not?

A. Yes, sir.

Q. In the opinion of the court in this case, the court quoted from your testimony which I will read to you: "In embalming shops, are any offensive odors ever emitted when a body is being embalmed? A. No, sir; not after a body is embalmed. Sometimes we have quite a time getting the smell of the disease off, and when we are getting out the gases and getting the smell of disease off, they are not so sweet. Q. Is there any difference in operating on a live patient and on a dead patient, so far as the odor is concerned? A. I don't know; I guess some of those dead bodies are not very sweet, and there is an odor. Q. Would that odor be obnoxious? A. I don't know; sometimes it makes it offensive to us until we can get them under control, and I would think, if the neighbors were where they could smell it, or very close at the time, that they would not enjoy it. I have lived over undertakers' shops all my life, and I haven't minded it." Now, with reference to that testimony, did you mean to convey the idea to the court that there were odors around the undertaking shop?

A. No, sir.

Q. I wish you would explain to the court how long it is before you have gotten a dead body under control, after it is brought into the undertaking shop, irrespective of what its condition is?

A. Well, it is a great deal owing to the body; some bodies are very much decomposed, and, of course, it takes longer than an ordinary body. For instance, we get a floater; but, oftener, we get to work, it takes five or ten minutes.

Q. Now, then, during the year, is

it frequent or infrequent to get bodies decomposed in the morgue?

A. Very infrequent.

Q. How often?

A. I have been where I am at seven years, and have not had except two or three bodies in very bad condition.

Q. If the doors and windows were open, the odors would escape from the room?

A. Perhaps they would, but we do not let them get out; we kill them.

Q. You endeavor to do that?

A. Yes, sir.

Q. You would not swear you could absolutely prevent the odors from escaping?

A. No, sir.

No questions were asked him concerning his contract for the purchase of the residence, and all that we find upon that subject is the admission that he had made the purchase and the instrument by private signature, evidencing an agreement as above stated.

Of the other witnesses who were examined, two were undertakers or embalmers.

One witness gave the following testimony, when examined in chief:

Q. During the time that you have lived here, have you ever lived near an undertaking establishment?

A. Not until I lived at Osborn's.

Q. How long have you lived there?

A. About four years, I think.

Q. You did live next to Roll Osborn's undertaking establishment?

A. Yes, sir; for three years.

The inference that we draw is that the witness was a member of either plaintiff's domestic or business establishment, or both. She testifies that she observed no noxious odors. Another witness is a florist, and another an iceman, both of whom have had (by reason of their businesses, no doubt) frequent occasion to visit plaintiff's establishment. The florist lived for a year, with his family, over an undertaking shop, and suffered no in-

convenience from it, though, being asked whether there were no unpleasant odors coming from it at times, replied: "At times there were, the same as in any other business."

And he further testifies as follows (the question first asked being whether the odors would not be noticeable and objectionable), to wit:

It depends upon how close you came to it. I have been in undertaking establishments . . . when they would bring in a corpse that had been in the water several days in the summer, when the odor was very objectionable; but how it would affect different people I do not know. . . . The odor I do not mind, but I do not know what my neighbor would do.

Q. I will ask you if you have not, in your experience, heard neighbors complain about such matters as that?

A. I don't know that you could call it complaint, but I'll tell you what I have heard. I have heard people say that they would not live next to an undertaker's establishment; but, of course, that is from a sentimental standpoint; but I am taking the proposition that I would not object to it.

The iceman gave the following, with other testimony:

Q. Have you had occasion to go into an undertaker's shop when they brought in bodies decomposed?

A. I have been to Osborn's probably a hundred times.

Q. Have you not, on some occasions, noticed in their building odors that were disagreeable, from these dead bodies?

A. I can't say that I have.

At another time he testifies that he had been a butcher (before he became an iceman), and that he had lived next to plaintiff's place for more than three years; that he did not suffer from obnoxious odors emanating from the place, and was not otherwise inconvenienced; that it was just like living anywhere

else, to him; and the same as to his family.

A young lady operator in a telephone exchange, where there are sixty ladies employed, and next door to which (in the business part of the city) is an undertaker's shop, testifies that she has not been inconvenienced by it and has heard no complaint from the others.

One of the embalmers gave the following, with other, testimony:

Q. You think that you can get the odor from a corpse under control in ten or fifteen minutes, no matter how bad?

A. Not all of them; there may be some that I could not get under control in ten or fifteen minutes, but the majority I could.

Q. Have to be an extremely bad case that you could not get under control in ten or fifteen minutes?

A. Yes, sir. . . .

Q. You said that, in some cases, you could not get the odor under control in ten or fifteen minutes?

A. Perhaps I might, and then again I might not.

Q. Might take longer?

A. Yes, sir. . . .

Q. During the time that you were getting it under control, it would be bad?

A. I expect it would.

The testimony of the other embalmer (and undertakers) is slightly more favorable to the view that there is nothing unpleasant in that business.

The objection which first suggests itself, to the issuance by our civil courts of injunctions prohibiting prosecutions in the criminal courts, is that our written law does not so provide; but, to the contrary, the Constitution itself declares that prosecutions shall be by indictment or information, or (under statute) by affidavit, and it provides for the courts in which they shall be conducted, and confers upon the civil courts no authority to interfere with the exercise of that jurisdiction. In the other states the writ of injunction is a remedy which is

afforded by their systems of equity—systems of jurisprudence, separate, but incomplete, which are “administered side by side with the common law, supplementing the latter where it is deficient, in places overlapping, and there usually prevailing as against the law.” 16 Cyc. 1, 2, note 5 [p. 23]. The different Constitutions of Louisiana have uniformly, and in specific terms, prohibited the introduction into this state of any system or code of laws by general reference thereto, and the prohibition has always been understood as leveled at the common-law and equity systems prevailing in the other states and in England. Hence the sole basis for the exercise by our courts of equity jurisdiction is to be found in the provisions of article 21 of the Civil Code, reading: “In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.”

As, however, the same Constitution and laws which confer upon some of our courts jurisdiction in the matter of the prosecution of crimes and offenses confer upon others jurisdiction in the matter of the protection of property rights, and as the line between the two jurisdictions is not defined in cases where crimes or offenses are confused with property rights, it has been held, not that a court exercising civil jurisdiction will assume to prohibit a court vested with criminal jurisdiction from exercising the same, but that, where rights of property are threatened with invasion by prosecutions under un-

**Injunction—**  
against invalid  
penal ordinance.

constitutional or invalid statutes or ordinances, individuals and officers from whom such threats proceed may be enjoined from attempting to execute them, and that, in the absence of express law conferring that authority upon the civil courts, they may appeal to

“natural law and reason and received usages,” including the practice in the courts of equity in this country and England. *Le Blanc v. New Orleans*, 138 La. 272, 273, 70 So. 212. Turning then to the usages recognized in the courts of equity in this country, we find that in an exhaustive opinion, handed down in 1888, the Supreme Court of the United States, in considering an application for habeas corpus by certain municipal officers, imprisoned for contempt committed in disregarding an injunction issued by a circuit court of the United States, prohibiting them from further proceeding in the matter of the impeachment of a police judge, defined the jurisdiction of a court of equity as follows: “The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property; it has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government.” *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.

The doctrine sustained for a long time by this court is thus stated in *Levy v. Shreveport*, 27 La. Ann. 620 (being an appeal from a judgment enjoining defendant from prosecuting plaintiff under a city ordinance), to wit: “Defendants excepted to the action on the ground that the petition discloses no good cause for the suit and no proper showing is made for the issuance of the injunction. We think this exception should have been sustained. In order to present the question whether the mayor had authority to arrest and fine the defendants for carrying on a private market in

contravention of the ordinances of the city of Shreveport, and the question whether said ordinances are legal, the defendants should have appealed from the judgments imposing the penalty in said ordinances prescribed. They cannot test the authority of the mayor to enforce the ordinances of the city of Shreveport prohibiting private markets, . . . in a proceeding of this kind."

That doctrine was affirmed in many cases, some of which are cited in the opinion in *Le Blanc v. New Orleans*, *supra*.

In 1899, in the case of *L'Hote v. New Orleans*, 51 La. Ann. 96, 44 L.R.A. 90, 24 So. 608, this court maintained the right of the plaintiff to an injunction restraining the enforcement of a certain penal ordinance converting into a "red light" district a section of the city of New Orleans in which he owned and occupied a residence, the penalties of the ordinance having been leveled at others than himself, and he having no opportunity, actual or prospective, to test its validity upon the trial of any prosecution. The language used by the court in dealing with the question of jurisdiction was as follows: "It is clear that the civil district court has no jurisdiction to restrain prosecutions for crime confided by law to the criminal courts. No prevention of such prosecutions is attempted. The plaintiff seeks the injunction for the protection of his rights of property, menaced, as he conceives, by an illegal ordinance. The right of the citizen to that protection is too clear to permit dispute, and, in our view, the petition contains all that is essential to secure relief at our hands, if the allegations in the petition are supported. 1 High, Inj. § 68."

The suit was, however, dismissed, on the ground that the ordinance was valid, and that ruling was affirmed by the Supreme Court of the United States (177 U. S. 587, 44 L. ed. 899, 20 Sup. Ct. Rep. 788).

A few years later, in *Davis & F.* 3 A.L.R.—61.

*Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498, it appeared that plaintiffs were subcontractors, engaged in the erection of gas works for Mrs. Dobbins on a tract of land in Los Angeles, upon which, under an existing ordinance, such works could lawfully be erected, and by virtue of a permit from the proper department of the city government, when the city council passed an amendatory ordinance excluding said land from the territory within which the works were permitted, and prohibiting the erection of the same thereon, under penalty, after which the city authorities caused petitioners' employees to be arrested and prosecuted for violating the prohibition by continuing their work; wherefore, an injunction was prayed for, restraining the prosecutions, but the bill was dismissed by the circuit court, apparently on the ground that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.

On the appeal to the Supreme Court, that august tribunal considered the question of jurisdiction to some extent, but, expressing no conclusion concerning it, affirmed the judgment appealed from on the ground that plaintiffs, being merely subcontractors, presumably, had an action at law against the contractor, and showed no legal interest in the litigation.

In *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18, the plaintiff was the lady whose name appeared in the suit brought by *Davis & Farnum Manufacturing Company*, and her suit was founded on the same cause of action, and, like the other, was dismissed on demurrer; but, having been taken to the Supreme Court of the United States (by writ of error to the supreme court of California), it was there decided that the enactment of the amendatory ordinance by the city council of Los Angeles

was not a competent exercise of the police power, and that, taking the allegations of plaintiff's bill to be true, she had the right to proceed with the work without interference by the city authorities in the form of arrest and prosecution of those in her employ.

It is to be inferred that plaintiff herself was not threatened with prosecution, under the amendatory ordinance, and the questions whether she could have found an adequate remedy against such prosecution in the criminal court, and whether, that being the case, she was entitled to an injunction, staying the prosecution, were not considered in the body of the opinion; all that is said upon that subject being found in the closing paragraph, which reads as follows: "It is well settled that, where property rights will be destroyed, unlawful interference, by criminal proceedings, under a void law or ordinance, may be reached and controlled by a decree of a court of equity. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207-218, 47 L. ed. 778-780, 23 Sup. Ct. Rep. 498, and cases therein cited."

It was accordingly held that the demurrer should have been overruled and the city put upon its answer, and the case was remanded for further proceedings not in conflict with the opinion.

In *New Orleans Baseball & Amusement Co. v. New Orleans*, 118 La. 228, 7 L.R.A. (N.S.) 1014, 118 Am. St. Rep. 366, 42 So. 784, 10 Ann. Cas. 757, it appeared that plaintiff had purchased for \$10,000, a square of ground within corporate limits, and which was lawfully available for its purposes, with the intention of operating a baseball park, and that the city council thereafter adopted an ordinance declaring the operation of such parks unlawful within a territory including the square so purchased, and prescribing a penalty therefor; whereupon, plaintiff obtained a preliminary injunction from the civil district court, prohibiting the enforcement of the ordinance, and defend-

ant applied to this court for a writ of prohibition, alleging that the civil district court was without jurisdiction to issue the writ. It was here held, however, on the authority of the *L'Hote and Dobbins Cases*, that, taking the allegations of the petition to be true, the ordinance was personal, arbitrary, and discriminatory, and showed injury to property rights resulting from its enactment, and that a proper case for the issuance of an injunction was disclosed.

In *Le Blanc v. New Orleans*, 138 La. 243, 70 So. 212, *supra*, plaintiffs (two in number) applied for an injunction against the enforcement of what is known as the "jitney ordinance," attacking it as unconstitutional, unreasonable, discriminatory, etc., and alleging that one of the two was being prosecuted under it, in the recorder's court. To which the city excepted that the court was without jurisdiction, and that the petition disclosed no cause of action. The preliminary injunction was, however, issued, and application made to this court for prohibition, which was granted; it being held that the petition disclosed no invasion of a property right, and hence that it was immaterial whether the ordinance was valid or invalid, or whether an adequate remedy could be found in the courts vested with jurisdiction to enforce it.

In *Patout Bros. v. New Iberia*, 138 La. 697, 70 So. 616, this court maintained an injunction against the threatened enforcement of an ordinance making it unlawful for anyone to "begin, erect, maintain," etc., a livery stable in the residential part of the city, without first obtaining the consent of a majority of the persons owning property within 300 feet of the site, or proposed site, of such stable, and a permit from the city trustees; the facts being that plaintiffs were operating their stable and proposed to enlarge it, when they were threatened with prosecution under the ordinance, whereupon they brought suit, alleg-

ing that the ordinance was void because, at the time of its adoption, the city was without authority to regulate stables or fix the limits within which they might be conducted. It does not clearly appear from the opinion whether plaintiffs were in business prior to the adoption of the ordinance or not; but, from the statement that the ordinance had been in existence long before they sought to enlarge the stable, we infer that, in its original shape, it pre-existed the ordinance. However that may be, it was held that the ordinance was unauthorized; that plaintiffs had a property right in which they were entitled to protection; and that the injunction was the proper remedy.

We find nothing in the cited cases which authorizes the conclusion that a criminal court, actually in the exercise of its constitutional jurisdiction, can be ousted of that jurisdiction by the order

**Courts—ousting  
courts of  
jurisdiction.**

of a civil court possessing no supervisory control over the other.

The most that can be said is that, before either court is seised of jurisdiction, quoad a particular case, involving both an offense and a right of property, the question of the jurisdiction is an open one; and that, where a municipal ordinance, carrying a penalty, is adopted, is believed to be unauthorized and illegal, and its enforcement will destroy or invade a property right, it is open to the possessor of the right to appeal to the tribunal vested with jurisdiction of such matters for protection, and, pending the disposition of the question so presented, that tribunal may protect its jurisdiction by prohibiting the adverse litigant from carrying the same question into the criminal court. We do not

**Injunction—  
against interfer-  
ing with right  
to conduct  
business.**

find that the right to conduct a particular business in a particular place, whether in viola-

tion of a municipal ordinance, or to the prejudice of the rights of oth-

ers, is a property right within the meaning of those cases.

Applying the conclusions thus reached to the case at bar, we are of opinion that plaintiff has failed to show such a right of property <sup>—interest to maintain.</sup>

as to entitle him to the injunction that he has obtained. It is true that he alleges, and that it is admitted, that he purchased the residence described in the petition; but he makes part of his petition the instrument relied on as evidencing his purchase, and the one thing which it makes perfectly clear is that it was not intended to operate as a sale, though it may be construed as a promise of sale, an option, or, perhaps, a lease, since it declares that, in the event of plaintiff's compliance with certain conditions, the other party will execute a deed, and of his noncompliance with those conditions, the payments made by him may be regarded as rent, and one who claims title under a written instrument should require no deed, nor can he as owner be indebted to himself for rent. The fact that the instrument was not recorded is further evidence of its intention, since, as the matter stands, the alleged vendor can at any time, and the alleged vendee cannot, sell or mortgage the property to a third person.

In the cases to which we have referred, the property rights which were sought to be protected were acquired before the enactment of the ordinances by which they were invaded, and the ordinances were in the nature of ex post facto enactments which made it an offense to do with property that which did not constitute an offense when it was acquired; whereas, in the instant case, the agreement upon which plaintiff relies was entered into by him, say, two years after the enactment of the ordinance, and, as we think, with a view to its possible or probable enforcement as a valid enactment, which, whatever may be said in regard to the rights of the owner of the property, hardly pre-



sents a case for equitable consideration on behalf of the plaintiff.

If, however, that view of the matter should be erroneous, we are still of opinion that plaintiff would not be entitled to the injunction, for the

Municipal corporation—  
undertaking  
business—  
restrictions.

reason that we are not convinced that the enactment of the ordinance was beyond the police

power of the city of Shreveport.

The case appears to have been presented to the district court as though the plaintiff and the city were the only parties in interest, and theirs the only property rights to be considered, and none of the residents, in the midst of whom it is proposed to establish plaintiff's mortuary business, were given a hearing, nor were any witnesses summoned in their behalf to testify either as to the probable effect of the intrusion upon the value of their property or upon their future enjoyment of life in their homes. We have been at some pains, however, to consider carefully the testimony of the witnesses called by plaintiff, and we learn from some of them that a swollen corpse, salved from the river in midsummer, emits an unpleasant odor, but that they, being accustomed to handling such objects, do not mind it; from others, that they have lived in the neighborhood of undertaking establishments and have found them not different from other places of residence, occasional odors from decayed corpses to the contrary notwithstanding; and from still others that, living in such proximity, they have observed no odors and suffered no inconvenience. Where, however, in cases involving the suppression of nuisances, witnesses testify that a stench is emitted from a particular establishment, no one thinks it necessary to prove that it is unpleasant or nauseating to the vast majority of those whom it reaches, and who, not being employed in the establishment, have not become inured to it. The courts, we think, may

safely take it for granted that, with rare exceptions, civilized human beings are in a greater or less degree made uncomfortable by foul odors, and by none more so than by those emitted from a badly decomposed human body.

Judicial notice—  
inconvenience  
from foul  
odors.

It may be that bad cases are infrequent in plaintiff's establishment, and that the stench emitted by them is "brought under control" as rapidly as possible; but a single experience of air so laden would, as we imagine, more than satisfy the average individual for the period of his natural life, and fifteen minutes would be quite long enough for the experience.

We find no reason to doubt that plaintiff conducts his business after the most approved methods and with as little offense to those by whom he may be surrounded as the business will admit; but, to the incidents mentioned, there is to be added the fact that the business itself is a gruesome one, and that the psychological influence of being confronted, and having one's family confronted, day after day and at all hours of the day, with death, and its woeful trappings in the shape of hearses and other vehicles, carrying in and out of a neighboring building the mortal remains of some fellow being, is no more enlivening nor wholesome than would be the constant presence of the same corpse, or the immediate proximity of a graveyard; and we take judicial notice that the introduction of such a business into a residential neighborhood, where none has previously been established, will inevitably depreciate the value of the property as well as discommode the owners. The case is therefore one in which the maxim, "Sic utere tuo," etc., is particularly applicable, and if the city of Shreveport had no power to enforce that maxim and protect its citizens in the peace and quiet of their homes, they would be entitled to much sym-

—effect of  
undertaking  
establishment.

pathy. But we find that Act 220 of 1912 (amending the charter of that city), § 1, ¶ 21, after conferring on the council the power to "prohibit and prevent" various specified businesses, concludes with the following language: "All establishments where any nauseous or unwholesome business may be carried on shall be restricted to certain limits within the city, to be determined by the city council." And we think the business here in question is subject to the authority thus conferred.

But, even if that were not the case, and there were no ordinance upon the subject, we can, at present, see no sufficient reason why the residents of the threatened district should not be protected from plaintiff's proposed invasion, under the general provisions of law which safeguard the citizen, in his home life, not only against nuisances per se, but against occupations which become nuisances by reason of the inappropriateness of the places in which they are conducted. The view thus suggested is ably expressed by the supreme court of Michigan in an opinion, the official report of which is not at hand, but which counsel for defendant has printed in full, as his brief, and which is said to have been handed down in a case entitled *Saier v. Joy*, on September 27, 1917 [198 Mich. 295, L.R.A.1918A, 825, 164 N. W. 507].

The learned court states that the industry of counsel and its own investigations had disclosed but two cases directly in point—the one, *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490, and the other, *Densmore v. Evergreen Camp*, 61 Wash. 230, 31 L.R.A.(N.S.) 608, 112 Pac. 255, Ann. Cas. 1912B, 1206—and that, in the case first mentioned, it appeared that defendant had been carrying on his business in its then location, in what was said to be a "populous part of the city," that a portion of the complainant's house was occupied for business purposes, that the case

turned largely upon the question whether the undertaking business was a nuisance per se, and that complainant appeared to be of a supersensitive temperament; and the injunction was denied.

In the last case mentioned, the injunction was granted, on the ground that the business might become a nuisance by reason of its location (in a residential neighborhood) and surrounding circumstances.

Other cases mentioned are *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654, in which it was said: "But, on the other hand, it [the law] does not allow anyone, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity. The maxim, 'Sic utere tuo ut alienum non lædas,' expresses the well-established doctrine of the law;" and *Barth v. Christian Psychopathic Hospital Asso.* 196 Mich. 642, 163 N. W. 62, in which the erection and maintenance of a private insane asylum in a strictly residential district was prohibited, and it was said, inter alia: "It must be conceded that the establishment of such an institution in close proximity to the residences of the plaintiffs, which are in a residential section of the city, would destroy the comfort, the well-being, and the property rights of the plaintiffs."

In the case before it, after finding that the danger alleged by plaintiff, of diseases being communicated from the dead bodies taken to the premises of defendant, was negligible, the learned court of Michigan went on to say: "We are not so well satisfied that noxious odors will not escape defendant's premises. Formaldehyde is extensively used by them in embalming, deodorizing, and sanitation. The more thorough and complete the sanitation the more formaldehyde is used. It gives off a pungent odor, and it is quite doubtful to our minds that this odor

Nuisance—  
undertaking  
business.

would fail to reach adjacent houses situated as close as these houses, especially in the summer time, when plaintiffs would expect to have, as they have a right to have, their windows open."

The court was not convinced that undertaking establishments, with morgues attached, were located in other cities in strictly residential districts, and expressed its views on the psychological aspect of the case as follows: "We think it requires no deep research in psychology to reach the conclusion that a constant reminder of death has a depressing influence upon the normal person. Cheerful surroundings are conducive to recovery for one suffering from disease, and cheerful surroundings are conducive to the maintenance of vigorous health in the normal person. Mental depression, horror, and dread lower the vitality, rendering one more susceptible to disease, and reduce the power of resistance. There is an abundance of testimony in this record confirmatory of this, and it is a matter of common knowledge."

And reference is made to funerals, funeral mourners, the taking in and out of the dead, the funeral music, the unknown dead lying in the morgue, the visitors seeking to identify them, and various other reminders of mortality incidental to an undertaker's establishment and likely to produce a depressing effect.

"We cannot overlook the right to engage in a lawful trade," said the court, "nor the fact that the conduct of the undertaking business is not only lawful but highly necessary, nor that it is not a nuisance per se. Nor can we overlook the right of the citizen to be protected in his home, and his right to the enjoyment thereof of that repose and comfort which are inherently his. The question here is not the restraining of defendant's business, but the restraint of its intrusion into a long-established and strictly residential district."

The conclusion reached was that the case appealed to the conscience and discretion of the court, and called for injunctive relief.

In the case that we are now considering, the positions of the litigants being reversed, and the injunction issued by the District Court operating to permit the establishment of the undertaking business upon a residential street, for the reasons thus assigned, it is ordered and decreed that the judgment appealed from be annulled, the injunction herein issued dissolved, the ordinance in question sustained as a valid enactment, plaintiff's demands rejected, and this suit dismissed at his cost.

Petition for rehearing denied June 29, 1918.

## ANNOTATION.

### Restrictions on location of business of undertaker.

It will be seen that it is held in the reported case (*OSBORN v. SHREVEPORT*, ante, 955) that under statutory authority to restrict the location of nauseous or unwholesome business a municipality may restrict the business of undertaker.

In *Koebler v. Pennewell* (1906) 75 Ohio St. 278, 79 N. E. 471, a suit to enjoin an undertaking business, the court stated that a statute which provides that it shall be unlawful for any person or persons, company, associa-

tion, or firm to establish a morgue on any street or part of a street upon which are dwelling houses, unless the owners or occupants of dwelling houses within 200 yards of said proposed morgue give their written consent thereto, does not prohibit the location of an undertaking establishment on a residence street, nor make it unlawful to receive, care for, and keep temporarily in an undertaking establishment thus located, in a private room thereof and unexposed to

public view, the bodies of known and identified dead, which are from time to time taken to such undertaking establishment at the instance and request of relatives or friends of the deceased, that funeral services over the dead bodies may be held and conducted at that place.

As bearing upon the question under examination reference may be here made to the views of the courts in regard to undertaking establishments as nuisances.

In *Saier v. Joy* (1917) 198 Mich. 295, L.R.A.1918A, 825, 164 N. W. 507, it was held that the opening of a morgue and undertaking establishment in a residence district, to the depreciation of the value of neighboring property, may be enjoined as a nuisance.

So, in *Densmore v. Evergreen Camp* (1910) 61 Wash. 230, 31 L.R.A. (N.S.) 608, 112 Pac. 255, Ann. Cas. 1912B, 1206, it was held that the maintenance of an undertaking establishment in a residence part of a city within a few feet of neighboring residences may be enjoined by their owners as a nuisance, in view of the probable interference with the comfortable enjoyment of their property, by the depressing effect of the reminders of mortality, and the escape of noxious odors and gases from the chemicals used in the business; and it is immaterial that the owner of the business intends to reside in the upper stories of the building.

But in *Westcott v. Middleton* (1887) 43 N. J. Eq. 478, 11 Atl. 490, the court refused an injunction sought against the maintenance of an undertaking establishment on the lot adjoining the one on which the plaintiff resided. It appeared that no noxious vapors or

germs of disease were noticed as a result of the business, and that the main feature of offensiveness resulted from the plaintiff's sensitive nature and repugnance to anything pertaining to death. In dealing with the contention that the business was a nuisance per se, and after referring to the general rules as to what constitutes such a nuisance, the court stated that the injury must be physical, as distinguished from purely imaginative, and that before a trade or business can be declared to be a nuisance per se, it must be made to appear that it necessarily works injury, discomfort, or annoyance to the property or persons of citizens generally, who may be so circumstanced as to come within its influence; and said: "The results of my inquiries are that, while the defendant has no right to conduct his business so as to endanger or threaten the health of the complainant, or to make his home uncomfortable, either by filling the air with noxious vapors, or the germs or seeds of disease, the evidence does not show that he has done either, and that the business of an undertaker is not a nuisance per se." This case was affirmed without opinion (1888) 44 N. J. Eq. 297, 18 Atl. 80.

It may be noted that in *Rowland v. Miller* (1893) 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. 765, it was held that an undertaking establishment in which human dead bodies are prepared for burial or other sepulture, and sometimes subjected to embalming and post mortem examination, is a business "injurious or offensive to the neighboring inhabitants," within the terms of a restrictive agreement, although it may not constitute a legal nuisance. B. B. B.

JOHN M. WALKER, Plff. in Certiorari,  
v.  
STATE OF ARKANSAS.

*Arkansas Supreme Court — February 17, 1919.*

(— Ark. —, 209 S. W. 86.)

**Bail — appeal from conviction of murder — effect of life sentence.**

1. One sentenced to life imprisonment upon recommendation of the jury, upon conviction of murder for which the death penalty might have been inflicted, is entitled to bail pending appeal under a statute allowing bail except in appeals from conviction of a capital offense.

[See note on this question beginning on page 970.]

**Appeal — effect on conviction.**

2. A conviction of a criminal offense is not vacated by an appeal and

supersedes, but proceedings under the judgment are merely stayed.

[See 2 R. C. L. 117 et seq.]

(Smith, J., dissents.)

**CERTIORARI** to the Circuit Court for Clay County to review a judgment refusing a motion to fix bail, pending appeal by defendant from a judgment convicting him of murder in the first degree. *Order admitting defendant to bail.*

The facts are stated in the opinion of the court.

McCulloch, Ch. J., delivered the opinion of the court:

Appellant was indicted for the crime of murder in the first degree, and on the trial of the case was convicted of that offense, but the verdict of the jury fixed the punishment at imprisonment in the state penitentiary for life.

The court overruled appellant's motion for a new trial, and granted an appeal to this court, but refused, on motion of appellant's attorneys, to fix bail.

The statute provides that a defendant in a criminal case, on appeal to the supreme court, "shall be permitted to give bail pending the appeal in such amount as the court may think proper and safe, in all cases, except in appeals from a conviction of a capital offense." Kirby's Dig. § 2587. The learned circuit judge refused bail on the ground that appellant was convicted of a capital offense, within the exception specified in the statute. The general assembly of 1915 enacted a statute (Acts 1915, p. 774) providing that in the trial of cases where the

punishment was death, as the law then stood, the jury should have the right "to render a verdict of life imprisonment in the state penitentiary at hard labor."

It was pursuant to the authority of that statute that the jury assessed the punishment in this case at life imprisonment instead of imposing the death sentence.

The question presented now is whether, notwithstanding the imposition of the lower penalty, the appeal comes within the exception in the statute allowing bail on appeals in criminal cases.

We do not think that the case comes within the exception, and that appellant is entitled to bail. What the lawmakers intended by this statute was to allow bail in all cases except where capital punishment was imposed by the judgment appealed from. The statute deals solely with the question of appeals, and measures the right of an appellant to bail according to the severity of the punishment imposed under the judgment of conviction, and not by the gravity of the original charge in the

indictment. Conceding, without deciding, that if the judgment be reversed, and the cause remanded for a new trial, the jury would have the power, upon another conviction of murder in the first degree, to impose the death penalty notwithstanding the fact that the former jury had imposed the lesser penalty, still the judgment now before us is not one which constitutes a capital conviction, for the simple reason that the severest penalty of the law is not imposed.

The judgment is not vacated by the appeal and supersedeas, but the effect of the appeal and supersedeas

Appeal—effect  
on conviction.

is only to stay proceedings under the judgment. *Miller v. Nuckolls*, 76 Ark. 485, 113 Am. St. Rep. 101, 89 S. W. 88, 6 Ann. Cas. 513; *Boynton v. Chicago Mill & Lumber Co.* 84 Ark. 203, 105 S. W. 77; *Foohs v. Bilby*, 95 Ark. 302, 129 S. W. 1104.

The attorney general relies upon the case of *Cæsar v. State*, 127 Ga. 710, 57 S. E. 66, as sustaining the contrary view. That case involved the interpretation of a provision of the Georgia Constitution, which conferred jurisdiction on the supreme court "in all cases of conviction of a capital felony," and the court held that a conviction of murder in the first degree, with the imposition only of life imprisonment, where either that punishment or the death penalty might be imposed by the trial jury, was "a conviction of a capital felony," within the language of the Constitution, so as to confer jurisdiction on the supreme court.

The reasoning of the court in that case is not without some force in the present one, but the question there involved was altogether different from the one now before us. The constitutional provision under consideration in that case involved the jurisdiction of the court in a certain class of cases, whereas we are dealing with a statute which concerns the right of bail, and we

think that the legislative intent is clear that bail should be allowed except in cases where the appellant rests under a conviction imposing the death penalty.

An order will therefore be entered here admitting appellant to bail.

Smith, J., dissenting (filed February 24, 1919):

The majority say that "what the lawmakers intended by this statute was to allow bail in all cases except where capital punishment was imposed by the judgment appealed from." Possibly so, but that is not the language of the statute. The statute is that bail shall be permitted "in all cases except in appeals from a conviction of a capital offense." So that the question, properly stated, is not whether a capital sentence has been imposed, but whether there has been a conviction of a capital offense, and as thus stated, the question, it would seem, is much simplified. There is no right of bail unless the statute gives it, as the constitutional guaranty reads as follows: "All persons shall, *before* conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." Const. § 8, art. 2.

In the transcript filed in this case, we read the following verdict: "We, the jury, find the defendant guilty of murder in the first degree. . . ." That murder in the first degree is a capital offense is a proposition which will not be questioned. Appellant has been convicted of that offense. It is true the death sentence was not imposed, but it could have been imposed by the jury. In the case of *Bell v. State*, 120 Ark. 538, 180 S. W. 190, in construing this statute we said: "The manifest purpose of the legislature was not to abolish capital punishment, but to provide also another method of punishment if the jury so ordained."

And in *Kelley v. State*, 133 Ark. 261, 202 S. W. 54, where the same statute was before us, we said: "It

is strenuously insisted by learned counsel for appellant that the act is mandatory, and imposes a duty upon the jury to fix the punishment either of death or life imprisonment. We think the plain language of the statute is against the contention. It, in so many words, extends a privilege or right to a jury to impose a lighter punishment than death. In case the clemency is not extended, the punishment fixed by law follows the verdict."

So that, while a jury may or may not assess the death punishment upon a conviction of murder in the first degree, that crime remains a capital one, because death is still a punishment fixed by law for its commission.

I agree with the majority of the court that the reasoning of the Georgia court is not without force in the instant case, although the facts are different. Discussing the principle involved here, that court said: "If the statute imposes death as a punishment, and provides for no other punishment, of course the offense is a capital felony. The question now is, when the statute provides that the punishment shall be death or imprisonment, as the jury shall recommend, and the jury recommends imprisonment, whether the verdict of guilty of the offense

is a conviction of a capital offense. In our view, the expression, 'capital felony,' when used in our law, is merely descriptive of those felonies to which the death penalty is affixed as a punishment under given circumstances, to distinguish such felonies from that class in which, under no circumstances, would death ever be inflicted as a penalty for the violation of the same. Felonies, in the Penal Code, are thus divided in two classes—capital felonies and felonies not capital. If under any circumstances, the penalty of death can be inflicted, the offense is capital, whether it is actually inflicted in a particular case or not. If under no circumstances the death penalty can be inflicted, the offense is not capital. If one were asked as to what are the capital felonies under the law of Georgia, the immediate reply would be treason, murder, arson, rape, etc.; still, in all of these cases, capital punishment cannot be inflicted if the jury trying the offender shall recommend imprisonment for life as a punishment." *Cesar v. State*, 127 Ga. 712, 57 S. E. 67.

I am of the opinion that the court below in refusing bail correctly interpreted the statute, and I, therefore, dissent.

### ANNOTATION.

#### **Bail: imposition of life sentence as affecting capital character of offense.**

The reported case (*WALKER v. STATE*, ante, 968) appears to be the first directly to pass upon the question whether the fact that the jury, in a case where the capital penalty might have been imposed, have assessed the defendant's punishment at imprisonment for life, renders the offense no longer capital, and removes the defendant for the time being from the category of capital offenders, and so entitles him to bail.

The point was, however, raised in *Ex parte Heath* (1910) 227 Mo. 393, 126 S. W. 1031, and *Butt v. State* (1915) 181 Tenn. 415, 175 S. W. 529;

but the necessity for deciding it was avoided by the court's conclusion that the constitutional right to be admitted to bail except for capital offenses, invoked by the petitioner, did not extend beyond the time of conviction. In the case last cited, however, the court said: "Under the practice obtaining in this state it is competent for the trial judge, or for this court on appeal, to disregard the finding of mitigating circumstances by the trial jury, and to order the infliction of the death penalty. Hence, there continues to be involved a 'capital offense,' within the meaning of the consti-

tional provision now under consideration. The mere fact that the functionary empowered to assess punishment may impose either life imprisonment or the death penalty does not make the offense any the less capital within the meaning of the law."

The fact that the penalty which may be imposed may be, instead of death, imprisonment for life, or for a term of years, has been held not to change the capital character of the offense, so as to entitle a person awaiting trial for such offense to bail, under a constitutional provision that all persons shall be bailable except for capital offenses. *Ex parte McCrary* (1853) 22 Ala. 65; *Ex parte McAnally* (1875) 53 Ala. 495, 25 Am. Rep. 646; *Ex parte Fortenberry* (1876) 53 Miss. 428; *Ex parte Dusenberry* (1888) 97 Mo. 504, 11 S. W. 217.

Where a conviction has been set aside upon appeal, the case, for the purpose of determining the defendant's right to bail, stands as if it had not been tried. *Ex parte Patterson* (1917) 81 Tex. Crim. Rep. 26, 193 S. W. 146.

And so, where a person convicted of any offense punishable with imprisonment at hard labor may not be admitted to bail, one convicted of an offense which may be punished by hard labor is not entitled to bail between the time of his conviction and that

when sentence is to be passed. *State ex rel. Collette* (1902) 106 La. 221, 30 So. 746, 12 Am. Crim. Rep. 51.

It has been held that since a conviction of a lesser degree of homicide is an equivalent of acquittal of the higher degree, for which the defendant may not again be tried, one who, on being tried for murder in the first degree was convicted of murder in the second degree, is entitled to admission to bail pending appeal. *Ex parte Spivey* (1912) 175 Ala. 43, 57 So. 491; *Ex parte Moore* (1904) 46 Tex. Crim. Rep. 417, 80 S. W. 620.

Though the point is not germane to the subject of this note, the reader may be interested to know that it has been held that the effect of the abolition of capital punishment is to extend the constitutional right to bail for noncapital offenses to persons charged with offenses formerly punishable with death (*Re Welisch* (1917) 18 Ariz. 517, 163 Pac. 264 (obiter); *Re Perry* (1865) 19 Wis. 676), except where the repeal of the death penalty and the enactment of the amendment imposing the penalty of imprisonment for life do not affect offenses previously committed, although the prosecution therefor may have been instituted subsequently to the amendment (*Re Schneck* (1908) 78 Kan. 207, 96 Pac. 48). E. S. O.

LEVI M. TODD, Appt.,

v.

STATE BANK OF EDGEWOOD.

*Iowa Supreme Court—December 20, 1917.*

(— Iowa, —, 165 N. W. 593.)

**Bills and notes — land contract — bona fide purchaser — condition precedent.**

1. A bank which, upon purchasing notes given for the purchase price of land, an unencumbered title to which is to be conveyed by the payee as a condition to the payment of the notes, takes over the land contract, is not entitled to enforce the notes if a good title to the land cannot be conveyed when the notes mature, although there had been no breach when the notes were purchased by the bank.

[See note on this question beginning on page 987.]



**Appeal — form of action — right to raise question.**

2. Objection that a case is not properly brought on the equity side of the court cannot be raised on appeal if it was brought and tried as an equity

suit without objection in the lower court.

[See 2 R. C. L. 81.]

— **finding in equity case.**

3. The finding in an equity case is not binding on appeal.

[See 2 R. C. L. 203, 204.]

(Salinger, J., dissents.)

**APPEAL** by plaintiff from a decree of the District Court for Delaware County dismissing a petition filed to enforce an agreement to return to him, on demand, money on deposit in the defendant bank. *Reversed.*

**Statement by Weaver, J.:**

Action to enforce an agreement whereby it is claimed defendant received a sum of money originally deposited with the Delaware County State Bank, and afterwards taken over by defendant upon an agreement to return the same to plaintiff, on demand, if plaintiff did not receive title to certain land in the state of Texas, which plaintiff had purchased from the American & Canadian Land Company. It is alleged that this money was deposited in the banks as a tender of the amount due on certain notes given for the Texas land, with a demand for the fulfilment of the contract, which was never done; and the suit was primarily to recover the amount of the tender and deposit from the bank. Defendant bank admitted the tender and deposit, said it was made to stop interest on the notes, and also pleaded a counterclaim upon the notes. It also alleged that plaintiff was a nonresident, and it sued out a writ of attachment, which was levied upon the fund. To this plaintiff replied by alleging that the consideration for the notes had failed, and that defendant was not a bona fide holder thereof, but had notice when it purchased that the notes were given for the purchase price of lands, title to which thereafter entirely failed. Defendant averred that it was a bona fide holder without notice of any infirmities, and also pleaded an estoppel on plaintiff to deny the validity of the notes. Other issues were tendered which will be noticed in the body of the opinion. The case was tried as

in equity, resulting in a decree dismissing plaintiff's petition, finding for the defendant on its counterclaim, and sustaining the attachment.

Messrs. Yoran & Yoran and J. W. Arbuckle for appellant.

Messrs. W. H. Norris and Grimm & Trewin for appellee.

Weaver, J., delivered the opinion of the court:

In March of the year 1909 plaintiff and one F. B. Peet separately entered into written contracts with the American & Canadian Land Company of Tipton, Iowa, for the purchase of certain Texas lands. Plaintiff Todd agreed to pay \$3,600 for his tract, \$800 of which he paid in cash, and the balance of \$2,800 was represented by two negotiable promissory notes in the sum of \$1,400 each, maturing March 18, 1912. Peet agreed to pay \$7,200 for his land, \$3,200 of which was paid by a transfer of land to the company, and the remainder was represented by negotiable notes in the sum of \$1,000 due March 18, 1912, \$1,000 due March 18, 1913, \$1,000 due March 18, 1914, and a note for the same amount due March 11, 1911, was paid by Peet. The five notes above described are made the subject of counterclaim against the plaintiff, he having taken over the Peet contract and assumed and agreed to pay the notes. The American & Canadian Land Company executed contracts with the purchaser of the land wherein it was agreed, among other things:

"In consideration of the pay-

ments above mentioned the vendor agrees to convey to purchaser in fee simple, free and clear of all encumbrances, the following described real estate, to wit: Southeast quarter section No. 5 in block 6, Randall county, state of Texas, U. S. A.

"It is further agreed that on the date of the last payment mentioned herein, in case same shall have been fully paid, purchaser shall have a warranty deed to the above-described property, together with an abstract of title showing title free and clear from all encumbrances in vendor; said abstract to be approved by Gustavus, Bowman, & Jackson, of Amarillo, Texas, and when so approved to be final and conclusive upon the purchaser, and his money should be due and payable; all money paid under this contract to be returned if warranty deed and abstract are not furnished as herein provided."

Some time in April, 1909, one W. R. Jameson, acting as agent for the land company, entered into negotiations with the defendant bank to sell it the Todd and Peet notes, and not later than April 19, 1909, defendant purchased all these notes, which were duly indorsed to it by the original payee. It paid cash for the notes, and took assignments of the land contracts for security. There is some dispute in the record as to the exact date when the bank took over the contracts, but, notwithstanding the claim of some of the bank officers that the contracts were not received until after the purchase of the notes, the record as a whole shows beyond reasonable doubt that they are mistaken in this respect, and that the contracts were in fact assigned and delivered to the bank together with the notes. March 18, 1912, plaintiff made a tender of the full amount called for in his notes, and also the ones executed by Peet, and demanded a deed to the land covered by the contracts. This demand was made of the appellee bank, but it could not make the title, and the money so tendered was deposited in the Delaware State

Bank, and afterwards, by written agreement, transferred to the appellee bank. The tender covered the amount due and to become due on the notes at the time it was made. It was stipulated in the agreement under which the tender and deposit were made as follows:

"Both the State Bank of Edgewood and Levi M. Todd are desirous of avoiding any loss to anyone of the interest on the amount still remaining unpaid on said notes and contracts, and it is therefore agreed between the said State Bank of Edgewood and the said Levi M. Todd that the amount above stated, offered to be paid by the said Levi M. Todd and by him tendered, which is now on deposit, as above stated, with the Delaware County State Bank, shall be deposited by him with the State Bank of Edgewood under the following agreement and understanding, that is to say:

"That so long as the same is left by the said Levi M. Todd with said bank the said deposit shall have the same force and effect with relation to the tender and offer of payment above made as though the same had remained on deposit in the Delaware County State Bank, and the said State Bank of Edgewood agreed to thus accept the same as a deposit by the said Levi M. Todd for the purpose stated, and agrees that so long as the same is left on deposit with said bank there shall be no interest due or to be collected on the said notes of F. B. Peet and Levi M. Todd now held by said bank, and to pay which the said amount was offered in payment and so tendered, and each party further agrees that the making of this agreement to deposit said money with the State Bank of Edgewood, the depositing of the same, and none of the negotiations with reference to this agreement or deposit, shall be considered or held to in any way influence or change the rights or interests of either party in the ultimate determination of any question to be determined with reference to the obligations of said Levi M. Todd

on said notes, or his rights under said contracts, or his right to demand and receive deed with perfect title to the property purchased under said contract before the delivery and payment of the amount to be paid as evidenced by said notes.

"It is understood that in the final settlement with the American & Canadian Land Company said company will pay all interest from the time of tender, and it is agreed that such interest, when paid, shall be for the time the deposit is kept in the State Bank of Edgewood, to be by it paid to Levi M. Todd.

"And it is further specifically agreed that the said Levi M. Todd shall have the right to withdraw said deposit at any time that he sees fit to do so, and the said State Bank of Edgewood agrees to pay the same to him on demand at the Delaware County State Bank in Manchester, Iowa."

This action is bottomed primarily on the last paragraph of this stipulation. The agreement was entered into September 23, 1912, and on September 13, 1913, plaintiff demanded the return of his money, which was refused. It appears that the land company had title to the Texas land it had agreed to convey to plaintiff and Peet at the time they negotiated for the same, but it was encumbered by vendors' liens. Todd, however, took up the vendors' liens so far as they affected the land purchased by him. There is evidence that the land company which issued these contracts and sold these notes was solvent and doing business until February, 1912, but we think it clear that long before these notes became due, if not, indeed, at the time they were negotiated, the concern was in financial straits, and that if it remained for some time a so-called "going concern" it was due to the law of nature which keeps a paper balloon afloat until some puncture allows the hot air to escape. When the notes became due March 18, 1912, and the company was called upon to perform its contracts, it confessed its inability to do

so or to convey the lands free from encumbrance, and whatever title it had to the property had since been lost by foreclosure of prior liens. Before buying the notes one of the bank officers met the plaintiff and asked him whether he had any objections to their making the purchase, and he replied it would be satisfactory to him. Later, on one or two occasions, one of the men representing the bank testifies he spoke to plaintiff of the advisability of obtaining a conveyance of the land, and says he told him if he would make his own notes for the amount direct to the bank it would turn over to him the notes he had given for the land, and thereby enable him to fix the matters up with the company, but the witness further says that the plaintiff seemed satisfied with the situation as it was, and did not accept the offer made him. As it does not appear that the notes were then due or that the land company was then under any present obligation to make the conveyance, it is somewhat uncertain what the plaintiff could have done in the matter, and as he could not substitute new notes direct to the bank without waiving the benefit of his defense, if any he has, we think it not very material what the truth may be with respect to these interviews. The first of the notes in suit fell due on March 18, 1912, and promptly thereon plaintiff, with his counsel, visited the defendant bank. What talk passed between the parties at that meeting is the subject of somewhat sharp conflict in the testimony. It is conceded, however, that, as already stated, plaintiff made tender of a sufficient sum to cover the debt, and, upon defendant's statement that it was not prepared to make or furnish title to the land, plaintiff informed the bank's representatives that he would deposit the money in the Delaware County State Bank to be paid over to defendant upon delivery of a deed of conveyance in accordance with the land company's contract. It was this deposit which became the

subject of the contract by which the money was withdrawn from the Delaware County State Bank and deposited in the defendant's bank, and on which this action was brought. The defendant answered this claim, denying the plaintiff's right to withdraw the deposit, and by way of counterclaim pleaded the notes upon which the plaintiff became liable, and demands a recovery thereon. Plaintiff denies that defendant has any right of recovery as a bona fide holder of the notes, and insists that he has in this action the same right to demand a conveyance of the land as a condition precedent to the payment of the notes which he would have were the action being prosecuted by the land company itself. The contest resolves itself practically into a question whether defendant is entitled to recover the amount of the notes in suit without regard to the fact that the land had never been conveyed as agreed. That plaintiff's defense would be good were the claim being sued by the payee, the land company, no one denies, and the question upon which the issue here presented must turn is, whether upon the proved or admitted facts the defendant is entitled to be considered a bona fide holder against whom such defense is unavailing. This inquiry arises here in a two-fold aspect. In the first place, it sufficiently appears that before and at the time of the purchase the managing officers of the bank conducting that transaction knew, or were reasonably well advised, that the notes were given upon contracts for the purchase of Texas land. In the second place, it is well established that the bank, at the time it purchased the notes, also demanded and took over to itself the contract of sale which the land company made with the plaintiff and Peet, in consideration of which the notes were given. Is the bank, under such circumstances, a bona fide purchaser without notice, within the meaning of the law merchant or of our statute?

In a carefully prepared opinion the trial court, having conceded that the assignment of the contracts to the defendant brought to it knowledge of the terms and conditions therein contained, finds, nevertheless, that the case falls within the doctrine of *McNight v. Parsons*, 186 Iowa, 392, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665, and other precedents of that class, which hold to the general rule that knowledge by the purchaser of a negotiable instrument that it was given in consideration of an executory contract will not affect his rights as a bona fide holder unless he also has notice of a breach of such contract. No breach of these contracts having been shown until the notes matured and the company failed to make the conveyance agreed upon it must be admitted that, if the court was right, that this case is of the same class as the cited precedents, the correctness of its conclusion is undisputable. But in our opinion the case presented by this record is quite distinguishable from those to which the rule contended for is properly applicable. In the *McNight* Case the question was whether mere knowledge by the indorsee of a note, that it was given for personal property sold with a warranty of quality, was sufficient to make the note in his hands subject to defense or counterclaim on account of a breach of such warranty, of which breach he had no notice when he bought the paper, and upon that question we found in the negative. To that holding we still adhere. A large proportion of the negotiable paper which finds its way into the banks or markets of the business world has its consideration to a greater or less extent in executory undertakings, and any other rule would be attended with unfortunate results. But there is a marked distinction to be noted between the cases of the kind just mentioned, and those where the note has been made upon terms by which the performance of an execu-

utory agreement is a condition precedent to the right of the payee to demand or recover payment. If such be the contract, then, as between the maker and payee, the latter, in order to make a case for recovery upon the notes, must be able to show his performance or readiness to perform the condition. It is equally clear that one who becomes the indorsee or assignee of such notes, knowing the condition precedent to a recovery thereon by the payee, takes his title with the same burden which attached to it in

**Bills and notes—  
land contract—  
bona fide  
purchaser—  
condition pre-  
cedent.**

the hands of his indorser or assignor. That such is the position occupied by the defendant in this case, we think there can be no doubt. Let us revert for a moment to the language of the contract. After the agreement on the one part to sell, and upon the other to purchase, the land at a stipulated price, and for the giving of notes for the deferred instalments of the purchase money, the land company's undertaking to make conveyance is expressed in the following words:

"In consideration of said payments above mentioned the vendor agrees to convey to purchaser in fee simple, free and clear of all encumbrances, the following described real estate, to wit: southeast quarter of section No. 5 in block 6, Randall county, state of Texas, U. S. A."

"It is further agreed that on the date of the last payment mentioned herein, in case same shall have been fully paid, purchaser shall have a warranty deed to the above-described property, together with an abstract of title showing title clear and free from all encumbrances in vendor; said abstract to be approved by Gustavus, Bowman, & Jackson, of Amarillo, Texas, and when so approved to be final and conclusive upon the purchaser, and his money shall be due and payable; all money paid under this contract to be returned if warranty deed and abstract are not furnished as herein provided."

It does not differ materially from the ordinary form of agreement or bond for the sale of land, and we set it out in terms only to make clear the applicability of the authorities to which we shall soon call attention. It is a well-settled doctrine in equity that the effect of such a contract is to vest the purchaser with the equitable title to the land (so far, at least, as the seller is able to pass such title), and leave the seller holding the legal title in trust for the purchaser to be conveyed on payment of the price. Until both parties are prepared to complete the transaction the unpaid purchase money in the buyer's hands in his security for the performance of the seller's agreement to convey to him a good title, while, on the other hand, the legal title remaining in the seller is his security for the payment of the remainder of the price. 1 Pom. Eq. Jur. 3d ed. § 368. Concerning the mutual rights of a buyer and seller under a contract for conveyance, this court has had frequent occasion to speak. In *School Dist. v. Rogers*, 8 Iowa, 316, it is said: "Where it is made to appear that the conveyance [of land] was to be made upon the payment of the purchase money, the courts regard the two acts as so far dependent that it is held that to entitle the plaintiff to recover he must show a performance, or offer to perform the contract on his part, unless the defendant has waived a tender of the deed."

And it was held that in an action upon a note given for the purchase of land, where the seller was to make conveyance upon payment of such note, it was error not to instruct the jury to that effect. See to the same effect, *Fitch v. Casey*, 2 G. Greene, 307. The rule is restated in the same language in *Berryhill v. Byington*, 10 Iowa, 223. Even if it be said that the duty to convey or offer to convey is not technically a condition precedent, the covenants and conditions are at least dependent and mutual, and if the buyer cannot claim his deed until he has

paid or tendered the price, neither can the seller sue for the money without tendering the deed. *Barron v. Easton*, 3 Iowa, 76; *Lyon v. O'Kell*, 14 Iowa, 234; *Courtright v. Deeds*, 37 Iowa, 503; *Claude v. Richardson*, 127 Iowa, 623, 103 N. W. 991; *Sutton v. Griebel*, 118 Iowa, 78, 91 N. W. 825. Where the seller had undertaken to furnish title supported by an abstract showing it to be good, the performance of the covenant was held to be a condition precedent, and he was not entitled to recover the purchase money until he had complied therewith. *Martin v. Roberts*, 127 Iowa, 220, 102 N. W. 1126. In *American Gas & Ventilation Mach. Co. v. Wood*, 43 L.R.A. 465, the annotator, distinguishing between cases in which a promissory note and a contemporaneous agreement are collateral and independent, and those in which the note and contemporaneous agreement are mutual and dependent, says, in substance, that the difference is that in the former it is not the intent of the parties that the performance of the one contract should be dependent or conditional upon the performance of the other. Applying this rule, the same authority classified a promissory note given for the purchase of land, and the payee's promise to convey the land on payment of the note, as mutual and dependent agreements. Stating the rule in another way, it is said that mutual and dependent agreements depend upon whether they relate to the same subject-matter, and whether it was the intent that the performance of both should be simultaneous. That contracts like those involved in the case at bar fall within this class is, as we have seen, thoroughly well settled in this state—a position which has the support of the courts generally. *Goodwin v. Nickerson*, 51 Cal. 166; *Mix v. Ellsworth*, 5 Ind. 517; *Little v. Thurston*, 58 Me. 86; *Hoag v. Parr*, 13 Hun, 95; *Kessler v. Pruitt*, 14 Idaho, 175, 93 Pac. 965; *Sayre v. Mohney*, 30 Or. 238, 47 Pac. 197; *McCulloch* 3 A.L.R.—62.

*v. Dawson*, 1 Ind. 413; *Kelly v. Webb*, 27 Tex. 368; *Naftzger v. Gregg*, 3 Cal. Unrep. 520, 31 Pac. 612. In short, as between the parties to the contract, it is perfectly clear that both the contracts made, each in connection with or in consideration of the other, are to be read together in determining the mutual rights of such parties, and neither can recover against the other without performance or tender of performance on his own part of their mutual covenants. It is not to be denied that, if a note so made is negotiable in form, and is in fact negotiated before due, and for value, to an indorsee who receives it without notice of the conditional character of the promise to pay, he will be protected as an innocent purchaser, and may enforce collection of the note, notwithstanding the failure of the payee to perform his agreement by the conveyance of the title. But it is very difficult to understand upon what theory the defendant in this case can bring itself within the benefit of that rule. As the purchaser of the note and the assignee of the contemporaneous contract, it has perfect and complete knowledge of the contract between the parties, and as a matter of law it must be held to have known and understood the mutual dependency of the maker's agreement to pay on the payee's agreement to convey, and that as between these parties the payee could not enforce payment without proof of its performance, or of its readiness and willingness to perform. If the payee could not collect the note without such showing, by what rule or upon what principle can the indorsee, taking the paper with knowledge of the rights and equities of the maker as against the indorser, hope to stand in any better right? Had the contract and the accompanying note been written together, both upon the same sheet of paper, and in that form indorsed and delivered to the bank, counsel would hardly argue that by suing upon the note alone it could exclude the defense thereto

which is asserted in this case, and founded upon the entire agreement. See *Goodwin v. Nickerson*, *supra*. But so long as it is conceded, as it must be, that the note was but a part of the contract and that defendant knew the fact, it is perfectly immaterial whether it was written all upon the same sheet or whether the mutual and dependent covenants were written on separate sheets. It is scarcely necessary to cite authorities to this proposition, which is entirely clear upon principle, but it may be said that the proposition is directly affirmed in *Thomas v. Page*, 3 McLean, 167, Fed. Cas. No. 13,906, where it was held that a note, though absolute in form, may, by a separate agreement between the parties, be made payable on condition, and, in the hands of an assignee or indorsee with knowledge of the condition, it takes effect the same as between the original parties. See also *Sutton v. Beckwith*, 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79. We conclude, therefore, that defendant was a holder of the note and of the contemporaneous contract between the original parties charged with notice of the equities in favor of plaintiff.

We cannot see how defendant's claim of having advised plaintiff to take these notes before due, giving other notes direct to itself, and then adopt measures to compel the land company to make the title to the land, materially affects the relative rights of the parties. The notes in suit were not due, and, as we have seen, defendant had acquired them with knowledge of the equities in plaintiff's favor, and the latter had the right against either or both to resist payment until title to the land was conveyed or tendered to him. To have acted on the defendant's suggestion would have been to abandon his defense against the bank, and pay their claim in full, leaving him only a remedy without value against the bankrupt payee. He could rightfully insist upon the time which his contract gave him for the payment of the debt, and

rest upon his right to demand a deed of the land before surrendering his money to the payee, or to any holder of the paper receiving it with notice of the facts. This is not saying that the defendant bank, by taking an assignment of the land contract, bound itself to perform the agreement to convey, or that plaintiff could maintain an affirmative action against it for specific performance of such contract. It is enough to say, in this respect, that by taking an assignment of the contract, thereby acquiring the land company's vendor's lien, it became charged with knowledge of the plaintiff's rights, and took upon itself the risk of the consequences which might follow if its assignor failed to convey the title, if it had any. True, plaintiff could also have sought such relief when his notes became due, but he has an equal right, having tendered performance on his part, to assume a purely defensive attitude. This he has done, and we find nothing in the record indicating any waiver of such right. The authorities cited by appellee are almost entirely of the class of *McNight v. Parsons*, 136 Iowa, 392, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665, to the effect that mere knowledge by an indorsee of a negotiable note that it was given in consideration of an executory contract of some kind is not sufficient to deprive him of the character of a bona fide holder; but, as we have tried to show, this proposition is not at all inconsistent with the view we have expressed of the effect of the knowledge by the indorsee that the note is but one of two mutual and dependent agreements between the maker and the payee, neither of which may be enforced without performance of the other.

There was no apparent lack of diligence on the part of plaintiff. It is shown that on that day when the note matured plaintiff with his counsel went to the defendant bank, and, having tendered full payment, asked that title to the land for which

the notes were given be converted to him. The bank not being able to comply with this demand, the tender was deposited, as we have already seen, and on the following day plaintiff appeared with his counsel at the office of the land company, and there demanded a conveyance in accordance with the contract, and the company was unable to comply. Foreclosure proceedings, by which the company lost what title it had, were begun in Texas within a few days thereafter. Though disputed, a preponderance of the evidence is to the effect that, at the time the tender was made, the bank by its officers admitted plaintiff's right to demand conveyance before parting with his money; but such admission, if made, has little, if any, material effect upon the rights involved in this action, such rights depending, in our judgment, upon the effect of the contract between plaintiff and the land company and the mutual and dependent conditions thereof, with knowledge of which the defendants received the notes.

We regard it clear that the fact that when the notes were received by the bank the conveyance to the plaintiff by the land company was not yet due does not avoid the effect of the rule we have just stated. If this were a case of mere failure of consideration, arising from the failure of the payee to perform a collateral independent contract, there would be reason for the other conclusion; but in cases of mutual dependent agreements each party secures himself against loss from failure on part of the other, by a contract which requires reciprocal and simultaneous performance by both. This agreement qualifies and conditions the liability of the parties, and that condition inheres in and qualifies the obligation of each from the inception of the contract relation, and he who acquires a promissory note having such origin, with knowledge of the fact, takes it subject to the conditions upon which it was given. In the language of the Michigan case last cited: "It has

been well settled in this case and elsewhere that several instruments made at one and the same time, and having relation to the same subject-matter, must be taken to be parts of one transaction and construed together for the purpose of showing the true contract between the parties. . . . If the plaintiff had been a good-faith holder of the note, with no knowledge of the bond, he would have been entitled to recover, because of the negotiable form of the note. But if he purchased the note before due, and before the time of performance stated in the bond with the agreement attached to it and forming a part of the contract, he would be obliged, under the law, to take the note as qualified and controlled by the bond or agreement. And if he saw the bond before he purchased the note, and was acquainted with its relation to the note, he must be considered as bound by it the same as if it had been attached to the note or written upon the same piece of paper."

See also *Jacobs v. Mitchell*, 46 Ohio St. 601, 22 N. E. 768; *Brooke v. Struthers*, 110 Mich. 562, 35 L.R.A. 536, 68 N. W. 275; *National Hardware Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 883; *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620, 91 N. W. 299, 96 N. W. 1021; *Garnett v. Meyers*, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803; *Zebbley v. Sears*, 38 Iowa, 507.

There is still another angle from which this feature of the case may be considered. Defendant, as assignee of the contract, acquired the vendor's lien held by the land company to secure these notes. Let us suppose that, instead of seeking to recover in some other form of action, it had brought suit upon the contract alone or upon the contract together with the notes, and plaintiff had appeared thereto, pleading his tender of performance and the failure of both the defendant and the land company to perform the agreement to convey; could the bank in such proceeding have successfully relied on its claim, being an



innocent holder of either the note or contract? If not, can it, by ignoring the contract in its own hands, escape its effect by suing upon the notes alone? We think not.

II. Neither can we find anything in the record on which the defendant can base a plea of estoppel. If plaintiff declined to act upon defendant's advice to pay the notes, and to give new notes direct to the bank, and take his chances of compelling the land company to give him title to the land, he was, as we have before said, entirely within his rights. He would properly plant himself upon the terms of his contract, and, so far as we are able to discover, he complied literally with the obligation he had therein assumed. The situation affords no opportunity for the application of the rule that, where one of two innocent persons must suffer, the loss must be borne by the one by whose negligence it happened. As between the one party to mutual and dependent agreements who promptly tenders full performance on his part, and the other party who fails or refuses to perform, there is no equality of legal or equitable merits, nor does the indorsee or assignee of the party in default, with notice of the character of the contract, stand in any more favorable position than his indorser or assignor.

III. Appellant argues the question whether the circumstances in this case are not such as to cast upon the defendant the burden of proof that it is a purchaser of the notes in suit in good faith, for value, and in the due course of business. The point thus made is, in substance, that, the land company having entered into this contract with the agreement that upon payment of the notes it would convey a good title, it could not, without breach of faith, put the note upon the market and expose plaintiff to the liability to pay them to innocent holders, while such company did not have the title which it agreed to convey, and was not in position or able to perform such agreement.

As we have reached the conclusion that the record sufficiently and affirmatively shows the defendant to be a holder of the paper with notice, it is unnecessary to extend this opinion for the consideration of the proposition so made. That the negotiation of a note for the purpose of depriving a maker of the benefit of a good defense, or the putting in circulation of a note without being accompanied by a contemporaneous agreement affecting the maker's liability on such paper, may be a fraud, has been often held, but whether the facts of this case bring it within the rule is a question which, for the reasons stated, we do not determine.

For like reasons, we pass without consideration the question whether the writ of attachment sued out by the defendant was wrongful.

IV. This case as originally brought was entitled as a suit in equity. The answer and cross petition or counterclaim were entitled in like manner. In each pleading the parties ask for general equitable relief. The issues were tried to the court as in equity without objection on either side. In this court the appellee raises the question that the issues were in fact not of an equitable nature, and asks to have the finding below treated as the verdict of a jury. It has been decided too often to be longer an open question that, where a case is brought and tried as a suit in equity without any objection thereto in the lower court, such

Appeal—form of action—right to raise question.

objection will not be considered by this court upon appeal. *Gate City Land Co. v. Heilman*, 80 Iowa, 477, 45 N. W. 760; *Lough v. Estherville*, 122 Iowa, 479, 98 N. W. 308; *Des Moines Sav. Bank v. Morgan Jewelry Co.* 123 Iowa, 432, 99 N. W. 121; *Blondel v. Ohlman*, 132 Iowa, 257, 109 N. W. 806; *Niemand v. Seemann*, 136 Iowa, 713, 114 N. W. 48; *Reiger v. Turley*, 151 Iowa, 491, 131 N. W. 866. It is not, as counsel seem to think, a question of jurisdiction which may be raised at any

time. The case was brought in the district court, and the district court had jurisdiction of the parties and of the subject-matter; whether it be triable to the court as in equity, or to a jury as at law, is merely a question as to the manner of trial and the relief which may be administered. If either party thinks that the case should be docketed for trial in equity instead of at law, or vice versa, it is his privilege to move for such order. Failing so to do, exception thereto taken on appeal is

—ending in  
equity case.

entitled to consideration. The case must be treated as one in equity, and the trial here is *de novo*.

It follows that the decree of the District Court must be reversed, the defendant's counterclaim dismissed, and that plaintiff have judgment as prayed in his petition. The cause will be remanded to the District Court for the entry of judgment as herein directed.

Gaynor, Ch. J., and Ladd, Evans, Preston, and Stevens, JJ., concur.

Salinger, J., dissenting:

The sole question is whether the majority is justified in holding that the facts here create an exception to a confessed rule. Hundreds of cases have built up the rule.

In *McNight v. Parsons*, 136 Iowa, at page 392, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265 (113 N. W. 860, 15 Ann. Cas. 665), that rule is stated as follows: "The courts quite universally hold that knowledge that a note was given in consideration of the executory agreement or contract of the payee, which has not been performed, will not deprive the indorsee of the character of a bona fide holder, unless he also has notice of the breach of that agreement or contract."

The collateral agreement in the case was a warranty of the animal for the purchase price of which the note was given, and further agreement by the seller that he would retain possession of the animal for several months and do certain

things to enhance its value. The agreement, the sale, and the giving of the note were all parts of the same transaction.

In *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148, all the papers were made at the same time and related to the same transaction. The collateral agreement was that the payee was to do certain things, and that the note should not be paid if it failed to fulfil any part of this agreement. Against defense to the note, the court said: "We think, however, that no well-considered case can be found in which a collateral, contemporaneous agreement, providing that the note should not be paid in the event that an executory contract, which was the consideration of the note, should not be performed, has been allowed to defeat the negotiability of the note in the hands of an indorsee, though he had notice of such agreement."

In view of these, it will suffice to cite but a few of the great number of cases affirming this rule. See *Kinkel v. Harper*, 7 Colo. App. 45, 42 Pac. 173; *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461; *First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855; *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 194; *Hakes v. Thayer*, 165 Mich. 476, 131 N. W. 174; *Houston v. Keith*, 100 Miss. 83, 56 So. 336; *Merchants' & P. Bank v. Penland*, 101 Tenn. 445, 47 S. W. 693.

The contract upon the execution of which the notes in dispute were given recites that in consideration of the payment of said notes the vendor agrees to convey certain lands in fee simple, free and clear of all encumbrances; that when all the notes have been fully paid a warranty deed shall be made and an abstract furnished, showing title free and clear from all encumbrances in the vendor; and that all money paid under the contract is to be returned if warranty deed and abstract are not furnished as provided in the contract. As I experience much difficulty in understanding what

there is about this transaction and collateral agreement to justify the majority in making an exception of this case, I shall attempt to clarify myself by elimination, by pointing out in what respects the situation here does not work an exception. The rule applies to nothing but considerations formed by an executory agreement. Can it be said that the contract here is not an executory agreement? It is so manifest that it is a promise not yet performed as that I shall assume the majority does not ground its opinion upon the claim that the agreement is not executory. Can it be the majority thinks the general rule does not apply because the promise is one to convey land? I can scarcely believe so, because the books are full of cases where the buyer of the note was protected, though the consideration was just such a promise. *American Funding Corp. v. Pennington*, 107 Miss. 10, 64 So. 845; *United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751; *Merchants' & P. Bank v. Penland*, *supra*. Is its reason that the contract and the notes here were contemporaneously made and are part of the same transaction? I can hardly think that either, because that was the situation in *McNight v. Parsons* and in *Jennings v. Todd*, *supra*, and, for that matter, in practically all the cases wherein the rule was applied. Is it thought that here is an exception because the payee promised to give perfect title as soon as all the notes were paid, and expressly stated what the law implies—that he would convey when all the notes were paid, or repay all the buyer had paid if there was a failure to give such title after the notes were paid? Concede, if you please, that this in a sense makes an interdependent contract, and involves reciprocal promises, and still the case remains within the rule. Call the transaction what you will, still the voice of authority says such interdependence and such reciprocal promises as are found here do not affect the buyer of the

notes. These reciprocal promises create an adequate consideration, but have no other effect except to assure the buyer of the note that he is to be paid by the maker, whether the promise to the maker be or be not kept. It absolves him from inquiry whether the payee of the note will perform his contract, and he may assume that he will. *Houston v. Keith*, 100 Miss. 83, 56 So. 336; *Hakes v. Thayer*, 165 Mich. 476, 131 N. W. 174; *Tiedeman*, *Com. Paper*, § 300. By selling the note the maker declares he will pay it to the indorsee, though the consideration should fail as to the payee. *Siegel's Case*, 131 Ill. 570, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417; *Jennings v. Todd*, *supra*. In *Whitehead v. Purdy*, 172 Mich. 31, 137 N. W. 684, there were reciprocal promises, and there was an express agreement that, if the promise was not kept, the maker of the note should be reimbursed in full. The note was sold to one who had full knowledge of this agreement. At the time of the sale it was impossible to determine whether the contract of the payee could be performed as was agreed. But a verdict for plaintiff was directed because the case presented no more than that the makers of the note were willing to give it to secure what the payee promises in reliance upon the agreement to indemnify and reimburse them for what they had paid on their note if the collateral agreement was not kept. And see *Kinkel v. Harper*, *supra*; *Saddler v. White*, 14 La. Ann. 173. The rule was applied in *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461, where it is expressly found that no exception is worked because the consideration is "founded upon reciprocal promises of the parties." And in *United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751, the payee stipulated just as here, to wit, that upon payment of the note at maturity he would convey to the maker by good and sufficient warranty deed. In *Jennings v. Todd*, *supra*, the note collected by the

buyer itself recited it should not be paid if the payee did not fulfil every requirement of the collateral contract.

To the difference between these notes and what the law terms a conditional note I shall address myself later. All that it is necessary to say at this point is that the reciprocal nature of the engagements can have no effect here. The maker was bound to pay all the notes before he was entitled to a conveyance. Although upon payment he was thus entitled, he could not defend against either note, because no conveyance had been made, for the self-evident reason that no matter how reciprocal the promises were, as payment must precede conveyance, failure to convey was no reason for not paying.

Such agreements create a condition subsequent which cannot affect the buyer of the note. By making a negotiable note the maker says, in effect: If anyone shall buy this note, let him be advised that I have confidence the payee will perform the agreement for which I gave the note. If he shall fail, I will obtain redress for the breach of contract. *Siegel's Case*, supra.

It is said in *Jennings v. Todd*, supra: "In purchasing such note no inquiry as to the consideration is required. If a failure of consideration occur, the maker must look to the payee for indemnity."

And in *Saddler v. White*, supra: "Anyone having sufficient confidence in another to give his written obligation for something to be given or enjoyed thereafter is at liberty to do so, and the maker cannot censure any future holder . . . for having purchased it, and for seeking to hold him liable, for it was the faith of the maker in the payee, that he would execute his promise and allow no obstacles to defeat it, that created the note and gave currency to it."

Can it be a difference is found because the buyer of the notes here was advised by inspection of the contract itself that it was what it

was? Can it make a difference how such knowledge is acquired? It seems to me the rule must be the same, whether the buyer is advised of the existence of the executory contract by statement on part of those who profess to know the fact, or gets his information by reading the contract itself. In both cases nothing is accomplished except that the buyer has notice of the agreement. If this self-evident proposition is not to be agreed to, unless supported by authority, that is not lacking. The purchaser of the note has been protected where the note itself advised him that its consideration was an executory contract. *Houston v. Keith*, supra; *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193; *Henneberry v. Morse*, 56 Ill. 394. In *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148, the note itself recited that it should not be paid if the payee did not fulfil every requirement of the collateral contract. The purchaser has had the benefit of the rule where he saw a recital in the bond itself of what consideration it was given for. *First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855. And it is said in *Siegel's Case*, 131 Ill. 570, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417, citing *Henneberry v. Morse*, 56 Ill. 394: "The most that can be said of a recital in the instrument itself, of the consideration upon which it rests, is that the indorsee, taking it before maturity, is chargeable with notice of the recital."

And see cases in notes to *Kimpton v. Studebaker*, 125 Am. St. Rep. 185, 14 Ann. Cas. 1126.

Every factor thus far considered was present in the cases wherein knowledge that the note had for its consideration an executory contract was not allowed to defeat the collection of the note. But in many of these cases one factor was absent that is present here, and that is that the buyer of the note took an indorsement of the note, and also took an assignment of the contract itself as further security. Now, in the first

place, taking possession of the contract added nothing to notice. So far as the general rule is concerned, the buyer of the notes was as much affected by obtaining hearsay knowledge that the executory contract existed as he would be by seeing it in the contract of which he took possession. The majority refers to some cases to the effect that when a note and mortgage are made contemporaneously the two must be construed together, and that in jurisdictions where a note secured by mortgage is non-negotiable the buyer of the note is affected by conditions in the mortgage which limit the obligation of the note, and that, even though the note be negotiable, such conditions in the mortgage may be used in defending against the note, if the buyer had knowledge of the provisions of the mortgage. See *Briggs v. Crawford*, 162 Cal. 124, 121 Pac. 381; *National Hardware Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881; *Garnett v. Meyers*, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803; *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620, 91 N. W. 399, 96 N. W. 1021; *Brooke v. Struthers*, 110 Mich. 562, 35 L.R.A. 536, 68 N. W. 272; *Jacobs v. Mitchell*, 46 Ohio St. 601, 22 N. E. 768. I concede their holdings, but challenge their applicability here. I am in no doubt that one who buys a contract and assumes to become a party to it is bound to perform it, and if failure to perform causes a loss to the other party, he may offset that loss when the buyer of the contract sues upon the note which he has bought, though he also bought the contract, which is the consideration for such note. The trouble lies with the premise. The buyer of the notes here did not buy the contract. He did not agree to become a party to it. He did not assume any of its obligations. He took it purely as an additional security. Such taking does not change the rights the rule gives him. See *Moyes v. Bell*, 62 Wash. 534, 114 Pac. 193; *Kinkel v. Harper*, 7 Colo. App. 45, 42 Pac. 173. As well say that if a bank

takes a bond as a collateral to the note of a borrower, and has it indorsed for that purpose, it becomes obliged to pay the bond if the maker fails to do so. Taking an indorsement of the note gave the buyer the right to collect from the maker, and, in certain contingencies, from the indorser. When it took an assignment of the contract, it merely obtained a further security, consisting of a species of lien upon the interest both parties to the contract had in the land covered by the contract. Instead of becoming bound by the agreement to convey good title to land, the transfer of the contract worked merely that, if the buyer of the notes has need to resort to the land, he might resort to it, that in such event he would make any deficiency out of the land if the land was worth it, and the title of either party to the contract was good, and if there was no deficiency, or if it could not be made out of the land, the assignment of the contract would prove to be no additional security. It was never before held, and, unless it be done here, in my opinion never will be held, that the general rule which protects the buyer of the note, though he knew its consideration was an executory contract, is abrogated because the buyer takes security additional to what the mere signing and indorsing of the note gave him.

I have no complaint to make of the pronouncement of the majority that, where a note is conditional, whosoever buys it with knowledge of the condition is bound by that knowledge, unless that this is so is to be an argument for holding that the notes in suit here are conditional notes within the meaning of that rule. There is nothing in *Thomas v. Page*, 3 McLean, 167, Fed. Cas. No. 13,906, and *Sutton v. Beckwith*, 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79, the only cases cited in the opinion for this point, which in the least attempts to destroy the general rule by holding that the notes here are conditional ones. They are conditional only in

the sense that paying them is not the end, and that if, after payment is made, the contract is breached, the money paid may be recovered back. If that makes the notes conditional in such sense as that knowledge that the consideration is an executory contract affects the buyer, then there never was any substance to the confessed general rule. Every note upheld under that rule was in that sense conditional. I have called attention to a number of cases wherein collection was enforced, though the very note stated that payment was to be made if the payee did certain things. See *Seigel, C. & Co. v. Chicago Trust & Sav. Bank*, 131 Ill. 570, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417; *State Nat. Bank v. Cason*, 39 La. Ann. 865, 2 So. 881; *McCarty v. Howell*, 24 Ill. 341; *First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855; *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461; *Kinkel v. Harper and Moyses v. Bell*, supra. A conditional note which one having knowledge of the condition cannot enforce is one wherein the condition makes it uncertain whether the note can ever be collected, or when the obligation to pay it will mature. Here, there is no uncertainty in either respect. The only uncertainty is whether, after they are paid on the day they come due, the original payee will not create a right to reimburse the maker for what he has paid.

The transaction at bar is not against public policy. *Whitehead v. Purdy*, 172 Mich. 31, 137 N. W. 684. The enforcement of the rule is a salutary help to the transaction of business. *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148. That is why the "Bohemian Oats" Cases are not in point. In *Merrill v. Hole*, 85 Iowa, at pages 71, 72, 52 N. W. 5, it was complained that the court should have met a claim that mere notice of what the consideration was would not defeat an innocent buyer, and the answer was: "There is no claim that mere notice that the consider-

ation was the sale of oats and a bond would be notice of want or failure of consideration, but it is that notice of that kind of sale and bond would be, because of their being illegal and void."

In other words, when a buyer knows that the note he buys rests upon an illegal consideration, he is not an innocent purchaser. It is all met by the elementary proposition that interchanges of agreements are nothing illegal, and, on the contrary, are a valid agreement and consideration. The contract involved in this case is not "this kind of sale and bond." It is one which the authorities have always held not to affect the buyer. And it is said in *Hakes v. Thayer*, 165 Mich. 476, 131 N. W. 174, distinguishing *Bohemian Oats Cases*, that as to a contract which is lawful the buyer of the note need not inquire "whether the seller has performed his agreement, or will be able to perform."

As to numerous cases cited by the majority in support of the fact that the notes and contract were mutual and dependent agreements, that it was the intent that performance of both should be simultaneous, that as between buyer and seller the two things are interdependent, and that the buyer need not pay unless the seller conveys, I submit that any reliance upon these begs the whole question, by assuming, against the conceded general rule, that, because these things are so between the original parties therefore they control the rights of one who buys the notes.

As to the argument that the buyer of the note would have been subject to the conditions of the contract if the note and the contract had been one piece of paper, and that paper had been indorsed, answer is that the papers are not in that condition, and consequently were not indorsed while in that form. Another answer is that in the supposed case the buyer would not be subjected to defenses because he had knowledge that the obligation rested upon an

executory agreement, and such agreement was breached by the payee of the notes, but because what he bought was non-negotiable, which, as a very necessary consequence and of itself, alone explains why in the supposed case the buyer would not have the status that I think he should have in this case.

It seems to me that here is another instance of asserting a non-existent distinction for the purpose of abrogating a rule, while ostensibly affirming the rule that nothing takes this case out of the confessed rule, and I would affirm.

If *Zebley v. Sears*, 38 Iowa, 507, is opposed, and I do not think it is, it should be overruled, and the *Mc-Night Case* does in effect overrule it.

A motion to amend order of remand having been sustained, the following *Per Curiam* response was handed down, June 27, 1918 (— Iowa —, 168 N. W. 113):

The appellant's motion to amend order remanding the case to the trial court, with direction to enter judgment for the plaintiff, is sustained, in part, as follows:

Said order to enter judgment as the same appears in the final clause of the opinion as heretofore filed and as published in — Iowa, —, ante, 971, 165 N. W. 599, is withdrawn, and the following is substituted therefor:

The decree of the District Court is reversed, and the cause remanded, with direction for the entry of judgment in plaintiff's favor for the recovery of the amount of his deposit in the defendant bank, subject only to the following condition, relating to the amount thereby and to the counterclaim pleaded by said defendant. It being claimed by the defendant in argument that plaintiff has acquired from another source title to the land for which the promissory notes set up in the

counterclaim were given, and that he has acquired such title at a cost or expense materially less than the price of said land as fixed by the contract of purchase with the American & Canadian Land Company, which contract, together with said notes, was assigned to the plaintiff; and it being further claimed that, by reason of his acquirement of the outstanding title at a reduced price, plaintiff's loss or damage because of the failure of title in said American & Canadian Land Company has been lessened in like proportion, and that his recovery should not exceed the amount of such actual damage; and the record before this court not clearly or satisfactorily showing the truth as to the facts so asserted, it is therefore ordered that upon the remand of this cause the trial court shall proceed to ascertain and determine the facts with reference to said claim, and if it be found that plaintiff has acquired such title, and that the cost or expense of procuring the same, together with the amount of the payments, if any, made to said American & Canadian Land Company or its assignee before this suit was brought, is less than the price agreed to be paid to said company, then the difference so ascertained shall be treated and applied as a credit in favor of the defendant bank, and plaintiff's recovery upon his deposit account shall be reduced by the amount of such credit. If, however, such alleged credit is not established on the hearing, then judgment shall be entered for the plaintiff for the amount of his deposit without deduction. At the hearing upon said question of fact the parties, if so advised, may offer additional relevant testimony, but such hearing and testimony shall be confined and limited to the single question herein indicated.

## ANNOTATION.

**Bona fides of purchaser of note on an executory consideration, performance of which is a condition precedent.**

It is a well-settled rule that knowledge by the purchaser of a bill or note that the consideration therefor was an executory contract does not prevent him from becoming a bona fide holder thereof unless there has been a breach of the contract to the knowledge of such purchaser.

**United States.**—*Arthurs v. Hart* (1854) 17 How. 6, 15 L. ed. 30.

**Arizona.**—*Phoenix Safety Invest. Co. v. Michaels* (1918) — *Ariz.* —, 176 Pac. 587.

**California.** — *Splivallo v. Patten* (1869) 38 Cal. 138, 99 Am. Dec. 358; *Flood v. Petry* (1913) 165 Cal. 309, 46 L.R.A.(N.S.) 861, 132 Pac. 256.

**Colorado.**—*Kinkel v. Harper* (1895) 7 Colo. App. 45, 42 Pac. 173.

**Georgia.**—*Bank of Commerce v. Barrett* (1868) 38 Ga. 126, 95 Am. Dec. 384; *Hudson v. Best* (1898) 104 Ga. 131, 30 S. E. 688; *Wilensky v. Morrison* (1905) 122 Ga. 664, 50 S. E. 472; *Morrison v. Hart* (1905) 122 Ga. 660, 50 S. E. 471; *Simmons v. Council* (1908) 5 Ga. App. 386, 63 S. E. 238; *Brooks v. Floyd* (1913) 12 Ga. App. 530, 77 S. E. 877; *Reese v. Citizens' Bank* (1918) 22 Ga. App. 519, 96 S. E. 452; *Cosmopolitan L. Ins. Co. v. Head* (1919) — *Ga. App.* —, 98 S. E. 124.

**Illinois.**—*Siegel, C. & Co. v. Chicago Trust & Sav. Bank* (1890) 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417.

**Iowa.**—*McNight v. Parsons* (1907) 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665.

**Louisiana.** — *Saddler v. White* (1859) 14 La. Ann. 173; *State Nat. Bank v. Cason* (1887) 39 La. Ann. 865, 2 So. 881.

**Maine.**—*Adams v. Smith* (1853) 35 Me. 324.

**Maryland.** — *Black v. First Nat. Bank* (1903) 96 Md. 399, 54 Atl. 88.

**Massachusetts.** — *Patten v. Gleason* (1871) 106 Mass. 439.

**Michigan.** — *Miller v. Ottaway* (1890) 81 Mich. 196, 8 L.R.A. 428, 21

*Am. St. Rep.* 513, 45 N. W. 665; *Hakes v. Thayer* (1911) 165 Mich. 476, 131 N. W. 174; *Whitehead v. Purdy* (1912) 172 Mich. 31, 137 N. W. 684.

**Mississippi.** — *Houston v. Keith* (1911) 100 Miss. 83, 56 So. 336.

**Missouri.**—*Jennings v. Todd* (1893) 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148.

**Nebraska.**—*Rublee v. Davis* (1892) 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135.

**New York.** — *Davis v. McCready* (1858) 17 N. Y. 230, 72 Am. Dec. 461; *Tradesmen's Nat. Bank v. Curtis* (1901) 167 N. Y. 194, 52 L.R.A. 430, 60 N. E. 429; *Mabie v. Johnson* (1876) 8 Hun, 309.

**North Carolina.**—*Bank of Sampson v. Hatcher* (1909) 151 N. C. 359, 134 Am. St. Rep. 989, 66 S. E. 308, overruling *Howard v. Kimball* (1871) 65 N. C. 175, 6 Am. Rep. 739.

**Oklahoma.**—*Producers' Nat. Bank v. Elrod* (1918) — *Okla.* —, L.R.A. 1918F, 1016, 173 Pac. 659.

**Oregon.**—*United States Nat. Bank v. Floss* (1900) 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751.

**Pennsylvania.** — *Craig v. Sibbett* (1850) 15 Pa. 238.

**Tennessee.**—*Fox v. Citizens' Bank & T. Co.* — *Tenn.* —, 35 L.R.A. 678, 37 S. W. 1102.

**Texas.** — *Adoue v. Tankersley* (1894) — *Tex. Civ. App.* —, 28 S. W. 346.

**Washington.**—*Moyses v. Bell* (1911) 62 Wash. 534, 114 Pac. 194.

**West Virginia.**—*Dollar Sav. & T. Co. v. Crawford* (1911) 69 W. Va. 109, 33 L.R.A.(N.S.) 587, 70 S. E. 1089.

**Contra**, *Thrall v. Horton* (1872) 44 Vt. 386 (dictum).

If there has been a breach to the knowledge of the purchaser, he is thereby prevented from becoming a bona fide holder.

**Arizona.**—*Phoenix Safety Invest. Co. v. Michaels* (1918) — *Ariz.* —, 176 Pac. 587.

**California.**—*Russ Lumber & Mill.*



**Co. v. Muscupiabe Land & Water Co.** (1898) 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995.

**Georgia.** — **Montgomery v. Hunt** (1893) 93 Ga. 438, 21 S. E. 59; **Wilson v. Carter** (1908) 4 Ga. App. 349, 61 S. E. 494.

**Illinois.** — **Bryant v. Sears** (1885) 16 Ill. 288; **Henneberry v. Morse** (1870) 56 Ill. 394; **Smith v. Munch** (1886) 21 Ill. App. 323.

**Michigan.** — **Miller v. Ottaway** (1890) 81 Mich. 196, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665.

**Missouri.** — **Wagner v. Diedrich** (1872) 50 Mo. 484; **Jennings v. Todd** (1893) 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148.

**Pennsylvania.** — **Bronson v. Silverman** (1874) 77 Pa. 94; **Detroit Sav. Bank v. Towers** (1910) 42 Pa. Super. Ct. 246.

**Tennessee.** — **Alderson v. Cheatham** (1837) 10 Yerg. 304. See **Ferriss v. Tavel** (1888) 87 Tenn. 386, 3 L.R.A. 414, 11 S. W. 93.

One who purchases for value from a vendor the obligation of his vendee, and obtains the latter's promissory note payable to himself as evidence of such obligation, with full knowledge that it represents the final payment on the purchase price of land which he knows the vendor has conveyed with covenants of warranty and against encumbrances, that he knows were broken when made, takes the note subject to the right of the maker to reduce the amount of recovery thereon by the amount of the damages sustained by reason of the partial failure of consideration, brought about by the defects in the title. **Williams v. Neely** (1904) 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1.

The holding that the purchaser of a note, given in one of the so-called Bohemian oats transactions, or a transaction of similar kind, is, because of knowledge of this fact, precluded from becoming a bona fide holder, is not usually regarded as contrary to the above doctrine; for, as stated in **Hakes v. Thayer** (1911) 165 Mich. 476, 131 N. W. 174, "knowledge of those contracts or bonds was knowledge of fraud, and of contracts made

in violation of law, and against public policy." **Johnson v. First Nat. Bank** (1887) 24 Ill. App. 352; **Merrill v. Hole** (1892) 85 Iowa, 66, 52 N. W. 4; **Griffith v. Shipley** (1891) 74 Md. 591, 14 L.R.A. 405, 22 Atl. 1107; **Sutton v. Beckwith** (1888) 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79; **Mace v. Kennedy** (1888) 68 Mich. 389, 36 N. W. 187; **McNamara v. Gargett** (1888) 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; **Davis v. Seeley** (1888) 71 Mich. 209, 30 N. W. 901; **Ward v. Doane** (1889) 77 Mich. 328, 43 N. W. 980; **Fink v. Chambers** (1893) 95 Mich. 508, 55 N. W. 375; **Hakes v. Thayer** (1911) 165 Mich. 476, 131 N. W. 174; **Watson v. Blossom** (1888) 18 N. Y. S. R. 726, 4 N. Y. Supp. 489; **Farthing v. Dark** (1891) 109 N. C. 291, 13 S. E. 918.

The court in **TODD v. STATE BANK** (reported herewith) ante, 971, admits the general rule, but holds it inapplicable where "the performance of an executory agreement is a condition precedent to the right of the payee to demand or recover payment." There can be no question about the correctness of the court's conclusion if the performance of the executory agreement is a condition precedent to the right of the payee to recover on the note, and this is brought to the knowledge of the indorsee before he acquires the note. The question arises over the correctness of holding that under the contract in question the performance of the executory agreement was a condition precedent to the maker's liability on the note. Where the contract provides for performance by the payee upon the payment of the note, or at the maturity of the note, there is reason in holding that—at least, as against the payee—payment of the note cannot be enforced unless the payee is ready to comply with his agreement. And the holding of the court in the reported case (**TODD v. STATE BANK**), that this defense is good as against an indorsee with notice, finds support in the earlier Iowa case of **Zebley v. Sears** (1874) 38 Iowa, 507, where the purchaser of a note, given as the last payment for land purchased by the maker from the

payee, who knew that the payee had entered into a written contract to execute a deed to the maker for the land upon the payment of the note, and that the payee was a married man at the time of making such contract to convey, and that his wife had not joined him in such contract and was then living, was held not to occupy the position of a bona fide holder, because of the knowledge of such fact. The court states that the indorsee of the note with full knowledge of the facts out of which this equity of the maker arises can occupy no better position than the payee thereof. It is also stated by the court to be settled by the decisions of the Iowa court that where a promissory note "is executed for the whole or a part of the purchase price of land, which is to be conveyed upon payment of such note, the acts are so far dependent that the grantor cannot recover in an action on the note, without showing a performance on his part by the tender of a deed, or an offer to convey upon payment."

The purchaser of notes given by the vendee of land, and expressed on their face to be in payment "on the . . . tract of land," is put on inquiry and fixed with notice of the terms of the contract, and where this provides that the vendor shall make title to the land upon the payment of the purchase money, the right to collect the note is defeated by failure of the payee's title. *Howard v. Kimball* (1871) 65 N. C. 175, 6 Am. Rep. 739. The court states that although notice that the notes were given as the consideration for the land sold does not amount to notice of a defect in the vendor's title, it does amount to notice of the vendee's equity, provided it turns out that the title is defective. But this case has been disapproved in *Bank of Sampson v. Hatcher* (1909) 151 N. C. 359, 184 Am. St. Rep. 989, 66 S. E. 308, where the court states that: "An examination into the facts of that case will disclose that the assignee of a note which expressed upon its face that it was given as purchase money of a certain tract of land not only had actual notice of the defect of title at the time he purchased, but he had

taken a deed for such defective title from the original vendor, and held same, to be conveyed to the vendee when the note was paid. The case, therefore, is undoubtedly well decided; but, in so far as the opinion gives countenance to the position that a defect of title is available against an indorsee for value of a note for the purchase money, from the fact, and from that alone, that the note on its face is expressed to be for the purchase money of land, or a given tract of land, the case is not in accord with the better-considered decisions. As an authority for such a position, it was in effect disapproved by a subsequent decision of this court, in *First Nat. Bank v. Michael* (1887) 96 N. C. 53, 1 S. E. 855, in which a note of that kind was held to be 'negotiable;' the term 'negotiable' being used in the sense that an indorsee for value without notice, ultra, became the owner of the note, unaffected by the equities and defenses existent between the original parties to the contract." The cases in which the general rule has been applied have not given much consideration to the effect upon the rule of the relative time of performance by the parties. In *Jennings v. Todd* (1893) 118 Mo. 296, 40 Am. St. Rep. 878, 24 S. W. 148, a collateral contemporaneous agreement, providing that the note should not be paid in the event that the executory contract, which was the consideration of the note, should not be performed, is held not to prevent an indorsee from becoming a bona fide holder, although he had notice of such agreement, the court stating that in purchasing such a note no inquiry as to the consideration is required; that if a failure of consideration occurs, the maker must look to the payee for indemnity.

Where a note is due before performance of his executory contract by the payee is due, it is not clear how even the maker can defend an action on the note at its maturity, at least, not unless it could be shown that it would be beyond the power of the payee to perform when his performance was due. In *Siegel, C. & Co. v. Chicago Trust & Sav. Bank* (1890) 131 Ill. 569,

7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417, the court was dealing with a case in which the note matured before performance by the payee was due, and it is stated: "Here, the money was payable, absolutely, on the 1st day of July, 1887,—a time when the contract for the advertising could not have been completed. If the instrument had remained the property of the payee, and upon its maturity and performance to that time, suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired. No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of the consideration to put the indorsee upon inquiry at the time the indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the 15th of May thereafter, when the term

was to commence. All that the recitals would give notice of was that the note was given in consideration of an agreement on the part of the payee that the privilege of an advertisement named should be enjoyed by the makers for three months, from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as notice to the indorsee of the future breach of the contract by Dalziel. The presumption of law would be that the contract would be carried out in good faith and the consideration performed as stipulated. The makers had put their promissory note into the hands of Dalziel upon an expressed consideration, which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel, and we are aware of no rule by which they can hold this indorsee for value, before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed." W. A. E.

## IVA THOMPSON

v.

CLARENCE THOMPSON, Appt.

*Michigan Supreme Court—April 3, 1919.*

(205 Mich. 124, 171 N. W. 347.)

### Divorce — subjecting wife to abuse of mother-in-law.

1. A man's insistence that his wife live in his mother's home where she is subjected to abuse, and is the recipient of vile epithets from his mother, is extreme cruelty, entitling her to a divorce, although the mother's home is the only available place within 2 miles of his work and living at that distance from his work would make its successful prosecution impossible.

[See note on this question beginning on page 993.]

— cruelty — failure to provide proper home.

2. Ordinarily the refusal or inability of a man to provide a home for his wife commensurate with her ideas of comfort and luxury is not extreme cru-

elty which will entitle her to a divorce. [See 9 R. C. L. 349.]

— alimony — amount.

3. An allowance of \$900 as permanent alimony to a wife who had no share in accumulating her husband's

property and had lived with him but a few months is too high, when his property consists of an interest in a heavily mortgaged farm which, according to the highest estimate, amounts to only \$2,700.

[See 1 R. C. L. 929 et seq.]

— provision for child — discretion to enlarge.

4. A provision in a divorce suit for support of a child may be enlarged in the discretion of the court as circumstances alter.

[See 9 R. C. L. 484.]

APPEAL by defendant from a decree of the Circuit Court for Hillsdale County, in Chancery, (Chester, J.) in favor of plaintiff in a suit for a divorce. *Modified and affirmed.*

Statement by Brooke, J.:

Plaintiff and defendant at the time of their marriage on December 8, 1915, were each about twenty-three years of age. Plaintiff is the daughter of a farmer, and defendant is a farmer, their respective places being about 2 miles distant from each other. Defendant's father is dead, and defendant, together with one of his brothers, purchased from the administrator of his father's estate a 100-acre farm upon which his brother lived. Defendant at the time of the marriage lived with his mother in a house belonging to her near the farm he owned jointly with his brother. It is in evidence that the parties had known each other for some five years prior to the marriage, and had been engaged to be married for upwards of one year. A child was born to the union on January 26, 1916. The record shows that the marriage had been set for a date nearly a year before it actually took place, but because of some differences which arose was not then consummated. Some time after the date first set for the marriage the parties became sexually intimate, and as a result the plaintiff became enceinte. Plaintiff's condition becoming apparent to her father, he interviewed defendant, and urged him to make such tardy reparation as was possible to his daughter through a belated marriage. After two or three interviews the father's importunity bore fruit, and the parties were married on the date above specified. They spent the night of their wedding day with plaintiff's parents, and on the next day defendant took plaintiff to the home of his mother.

A perusal of this record convinces us that the treatment accorded the plaintiff by defendant's mother was abusive and contumelious in the highest degree. In effect, defendant's mother charged plaintiff with being a prostitute, ordered her from her home, and asserted that no Stiverson (that being plaintiff's maiden name) should ever enter her house. After a three days' sojourn plaintiff's position in the household of her husband's mother became so intolerable that she insisted upon returning to the home of her parents, where she remained a few days. On two other occasions between the date of the marriage and the birth of her child, plaintiff, at the solicitation of her husband, went to live in his mother's house, but was accorded no better treatment than upon the first attempt. She lived with her husband in his mother's house for about a week prior to the birth of her baby, during a time when the mother was absent, with fair tranquillity. Being advised of the imminent approach of maternity, the husband, at her request, took her to her mother's home on the morning of January 22d, where the baby was born two or three hours later. Thereafter, during her confinement in bed as the result of parturition, defendant visited her nearly every evening. It is in evidence that the husband insisted that she should return with him to his mother's home, but after the treatment she had received the wife steadily refused to accede to his demands, and urged him to secure a home apart from that of his mother. Shortly after plaintiff was able to be about, her mother told defendant that if he could not take

proper care of her daughter she did not desire to have him come to see her. "I told him we had one young one by him, and we didn't want another one." Thereafter, and for a period of approximately two months, defendant absented himself entirely from his wife and child; made no effort to see them, to provide them with the necessaries of life, or to arrange a home for them apart from that of his mother. Plaintiff's bill was filed on March 24th. Immediately upon service of the process upon him defendant sought a conference with plaintiff and tried to induce her to return to him, stating that he had a paper from his mother to the effect that if he and his wife could not get along together she, the mother, would leave. Plaintiff refused to undertake a further experiment in the desired direction, and the case proceeded to a hearing in open court, after which a decree of divorce was granted plaintiff with permanent alimony in the sum of \$900, the custody of the infant child, and the sum of \$2.50 per week for the support of the child. Defendant has appealed, and in this court urges that the court below was in error: First, in granting a decree upon the ground of extreme cruelty; and, second, in fixing the amount of permanent alimony at so high a figure.

Messrs. Paul W. Chase and Merton Fitzpatrick for appellants.

Mr. B. D. Chandler for appellee.

Brooke, J., delivered the opinion of the court:

It is impossible to define with accuracy the exact meaning of the term, "extreme cruelty," as used in the statute which provides for divorce upon that, among other grounds. We have, however, held that when a husband imputes a lack of chastity to his wife, she being a woman of character, education, and refinement, a case for divorce on the ground of extreme cruelty is made out. In the case at bar the evidence shows that the defendant husband, aside from his insistence that his wife should live with him in the

home of his mother and there be subjected to attacks of the most bitter and abusive character from his mother, treated his wife, the plaintiff, with uniform kindness. Plaintiff's position in the house of her husband's mother was one of extreme delicacy. Her earlier indiscretion had rendered her peculiarly vulnerable to attack. Ordinarily it is the duty of the wife to follow the husband to such a home as he may choose or may be able reasonably to provide, and his refusal or inability to provide a home commensurate with the ideas of comfort and luxury entertained by his wife is not "extreme cruelty," and constitutes no ground for divorce.

Divorce—  
cruelty—  
failure to provide proper home.

It is in evidence that there was no vacant house available for defendant's use within 2 miles of the farm where he worked, and that it was impossible for him to carry on his work successfully from such a distance, and it is urged in his behalf that his failure to comply with plaintiff's demands should not be taken as evidence of his lack of interest in her welfare, and much less should it be construed as such an act of extreme cruelty as would warrant a decree of divorce. The case is one of peculiar hardship. Defendant's mother, though in the court room during the hearing, did not take the stand to deny the accusations made against her by plaintiff. The learned circuit judge who saw and heard the witnesses readily granted the relief prayed. We have concluded, though with some hesitation, not to disturb the decree in this regard.

—subjecting  
wife to abuse  
of mother-in-law.

The court found defendant's net worth to be approximately the sum of \$2,700, and awarded the plaintiff \$900 as permanent alimony. He likewise allowed the sum of \$100 for attorney's fees. Defendant's assets consist of a one-half interest in the farm, quite heavily mortgaged, and a one-third interest in the personal

property used upon the farm. In computing their value the court used the highest figures given by any witness thereon. We think the allowance too high. It should be remembered that plaintiff has had no share in the accumulation of defendant's property, and that she lived with him as a wife less than two months. True, she has borne his child, but the decree provides for a contribution from the defendant

—alimony—  
amount.

for its support, which provision, as circumstances alter, may, in the discretion of the court, be enlarged. All things considered, we believe that an allowance of \$500 as permanent alimony is equitable. The allowance for attorney's fees will stand as made, and neither party will recover costs in this court.

—provision for  
child—dis-  
cretion to  
enlarge.

As so modified, the decree will stand affirmed.

## ANNOTATION.

### Abuse by relatives of other spouse as cruelty constituting ground for divorce.

Abuse by relatives of other spouse, countenanced by such other spouse, may be cruelty constituting ground for divorce. THOMPSON v. THOMPSON (reported herewith) ante, 990; Dakin v. Dakin (1901) 1 Neb. (Unof.) 457, 95 N. W. 781.

So, such abuse, so countenanced, may be cruel and inhuman treatment constituting ground for divorce (Day v. Day (1892) 84 Iowa, 221, 50 N. W. 979); or may, with other acts, amount to such cruel and inhuman treatment (Snyder v. Snyder (1917) 98 Misc. 431, 162 N. Y. Supp. 607). So, such abuse, so countenanced, may justify a divorce on the ground of cruel and inhuman treatment and personal indignities, rendering the wife's life burdensome. Hall v. Hall (1881) 9 Or. 452.

It will be seen that in the reported case (THOMPSON v. THOMPSON) the court, with some hesitation, affirms a decree of divorce granted to the wife for extreme cruelty where the husband insisted that she should live in the house of his mother, who had abused her, called her a prostitute, ordered her out, and made her sojourn there intolerable.

In Dakin v. Dakin (Neb.) supra, it was held that a husband who requires his wife to live with his mother, refusing to provide her with another home, and who allows the mother to assault and abuse the wife and to teach her child bad habits, is guilty of cruelty for which the wife is entitled to a divorce.

3 A.L.R.—63.

The failure of a husband to protect his wife from disdainful, insulting, and abusive treatment by his children of a former marriage, she being of nervous temperament, advanced in years, and of impaired health, was held to be such cruel and inhuman treatment as would entitle her to divorce, and would justify her in leaving her husband's home, in Day v. Day (Iowa) supra.

It is held in Hall v. Hall (Or.) supra, that a husband who, in disregard of his wife's remonstrances and of his antenuptial promise to provide for them elsewhere, continues to keep at the family domicile his grown-up children of a former marriage, who habitually treat her with disrespect, apply coarse and degrading epithets to her, and one of whom, on one occasion, actually assaults her under such circumstances as cause conviction and punishment therefor in a criminal action, and who, generally, so conduct themselves toward her as to justify a reasonable apprehension on her part of danger to her person from their violence while endeavoring to perform her duties, adopts such misconduct as his own, and must be held responsible for it to the same extent as if it were his own, in a suit for divorce, brought against him by his wife on the ground of cruel and inhuman treatment and personal indignities, rendering her life burdensome.

Under the New York statute, providing as distinct grounds for a sepa-

ration, "cruel and inhuman treatment" and "such conduct" as may render it unsafe and improper" for the defendant to cohabit with the plaintiff, the courts at first considered that the distinct grounds were synonymous. See *Mason v. Mason* (1831) 1 Edw. Ch. (N. Y.) 278. And in *De Meli v. De Meli* (1884) 67 How. Pr. (N. Y.) 20, affirmed in (1890) 120 N. Y. 485, 17 Am. St. Rep. 652, 24 N. E. 996, where, among the facts, it appeared that there had been some difference between wife and mother-in-law, who did not live together, in which the husband had taken no active part, it is stated that the cruel and inhuman treatment "must be either actual personal violence, committed with danger to life, limb, or health, or there must be a reasonable apprehension of personal violence, arising from menaces or threats creating a reasonable fear of bodily harm." But the later cases do not require physical violence, or fear of it. Thus in *Snyder v. Snyder* (1917) 98 Misc. 431, 162 N. Y. Supp. 607, the plaintiff was held entitled to a separation for cruel and inhuman treatment, although there was no actual violence of tongue or fist by the husband, and she was willing to live with him apart from his mother, where for several years the husband was without employment except helping his mother in her business, for which she allowed him and his wife and child to live in her home, or in other houses owned by her, and furnished them with food, the mother being the dominant factor in their lives and the real head of their household, and the plaintiff being subjected "by the mother to a continuous course of unkind treatment, evidently animated by that dislike and a desire to break up the little family, to the end that the mother might have the son to herself." The defendant knew of this treatment, but refused to live away from his mother, or to work, except for her, and he supplied his wife with no necessities except food, and refused to pay the doctor's bill for her confinement, and she herself earned the money to pay the hospital bill. The court said: "Defendant's

counsel earnestly urges that plaintiff has not brought herself within the rule laid down in *De Meli v. De Meli* (N. Y.) *supra*, and other decisions of like import. This may be so, but the later cases have brought the doctrine to rest upon a rule somewhat less strict and more humane than that earlier announced. 'Cruel and inhuman treatment does not necessarily imply such treatment as places a wife in physical fear of the husband. The conduct of the husband may produce such mental agony in the wife as to be even more cruel and inhuman than if mere physical pain had been inflicted; and where the conduct of the husband toward the wife is of this character, it is certainly cruel and inhuman, and justifies the court in freeing her from the necessity of submission to such treatment.' *Kissam v. Kissam* (1897) 21 App. Div. 142, and cases cited at page 144, 47 N. Y. Supp. 270."

It was held in *Hutchins v. Hutchins* (1896) 93 Va. 68, 24 S. E. 903, that a man who marries a woman and sends her to live with his parents, who taunt her with vexatious remarks, culminating in such a violent physical attack upon her by his mother that she requires the assistance of neighbors in dressing the wounds, in consequence of which she goes to live with friends, was guilty of cruelty, and was not entitled to a divorce on the ground of desertion, where, during the wife's sojourn with his parents, he turns a deaf ear to her importunities for a different home.

In reversing a judgment granting the husband a divorce on the ground of the wife's desertion, the court said: "There is no doubt that it was a contentious household, for which the mother was at least partly to blame, so that if her conduct was not modified there could be no happiness, and this the husband did not undertake to accomplish, for he testified that he heard both sides and remained neutral, even when told by his wife that his mother had written a letter to a fortune teller in which the wife was described as 'a bad, wicked woman.' This attitude on the part of the hus-

band is not perhaps such legal cruelty that it would justify a wife in leaving the home, but there is a species of cruelty which cuts deeper than a blow or the lash, and that is the weakening of a husband's love and affection through the disparagement of the wife by the husband's mother, and when not resented by him, but apparently sustained, is bound to destroy the happiness of the home. Under such circumstances it is his duty to remove the cause, and if he refuses it is a potent element in the consideration of the questions whether he did not consent to the separation, and whether he made a bona fide effort to induce his wife to return." *Fraser v. Fraser* (1917) 87 N. J. Eq. 633, L.R.A. 1917F, 738, 101 Atl. 58.

But a youth's insolent and abusive conduct toward his stepmother, there being mutual antipathy between them, and his frustration of her attempt to return to the husband's domicile after she had left by reason of his refusal to send his son away when she said that one of them must go, was held

to be no ground for divorce, on the ground of cruelty, where the husband neither encouraged nor approved of his son's conduct. *Nickerson v. Nickerson* (1898) 34 Or. 1, 48 Pac. 423, 54 Pac. 277.

And a husband was held not guilty of extreme cruelty so as to warrant his wife in deserting him because her control of the household was intruded upon by his daughters by a former marriage, and his spinster sister, who lived with him, where the wife was not without fault in the matter, and the husband did not encourage the interference or treat her with anything resembling cruelty. *Dummer v. Dummer* (1898) — N. J. —, 41 Atl. 149, where the case appeared to be merely one of an inharmonious household, the female members of which, because of infirmities of temper, took exceptions to acts of each other which ordinarily would be regarded as unobjectionable. *Marshak v. Marshak* (1914) 115 Ark. 51, L.R.A.1915E, 161, 170 S. W. 567, Ann. Cas. 1916E, 206. B. B.-B.

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JOHN READ MINER, Pkf. in Err.,

v.

UNITED STATES OF AMERICA.

*United States Circuit Court of Appeals, Third Circuit—August 27, 1917.*

(157 C. C. A. 48, 244 Fed. 422.)

**Criminal law — postponing sentence — effect on jurisdiction.**

1. The effect of orders postponing sentence under a conviction from term to term, upon the jurisdiction of the court to impose such sentence, depends upon the validity or invalidity of the orders.

[See note on this question beginning on page 1003.]

— functions of departments of government.

2. The penalty for a crime is a matter within the legislative department of the government, the imposition of the penalty by sentence is the function of the judicial department, to be performed as prescribed, and relief therefrom by pardon is exclusively within the executive department.

[See 6 R. C. L. 149; 8 R. C. L. 272.]

— suspension of sentence — validity.

3. An order of suspension of sen-

tence or of the imposition of sentence, in the exercise of a power of pardon or parole not possessed by the court is invalid,

[See 8 R. C. L. 237, 248.]

— postponing sentence for purpose of justice.

4. If the court's purpose in postponing the imposition of sentence upon a convict is incident to the administration of justice within its conceded powers, and its orders postponing sentence are unconditional and to definite



periods, the jurisdiction of the court finally to impose sentence is not affected.

[See 8 R. C. L. 249.]

— application of accused.

5. Orders postponing sentence from term to term upon application of accused, and upon his giving recognizance upon reasons which, though not appearing, cannot be assumed to be unsubstantial, do not affect the

jurisdiction of the court finally to impose sentence.

[See 8 R. C. L. 250.]

Appeal — assumption as to procedure.

6. The appellate court must assume that orders postponing sentence of a convict were for a lawful purpose in the orderly progress of the case, in the absence of anything in the record to the contrary.

[See 8 R. C. L. 252.]

**ERROR** to the District Court of the United States for the Western District of Pennsylvania (Orr, District Judge) to review a judgment imposing a sentence upon defendant's pleading guilty to an indictment charging him with unlawfully making a fraudulent report of a banking association in violation of statute. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Buffington, McPherson, and Woolley, Circuit Judges.

Messrs. Thomson & Bradshaw and George C. Bradshaw, for plaintiff in error:

The United States courts are without power to suspend sentence.

Ex parte United States, 242 U. S. 27, 61 L. ed. 129, L.R.A.1917E, 1178, 37 Sup. Ct. Rep. 72, Ann. Cas. 1917B, 355.

In jurisdictions where the right of the court to suspend sentence is denied, where the defendant is set at liberty upon an indefinite suspension, he cannot be further proceeded against, and, if rearrested, is entitled to discharge.

State ex rel. Dawson v. Sapp, 87 Kan. 740, 42 L.R.A.(N.S.) 249, 125 Pac. 78; Grundel v. People, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022; Re Flint, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531; People ex rel. Boenert v. Barrett, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23; People ex rel. Smith v. Allen, 155 Ill. 61, 41 L.R.A. 473, 39 N. E. 568; United States v. Wilson, 46 Fed. 748; State v. Hockett, 129 Mo. App. 639, 108 S. W. 599; People ex rel. Powers v. Shattuck, 274 Ill. 491, 113 N. E. 921.

Messrs. Neil W. McGill and E. Lowry Humes, for defendant in error:

It was not only within the power of the court to impose sentence at a subsequent term, but it was the duty of the court then to impose sentence.

Ex parte United States, 242 U. S. 27, 61 L. ed. 129, L.R.A.1917E, 1178, 37 Sup. Ct. Rep. 72, Ann. Cas. 1917B, 355; 12 Cyc. 772; Clark, Crim. Proc. p. 495; State v. Guild, 10 N. J. L. 163,

18 Am. Dec. 404; Clark v. Allen, 114 Fed. 374; Morgan v. Adams, 141 C. C. A. 475, 226 Fed. 719.

Woolley, Circuit Judge, delivered the opinion of the court:

John Read Miner was indicted for violating § 5209, Revised Statutes (Comp. Stat. 1916, § 9772). On March 11, 1915, he entered a plea of guilty. Sentence was deferred to May 1, 1915. Thereafter sentence was postponed on the application of the defendant, from term to term, for three terms, recognizance being required and given at each term for his appearance at the next. On January 15, 1917, he was called for sentence. In response, he filed a motion in arrest of judgment. Upon its denial, sentence was imposed. He now brings this writ and raises the question whether the court, by failing to impose sentence at the trial term, lost jurisdiction to impose sentence at a later term.

In support of his contention that the postponement of sentence beyond the trial term, though on his motion, deprived the court of jurisdiction to impose sentence upon him at any other term, the defendant cites, for authority, Ex parte United States, 242 U. S. 27, 61 L. ed. 129, L.R.A.1917E, 1178, 37 Sup. Ct. Rep. 72, Ann. Cas. 1917B, 355, and numerous state decisions, holding that a court is without power to suspend a sentence once imposed, and similarly is without power to sus-

pend the imposition of sentence, conditioned, in either instance, upon the good behavior of the prisoner, or upon the future attitude of the court toward him. These decisions are based upon the principle that the penalty for a crime is a matter within the legislative department of the government, the imposition of

**Criminal law—  
functions of  
departments  
of government.**

the penalty by sentence is the function of the judicial department, to be performed as prescribed, and relief therefrom by pardon is exclusively within the executive department. This principle, of course, is not open to dispute. The questions are, When is the principle invaded? and, What is the effect of its invasion upon the further jurisdiction of the court over an offender?

It is now very generally held that the principle is invaded when a court, by an act done either before sentence or after, attempts to pardon a convict, or to parole him when it is not vested with power of parole, or to parole him in a manner different from that provided by law. That such an act is beyond the jurisdiction of a Federal court, and therefore invalid, has lately been decided by the Supreme Court in *Ex parte United States*. There the prisoner had been convicted, and sentence had been imposed. The court then ordered "that the execution of the sentence be, and it is hereby, suspended during the good behavior of the defendant, and for the purpose of this case the term of this court is kept open for five years." The Supreme Court held the order invalid, and directed that it be vacated.

While it is no longer questioned that an order of suspension, either of sentence or of the imposition of sentence, in the exercise of a power of pardon or parole not possessed by a court, is invalid, the courts are divided upon the question of the legal effect of such an invalid order upon the con-

tinued jurisdiction of a court to impose or enforce a sentence after the term, some holding that jurisdiction is lost by the illegal act, others that it is retained.

In *State ex rel. Dawson v. Sapp*, 87 Kan. 740, 42 L.R.A. (N.S.) 249, 125 Pac. 78, the court recognized the general rule that, where a verdict or plea of guilty is final, a court has no discretion, as a disciplinary measure, to suspend the imposition of sentence, and held that the legal effect of the exercise of such discretion by suspending the imposition of a sentence, indefinitely or conditionally, is to deprive the court of jurisdiction to impose sentence at a later term. Other courts have held the same view with reference to sentences imposed and conditionally suspended. *United States v. Wilson* (C. C.) 46 Fed. 748; *Ex parte Clendenning*, 22 Okla. 108, 19 L.R.A. (N.S.) 1041, 132 Am. St. Rep. 628, 97 Pac. 650; *Re Peterson*, 19 Idaho, 433, 33 L.R.A. (N.S.) 1067, 113 Pac. 729; *Re Strickler*, 51 Kan. 700, 33 Pac. 620; *Gray v. State*, 107 Ind. 177, 8 N. E. 16; *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482; *Weaver v. People*, 33 Mich. 296, 1 Am. Crim. Rep. 552; *Grundel v. People*, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022; *Re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531; *People ex rel. Smith v. Allen*, 155 Ill. 61, 41 L.R.A. 473, 39 N. E. 568; *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23; *State v. Hockett*, 129 Mo. App. 639, 108 S. W. 599; *Re Beck*, 63 Kan. 57, 64 Pac. 971.

Opposed to this line of cases is another, in which the validity of an order conditionally postponing or suspending sentence is similarly recognized, but an opposite view of its effect upon the court's jurisdiction is entertained. In these cases it is held, in effect, that the order, being illegal, is so not because it is irregular or technically defective, but because it is beyond the power of the court, and being for that reason void, the conviction or sentence

stands unaffected by the order, and is enforceable by the court at any time after the term, and until the convict has suffered the penalties the law imposes. *Morgan v. Adams*, 141 C. C. A. 475, 226 Fed. 719; *State v. Abbott*, 87 S. C. 466, 33 L.R.A. (N.S.) 112, 70 S. E. 6, Ann. Cas. 1912B, 1189; *State v. Drew*, 75 N. H. 402, 74 Atl. 875; *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954; *State v. Hatley*, 110 N. C. 522, 14 S. E. 751; *State v. Whitt*, 117 N. C. 804, 23 S. E. 452; *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459, 14 Ann. Cas. 718; *Fuller v. State*, 100 Miss. 811, 39 L.R.A. (N.S.) 247, 57 So. 806, Ann. Cas. 1914A, 98.

From this brief survey of the cases, it is pertinent to note that the question before us as to the jurisdictional effect of the court's orders

—postponing sentence—effect on jurisdiction.

postponing sentence from term to term is controlled by the validity or invalidity of the orders, and the validity of the orders is determined by their character and purpose. If, in this case, the purpose of the district court in postponing sentence was to pardon or parole the defendant, then we have to decide whether the court had jurisdiction to impose a sentence at a later term. If, on the other hand, the court's purpose was incident to the administration of justice within its conceded powers, and its orders postponing sentence were unconditional and to definite periods, then we have no jurisdictional question

—postponing sentence for purpose of justice.

before us, for all courts agree that in such a case jurisdiction to impose sentence at a term after the trial term is retained.

What, then, does the record show as to the validity of the orders? The record shows that sentence was regularly postponed from term to term, recognizances given, and appearance made. The postpone-

ments, therefore, were entirely definite. They were made, in each instance, upon application of the defendant and against objection by the government. Hence we must assume that some —application of accused. reasons for the postponements were offered and controverted by the parties, and in that sense were litigated before and decided by the court. The reasons for the postponements do not appear of record. We cannot assume that they were not substantial.

There is nothing to show that the postponements were conditional. On the contrary, the proceedings clearly indicate that they were unconditional. If the court was moved by impulse to postpone sentence, it does not so appear. We should not assume that it was actuated by improper or unlawful considerations. Nor does the court's purpose appear. But every legal intendment favors the notion that it had a purpose, and that the purpose was lawful. In fact, we must assume, in the absence of anything in the record to the contrary, that the postponements were made for a lawful purpose, in the orderly progress of the case. This being true, the validity of the orders postponing sentence is established, leaving for decision no question of the court's jurisdiction to impose sentence at a later term.

Appeal—assumption as to procedure.

The judgment below is affirmed.

#### NOTE.

The question as to whether jurisdiction is lost by delay in imposing sentence is considered in the annotation beginning at page 1003, post. The effect on this general question of orders, as in the reported case (*MINER v. UNITED STATES*, ante, 995), postponing sentence from term to term, is treated in subdivision III. of that annotation.

ROMEO SMITH, Appt.,  
v.  
STATE OF INDIANA.

*Indiana Supreme Court — February 11, 1919.*

(— Ind. —, 121 N. E. 829.)

**Criminal law — loss of power to pronounce judgment after conviction.**

1. Under a statute requiring the court to pronounce judgment after a finding of guilt the court loses jurisdiction to pronounce a judgment on a plea of guilty by the passing of two terms of court thereafter, during a portion of which time accused is permitted to be at large without bail.

[See note on this question beginning on page 1003.]

**— failure to compel court to act — effect.**

2. An accused is not deprived of the benefit of the failure of the court to act by not compelling it to perform its plain statutory duty.

[See 8 R. C. L. 248-250.]

**— right to defer sentence.**

3. Courts may defer final action upon a plea of guilty, or upon a conviction, to a subsequent day or term, when it appears that the interest of justice demands it.

[See 8 R. C. L. 249.]

**— when cause shown.**

4. Cause for deferring sentence after conviction is shown when time

is allowed the accused to move for a new trial, or in arrest of judgment, or to take other steps involving delay allowed by statute or the practice of the court, or for the purpose of hearing evidence on the question of punishment.

[See 8 R. C. L. 249.]

**Appeal — failure to sentence — assumption of justification.**

5. An appellate court cannot, when the record shows unlawful delay in imposing sentence after plea of guilty, assume that the delay was justified for the purpose of upholding a sentence subsequently imposed.

[See 8 R. C. L. 252.]

APPEAL by defendant from a judgment of the Circuit Court for Delaware County overruling his verified motions to set aside and vacate, and to modify, a judgment convicting him, on pleading guilty, of keeping a gaming house. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. George W. Cromer and Harry Long, for appellant:

The court has no power to withhold judgment for an indefinite or unreasonable time.

Smith v. Hess, 91 Ind. 424.

In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of a crime deprives the court of jurisdiction to pronounce sentence at a subsequent term.

Grundel v. People, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022; Republic v. Pedro, 11 Haw. 287; Com. v. Maloney, 145 Mass. 205, 13 N. E. 482; Com. v. Dunleavy, 16 Pa. Super. Ct. 80.

By an indefinite suspension of sentence, the court loses jurisdiction of

the defendant, and cannot thereafter order his commitment.

Ex parte Peterson, 19 Idaho, 433, 33 L.R.A.(N.S.) 1067, 113 Pac. 729.

Where the court, without any legal cause therefor, passes the case over under an entry that, by agreement, the assessing of punishment and sentence is deferred to some future time, it loses its jurisdiction, and cannot pronounce sentence at a subsequent term.

State v. Hockett, 129 Mo. App. 639, 108 S. W. 599; State v. Dibert, — Mo. App. —, 108 S. W. 600; State v. Jacobs, — Mo. App. —, 108 S. W. 601.

Where sentence is delayed from time to time without the defendant's request, until the period of imprisonment to which he could have been

sentenced has elapsed, the court has no jurisdiction to pass sentence.

*People v. Kennedy*, 58 Mich. 372, 25 N. W. 318.

A court has no authority (in the absence of a statute) to order a term of imprisonment to commence at a future period of time, and the order to that effect may be regarded as a nullity.

*Miller v. Allen*, 11 Ind. 389; *Kennedy v. Howard*, 74 Ind. 87.

Where two sentences of imprisonment are imposed at the same time, both terms commence and run concurrently.

*Ibid.*

Messrs. Ele Stansbury, Attorney General, and Edward M. White, for the State:

It is lawful and competent for a criminal court, after conviction on plea of guilty, to stay for a time its sentence, to give the court opportunity to better satisfy his own mind what the punishment ought to be.

*Smith v. Hess*, 91 Ind. 424; *People v. Brown*, 54 Mich. 15, 19 N. W. 571; *Com. v. Dowdican*, 115 Mass. 133; *Ex parte United States*, 242 U. S. 27, 61 L. ed. 129, L.R.A.1917E, 1178, 37 Sup. Ct. Rep. 72, Ann. Cas. 1917B, 355; *People v. Felker*, 61 Mich. 110, 27 N. W. 869.

The court had the power and right to delay defendant's sentence, and the presumption must be indulged that it was delayed for proper and legal reasons, and for a proper and reasonable time.

*Smith v. Hess*, *supra*; *Cassady v. Miller*, 106 Ind. 72, 5 N. E. 713; *People v. Brown*, 54 Mich. 15, 19 N. W. 571.

If defendant was at liberty, after his plea of guilty was entered, it was not the result of any order of the court, for the court made no order to that effect.

*Shaffer v. State*, 100 Ind. 365.

The trial court has no right, after a plea of guilty in a criminal case by one of legal age, to enter any order permitting the defendant to be released during good behavior.

*Gray v. State*, 107 Ind. 177, 8 N. E. 16.

The Delaware circuit court did not lose jurisdiction to punish defendant on his plea of guilty because of delay in administering such punishment.

*Ibid.*; *Ledgerwood v. State*, 134 Ind. 81, 33 N. E. 631; *United States v. Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247; *State v. Ray*, 50 Iowa, 521; *Peo-*

*ple v. Reilly*, 53 Mich. 260, 18 N. W. 849; *Re St. Hilaire*, 101 Me. 522, 64 Atl. 882, 8 Ann. Cas. 385; *Re Terry*, 71 Kan. 362, 80 Pac. 586; *State v. Abbott*, 33 L.R.A. (N.S.) 112, and note, 87 S. C. 466, 70 S. E. 6, Ann. Cas. 1912B, 1189.

Even at common law, sentence may be suspended indefinitely and the court still retain jurisdiction of the person of the defendant and sentence him at a later date.

*Re Collins*, 8 Cal. App. 367, 97 Pac. 188; *Mann v. People*, 16 Colo. App. 475, 66 Pac. 452; *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954; *Weber v. State*, 58 Ohio St. 616, 41 L.R.A. 472, 51 N. E. 116; *Fults v. State*, 2 Sneed, 232; *State v. Abbott*, *supra*; *Ex parte United States*, 242 U. S. 27, 61 L. ed. 129, L.R.A.1917E, 1178, 37 Sup. Ct. Rep. 72, Ann. Cas. 1917B, 355.

In view of the state of the record, which fails to show any entry showing why sentence was not pronounced sooner upon the plea of guilty, the court must presume the postponement of the court was based upon some sufficient reason.

*Gray v. State*, *supra*; *People v. Brown*, 54 Mich. 15, 19 N. W. 571.

*Myers, J.*, delivered the opinion of the court:

On January 10, 1918, appellant was sentenced to pay a fine of \$250, and to imprisonment on the Indiana state farm for a period of six months. On January 28, 1918, appellant filed his verified motion to set aside and vacate said judgment, which motion was overruled February 1, 1918; thereupon he filed his verified motion to modify the judgment. This motion was overruled. From the judgment thus rendered appellant has appealed to this court, and has assigned as error: (1) The overruling of his motion to set aside and vacate the judgment; (2) the overruling of his motion to modify the judgment.

Counter affidavits were filed by Honorable William A. Thompson and the deputy sheriff of Delaware county, denying certain statements of fact contained in appellant's motion to vacate the judgment. The facts thus questioned we will not undertake to settle. With these facts out of the way, this case is

before us under practically an agreed statement, as follows: Two indictments were returned by the grand jury at the January term, 1917, of the Delaware circuit court, one on January 6th and one on January 16th, hereafter referred to as the first and second, respectively. On March 19, 1917, appellant appeared in the Delaware circuit court, and before Honorable William A. Thompson, sole judge thereof, and entered a plea of guilty to each of said indictments. He was then permitted to go hence on bond for his appearance in that court on May 22, 1917. He appeared in court as stipulated in the bond, and before the judge thereof, and then and there, on appellant's plea of guilty theretofore entered to the first indictment, judgment was pronounced and sentence fixed at a fine of \$250, and imprisonment on the Indiana state farm for a period of three months. Appellant paid the fine and costs assessed against him, and was imprisoned in accordance with the sentence imposed. The term of his imprisonment expired on August 22, 1917, at which time he was released, and then and there returned to his home in Muncie, Indiana, where he has continuously resided, and within the jurisdiction of the Delaware circuit court.

No action whatever was taken by the court on appellant's plea of guilty to the second indictment prior to January 10, 1918, at which time, on order of the court, the sheriff of Delaware county brought appellant into court, and judgment was then and there rendered against him on his plea of guilty entered more than nine months prior thereto, and more than seven months after the time of his sentence on the first indictment. Appellant was forty-eight years old at the time he pleaded guilty, and from the time of his release from the state farm he was not in the custody of the court or sureties until said January 10th. There is no claim of any attempt on the

part of the court to follow the provisions of §§ 2174, 2176, Burns's Anno. Stat. 1914 (Acts 1907, p. 447, §§ 1, 3), known as the Parole or Suspending Sentence Statute.

Appellant insists that under this state of the record, the Delaware circuit court has no authority or jurisdiction to pronounce judgment or sentence him on January 10, 1918. Section 2166, Burns's Anno. Stat. 1914 (Acts 1905, p. 584, § 290, of our Criminal Code), provides that "after a finding or verdict of guilty against the defendant, if a new trial be not granted, or the judgment be not arrested, the court must pronounce judgment."

And § 2171, Burns's Anno. Stat. provides that "if no sufficient cause be alleged or appear to the court why judgment should not be pronounced, it shall thereupon be rendered."

Under § 2073, "if the accused plead guilty, said plea shall be entered on the minutes, and he shall be sentenced, or he may be placed in the custody of the sheriff until sentenced."

The remainder of this section has reference to an accused under the age of twenty-one years, and can have no bearing on the question here for decision.

The state has called our attention to the case of *Gray v. State*, 107 Ind. 177, 8 N. E. 16. That case holds that any agreement to compound, discontinue, or delay a prosecution is forbidden by the statute, and is illegal and void. It also reaffirmed the doctrine announced in the case of *Smith v. Hess*, 91 Ind. 424, to the effect that the trial court, under the provisions of § 2073, *supra*, had no power to permit the accused to depart from court without sentence, subject to arrest in case he did not behave well. The ruling thus made is in harmony with the holding of this court in *Shaffer v. State*, 100 Ind. 365. In this last case there was an order-book entry showing that the sentence was sus-

pendent. A motion to discharge the accused on the ground that the order suspending sentence amounted to a judgment which was not subject to change or amendment was overruled, and the defendant sentenced. This action of the court was upheld for the reason it did not appear from the record that the judgment was unnecessarily delayed.

In the *Smith Case*, this court said: "The legitimate inference from the statute is that the legislature in its enactment did not intend that the courts should allow adult offenders to go on good behavior. Without deciding what might be the result of such a practice, upon a proper case made, and properly brought before us, we may say that, as at present advised, we do not feel like giving our sanction to that practice."

The case of *Ledgerwood v. State*, 134 Ind. 81, 33 N. E. 631, is cited by the state in support of its contention that the trial court did not lose jurisdiction to punish appellant on his plea of guilty. That case holds that the court's failure to render judgment after a plea of guilty, until the next term, will not divest its jurisdiction. By reference to the record in that case, it will be observed that the defendant was at all times after his arrest in the custody of the court. The reason for the postponement does not appear in the opinion, but the record shows just cause. This fact would be sufficient to distinguish it from the case at bar, for in this case no cause is shown for the delay of two full terms between the term at which the plea of guilty was entered and the term at which the sentence now under consideration was pronounced.

There is no reason or authority for saying that an accused must not only do what the law requires of him, but that he must go farther and compel the court to perform a plain statutory duty, if he would protect

himself from the motives of the court's failure to act. As said in the case of *People v. Kennedy*, 58 Mich. 372, 25 N. W. 318: "The defendant, even after conviction, has some rights that a court is bound to respect, and is entitled to have his liberty as soon as the limit of law, reasonably administered, will permit."

In the case of *Re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853, 71 Pac. 531, the court in its opinion, after recognizing the right to defer sentence from time to time for a proper purpose, said: "But we know of no rule or principle of law whereby a court can indefinitely suspend sentence, keep the defendant in a state of suspense and uncertainty, and, long after he has been discharged from custody, have him re-arrested, and impose a sentence of either fine or imprisonment on him."

In *Grundel v. People*, 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022, the order entry of the trial court at the August term fixed no definite time within which sentence should be pronounced. "The defendants were released upon their own recognizance. Whether or not they would ever be called to the bar for sentence was contingent upon the action of the prosecuting officer." More than three years elapsed before any action was taken, when, over the objection of the defendant, judgment was rendered and sentence imposed. Held, that "in the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction to pronounce sentence at a subsequent term. Such postponement is, in effect, a discharge of the prisoner, and therefore ousts the court after the expiration of the term of further authority over him. *People ex rel. Smith v. Allen*, 155 Ill. 61, 41 L.R.A. 473, 39 N. E. 568; *Com. v. Maloney*, 145 Mass. 205, 13 N. E.

—loss of power  
to pronounce  
judgment after  
conviction.

Criminal law—  
failure to  
compel court  
to act—effect.

482; 25 Am. & Eng. Enc. Law, 2d ed. 314; Re Flint, *supra*; Weaver v. People, 33 Mich. 296, 1 Am. Crim. Rep. 552; People ex rel. Boenert v. Barrett, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23; United States v. Wilson (C. C.) 46 Fed. 748."

The rule is fairly well settled that courts may defer temporarily final action upon a plea of guilty or upon

a conviction to a subsequent day or term, when it appears that the interest of justice demands it, or, as said, "for cause shown," and cause is shown when time is allowed the accused to move for a new trial, or in arrest of judgment, or to take other steps involving delay allowed by statute, or the practice of the court, or for the purpose of hearing evidence on the question of punishment.

—right to defer sentence. —when cause shown. Smith v. Hess, *supra*; State v. Ray, 50 Iowa, 520; People v. Kennedy, 58 Mich. 376, 25 N. W. 318; People v. Felker, 61 Mich. 110, 27 N. W. 869; State v. Watson, 95 Mo. 411, 8 S. W. 383.

The attorney general insists that, inasmuch as all presumptions must be indulged in favor of the action of the trial court, the record being silent as to reasons for postponing sentence, this court must assume the delay was justifiable. We cannot agree with this contention. In this

case no record was made other than the entry of appellant's plea of guilty.

Appeal—failure to sentence—assumption of justification.

This case must be decided upon the record, which shows affirmatively the facts which we have heretofore recited. Sections of the statute to which we have referred furnish the rule adopted by the general assembly of this state, for the guidance of courts in cases of conviction, or upon pleas of guilty. The fact that no order-book entry was made or agreement entered into whereby sentence was to be postponed will not be sufficient to overcome the facts disclosed by this record. If there had been a final judgment, accompanied by an order suspending sentence to which no objection was made, we would have an entirely different question. State v. Smith, 173 Ind. 388, 90 N. E. 607.

As bearing upon the question before us for consideration, see State v. Hockett, 129 Mo. App. 639, 108 S. W. 599; Ex parte United States, 242 U. S. 27, 61 L. ed. 129, L.R.A. 1917E, 1178, 37 Sup. Ct. Rep. 72, Ann. Cas. 1917B, 355; Re Peterson, 19 Idaho, 433, 35 L.R.A. (N.S.) 1067, 113 Pac. 729; Republic v. Pedro, 11 Haw. 287.

Judgment reversed, with instruction to the Delaware Circuit Court to sustain appellant's motion to vacate the judgment, and that the appellant be discharged.

## ANNOTATION.

### Loss of jurisdiction by delay in imposing sentence.

- I. Introductory, 1003.
- II. In general, 1004.
- III. Sentence imposed at subsequent term, 1012.
- IV. Sentence imposed at adjourned term, 1017.
- V. Effect of escape of accused, 1017.
- VI. Effect of pendency of proceedings to review or the like, 1017.
- VII. Waiver of delay, 1020.

#### I. Introductory.

This note is confined to a review of

the cases discussing the delay of the court in imposing sentence as affecting its jurisdiction to impose a valid sentence. It excludes cases dealing with the power of the court to suspend sentence, or to postpone or stay the execution of a sentence, though some cases have been included wherein it is impossible to determine with certainty from the opinion whether there was a definite suspension of sentence or a mere delay in pronouncing it.



*II. In general.*

It seems to be well settled that it is the duty of the court on a conviction or plea of guilty to impose sentence within a reasonable time, and an indefinite postponement of sentence deprives the court of jurisdiction over the prisoner, and a subsequent sentence is without judicial authority and void.

**Colorado.**—*Grundel v. People* (1905) 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022.

**Illinois.**—*People ex rel. Smith v. Allen* (1895) 155 Ill. 61, 41 L.R.A. 473, 39 N. E. 568; *People ex rel. Boenert v. Barrett* (1903) 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23.

**Indiana.**—*Smith v. Hess* (1883) 91 Ind. 424; *Gray v. State* (1886) 107 Ind. 177, 8 N. E. 16. See the reported case (*SMITH v. STATE*, ante, 999).

**Massachusetts.**—*Com. v. Maloney* (1887) 145 Mass. 205, 13 N. E. 482.

**Michigan.**—*People v. Kennedy* (1885) 58 Mich. 372, 25 N. W. 318; *People v. Felker* (1886) 61 Mich. 110, 27 N. W. 869.

**Missouri.**—*State v. Watson* (1888) 95 Mo. 411, 8 S. W. 383; *State v. Schierhoff* (1890) 103 Mo. 47, 15 S. W. 151; *State v. Hockett* (1907) 129 Mo. App. 639, 108 S. W. 599.

In *Smith v. Hess* (Ind.) *supra*, the court, in referring to the right to delay sentence, said: "This is reasonable, and in many cases absolutely necessary to the administration of justice. In many cases the court may not be sufficiently advised at the time of the plea of guilty to inflict the proper punishment. It may be necessary to hear evidence to inform the court of the circumstances under which the crime may have been committed, whether palliating or aggravating. That evidence may not be at hand, and a delay of sentence may be necessary to obtain it."

In *State ex rel. Dawson v. Sapp* (1912) 87 Kan. 740, 42 L.R.A. (N.S.) 249, 125 Pac. 78, the court, in discussing the power to suspend sentence, said by way of dictum: "A court may postpone the rendition of judgment in a criminal case, and has a practi-

cally unlimited discretion in that regard, so long as the imposition of a sentence as a matter of course at some time remains in contemplation. As to this there is no conflict in the authorities. There is a difference of judicial opinion, however, as to whether a court may withhold sentence with the understanding that it may never be pronounced at all. . . . We think the better rule is that where a verdict or plea of guilty has become final the court has no discretion, as a disciplinary measure, to suspend the imposition of sentence, but is under an absolute duty to pronounce it, and this duty is violated whenever an order is made the purpose and natural effect of which are that the defendant shall understand that he may never be punished. There is an obvious and important difference between the mere delay to pronounce sentence and its suspension, in the sense in which the expression is here used. Whether a postponement is rightful depends not upon its length or definiteness, nor upon whether it extends beyond the term, but upon its purpose and character. . . . In many of the cases the action of the court which results in a loss of jurisdiction is described as the indefinite postponement of a sentence. As already indicated, we think the important consideration in this connection is the purpose of the postponement. The mere omission to pronounce sentence, even though several terms pass without an order of continuance or any other action, might not amount to a suspension of sentence, in the sense here intended, if it were occasioned, for instance, by a doubt as to whether a verdict should be set aside, or as to what punishment ought to be assessed. On the other hand, the fact that in the present case the order purported to suspend the sentences until a definite time does not prevent a loss of jurisdiction. A mere postponement of sentence until that time would, of course, not have divested the court of jurisdiction."

In *People v. Kennedy* (Mich.) *supra*, it was held that a court has the power to defer sentence for a reasonable period and for any proper pur-

pose, such as allowing time for the defendant to make a motion for a new trial or to take exceptions to the appellate court, or for the judge to inform himself relative to the proper sentence to pass on the defendant.

In *People ex rel. Boenert v. Barrett* (Ill.) supra, it was said: "There can be no doubt that a court has the right, in a criminal cause, to delay pronouncing judgment for a reasonable time, for the purpose of hearing and determining motions for a new trial or in arrest of judgment, or to give the defendant time to perfect an appeal or writ of error, or for other proper causes."

Where a sentence was imposed nineteen days after the verdict was returned it was held that the presumption must be that the court appointed that time for pronouncing sentence, and it was therefore valid, notwithstanding a statutory provision that judgment must be pronounced at least two days after the verdict, "if the court intend to remain in session so long; or, if not, at as remote a time as can reasonably be allowed." *Dalton v. State* (1911) 6 Okla. Crim. Rep. 368, 118 Pac. 1001.

See also *Re Hemstreet* (1912) 18 Cal. App. 639, 123 Pac. 984.

Where the court delays the rendition of sentence, the presumption should be indulged that it was delayed "for proper and legal reasons, and for a proper and reasonable time." *Smith v. Hess* (Ind.) supra.

Where the court has lost the right to pass sentence, the fact that the defendant's attorney requested delay in passing it, in order to make a case for review in the appellate court, has been held not to confer on the trial judge any power to act in the premises. *People v. Kennedy* (Mich.) supra.

In Massachusetts, the court has statutory power, with the consent of the defendant, to place a case on file, where there are extenuating circumstances, the pendency of a like case on appeal, or for other sufficient cause. Thus, in *Com. v. Dowdican* (1874) 115 Mass. 133, it was said in reference to the practice of contin-

uing the case to a subsequent term for sentence: "It has long been a common practice in this commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or for other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute. Stat. 1865, chap. 223; 1869, chap. 415, § 60. Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein." In *Marks v. Wentworth* (1908) 199 Mass. 44, 85 N. E. 81, the petitioner applied for a writ of mandamus to compel the justice of a police court to bring forward on the docket a criminal case against the petitioner, and to impose sentence, or otherwise to make a final disposition of the case. The complaint against the petitioner was for an assault and battery, and after a trial in the police court he was found guilty; the case was then continued, and the probation officer was instructed to investigate the facts relating thereto and report to the court. The petitioner was then under a recognizance, but afterwards, with his consent, he was placed on probation with the probation officer, and the case was continued several times; and at the continuance next before the last one the petitioner, for the first time, objected to a further continuance and requested that sentence be imposed; but for a good reason the court again continued the case, and when it was afterwards

reached, the petitioner's wife, upon whom the assault was alleged to have been committed, appeared at the request of the court, and stated that she and her husband were living together and that matters were all right between them. The judge then intimated that he was willing to place the case on file, but the petitioner objected, whereupon the court took the case under advisement and continued it eight days, and when it came up at the expiration of that time, the petitioner asked that sentence be imposed. The judge stated that, as the petitioner had been put on probation, and the object of the probation seemed to have been accomplished, he deemed the only proper disposition of the case was to place it on file, and so ordered. The petitioner claimed an appeal, which the court refused; and the appellate court, in holding that he was entitled to an order disposing of the case in the police court, said: "It has long been the practice in this commonwealth for a court, with the consent of the defendant, after a verdict or plea of guilty in a criminal case, when for good cause it seems best not to impose sentence immediately, to place the case on file. This practice has been recognized by statute and approved by this court. . . . The case then stands on the records of the court, and although usually no further proceedings are had in it, it may at any time be called up and sentence may be imposed, or some other final disposition may be made of it. But the case cannot properly be placed on file without the consent of the defendant. He has a right to have it finally disposed of, without unreasonable delay, so that he will not be liable for an indefinite period to be brought into the court and subjected to punishment. Although this practice formerly prevailed only in the higher courts, it was extended by statute to the police district, and municipal courts. Rev. Laws, chap. 160, § 89; Stat. 1898, chap. 396, § 54. But when the statute gave to these courts authority to place complaints on file, it did not authorize such a disposition of a case against the objection

of the defendant. The order made by the respondent in this case was, therefore, irregular. The petitioner cannot be compelled to remain for years subject to the risk of being sentenced on this complaint, if at any time the public authorities should choose to bring him before the court for that purpose. If the order be given any effect, it leaves the case still in court, subject to be disposed of hereafter. If it be treated as invalid, the case remains as it was before the order was made. The petitioner is, therefore, entitled to an order or judgment from the police court which shall finally dispose of the prosecution in that court."

In *People ex rel. Smith v. Allen* (1895) 155 Ill. 61, 41 L.R.A. 473, 39 N. E. 568, the defendant entered a plea of guilty in February, 1890, but judgment on his plea was stayed and he was allowed by the court to depart therefrom, without recognizance, to again appear for sentence or any other purpose. No order whatever was made in the case from that time until the July term of 1893, when, on motion of the state's attorney, it was stricken from the docket; and at the following September term, on motion of the state's attorney, the case was reinstated on the docket of the court and, after overruling the defendant's motion for leave to withdraw his plea of guilty entered at the February term in 1890, as well as his motion in arrest of judgment, the judge then presiding (not the one before whom the plea was entered) sentenced him to three years' imprisonment. It further appeared that the defendant did not escape after his plea of guilty, and that he remained within the jurisdiction of the court between the time of entering his plea and his final arrest and sentence. The court said: "It is thus made to appear from the record of the criminal court, and all the facts in proof before us, that the attempt upon the part of that court was to indefinitely suspend sentence upon the plea of guilty; and the question now is, Having then withheld judgment upon the plea, and permitted the prisoner to go at liberty without in any way requiring him to further ap-

pear in answer to the charge, had the court jurisdiction, more than three years thereafter, to cancel his arrest, and pass sentence upon him? It must be admitted that, if such power remained in the court three years, it would continue indefinitely, and might be exercised at any future time, and that, too, without any reason for doing so, except such as might exist in the mind of the judge causing the re-arrest and pronouncing judgment." The court then concluded: "Until the legislature shall vest courts in this state with powers not given them, it is their duty, in the trial of criminal cases, upon a conviction or plea of guilty to pronounce judgment at that time, unless, upon motion for new trial, in arrest of judgment, or for other cause, the case is continued for further adjudication, and the defendant by recognizance or being held in custody, required to continue to answer the charge. And if they fail to perform that duty, but discharge the prisoner, or permit him to go indefinitely, their power and jurisdiction over him cease, and a subsequent sentence is without judicial authority."

In *Gray v. State* (1886) 107 Ind. 177, 8 N. E. 16, the prosecuting attorney, after the entry of a plea of guilty, entered into an agreement with the defendant that he might depart from the court without sentence, during good behavior, but subject to arrest if, in the future, he should commit another offense of a similar character. It was held that after the entry of the plea of guilty the court "could not lawfully do anything further therein except to sentence him at the time, or to place him in the custody of the sheriff until such sentence;" and the court further held that the agreement entered into between the prosecuting attorney and the defendant was void and of no effect.

In *Grundel v. People* (1905) 33 Colo. 191, 108 Am. St. Rep. 75, 79 Pac. 1022, the plaintiffs in error pleaded guilty at a term of court held in June, 1900, and sentence was deferred, at their request, until the first day of the August term; that at the August term, on their motion and request, further pro-

ceedings were stayed until the district attorney should move for sentence, and no further steps were taken until November 16, 1903, when the district attorney moved for sentence, which was passed over the defendant's objection. The appellate court held that the sentence was void, saying: "By the order entered at the August term, no definite time was fixed within which sentence should be pronounced. The defendants were released upon their own recognizance. Whether or not they would be ever called to the bar for sentence was contingent upon the action of the prosecuting officer. Three years and three months elapsed before such action was taken. This delay, unexplained, in connection with the order under which they were released, was equivalent to an indefinite postponement of sentence. There is no statute which permits this practice, and hence the court was without jurisdiction to pronounce judgment against them."

In *People v. Maloney* (1887) 145 Mass. 205, 13 N. E. 482, the defendant was arrested and brought before the trial justice on June 19, 1886, and pleaded not guilty; the case was continued to June 26, 1886, at which time the defendant retracted his plea of not guilty, and pleaded guilty; the case was "continued for sentence" to August 7, 1886, at which time the cause was continued nisi on payment of costs by the defendant, to be again called up for sentence on notice to the defendant; on October 6, 1886, the case was called up for sentence, and continued to October 16, 1886, at which time the defendant was sentenced. The court, in holding the sentence to be invalid, said: "It is clear that the trial justice had no power to continue the case indefinitely, and to hold the defendant to appear at a time to be afterwards named. A commitment or recognizance under such an order would be simply void, and a discharge of a defendant under it would be absolute. The record does not expressly state that the defendant was discharged; but that appears, as do other essential things in the record, by implication, because it shows that he

could not lawfully be longer held in custody. The record also shows that there was no final judgment and no termination of the case, unless the discharge of the defendant of itself terminated the case. During the progress of the trial, the case was indefinitely postponed, and the defendant discharged. Pronouncing sentence is a judicial act, and part of the trial. The indefinite postponement would relieve the defendant from lawful custody, and from any obligation to appear and answer further, and from any liability to be arrested and held to answer further. If the order of the magistrate discharged him, without leaving him under any obligation to appear, the magistrate would have no authority to issue a *capias* to compel his appearance; it would work a discontinuance of the case as to him."

In *People ex rel. Boenert v. Barrett* (1903) 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23, the relator was indicted at a term of court held in June, 1898, and on entering into a recognizance was released from custody; at the April term, 1900, he was tried and found guilty on April 12, 1900, and was remanded into custody after moving for a new trial; on May 5, 1900, being the last day of the April term, on motion of the relator the motion for a new trial was continued, and he was recognized, without sureties, to appear before the criminal court of the county on May 7, 1900, and from day to day and from term to term, until the final order or sentence of the court, he was released from custody; on October 31, 1902, the same judge before whom the relator was tried and convicted, and who allowed him to depart on his own recognizance, overruled his motion for a new trial, and the relator then moved in arrest of judgment, and this motion was continued to November 5, 1902, and he was remanded; the motion was finally overruled November 11, 1902, and the relator was sentenced to imprisonment, and immediately applied for a writ of habeas corpus. The appellate court, in ordering the discharge of the prisoner, said: "There was, in the case of the relator, a mo-

tion for a new trial pending, which was continued to the next term, but nothing was done in the matter, although numerous terms intervened, for twenty-nine months. We are of the opinion that this was an unreasonable and unwarrantable delay, it being entirely unexplained by anything in the record, and that the court, in view of all the circumstances, including the omission to require security for the relator's appearance, lost jurisdiction of the case, and that the subsequent sentence was without judicial authority. . . . Long and unreasonable delays in passing upon motions for new trials or in arrest of judgment are calculated to obstruct the administration of public justice, and to operate as a denial of the right of the citizen to a speedy trial. It is said, however, in this case, that all the delay was with the consent of the relator, and that he cannot now be heard to complain. It cannot, of course, be contended that the doctrine of estoppel has any application here, nor can it be held that the relator could waive any requirement respecting the jurisdiction of the court to enter judgment and pronounce the sentence. If the court had no power thus indirectly to suspend sentence and to permit the relator to go at large upon his own recognizance or upon parole, such power could not be conferred by his consent nor by his express request. . . . The rendering of judgment and the final sentencing of the defendant cannot be made a mere matter of discretion with the judge or the public prosecutor, nor to depend upon the subsequent conduct of the convicted person. If it were so, what subsequent conduct would demand or justify the pronouncing or withholding of the sentence? And who would determine its character? Such conduct might be innocent in itself, yet offensive to those in whom the power to apprehend or to punish resided. The liberty of the citizen cannot, in a free country, be made to depend for its security on the arbitrary will of any public officer; it can be taken from him by due process of law only."

In *People v. Felker* (1886) 61 Mich.

110, 27 N. W. 869, the defendant was arraigned before a justice of the peace, and judgment having been passed on him, he appealed to the circuit court, where he pleaded guilty, and was, on October 24, 1885, sentenced to pay a fine of \$75; the judge of the circuit court then ordered that the further judgment of the court be deferred until the first day of the next term, and that the defendant forthwith enter into a recognizance, conditioned that he should appear on the first day of the next term to receive the further judgment of the court; the defendant paid the fine, gave the recognizance, and appeared at the next subsequent term, and there received an additional sentence of ten days in jail. The appellate court held that the additional judgment was a nullity, saying: "The proceedings in this case cannot be sanctioned. A judgment in a criminal case cannot be divided up and parceled out, and pronounced from time to time, by the court. The court may, in the exercise of a reasonable discretion, suspend sentence for a reasonable time to enable the court to inform itself of such matters as will enable it to impose a just and proper sentence, or to enable the respondent to present exceptions to a higher court, or sue out a writ of error, but the sentence or judgment, when pronounced, must embrace the whole measure of the punishment imposed. The judgment last pronounced in this case is not a correction or alteration of the determination of the court when it pronounced the first judgment. It is a further judgment, which the court then announced its intention of pronouncing. There is neither law nor precedent for such course as was pursued in this case, and the judgment given must be reversed, and the respondent discharged."

In *State v. Hockett* (1907) 129 Mo. App. 639, 108 S. W. 599, the defendants pleaded guilty at the November term of court, 1906, and on the plea being entered the record showed that "thereupon, by agreement, the assessing of punishment and sentence is deferred to some future time;" and

the defendants were permitted to go at large without bail, no further entry appearing on the record for that term. No mention was made of the case at the following February term, but at the June term, 1907, the record not showing the presence of the defendants, they were fined and their license as dramshop keepers was revoked, and they were prohibited from obtaining a license for a period of two years. The appellate court held that the defendants were sentenced without authority of law, and that the court, having passed the case over indefinitely after the plea of guilty without any legal cause therefor, lost its jurisdiction. The court said: "It seems to us that it is an exercise of the power of pardon to withhold the sentence which the law imposes. The court is but the instrument, the arm, of the law. The only power to indefinitely stay the force of that arm is lodged with another department of the government. If the power be granted, where is it to be limited? It is asserted to be a discretionary power. Therefore, it would be in great part a power practically beyond control, and might be exercised in cases where the general good demanded the law's enforcement. If a court refuses to render a judgment in a civil case it may be compelled to perform that duty, and we can think of no good reason why it should not be likewise compelled to pass sentence in a criminal case."

A peculiar situation was presented in *People v. Kennedy* (1885) 58 Mich. 372, 25 N. W. 318, wherein the following facts appeared: The defendant was convicted before a justice of the peace, from which he appealed to the circuit court, where he was again convicted on November 28, 1883; and, on December 3 following, he was brought before the court for sentence, which, on motion of the court, was deferred until the first day of the next term. On February 29, 1884, which was not the first day of the term, the defendant was again brought into court, and sentence was further deferred to March 10th; and the next proceeding was had on May 26th, when the defendant was again brought into court

for sentence, but his attorneys objected that he could not then be legally sentenced, which objection was overruled. A desire being expressed to take the case to the supreme court, a request was made for a delay of sentence, and imposition of sentence was again deferred until the first day of the next term, being August 18th; and it was also ordered that the defendant enter into a recognizance to appear on that day and prosecute his bill of exceptions. On August 18th, the defendant not appearing in court, and not having prepared or settled any bill of exceptions, it was ordered that an attachment issue, directing the sheriff to produce him in court for sentence. The return of the sheriff showed that he was unable to find the defendant, and nothing further was done until September 22d, when an order was entered reciting that sentence having been deferred until that term of court, and the defendant not having appeared, sentence was further deferred until the first day of the next term. "The next step in this rather peculiar course of justice" occurred on December 6th, when it was ordered that the defendant appear on the first day of the next term for sentence, "and that sentence herein be, and the same is hereby, deferred until said time." The action of the court again slept until March 4, 1885, when an order was made reciting that the defendant had failed to appear according to the terms of the last order, and that an attachment issue to the sheriff directing him to bring the defendant into court to receive sentence, which was done on the following day. It was held that the court lost jurisdiction on March 10, 1884, and that the sentence passed on the defendant a year later was therefore void. The court said: "In this case, the order of the court made on the 3d day of December, 1884, was reasonable and proper, and perhaps the circuit judge had the right and power during the next term, although he did not act upon the matter the first day thereof, to again defer sentence until the 10th day of March. But when the defendant appeared on that day in obedience to the order of

February 29th, and found no court in session, his bondsmen were not only released, but we think the defendant was absolved from any further attendance upon the court. When he was convicted on the 28th day of November, 1883, if sentence had been at once imposed upon him, the utmost length of his imprisonment on account of not paying fine and costs, namely, ninety days, would have expired on or before the day the second order deferring sentence was made. If the defendant, for want of bail, had been in the county jail, it is obvious that the circuit judge could not, upon his own motion, and without apparent reason, have deferred sentence until the 26th day of May, 1884, and then imposed upon defendant the full penalty of the law. The defendant, even after conviction, has some rights that a court is bound to respect, and is entitled to have his liberty as soon as the limit of the law, reasonably administered, will permit. The principle in this case is the same as if the defendant had been in confinement, as he was under bonds and in the custody of the court; and the deferring of sentence was not asked by him or his counsel. We think the court lost jurisdiction on the 10th of March, 1884, and that the sentence passed upon the defendant a year afterwards was null and void."

In *People v. Stokes* (1907) 5 Cal. App. 205, 89 Pac. 997, the jury rendered its verdict on March 19, 1906, and April 2d following was by the court fixed as the date for pronouncing sentence, which, however, on motion of counsel for the defendant, was postponed to April 16th, and on that date, on like motion, again postponed to April 30, 1906; but nothing further was done until June 4, 1906, at which time sentence was pronounced. In answer to the contention that the trial court, by reason of this delay, had lost jurisdiction, the appellate court said: "At defendant's request, April 30th was the time fixed by the court for pronouncing sentence. This was, at most, a delay of thirty-five days, including intervening Sundays and holidays. We cannot assent to the proposition that, by reason of this delay,

the court lost jurisdiction to pronounce sentence. The delay was undoubtedly due to the holidays proclaimed by the governor of the state, and which continued throughout the month of May, 1906. It is not necessary to pass upon the question as to whether this holiday period of one month would excuse and justify an otherwise unwarranted delay, for the reason that we are of the opinion that, even though it be held that the act of pronouncing judgment is a part of the trial, the court did not, by reason of the postponement from April 30th to June 4th, lose jurisdiction in the matter."

In *Smith v. Hess* (1883) 91 Ind. 424, the defendant pleaded guilty on the 21st day of August, 1883, to a charge of grand larceny, and the record entry of the court, showing the plea, was the following: "Sentence withheld." It further appeared that at the time the sentence was withheld the defendant was allowed to depart from the presence and custody of the court without bond or recognizance; that the judge of the court stated to him that if he was brought back, or ever came into the court again, he would be sentenced; that he was absent from the court, and a part of the time from the state, until the 27th day of October, 1883, when he was arrested without any new warrant, or new legal proceedings, and was sentenced by the judge of the criminal court, and remanded to the custody of the sheriff. The defendant contended, under a writ of habeas corpus, that the criminal court had authority to allow minors to go on good behavior, but not adults; that, by reason of the facts stated, the court lost jurisdiction of the subject and the person, and hence had no authority to pronounce the judgment and sentence; that being thus allowed to depart operated as an acquittal, and that his rearrest and sentence constituted a second jeopardy for the same offense. The appellate court affirmed the sentence, saying: "The legitimate inference from the statute is that the legislature, in its enactment, did not intend that the courts should allow adult offenders to

go on good behavior. Without deciding what might be the result of such a practice, upon a proper case made and properly brought before us, we may say that, as at present advised, we do not feel like giving our sanction to that practice. We say this much, really, outside of the case before us. What we decide is, that the judgment of the criminal court under which appellant is imprisoned cannot be overthrown in the collateral attack here made upon it. For all irregularities and errors that may intervene in the trial and progress of a criminal cause, the statute of this state provides a direct, easy, cheap, and speedy remedy by appeal. The doctrine of the case is, that where such remedy is provided, defendants imprisoned under judgments, and seeking to overthrow them for reasons which do not render them absolutely void, and which are not apparent upon the record, will be driven to seek a remedy by appeal, or other direct proceeding. A judgment by a court of competent jurisdiction, valid upon its face, and a valid commitment under it, is an unanswerable return to a writ of habeas corpus. A large number of the states have statutes providing that a prisoner shall not be discharged under a writ of habeas corpus, where it appears that he is held in custody by virtue of the judgment or decree of a court of competent jurisdiction, or by virtue of a warrant issued upon such judgment or decree. This state is one of them. The writ of habeas corpus is not to take the place of a writ of error or a court of appeals."

In *State v. Watson* (1888) 95 Mo. 411, 8 S. W. 383, the defendant was convicted at a term of the circuit court held in November, 1882, and motions for a new trial and in arrest of judgment were filed and overruled at that term, and the defendant appealed to the supreme court. The cause was stricken from the docket on motion of the attorney general because the record disclosed no final judgment, and at a term of the circuit court held in June, 1885, the defendant, then under bail, was brought before the court and sentenced in ac-



cordance with the previous verdict. The supreme court, in upholding the sentence of the trial court, although reversing the conviction on other grounds, said: "There seems to be no doubt the sentence may be postponed until a future day or term to suit the convenience of the court, or for cause shown. . . . After the motion for new trial is overruled, the defendant should be brought before the court and given an opportunity to show cause, if any he has, why sentence should not be pronounced. He may then present matters which will render it proper for the court to postpone a final disposition of the case until a future term of the court. It would be highly prejudicial to the administration of the criminal law, both as to the state and as to the defendant, to deny the court power to render final judgment at a time subsequent to conviction. The power to pass sentence is not confined to the term at which the defendant was convicted by any statute of this state, nor, we conclude, by the law in the absence of any statute. The failure to pronounce sentence in this case at the term at which the cause was tried was an omission on the part of the state; but the continued delay was evidently due to the appeal prosecuted by the defendant. But let the blame, whatever there is, rest where it may, it was competent for the trial court, when the appeal was out of the way, to pronounce sentence upon the defendant according to the verdict of the jury."

The foregoing case was followed in *State v. Schierhoff* (1890) 103 Mo. 47, 15 S. W. 151, wherein it was contended that the court, having entered judgment against the defendant while a motion for a new trial was pending, and having overruled the motion, could not wait a year and then impose a final sentence. The court said: "We do not think there is any merit in this contention. The case of *State v. Watson*, 95 Mo. 411, and the cases cited on page 415, are decisive of this point. A court does not lose jurisdiction of a case till final judgment be rendered."

### *III. Sentence imposed at subsequent term.*

In the absence of a statute to the contrary, sentence need not necessarily be imposed at the same term of court at which the verdict or plea of guilty was had, and courts of general jurisdiction, having stated terms for the trial of criminal actions, have the power to continue the case to a subsequent term for sentence.

**United States.**—*MINER v. UNITED STATES* (reported herewith) ante, 995.

**Alabama.**—*Clanton v. State* (1892) 96 Ala. 111, 11 So. 299.

**Arkansas.**—*Thurman v. State* (1891) 54 Ark. 120, 15 S. W. 84; *Greene v. State* (1908) 88 Ark. 290, 114 S. W. 477; *Joiner v. State* (1910) 94 Ark. 198, 126 S. W. 723; *Barwick v. State* (1913) 107 Ark. 115, 153 S. W. 1106; *Cox v. State* (1914) 114 Ark. 234, 169 S. W. 789.

See also *State v. Wright* (1910) 96 Ark. 203, 131 S. W. 688; *Ford v. State* (1911) 100 Ark. 515, 140 S. W. 734.

**California.**—*People v. Felix* (1872) 45 Cal. 163.

**District of Columbia.**—*United States v. May* (1876) 2 MacArth. 512.

**Indiana.**—*Harbin v. State* (1892) 133 Ind. 698, 33 N. E. 635; *Ledgerwood v. State* (1892) 134 Ind. 81, 33 N. E. 631.

**Iowa.**—*State v. Stevens* (1877) 47 Iowa, 276; *State v. Ray* (1879) 50 Iowa, 520.

**Maine.**—*Re St. Hilaire* (1906) 101 Me. 522, 64 Atl. 882, 8 Ann. Cas. 385.

**Missouri.**—*State v. Watson* (1888) 95 Mo. 411, 8 S. W. 383; *State v. Schierhoff* (1890) 103 Mo. 47, 15 S. W. 151.

**New Jersey.**—*State v. Aaron* (1818) 4 N. J. L. 231, 7 Am. Dec. 592; *State ex rel. Gehrman v. Osborne* (1912) 79 N. J. Eq. 430, 82 Atl. 424.

**North Carolina.**—*State v. Overton* (1877) 77 N. C. 485.

**Oklahoma.**—*Ex parte Sparks* (1913) 9 Okla. Crim. Rep. 665, 132 Pac. 1118; *Beaubien v. State* (1917) — Okla. Crim. Rep. —, 165 Pac. 213.

**Tennessee.**—*Dunn v. State* (1912) 127 Tenn. 267, 154 S. W. 969.

**Texas.**—*Ex parte Beard* (1874) 41 Tex. 234.

As was said in *State ex rel. Gehrmann v. Osborne* (N. J.) *supra*: "To one approaching this subject for the first time, the initial question which presents itself is whether there is any legal foundation for the popular conception, held, I think, by most lawyers, that a sentence which is the judgment of the court, to be legal and effective, must be pronounced at the term at which the conviction is had. So far as my researches go, this conception has no basis upon which to rest; that is to say, at common law, and where the matter is not regulated by statute, there does not appear to have been any legitimate objection to a sentence imposed after the term at which the conviction was had."

In *Greene v. State* (1908) 88 Ark. 290, 114 S. W. 477, the court said: "Sentence may be pronounced on a plea of guilty at a subsequent term." See to the same effect, *State v. Wright* (1910) 96 Ark. 203, 181 S. W. 688.

In *Com. v. Mayloy* (1868) 57 Pa. 291, it was said by way of dictum: "The court has power to remand and hold convicts for sentence as long as may be deemed necessary and advantageous to the ends of justice, and, in the meantime, may receive information in addition to that disclosed on the trial, in regard to what should be an appropriate sentence, under the circumstances, where the court has a discretion on the subject."

In *MINER v. UNITED STATES* (reported herewith) ante, 995, it appeared that sentence was postponed on the application of the defendant from term to term for three terms, recognition being required and given at each term for his appearance at the next term; and it was held that the failure of the court to impose sentence at the trial term did not deprive it of jurisdiction to impose sentence at a later term.

In *Clanton v. State* (Ala.) *supra*, it was held that sentence may be pronounced at a subsequent term, provided the case has been regularly kept in court so that there has been no discontinuance.

In a case where the defendant requested that sentence be deferred and the case continued on the docket, it was held not to be error to impose sentence at a subsequent term of the court. *State v. Overton* (N. C.) *supra*.

Where the court fixed no time for pronouncing sentence, and the case was continued, it was held not to be error to impose sentence at a subsequent term, held more than one year after a plea of guilty was entered. *Cox v. State* (Ark.) and *State v. Stevens* (Iowa) *supra*.

In *Re St. Hilaire* (Me.) *supra*, the petitioner was indicted at a September term, 1901, and on his plea of guilty the trial court ordered that the case be continued for sentence; that at the September term, 1902, the case was placed on the special docket, and at the April term, 1905, the indictment was brought forward and the petitioner was sentenced to a fine and imprisonment. The appellate court held that the sentence and commitment of the petitioner were legal, and said: "We have recognized the power of courts of general jurisdiction, having stated terms for the trial of criminal cases, for good cause to place the indictment on file or continue the case to a subsequent term for sentence."

In *Ledgerwood v. State* (1892) 134 Ind. 81, 33 N. E. 631, the trial court deferred the rendition of judgment, after a plea of guilty, until the next term of court, and it was held that the court's failure to render judgment until the next term did not divest its jurisdiction. It appeared, however, that the defendant was at all times, after his arrest, in the custody of the court. See to the same effect, *Harbin v. State* (1892) 133 Ind. 698, 33 N. E. 635.

In *State v. Ray* (1879) 50 Iowa, 520, the defendant was tried and convicted at the January term of court, but no judgment was rendered on the verdict until the August term of the same year, when he was adjudged to pay a fine. The appellate court affirmed the judgment, saying: "It is insisted that the court could not render judgment after the term, but our attention is

called to no statute or decision which supports the position."

In *People v. Felix* (1872) 45 Cal. 163, it was held that sentence passed on a defendant at the third term of court after his conviction was valid, although it does not appear from the report of the case that the cause was continued by any record entry therein.

In *United States v. May* (1876) 2 MacArth. (D. C.) 512, the defendant was found guilty on November 9, 1875, and a motion was then made for a new trial, but the motion was overruled and an appeal was taken to the supreme court; and, with the assent of the defendant, the execution of the sentence was postponed for the statutory limit. The defendant having failed to obtain the relief sought, the case was sent back to the criminal court, whereupon that court, June 8, 1876, imposed a sentence of three years' imprisonment. The defendant contended that, the sentence not being pronounced at the same term at which the verdict was found, no sentence could be passed at any subsequent term. The court said: "I believe we all agreed that this proposition is untenable. Especially is this so when the delay in passing sentence is at the special instance and request of the defendant, which appears to be true in this case."

In *State ex rel. Gehrmann v. Osborne* (1912) 79 N. J. Eq. 430, 82 Atl. 484, the petitioner on April 28, 1909, pleaded not guilty, and on June 1, 1909, the case was called and put off; on June 14, 1909, the petitioner retracted her plea and pleaded *nolo contendere*, a plea of *non vult* being entered on the record, and bail continued for sentence; on June 11, 1909, the petitioner was called to the bar and sentence was postponed, and on August 9, 1911, sentence was ordered revoked; and on September 21, 1911, sentence was pronounced. In holding that it was within the power of the trial court to postpone the imposition of a sentence, and subsequently to impose sentence, the appellate court said: "If a defendant has pleaded *nolo contendere*, or guilty,

or has been convicted upon trial, the court has the power, if the defendant does not object thereto, and therefore is assumed to assent thereto, to refrain from pronouncing a judgment or sentence, and may, at a subsequent time, hale the defendant before it, and impose the punishment in the same manner that it would have been justified in pronouncing it upon the very day when the case was first ripe for sentence."

In *Ex parte Sparks* (1913) 9 Okla. Crim. Rep. 665, 132 Pac. 1118, it was held that there was no statutory provision forbidding the pronouncing of sentence at a term subsequent to that in which the verdict was rendered, the court saying: "The action of the trial court in postponing judgment in this case to a subsequent term of the court is approved." See to the same effect, *Beaubien v. State* (1917) — Okla. Crim. Rep. —, 165 Pac. 213.

In *Barwick v. State* (1913) 107 Ark. 115, 153 S. W. 1106, at the February term, 1907, the defendant pleaded guilty, and the court entered an order "that this cause be continued; that the defendant pay all costs herein at once, and that the fine be imposed at the pleasure of the court;" no further proceedings were had until the November term, 1912, when the court entered judgment against the defendant, on his plea of guilty, for a fine in the sum of \$100. The appellate court sustained the judgment, saying: "No statute is brought to our attention which would operate as a bar, on account of lapse of time, to the exercise of the court's power to render judgment after the lapse of several terms."

It is well settled that if, through inadvertence or oversight on the part of the court, sentence is not pronounced during the term at which the case is tried, or the clerk neglects to enter a sentence duly pronounced, the court may impose sentence at a subsequent term.

*United States v. May* (D. C.) supra; *Neace v. Com.* (1915) 165 Ky. 739, 178 S. W. 1062; *Easterling v. State* (1858) 35 Miss. 210; *Greenfield v. State* (1872) 7 Baxt. (Tenn.) 18;

State v. Miller (1873) 6 Baxt. (Tenn.) 513; Dunn v. State (1912) 127 Tenn. 267, 154 S. W. 969; Ex parte Beard (1874) 41 Tex. 234; Cleek v. Com. (1871) 21 Gratt. (Va.) 777; Flint v. Com. (1912) 114 Va. 820, 76 S. E. 808.

Thus, in Dunn v. State (1912) 127 Tenn. 267, 154 S. W. 969, the court said: "The judgment on the verdict may be lawfully entered at a subsequent term, whether the failure to enter it at the trial term be the result of mere inadvertence on the part of the court, or misprision of the clerk."

In State v. Miller (1873) 6 Baxt. (Tenn.) 513, the defendant was tried and convicted April, 1872, but for some cause not disclosed by the record, the court failed or omitted to enter judgment on the verdict until the next succeeding term held in July; and it was held that "there was no error in this of which the defendant can complain."

In Neace v. Com. (1915) 165 Ky. 739, 178 S. W. 1062, by inadvertence or oversight of the clerk the judgment on the verdict was not entered at the March term of the court, although the counsel for the appellants and the judge believed that the judgment, following the verdict, which was passed on the defendants, had been duly entered in the order book. At the following May term the defendants were brought into court and sentenced, and judgment in conformity thereto was duly entered on the record. The appellate court, in sustaining the sentence, said: "When the judgment was entered at the May term of the court, there was before the court the verdict of the jury that had been entered on the records of the court when it was returned at the March term, and in entering judgment on this verdict at the May term the court merely followed the verdict and pronounced and had entered the identical judgment that was pronounced, but not entered, on the verdict at the March term of the court. If, however, the trial judge at the March term had, by oversight or inadvertence of any kind, failed to pronounce judgment on the verdict and for this reason the judgment had not been entered by the clerk, we have

no doubt that at a subsequent term of the court the judge could have pronounced judgment on the verdict. So that whether as a matter of fact the court did or did not sentence the defendants at the March term is not material, nor does it matter whether the omission to enter judgment on the record book of the court at the March term was the fault of the judge or the clerk. The court had undenied power to pronounce judgment on the verdict and have it entered of record, and the jurisdiction and power to enter judgment on the verdict continued in the court until these things were done. It is urged that the substantial rights of the defendants were prejudiced by the failure of the record to show that judgment had been pronounced at the March term, as the right of appeal was thereby delayed. It is doubtless true that the right of appeal on account of this omission was delayed for a time, but this trifling delay cannot be allowed to interfere with the jurisdiction of the court to do at the May term what should have been done at the March term. The trial judge pronounced judgment and had it entered in due form immediately upon his attention being called to the omission by counsel for the defendants, and we have no doubt that he would earlier have done this had the matter been brought to his notice."

In Greenfield v. State (1872) 7 Baxt. (Tenn.) 18, the appellant was convicted at the May term, and his motion for a new trial and arrest of judgment being overruled, he was "remanded to jail," and the judge inadvertently omitted to impose sentence, or the clerk inadvertently omitted to enter it. No further action was taken until the September term, when the appellant was brought before the court, whereupon he moved for his discharge on the ground that no judgment had been rendered at the May term; but the court refused the motion and pronounced sentence on the verdict. The appellate court held the sentence valid, saying: "The time elapsing between the return of the verdict of the jury and the entering of judgment is not fatal to the judgment. They are

different steps in the cause. Upon the return of the verdict, unless a motion for a new trial, or in arrest of judgment, is pending, or has been allowed, the court should pronounce judgment, and unless for special reasons it is delayed, it should be pronounced at the same term of the court, . . . but until the judgment is rendered, or the cause in some way disposed of, it is still pending, and stands continued with the unfinished business until the next term."

In *Flint v. Com.* (Va.) *supra*, the court, in holding that a judgment, which, by inadvertence, the court had omitted to enter on a verdict rendered at the trial term, may be entered at a subsequent term, said: "The court had full authority to enter the judgment upon a verdict rendered at a preceding term. The court speaks of it as a *nunc pro tunc* order, and in a certain sense it was; that is, it was the entry of a judgment at the October term which the court might have entered at a former term; but in effect it was in the exercise of its ordinary jurisdiction. The prosecution had, indeed, proceeded to a verdict, but until judgment was rendered it was a pending action, upon which it was the duty of the court to render judgment, unless it had seen fit for good cause to set it aside." See to the same effect, *Cleek v. Com.* (1871) 21 Gratt. (Va.) 777.

In *United States v. May* (1876) 2 MacArth. (D. C.) 512, the court, in referring to the omission to pass sentence, said: "We are of the opinion that the judge who tries a cause, and a verdict is found by the jury, if the judge, by accident, mistake, or design, should fail to pass sentence during the term of the court at which the verdict was found, he may do so at a subsequent term, and so may any other judge holding the same court."

In *Ex parte Beard* (1874) 41 Tex. 234, the relator was found guilty in October, 1871, and his punishment assessed at fifteen years' imprisonment; his motion for a new trial being overruled, he appealed, and the case was reversed and remanded, but upon a rehearing, it appearing that no final

judgment had been rendered, the case was again remanded with directions to enter judgment *nunc pro tunc*. It further appeared that there was an omission to enter judgment at the next succeeding term, and it was not entered until the June term, 1872; and the judgment thus entered was affirmed on appeal, and the relator was sentenced to the penitentiary, from which place he obtained a writ of habeas corpus. The applicant claimed that he was unlawfully imprisoned, because the judgment of conviction was rendered during the second term of the court, after the trial and verdict against him, and contrary to the statute. The supreme court held that the judgment was valid, saying: "We are of opinion that the court below had a right to render the judgment *nunc pro tunc*, notwithstanding a term of the district court had intervened between the verdict and judgment so rendered, which had been caused by the effort of the applicant to carry his case to the supreme court on appeal, without a proper judgment having been rendered. The article relied on (Paschal's Dig. art. 3151) makes provision for rendering a judgment at the next term after verdict, but it does not restrict the general powers of the court to render a judgment at a later period than the next term when it clearly appears that the prosecution has not been abandoned and a proper case for it is presented."

In *Easterling v. State* (1858) 35 Miss. 210, the jury returned a verdict of guilty, and the entry on the minutes of the court recording the verdict was as follows: "It is, therefore, considered by the court, that the state of Mississippi do recover of and from the defendant, Simeon Easterling, the sum of — dollars, together with the costs in this behalf expended." At the next term of the court the judgment was corrected, and it was ordered to be entered as of the last term, to which the defendant objected on the ground that the court had lost jurisdiction. The appellate court sustained the sentence, saying: "After the verdict was returned, it was the duty of the court to render judgment

against the defendant for the penalty prescribed by law; and until that was done, the defendant was not discharged from the custody of the law, and the jurisdiction of the court was not at an end. It is manifest here that the essential thing required by law had not been done,—an award of the punishment prescribed by law for the offense; and that the verdict stood at the term at which it was rendered without a judgment. The judgment purporting to be rendered was without substance, and the judgment of the law remained to be pronounced. It was, therefore, competent for the court, at the next term, to render judgment upon the verdict for the penalty prescribed by law. It is not the case of a judgment merely erroneous, but of one without substance and void."

#### *IV. Sentence imposed at adjourned term.*

It has been held that sentence may be imposed on a plea or verdict of guilty at an adjourned term of the court, although the plea or verdict was had at a regular term. *Charles v. State* (1836) 4 Port. (Ala.) 107; *Greene v. State* (1908) 88 Ark. 290, 114 S. W. 477; *Williams v. Com.* (1857) 29 Pa. 102; *Com. v. Murphy* (1911) 45 Pa. Super. Ct. 185.

Thus, in *Com. v. Murphy* (Pa.) *supra*, it was said: "It is well settled, however, that a person convicted by the jury at a regular term may be sentenced at one of these adjourned courts."

Likewise, sentence may be imposed at a subsequent term by a different judge than the one who presided at the trial term. *Charles v. State*, (Ala.) *supra*.

#### *V. Effect of escape of accused.*

The decisions are in accord that where the accused escapes from custody, after conviction and before sentence, the court has jurisdiction to impose sentence at any subsequent term. Thus, in *Thurman v. State* (1891) 54 Ark. 120, 15 S. W. 84, the appellant pleaded guilty and the court adjourned without imposing sentence, but before the next term he escaped from prison, and after an absence of several years was recaptured, and

sentence was formally pronounced by the court in which the conviction was had. The appellate court, in sustaining the sentence, said: "The statute does not require that the sentence shall be pronounced and judgment entered at the same term at which a plea of guilty is entered, and the entry of the judgment at a subsequent term does not alter or conflict with anything done by the court at the previous term. There is, therefore, no lack of power in the court, and the judgment may be deferred until a succeeding term." So, in *Smith v. Com.* (1884) 6 Ky. L. Rep. 305, the fact that a verdict was returned in October, 1881, and sentence was not pronounced until May, 1884, was held not to entitle the defendant to a reversal, where it appeared that he had absconded after the jury had retired to consider their verdict, as judgment could not be rendered against him except in his presence, and he was not brought before the court until the time when judgment was rendered.

As to the power of the court to re-sentence a prisoner who escapes after the imposition of the death penalty, see *Bland v. State* (1851) 2 Ind. 608; *State v. Cardwell* (1886) 95 N. C. 643; *Rex v. Okey* (1674) 1 Lev. 61, 83 Eng. Reprint, 297; *Rex v. Ratcliffe* (1746) 1 Wils. 150, 95 Eng. Reprint, 543.

#### *VI. Effect of pendency of proceedings to review or the like.*

The rule seems to be well settled that during the pendency of a motion for a new trial, in arrest of judgment, or to give the defendant time in which to perfect an appeal or writ of error, a postponement or delay in pronouncing sentence does not deprive the court of jurisdiction to impose later a valid sentence. *Hall v. Patterson* (1891) 45 Fed. 352; *Rankin v. Superior Ct.* (1910) 157 Cal. 189, 106 Pac. 718; *People v. Rhodes* (1912) 17 Cal. App. 789, 121 Pac. 935; *People v. Boling* (1916) 32 Cal. App. 42, 161 Pac. 1169; *Darsey v. State* (1915) 17 Ga. App. 280, 36 S. E. 781; *State v. Guild* (1828) 10 N. J. L. 163, 18 Am. Dec. 404; *Beaubein v. State* (1917) — Okla. Crim. Rep. —, 165 Pac. 213. And see

**People v. Brewer** (1908) 142 Ill. App. 610.

A delay of three or four years from the rendition of the first verdict to the sentence of the court, caused by an appeal to the supreme court of the state and to the Supreme Court of the United States, has been held to give the accused no ground of complaint. **Darsey v. State** (1915) 17 Ga. App. 280, 86 S. E. 781.

In **Rankin v. Superior Ct.** (1910) 157 Cal. 189, 106 Pac. 718, the court, in referring to the statutory time within which sentence must be pronounced, said: "The court has no authority to fix the time for pronouncing judgment for a day later than five days after the verdict; that if a motion for new trial or in arrest of judgment is made, the court may, for the purpose of deciding the same, extend the time for ten days, and that where the question of probation is considered, the court may, for that purpose, extend the time twenty days. These two provisions for extension of time are not cumulative, and the latest date to which the court is authorized to extend the time for rendering judgment, where present insanity is not involved, is a day not more than twenty-five days after the date of the return of the verdict. . . . If judgment was not pronounced within the time limited, a new trial was made imperative, if the defendant so desired." See also the following cases, wherein the statutory limit of time for pronouncing sentence during the pendency of proceedings to review, was discussed. **People v. Treshenko** (1911) 159 Cal. 456, 114 Pac. 578; **People v. Bernard** (1913) 21 Cal. App. 56, 130 Pac. 1063; **People v. Flavin** (1913) 21 Cal. App. 244, 131 Pac. 321; **People v. Winner** (1916) 31 Cal. App. 352, 160 Pac. 689; **People v. Lamattina** (1918) — Cal. App. —, 175 Pac. 484.

In **People v. Rhodes** (1912) 17 Cal. App. 789, 121 Pac. 935, wherein sentence was not pronounced until the tenth day after the rendition of the verdict, because of the pendency of a motion for a new trial, it was held that the court was not deprived of

jurisdiction, even if no continuance was had. The court said: "The record shows that upon the rendition of the verdict the court fixed the time for pronouncing judgment upon the tenth day thereafter. This was within the time allowed by § 1191 of the Penal Code, where such extension is granted for the purpose of hearing a motion for a new trial. At the time appointed for the rendition of judgment a motion for a new trial was made and denied, and judgment thereupon rendered. While it does not affirmatively appear that the time for pronouncing judgment was extended to ten days for the purpose of hearing such motion for a new trial, it does not affirmatively appear that the extension was not made for such purpose, and we must therefore presume that the court acted regularly, and that the continuance was for such purpose."

In **People v. Boling** (1916) 32 Cal. App. 42, 161 Pac. 1169, the verdict was rendered on March 25th, and the court fixed March 28th as the day for pronouncing sentence, but on that day the time of sentence was continued to April 4th, on which day a motion for a new trial was made and denied, whereupon the defendant applied for probation, and the court extended the time for sentence to April 20th, and then to July 19th, on which day the defendant moved for a new trial on the ground that sentence had not been pronounced within the period limited by statute. The court denied the motion, but the ruling was reversed on appeal, the appellate court holding that the time of extension granted by statute was not cumulative, and more than 110 days had elapsed since the verdict was rendered.

In **Hall v. Patterson** (1891) 45 Fed. 352, the petitioner was convicted on May 19, 1883, but was not sentenced until April 4, 1884, and the delay in sentence was caused by the petitioner's interposition of special pleas in bar to the indictments, which pleas were certified to the supreme court of New Jersey for its advisory opinion; and immediately on the rendition of its opinion sentence was pro-

nounced. It was held that the New Jersey statute, fixing the punishment of the offense, and providing that a defendant "on being thereof convicted" shall be punished, did not require sentence to be immediately pronounced.

In *State v. Guild* (1828) 10 N. J. L. 163, 18 Am. Dec. 404, the pronouncement of sentence was deferred so that the advisory opinion of the supreme court on several questions of law, which had arisen during the trial, might be obtained. It was held that jurisdiction to sentence was not lost by the delay.

In *Beaubien v. State* (1917) — Okla. Crim. Rep. —, 165 Pac. 213, the verdict was returned on September 2, 1915, and thereupon the court appointed September 13, 1915, as the time for pronouncing sentence; on September 4, 1915, the defendant filed a motion for a new trial, which was pending until October 25, 1915, when the motion was overruled, and sentence pronounced. It was claimed that, as the term of court at which the verdict was returned had expired by operation of law, the court had lost jurisdiction to pronounce sentence; but the appellate court held to the contrary and sustained the sentence.

In *People v. Brewer* (1908) 142 Ill. App. 610, the defendant was convicted on March 6, 1906, and on the following day he entered a motion for a new trial, which was taken under advisement by the court, and on March 9, 1907, the motion was overruled; on May 18, 1907, the court entered judgment on the verdict and pronounced sentence on the defendant. It was contended that as the judgment was not entered and the sentence imposed until the April term, 1907, the court lost jurisdiction to lawfully perform those acts. The court said: "When the motion for a new trial was entered by plaintiff in error at the February term, 1906, and no action taken thereon at that term, the case stood continued until the next term of the court in accordance with the provision of paragraph 56, chapter 37, Hurd's Stat. 1905. The delay in entering judgment and imposing sen-

tence from the February term, 1907, when motion for a new trial was overruled, until the April term following, we do not regard as so unreasonable as to oust the court of jurisdiction to enter judgment and impose sentence. The practice, however, of delaying action by the court upon a motion for a new trial and in entering judgment and imposing sentence after conviction, as was done in this case, is not conducive to the wholesome administration of justice and should be discouraged."

Where the court delays the imposing of sentence in order to await the determination of another trial of the accused for the same or a similar offense, the delay does not deprive it of jurisdiction to pronounce a valid sentence. *Ex parte Morton* (1901) 132 Cal. 346, 64 Pac. 469; *People v. Robertson* (1907) 6 Cal. App. 514, 92 Pac. 498.

In *Robinson v. State* (1908) 54 Tex. Crim. Rep. 559, 113 S. W. 763, it was held that, where no sentence was pronounced at the trial term, the court could pass sentence at a subsequent term, although the judgment was affirmed on an intervening appeal, as such affirmance was invalid, owing to the omission to pronounce sentence.

But where a motion for a new trial is overruled and a notice of appeal is given, no sentence being imposed, a sentence subsequently pronounced and entered nunc pro tunc is without lawful authority and void. *Estes v. State* (1898) 38 Tex. Crim. Rep. 506, 43 S. W. 982.

In *Hinman v. State* (1908) 54 Tex. Crim. Rep. 434, 113 S. W. 280, the appellant was convicted at the August term, 1907, and a motion for a new trial being overruled, notice of appeal was given, and on account of the illness of the judge, or for some other cause, sentence was not pronounced until the following January term; and it was held that the court did not have jurisdiction to pass sentence at that time. The appellate court said: "When the August term of the court adjourned, all power of the district judge over it ceased, except to substitute lost or destroyed records.



. . . That court could in no manner amend the record, or add to it otherwise than stated. It was without power, pending the appeal to this court, to sentence, or to enter a judgment on the verdict even. The notice of appeal had attached the jurisdiction of this court, had ousted the jurisdiction of the trial court, and, until this court has passed upon the appeal, the trial court is without authority to enter a judgment or sentence."

In Texas the rule has been recognized that, where an appeal in a criminal case is dismissed because of the omission to enter judgment on the verdict, the court has the power to perfect the record at a subsequent term, by causing the formal entry of the judgment on the verdict. *O'Connell v. State* (1857) 18 Tex. 359, where the court said: "The entry of judgment in this case was in accordance with a settled practice, which has been recognized by this court in numerous cases. Where, as in this case, the court has failed to enter up judgment on a verdict at the term, but has caused entry to be made at a subsequent term, this court has uniformly entertained the appeal." See to the same effect, *Smith v. State* (1876) 1 Tex. App. 408.

In Tennessee the same rule prevails. *Nolin v. State* (1868) 6 Coldw. (Tenn.) 12; *State v. Miller* (1873) 6 Baxt. (Tenn.) 513.

#### VII. *Waiver of delay.*

It has been held that, where the conduct of the accused shows that he has waived any delay in pronouncing sentence, he cannot maintain that the court lost jurisdiction to impose sentence at a later or subsequent term. *Barwick v. State* (1913) 107 Ark. 115, 153 S. W. 1106; *People v. Creitsner* (1914) 25 Cal. App. 647, 145 Pac. 109; *People v. Everhardt* (1887) 104 N. Y. 591, 11 N. E. 62; *People v. Trimble* (1892) 131 N. Y. 118, 29 N. E. 1100, affirming (1891) 60 Hun, 364, 38 N. Y. S. R. 999, 15 N. Y. Supp. 60.

Thus, in *People v. Everhardt* (1887) 104 N. Y. 591, 11 N. E. 62, the defendant moved that judgment should be arrested because "the verdict was ren-

dered and the jury discharged on the 18th day of December, 1885, and during the December term of the court; and afterwards, to wit, on the 24th day of December, 1885, the court was duly adjourned until the next term, by which adjournment the December term was finally adjourned without day, no judgment having been rendered, and the defendant not having applied for or consented to any delay in the rendition of judgment beyond the 22d day of December, 1885, being the Tuesday following next after the day on which the verdict was rendered; and the court now holding the January term, 1886, has no jurisdiction to render judgment in the action." The court of appeals answered this contention by saying: "The court which pronounced the judgment was the same court which tried the indictment, and in which the verdict was rendered, and it would be a sufficient answer in this case that no substantial harm was done to the defendant by the delay from the 22d day of December to the 7th day of January following. But upon this record it may fairly be said that the defendant, not objecting, waived any delay within the meaning of § 472 of the Code of Criminal Procedure, which provides that the time for pronouncing judgment after a verdict of guilty 'must be at least two days after the verdict, if the court intend to remain in session so long, or, if not, as remote a time as can reasonably be allowed; but any delay may be waived by the defendant.' Judgment in this case was postponed at the request of the defendant until the 22d day of December, to enable his counsel to make a motion for arrest of judgment, and for a new trial. On that day he did not appear or request to appear in court to make his motion, and hence he must be assumed to have been wholly indifferent to the delay and to have consented thereto. There is, therefore, no reason for saying that the court lost jurisdiction to pronounce judgment on a subsequent day."

In *People v. Trimble* (N. Y.) *supra*, the defendant, in answer to an indictment, pleaded a previous conviction

for the same offense, which issue was tried and resulted in a verdict "for the people;" the defendant was thereafter permitted to plead over, and, without demanding the entry of a formal judgment or objecting to its omission, interposed a plea of not guilty, which issue was tried and the prisoner convicted. It was held that the defendant could not avail himself of the omission to enter a formal judgment on the first verdict, the court saying: "The omission of a formal judgment upon the first verdict was not objected to on behalf of the accused, nor was any demand made by him for its entry. If entered, it must necessarily have been either a general judgment of conviction, which seems to be the claim of the appellant, or a judgment of respondeat ouster, the plea not sustained, and the defendant must answer over. Certainly he cannot be heard to object that a formal judgment of conviction was not entered, for the error, if it was one, inured to his benefit. He accepted the order granted and availed himself of the privilege it gave him to answer over. He cannot now be permitted to complain that he should have been convicted when the issue of his guilt or innocence had not yet been tried."

Where the court continues a case from term to term, and the defendant does not ask that sentence be imposed or that he be discharged, he is held to have waived the delay and cannot complain because the court delayed pronouncing sentence on his plea of guilty. *Barwick v. State* (Ark.) *supra*.

In *People v. Creitser* (1914) 25 Cal. App. 647, 145 Pac. 109, the defendant, after entering a plea of guilty and after several postponements of the time for passing sentence, withdrew his plea of guilty, and asked that the case should be set down for trial; and the matter of fixing a date for the trial being continued to a certain date, the defendant again entered a plea of guilty and informed the court that he desired to dispense with any further services of his attorney. It was held that the defendant, on entering his plea of guilty the second time, waived any delay in pronouncing sentence, the court saying: "Assuming that there is a legal appeal here, it is readily obvious that, while the court in the first instance exceeded its authority by postponing the matter of passing sentence beyond the time expressly limited by the statute, that point cannot now be urged by the defendant, since it appears, as we have shown, that he withdrew his plea of guilty after the matter of pronouncing judgment had been postponed from one date to another until the statutory period had been passed, and that, after so withdrawing said plea, he again entered a plea of guilty, waived time for the pronouncing of judgment, and the court thereupon and at once pronounced its judgment of sentence. The court, therefore, in passing sentence was obviously within the time limit prescribed by the statute for pronouncing judgment upon what seems to have been at that time the only plea to the information before it."

H. B.

EDWARD S. SAVAGE et al., Respts.,  
v.

JOHN BLANCHARD EDGAR, Appt.

*New Jersey Court of Errors and Appeals—June 19, 1916.*

(86 N. J. Eq. 205, 98 Atl. 407.)

**Injunction — against action at law — matters arising pendente lite.**

1. Injunction does not lie to prevent further prosecution of an action at law because of an accord and satisfaction effected after beginning of the action.

[See note on this question beginning on page 1026.]

**Accord and satisfaction — effect.**

2. Performance by one party to an accord and satisfaction of the obligation imposed upon him thereby extinguishes the claim against him upon which the other party has begun action.

[See 1 R. C. L. 199.]

**— cognizance by court.**

3. An accord and satisfaction made between litigants privately and without judicial sanction is not entitled to judicial cognizance until properly brought before the court in which the action was pending.

[See 1 R. C. L. 202.]

**— refusal of party to be bound — effect.**

4. The refusal of one party to an accord and satisfaction to be bound by it does not alter its legal effect as a settlement.

[See 1 R. C. L. 201.]

**— effect on pending action.**

5. An accord and satisfaction of the matter involved in a pending action affords a complete defense to the further prosecution of the action.

[See 1 R. C. L. 201.]

**Fraud — availability at law.**

6. That an accord and satisfaction was induced by fraud may be shown in an action at law in which it is sought to rely upon it as a defense.

[See 1 R. C. L. 201.]

**APPEAL** by defendant from a decree of the Court of Chancery in favor of complainants in a suit to restrain the prosecution of an action at law in the Supreme Court. *Reversed.*

Statement by Kalisch, J.

The complainants filed their bill in the court of chancery to restrain the prosecution of an action at law in the supreme court. The bill and affidavit in support of it disclosed that John Blanchard Edgar, the defendant-appellant, had an action pending in the supreme court to recover \$50,000 from Edward S. Savage and his wife, the respondents; that, while the action was pending, an agreement was entered into by Edgar and Savage and reduced to writing, in which it was recited that it was the desire and purpose of both parties to settle and adjust all matters of difference of accounts between them, and thereupon it was agreed that Savage should transfer to Edgar 250 shares of the common stock of the Trembly Point Corporation and should, in addition thereto, pay to Edgar \$2,000 in cash, and give him a note for \$2,000 more, payable in thirty days. This was to be in full settlement of all claims and demands whatsoever. In consideration thereof Edgar agreed to discontinue the action at once and pay all fees, including his attorney's fees and counsel fees. The cash was paid, the note was given, and two days afterwards the parties met by

appointment in Mr. Savage's office. Savage took a certificate for 250 shares of the Trembly Point stock out of his safe, indorsed it in blank, exhibited it to Edgar, and together they then went to the transfer office of the company to have the stock there transferred to Edgar. The stock was thereupon delivered to the secretary of the company, and he was requested by Savage to transfer the name to Edgar, whereupon Edgar said that he would prefer to have the transfer of the stock made to his wife, and thereupon the secretary was directed to make the transfer as Edgar had requested, and this was done. Subsequently, Edgar refused to accept the stock upon the grounds that he was not bound to take it until he had ascertained its value, and that investigation had shown him that it was not worth what Savage represented it to be. After complainants filed their bill to stay the action at law, Edgar tendered back the cash and the notes, which Savage refused to accept.

The bill avers "that the said settlement made by the complainants with the said Edgar was positive and final, and was accepted by Edgar together with the property

paid and delivered, pursuant to the terms of the same, as a full compromise settlement of the said action of the said Edgar against the complainants, and the agreement of settlement made in writing, as hereinbefore mentioned, has been fully carried out and performed in all respects on the part of the said complainants, but that the said Edgar had violated the said agreement in that he has attempted and is now attempting to bring the said action to trial in the supreme court notwithstanding the same had been fully settled."

The case shows that after the settlement was made, and after Edgar, the plaintiff in the action at law, had noticed the case for trial, notwithstanding the settlement, that the complainants, defendants in that action, presented a petition to the supreme court in which the agreement was set up, and in which it was averred that the cash and note had been delivered to Edgar and the stock had been transferred to Edgar's wife at his request. In answer to the petition, Edgar set up that the stock was not worth what it was represented to be, and that when tendered to him it was made a condition of its delivery that he should sign a statement that the defendant Savage was making no representation as to its value, except the appraisals made by Mr. Corbin and Mr. Day, that Edgar declined to sign this, and, under the advice of his attorney, declined to accept the stock. The supreme court declined to perpetually restrain the action because of the controverted facts upon which the application was based, discharged the rule with leave to the defendants to file a supplementary answer setting up the settlement, and preserving to Edgar the right to take issue upon such answer and have the questions of fact settled by a jury.

From the refusal of the supreme court to perpetually restrain the action at law, the respondents herein appeal to this court, and upon a motion made by the appellant here-

in, in that cause, the appeal of the respondents was dismissed upon the ground that the action of the supreme court rested upon its discretion and, therefore, was not appealable.

The respondents declined to avail themselves of the leave granted to them by the supreme court to file a supplementary answer setting up the settlement, but, instead, filed their bill in chancery to restrain the action at law, and obtained in that tribunal a rule to show cause why the prayer of their bill to restrain the appellant from prosecuting his action at law should not be granted, and a temporary stay of the action. Upon the return of the rule the order to show cause was made absolute and the stay continued. The appellant then gave notice to strike out the bill upon two grounds, one of which was that the bill did not allege any ground for equitable relief. The vice chancellor refused to strike out the bill, and it is upon that order, and the order restraining the appellant from prosecuting his action at law, that the appellant appeals to this court.

Messrs. Carrick & Wortendyke, for appellant:

The action of the supreme court, embodied in the rule discharging the rule to show cause, was a determination of the issue before the court which is conclusive upon the parties, not only in the action itself, but in any other form in which they might seek to relitigate the question.

*West New York Silk Mill Co. v. Laubsch*, 53 N. J. Eq. 65, 30 Atl. 814, 57 N. J. L. 234, 30 Atl. 550.

Failure to restore the part consideration received by defendant is not necessarily a ratification, even if the contract be considered as executed, and not still resting in negotiation.

*Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593; *Roberts v. James*, 83 N. J. L. 492, 85 Atl. 244, Ann. Cas. 1914B, 859; *Redrow v. Sparks*, 76 N. J. Eq. 133, 79 Atl. 450; *Reed v. Benzineated Soap Co.* 81 N. J. Eq. 182, 86 Atl. 263.

Complainants are bound by the judgment of the supreme court, which has unquestioned jurisdiction, they

having elected to seek their remedy in that court.

*Wallace, M. & Co. v. Leber*, 67 N. J. L. 26, 50 Atl. 586; *Holmes v. Steele*, 28 N. J. Eq. 176; *Vaughn v. Johnson*, 9 N. J. Eq. 179; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Stein v. Cuff*, 76 N. J. Eq. 277, 74 Atl. 517, 21 Ann. Cas. 1285; *Roarke v. Roarke*, 77 N. J. Eq. 181, 75 Atl. 761; *McMichael v. Barefoot*, 85 N. J. Eq. 139, 95 Atl. 620.

If the court of chancery was not precluded by the action of the supreme court, the defendant should have been put upon the terms to permit complainants to plead the alleged settlement in the law action.

*Headley v. Leavitt*, 68 N. J. Eq. 595, 60 Atl. 963.

The bill of complaint, presenting no matter properly of equitable cognizance, should, on motion, have been struck out.

*Essex Paper Co. v. Greacen*, 45 N. J. Eq. 504, 19 Atl. 466; *Steelman v. Wheaton*, 72 N. J. Eq. 626, 66 Atl. 195.

*Messrs. C. McK. Whittemore and Robert H. McCarter*, for respondents:

The court of chancery had undoubted jurisdiction to grant the complainants their desired relief.

*Pryer v. Gribble*, L. R. 10 Ch. 534, 44 L. J. Ch. N. S. 676, 32 L. T. N. S. 238, 23 Week. Rep. 642; *Richardson v. Eyton*, 2 De G. M. & G. 79, 42 Eng. Reprint, 800; *Stapilton v. Stapilton*, 1 Atk. 2, 26 Eng. Reprint, 1; *Hart v. Hart*, L. R. 18 Ch. Div. 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 30 Week. Rep. 8; *Phillips v. Berger*, 2 Barb. 608, 8 Barb. 527; *Cook v. Richardson*, 178 Mass. 125, 59 N. E. 675; *Headley v. Leavitt*, 65 N. J. Eq. 748, 55 Atl. 731; *Trenton Street R. Co. v. Lawlor*, 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668; *Gardner v. Short*, 19 N. J. Eq. 341; *Line v. Nelson*, 38 N. J. L. 358; *Pom. Eq. Jur.* ¶ 752; *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084; *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L.R.A. 271, 38 N. E. 432; *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963; 36 Cyc. 560, 566; *Johnson v. Brooks*, 93 N. Y. 337; *Cushman v. Thayer Mfg. Jewelry Co.* 76 N. Y. 365, 32 Am. Rep. 315; *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371; *Moore v. Baker*, 62 N. J. Eq. 208, 49 Atl. 836; *Straus v. Norris*, 77 N. J. Eq. 33, 75 Atl. 980; *Law v. Smith*, 68 N. J. Eq. 81, 59 Atl. 327; *Adderley v. Dixon*, 1 Sim. & Stu. 607, 57 Eng. Reprint, 239, 2 L. J. Ch. 103, 24 Revised Rep. 254; *Hamblin v. Dinneford*, 2 Edw. Ch. 531;

*Story, Eq. Jur.* ¶ 723; *Hopper v. Hopper*, 16 N. J. Eq. 147; *Bumgardner v. Leavitt*, 35 W. Va. 194, 12 L.R.A. 776, 13 S. E. 67.

Defendant should not be permitted to rely on the representation as to the value of the stock as a ground for repudiating the settlement.

*Dennis v. Jones*, 44 N. J. Eq. 513, 6 Am. St. Rep. 899, 14 Atl. 913; *Reed v. Benzine-ated Soap Co.* 81 N. J. Eq. 182, 86 Atl. 263; *Clampitt v. Doyle*, 73 N. J. Eq. 678, 70 Atl. 129; *Gerli v. Mistletoe Silk Mills*, 83 N. J. L. 7, 84 Atl. 1065; *Sun Dredging & Constr. Co. v. Ottens*, 84 N. J. L. 741, 87 Atl. 1003; *Dennis v. Jones*, 44 N. J. Eq. 513, 6 Am. St. Rep. 899, 14 Atl. 913; *Byard v. Holmes*, 33 N. J. L. 119, 6 Mor. Min. Rep. 598; *Doughten v. Camden Bldg. & L. Asso.* 41 N. J. Eq. 556, 7 Atl. 479; *Russell v. Russell*, 60 N. J. Eq. 282, 47 Atl. 37, affirmed in 63 N. J. Eq. 282, 49 Atl. 1081; *Reid v. Hibbard*, 6 Wis. 175; *Bryant v. Proctor*, 14 B. Mon. 451; *Stewart v. Haas*, 23 La. Ann. 783; *Wales v. Newbould*, 9 Mich. 45; *Steinway v. Steinway*, 24 App. Div. 104, 48 N. Y. Supp. 1046; *Grabenheimer v. Blum*, 63 Tex. 369; *French v. Shoemaker*, 14 Wall. 315, 20 L. ed. 852; *Rodermund v. Clark*, 46 N. Y. 354.

The subject-matter of the bill of complaint has not been fully litigated and determined in the supreme court.

*West New York Silk Mill Co. v. Laubsch*, 53 N. J. Eq. 65, 30 Atl. 814.

Failure to restore the entire consideration received on the settlement, and the great delay in offering a return of a part, with the consequent prejudice to complainant, not only constitute weighty evidence of the intention to ratify the agreement, but also operate by way of estoppel to render the attempt at rescission futile.

*American Dock & Improv. Co. v. Public Schools*, 35 N. J. Eq. 181.

The doctrine of election of remedy will not apply to the complainants in the chancery suit.

*Way v. Bragaw*, 16 N. J. Eq. 213, 84 Am. Dec. 147; *Law v. Rigby*, 4 Bro. Ch. 68, 29 Eng. Reprint, 779; *Pickford v. Hunter*, 5 Sim. 122, 58 Eng. Reprint, 288; 2 Dan. Ch. Pl. & Pr. 721; *Roarke v. Roarke*, 77 N. J. Eq. 181, 75 Atl. 761; *Larter v. Canfield*, 59 N. J. Eq. 461, 45 Atl. 616; *Griffing v. A. A. Griffing Iron Co.* 61 N. J. Eq. 269, 48 Atl. 910; *Van Houten v. Stevenson*, 68 N. J. Eq. 490, 64 Atl. 1058; *Carlisle v. Cooper*, 18 N. J. Eq. 241; *Steers v. Shaw*, 53

N. J. L. 358, 21 Atl. 940; Fulton v. Golden, 25 N. J. Eq. 353.

Kalisch, J., delivered the opinion of the court:

The interposition of the court of chancery between the appellant and the respondents in their controversy in the supreme court cannot be sustained upon the facts before us. The agreement, in writing, entered into by the appellant and the respondent Savage for a complete accord and satisfaction of the matters in dispute between them and which were the subject of an action at law then pending in the supreme court, is clear and explicit in its terms. The fact that Savage fully performed his part of the agreement was not controverted. The legal effect of the performance by

Accord and satisfaction—effect.

Savage of his agreement was to extinguish the appellant's claim that was made the basis of the action against Savage in the supreme court. But as this settlement was made between the litigants privately and without judicial sanction, the settlement

—cognizance by court.

was, as a matter of course, not entitled to judicial recognition until brought properly before the court in which the action was pending. The appellant, it appears, not only refused to perform that part of the agreement whereby he had obligated himself to discontinue the action, but attempted to repudiate the entire agreement and insisted upon proceeding to a trial of the

—refusal of party to be bound—effect.

cause. The action of the appellant in that respect could in no manner alter the legal effect of the settlement.

It would be an anomaly in the judicial procedure of this state to countenance the right of the respondents to oust their adversary

Injunction—against action at law—matters arising pendente lite.

from the forum in which he was properly seeking his remedy, because, peradventure, he might set up facts in reply to their

defense of an executed compromise, matters which are only cognizable in a court of equity. For that is practically what the respondents are seeking to do.

Under the state of facts presented, the respondents' regular course to pursue was to have applied to the court in which the action at law was pending for leave to file a supplementary answer setting up the executed accord. Before the adoption of the new Practice Act, such a situation would have been met, under the common law, by an application for leave to file a plea puis darrein continuance. This plea was peculiarly adapted to the situation which the facts set out in the respondents' bill and affidavit present. In discussing the office of this plea, Stephen's Pleading (on p. 66) says: "It is to be observed that the effect of such a plea is not to impugn the right of action altogether, but only the right of further maintaining it, i. e., since the period when the matter of defense arose; and in this respect it differs from an ordinary plea in bar, which is in the nature of an absolute and general exception to the plaintiffs' right to maintain the action, and tends to deny that it was properly brought. A plea of this kind is always pleaded by way of substitution for the former plea; on which no proceeding is afterwards had. It may be either in bar or abatement; and is followed like other pleas, by a replication and other pleadings, till issue is obtained upon it."

If the plaintiff's replication to the additional plea set up matter which did not raise an issue of fact, cognizable in a court of law, the proper course was to demur, but now, under the new practice, such a situation may be met by a motion to strike out the reply to the supplemental answer.

The accord set up and executed by the respondent Savage will afford a complete defense to the appellant's action at law, unless it should appear

Accord and satisfaction—effect on pending action.

that the appellant was induced to sign a release (for such was the legal effect of the written agreement fully performed by the respondent Savage), by false and fraudulent

**Fraud—  
availability  
at law.**

representations as to the value of the stock. Of course, if the execution of the instrument was induced by fraud, that can be shown in an action at law.

While there is a resemblance in the circumstances of the present case to those which appeared in *Headley v. Leavitt*, 68 N. J. Eq. 591, 60 Atl. 963, and *Trenton Street R. Co. v. Lawlor*, 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668, in which cases this court held that the jurisdiction of the court of chancery was properly entertained, yet, upon an analysis of the cases cited, there will be found as much difference intrinsically from the case sub judice as one might expect to find between an original writing and its facsimile. The prominent distinguishing feature between the present case and the cases cited is that in neither of the latter was there a complete accord. In *Headley v. Leavitt* (N. J.) *supra*, the defendant attempted to set up in the action at law on certain promissory notes the accord and satisfaction as a defense; but the proof showed that he had not performed his part of the compromise, and the defense, therefore, was overruled. Subsequently, he did perform and filed a bill to restrain the action at law on the ground that he had an equitable defense, and then the court directed that the action at law should be restrained unless and until the plaintiff consented that the com-

plete accord and satisfaction might be set up as a defense. In that case this court, speaking through Mr. Chief Justice Gummere (on p. 595), said: "The subject of litigation which resulted in the judgment was one which was cognizable by a legal, rather than an equitable, tribunal. The contract which the appellant sought to set up as a defense to the action in the supreme court would, if it had been executed by him, have constituted a legal and not an equitable defense to that action. Subsequent performance of the contract on his part gives him no right to have the forum of the litigation changed to a court of equity and to deprive the respondent of the determination of a jury upon the question of the existence or nonexistence of such contract."

In *Trenton Street R. Co. v. Lawlor*, *supra*, the agreement for compromise was made while the action at law was pending. Lawlor's attorney, with authority from Lawlor, agreed to take a certain sum in compromise, and this Lawlor refused to accept. The case, therefore, was one of unexecuted accord.

In the present case, it appeared that the accord had been fully executed by the respondent Savage, and of which the respondents could have availed themselves by a proper plea in the action at law, hence there was no ground for the interference of a court of equity. The appellant's motion to strike out the bill for want of equity should have prevailed.

The decree will be reversed, with direction to the Court of Chancery that the bill be dismissed, with costs.

## ANNOTATION.

### Right to enjoin prosecution of civil action because of matters arising pendente lite.

Equity will enjoin the prosecution of civil actions for matters arising pendente lite, where such matters do not constitute an adequate defense at law or the remedy at law is not ade-

quate. *Trenton Street R. Co. v. Lawlor* (1908) 74 N. J. Eq. 828, 71 Atl. 23, 74 Atl. 668; *Harvey v. Ryan* (1906) 59 W. Va. 134, 7 L.R.A. (N.S.) 445, 115 Am. St. Rep. 897, 53 S. E. 7.

In the case first cited, it appeared that in an action for personal injuries the plaintiff agreed to a compromise immediately preceding the trial. Subsequently, he refused to execute a release or accept a tender of the agreed amount. Thereafter he noticed the case for trial after having substituted counsel. Thereupon the defendant instituted an action to restrain the prosecution of the suit. The court held that while a compromise was a good defense at law, still the compromise here remained unexecuted and was, therefore, unavailable as a defense at law, so that an injunction was proper.

So, in *Harvey v. Ryan* (W. Va.) supra, it appeared that the complainant's testator had purchased a lot of land with general covenants of warranty from an intestate of one of the defendants. The complainant had given his bond to the defendant's intestate for the purchase price. Subsequently an action of ejectment was instituted against the complainant's testator, by a person who claimed a paramount title. Pending the ejectment action, a suit was commenced for the payment of the bond. The complainant's testator obtained a temporary injunction restraining the action on the bond pending the result of the ejectment action. The ejectment action having been decided against the complainant's testator, and all the interested parties having died, the complainant, who was executor, revived the suit, praying for a perpetual injunction restraining the prosecution of the action on the bond by the personal representatives of the deceased. On motion the bill was dismissed. In reversing that judgment the court held that equity would intervene, since complainant did not have an adequate defense at law, the action on the bond being on a sealed instrument, wherein the lack of consideration could not be pleaded at law.

Similarly, in *Williams v. Neely* (1904) 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1, it appeared that, since the final hearing of an action on a note given for a tract of land, the defendants had

paid certain liens against that land. They thereupon instituted an action to restrain the action on the note, and for an adjudication of the rights of the parties. It was held that the court had jurisdiction to adjudicate the rights and interests of all the parties, and so put an end to the litigation. The court said: "In case it shall appear, as counsel have intimated, that since the final hearing below the complainants have paid and secured releases of these liens, the court should reduce the amount of the recovery in the action at law upon the note by the amount, not exceeding the value of the annuities at the time such payments were made, which the complainants have necessarily expended in paying the liens of the annuities upon their land and in defending their title against them. That court undoubtedly has jurisdiction to adjudicate the rights and interests of all the parties to this suit in the three quarter sections of land to which the liens attach, and to put an end to this litigation."

In *Marshall v. Bryant Electric Co.* (1911) 107 C. C. A. 599, 185 Fed. 499, it was held that a manufacturer who had intervened in and successfully defended one customer against a charge of infringing a patent might enjoin the further prosecution of an infringement suit brought by the patentee against another customer.

If the enforcement of a judgment in a civil action would be unconscionable, equity will enjoin the enforcement. *Elder v. Prussing* (1902) 101 Ill. App. 655. In that case it appeared that, in an attachment suit, the defendant gave a recognizance, whereupon the attachment was dissolved. By the bond the surety was given the management of the defense. Prior to the trial the principal became a bankrupt and interposed that plea, in violation of his recognizance agreement. Subsequent to the interposition of the plea of the principal's discharge in bankruptcy, a personal judgment was obtained against the bankrupt principal, but with a perpetual stay of the execution against him. The plaintiff in that suit there-



upon sought to enforce the judgment against the surety, who instituted a suit to restrain such enforcement, pending a defense which his principal had prior to his plea in bankruptcy. The court held that it would be unconscionable to enforce the judgment against the surety.

If a defense arising since issue joined may be adequately presented in the action, equity will not interfere. *Williams v. Wilson* (1878) 124 Mass. 257; *Deepwater R. Co. v. Motter* (1906) 60 W. Va. 55, 116 Am. St. Rep. 873, 53 S. E. 705; *Burkhart v. Scott* (1911) 69 W. Va. 694, 72 S. E. 784. And see the reported case (*SAVAGE v. EDGAR*, ante, 1021).

In *Burkhart v. Scott* (1911) 69 W. Va. 694, 72 S. E. 784, it appeared that a verdict had been obtained in an action in assumpsit, and the defendant therein effected a compromise with the plaintiff. Subsequently the plaintiff instituted a bill to restrain the defendant therein from making use of the agreement of compromise, alleging that it was procured by fraud. The court held that complainant had an adequate remedy at law, and therefore equity would not interfere. It was said: "The original bill states no cause for injunction. The law court can determine whether or not the compromise was fraudulently made to defeat Wamsley's fee, and if it should find that it was in fact fraudulent it has the power to reject the paper as evidence. . . . Injunction is one of the extraordinary remedies, and equity will not relieve by injunction when there is a plain and adequate remedy at law. In fact, it is essential to confer jurisdiction by injunction that it must appear that no adequate relief exists in law on the facts averred, and a bill which fails to show the want of such legal remedy is factually bad."

In *Deepwater R. Co. v. Motter* (1906) 60 W. Va. 55, 116 Am. St. Rep. 873, 53 S. E. 705, it appeared that an action of assumpsit had been begun. A number of creditors of the defendants brought suit against them, and garnisheed the complainants. The defendants in those actions sued to en-

join the prosecution of the action of assumpsit and the garnishment proceedings. The court held that the persons bringing those actions could not be deprived of the tribunal in which they chose to bring their legal action, saying: "Clearly the demand of Motter & Company is legal in character, triable by a jury in a law court in the action of assumpsit, and under the Constitution Motter & Company are entitled to such trial, unless we can see some plain reason why equity should deprive them of it. As between the railroad company and Motter & Company, a law court can give adequate and full remedy by testing whether any amount is due to Motter & Company, and if so, how much. They have right to have that amount determined by verdict and judgment, as such judgment would be conclusive, not only between the railroad company and them, but as between Motter & Company and their creditors, as to the fund liable for debt. *Turner v. Stewart* (1902) 51 W. Va. 493, 41 S. E. 924. Say that the railroad company could sue the conflicting creditors in equity to settle their rights as to the fund in its hands (this is not decided), still that fact cannot disable Motter & Company from sustaining a suit at law. The fact that these creditors on various claims are pursuing the railroad company is a matter between them, not between the company and Motter & Company, and cannot put it in the power of the company to exclude Motter & Company from their proper chosen tribunal. It is this right of Motter & Company to have their demand passed by a jury that must be the dominant factor. We must not ignore that right. The law forum's relief, as between the company and Motter & Company, is full and adequate to fix their rights. When we are met by the plea that it is not adequate between the company and the creditors of Motter & Company, we answer, that is another matter, and that the action of the circuit court leaves the injunction in force as to that."

In *Williams v. Wilson* (1878) 124 Mass. 257, it appeared that suit had been begun on a note secured by a mortgage, given as part of the purchase price of an undivided half of an estate. The vendor had since sold one half of his remaining half. The co-owners thereafter sold a portion by metes and bounds to another, releasing the vendee from the mortgages thereon. They advised the mortgagee of the contemplated sale and the agreed price, and he advised immediate completion. Prior to that transaction, the mortgagee had commenced an action on the note. In a suit to en-

join the action on the note on the ground that the last purchaser was discharged from all liability on the note by reason of the conveyances and releases, it was held that the defense was available in the action on the note and mortgage.

In the reported case (*SAVAGE v. EDGAR*, ante, 1021) it is held that the complainant was not entitled to an injunction restraining the prosecution of a suit at law, though the parties had completed an accord and satisfaction after issue joined; since the accord and satisfaction could be pleaded in a supplemental answer. R. C. L.

JOE HANEL, Respt.,

v.

JOHN OBRIGEKEWITSCH, Doing Business as Dickinson Roller Milling Company, Appt.

*North Dakota Supreme Court—May 18, 1918.*

(— N. D. —, 168 N. W. 45.)

**Master and servant — obvious risk — machinery in motion.**

1. The danger of having one's fingers crushed, if placed between the rollers of a machine for the purpose of removing material which has clogged the same, and while the engines are working and the machine is in operation, is a risk which is so patent and apparent that an employee of reasonable intelligence would be presumed to know and appreciate it.

[See note on this question beginning on page 1035.]

**— warning — knowledge.**

2. The rule requiring the employer to instruct his employee and to warn him of dangers is only for the purpose of supplying the latter with information which he is not supposed to have, and, if it is shown that the employee did, in fact, possess the knowledge and an appreciation of the danger, a failure to warn him can in no sense be said to be the proximate cause of the injury; and, if not a proximate cause of the injury, it cannot be actionable negligence.

[See 18 R. C. L. 569 et seq.]

**— presumption.**

3. An employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience, and with the same capacity for estimating their significance, would see and understand.

[See 18 R. C. L. 570.]

**— safe and unsafe method of work — instruction.**

4. Where there is a safe and an unsafe way of doing the work, the master must give the servant instruction how to do it to avoid injury.

[See 18 R. C. L. 567 et seq.]

Headnotes 1-3 by BRUCE, Ch. J.

(Grace, J., dissents.)

**APPEAL** by defendant from a judgment of the District Court for Stark County (Crawford, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Casey & Burgeson for appellant.

Mr. W. F. Burnett, for respondent: Plaintiff was entitled to have the issues submitted to a jury.

Ross v. Double Shoals Cotton Mills, 140 N. C. 115, 1 L.R.A.(N.S.) 298, 52 S. E. 121.

The court will not disturb the verdict of a jury, if there is a question of fact for them to pass on, or any evidence of negligence.

Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Zink v. Lahart, 16 N. D. 56, 110 N. W. 931; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; Umsted v. Colgate Farmers Elevator Co. 18 N. D. 309, 122 N. W. 390; Webb v. Dinnie Bros. 22 N. D. 377, 134 N. W. 41; Wyldes v. Patterson, 24 N. D. 218, 139 N. W. 577; Messenger v. Valley City Street & Interurban R. Co. 21 N. D. 82, 32 L.R.A.(N.S.) 881, 128 N. W. 1023; Roux v. Blodgett & D. Lumber Co. 85 Mich. 519, 13 L.R.A. 728, 24 Am. St. Rep. 102, 48 N. W. 1092; Haines v. Lake Shore & M. S. R. Co. 129 Mich. 481, 89 N. W. 349; Smith v. Spokane, 16 Wash. 408, 47 Pac. 888, 1 Am. Neg. Rep. 386; Stephenson v. Sheffield Brick & Tile Co. 151 Iowa, 371, 130 N. W. 586; Yanike v. Chicago & N. W. R. Co. 149 Wis. 554, 136 N. W. 329; O'Brien v. Northwestern Consol. Mill. Co. 119 Minn. 4, 137 N. W. 399.

Where there is a safe and unsafe way of doing the work, the master must give an unskilled servant instructions how to do it to avoid injury.

Wright v. Stanley, 56 C. C. A. 234, 119 Fed. 330; Royer v. Tinkler, 16 Pa. Super. Ct. 457; Shee-tram v. Trexler Stave & Lumber Co. 13 Pa. Super. Ct. 219; Missouri P. R. Co. v. Watts, 64 Tex. 568.

Bruce, Ch. J., delivered the opinion of the court:

This is an action to recover damages for personal injuries, occasioned by the hand of the plaintiff being caught and crushed between two rollers in a flour and feed mill. The plaintiff was a man thirty-nine

years of age. He had worked at the blacksmith's trade for years in Russia, before coming to the United States, and during such employment had repaired wagons, plows, etc. He does not, however, seem to have been there employed around machinery. After coming to the United States he farmed for a while, and while doing so, and for about eight months, used an ordinary farm feed mill. He had been working for about three and one-half months at the particular employment at which he was injured, and that employment seems to have furnished all of his real knowledge of grinding machinery. The machine at which he was injured was an iron frame with three sets of rolls inclosed, about 18 inches apart, and one above the other. There was an opening in the iron frame just below each set of rolls. This opening was covered by an iron door which fitted into the machine so as to prevent dust coming out, and the bottom of the door was about 6 inches above the set of rolls below. In order to get his hand caught in the rolls, it was necessary to put it in the door, and down from 4 to 6 inches, before it would reach the top of the rolls, or it would have to be drawn by something or by some means down that distance. So, too, as the rolls were about 17 inches in diameter, it would be necessary that the fingers should be put or drawn a few inches lower between the rolls before they would be caught. The negligence charged is:

"That the defendant carelessly and negligently failed to instruct the plaintiff in respect to the mechanism of the said grinding machine, or as to the use thereof, or as to the manner of operating the same, and neglected to warn the plaintiff relative to the risks incident thereto, and especially of the danger and risk of his hands being caught or

drawn in between the rolls of said machine, although the plaintiff was ignorant of said danger and risks.

"That the defendant negligently and carelessly failed to provide a proper belt for the operation of said machine; that said machine was intended to be equipped, and should have been equipped, with a belt 6 inches in width; that prior to the time plaintiff entered the employ of the defendant one of the belts on said machine had worn out, and the defendant negligently replaced the same with an old 4-inch belt, which was inadequate and not of sufficient strength or width to properly operate and turn said grinder machine, and that the defendant, with knowledge, negligently permitted, allowed, and authorized the use of said defective, unfit, and worn belt in the operation of said machine and equipment so furnished by him, and negligently failed and neglected to warn and instruct the plaintiff of such dangerous, unfit, and defective appliance.

"That on or about the 18th day of November, 1914, while the defendant was operating said machine in the usual and ordinary manner, under instructions and by the direction of the defendant, the said machine, by reason of said defective and unfit belt and appliance, choked up and clogged, thereby making it necessary for the plaintiff, in the course of his employment, to clean the same to prevent injury to said machine and belting and to protect and preserve his employer's property, and that, while the plaintiff was cleaning said clogged machine in the usual and ordinary manner, by reason of said defective belt, and by reason of the failure of the defendant to warn and instruct the plaintiff as to the dangers incident to the use of said defective machine and appliance, the plaintiff was injured as hereinafter set forth, to wit: While cleaning said machine in the usual and ordinary manner, and without negligence on the part of the plaintiff, the said machine, which had become clogged, as

hereinbefore set out, suddenly started, and caught the right hand of the plaintiff between the rolls of said machine, and cut and bruised the same so that two fingers thereof had to be amputated, and all the joints of plaintiff's said hand became ankylosed, so that the plaintiff has totally and permanently lost the use of said hand."

The answer is a general denial, and, in addition, contains the defense that the plaintiff was not employed to work around the machine at all, nor did his duties take him there, and that:

"Further answering, the defendant alleges that the belts driving the feed mill were in first-class condition for doing the work of grinding grain, and the rolls and everything connected with such work were properly covered, so as to prevent accidents of any kind; that the plaintiff had no right or authority to be anywhere near such rolls, and, in order for him to have his hand injured, it was necessary for him to open the door of the covering for such rolls and stick his hand in there; that the rolls between which he stuck his fingers were not used for the grinding of grain at all, but were running spread apart and idle; that the defendant hired a miller for the purpose of looking after the grinding of feed, as well as the grinding of flour, and it was not the duty of nor was plaintiff allowed to have anything to do with the rolls grinding the feed by which his hand was hurt.

"That upon information and belief defendant alleges that plaintiff, on the day in which he was hurt, came into the mill intoxicated, and, because of such condition, opened the door of the cover securely covering such rolls, stuck his hand between said rolls while running, and by so doing injured two fingers of his hand; that he was not at that time performing any duty imposed upon him by the defendant, nor was he doing anything that he was instructed or allowed to do, and his injuries were caused because of his

intoxicated condition, and his negligence in interfering with the machinery his duties did not require him to touch in any manner."

The defense of intoxication was clearly presented, and must be conceded to have been determined in favor of the plaintiff by the verdict of the jury. The defense that the plaintiff was not employed to work around the machinery appears to have been abandoned.

The defenses of contributory negligence and of the assumption of risk are hardly pleaded. The only real defense that is left is that of lack of negligence on the part of the defendant. On this point, however, it would appear that the claim that the belts on the so-called slow side of the machine were too small, and that this occasioned the machine to choke up, should be eliminated, if, indeed, it has any merit, since these belts were on the machine at the time of the employment. The plaintiff knew of none other, and the machine choked at the beginning of his employment, and choked repeatedly afterwards. Perhaps larger belts would have prevented the choking, though of this we are by no means certain. The case, however, is very similar to that in which one is employed to drive an automobile, which has no self-starter, and who breaks his arm while cranking the machine. It may be true that there would have been no accident if a self-starter had been furnished. No court, however, would hold the master liable for the lack of the equipment.

The question, then, which is presented to us is, Where a person is employed to work in a mill and in the grinding of grain, at a machine which is so equipped that it is liable to clog when grain is run therethrough, and when no specific instructions are given as to the care of the machine and as to the method of cleaning it when the clogging takes place, and when, soon after the employment, the machine does clog and the employer uses a method to relieve the difficulty, which is

dangerous and palpably dangerous to anyone, an adult employee, merely because the employer has used that method, can continuously continue so doing without complaint, and can later, and when injured, recover damages, because he was not told that the method used was dangerous.

To put the question in another form, Is it negligence for an employer to fail to warn an employee of a danger that is so obvious that one of his age and experience should readily realize it, and refrain from a practice which such employee must realize is fraught with danger?

The plaintiff himself testifies that no specific instructions were given to him as to how to clean out the machine when it clogged, and admits that there was a way to stop the rolls and to thus work in safety, and that that was to either throw off the belt or to stop the engine.

After stating that the machine clogged about a week after he started to work he testifies as follows:

He (Obrigekewitsch) came right over and cleaned out that machine, and then he pressed on the belt, and the machine started again. I simply told him that it stopped; that he would have to come over there. He opened one of the little doors, and cleaned it out with his hand.

Q. I will ask you to state whether or not Mr. Obrigekewitsch pulled out the feed, or whatever there was in there, with his hand, out onto the floor, out through the door.

A. Yes, sir.

Q. Then, when he pulled the feed out, what did he do, if anything?

A. He pressed on the belt, and the machine started up again.

Q. After this did the machine clog again?

A. Yes. It stopped a great many times, especially when the grain was a little damp, or a little damp oats, why it bothered considerably.

Q. What did you do then, when the machine stopped?

A. I always proceeded to clean the machine the same way as I seen

it done, the same way as I seen Mr. Obrigekewitsch clean it.

Q. Now, did Mr. Obrigekewitsch ever give any warning or caution about the danger of any parts of the machinery in the mill?

A. He never told me, or I never asked.

Q. Did Mr. Obrigekewitsch see you clean this machine afterwards at different times?

A. I could not state positively he seen me, because I was always busy and had to watch the roll closely. He could have been there many times, but I could not say positively that I seen him there. The machine clogged so many times that I could not state. Sometimes it was two or three times a day, and sometimes it would not clog for a couple of days. Just as soon as wet grain would come around it would clog two or three times or more.

Q. Did you always, or did you not, use the same method of cleaning it out as that you had seen Mr. Obrigekewitsch use?

A. Yes, sir. I never asked anybody else afterwards. I was crippled on the 17th day of November. The machine was clogged as usual.

Q. On each of the times when the machine was clogged and you cleaned it out with your hand, what, if anything, did you do to the belt to start it?

A. After I cleaned it out and seen the machine would pretty near go, I would either bear down on the belt with my knee, or sometimes on my hand, and then the machine would get hold again, and start running. On the day of my injury I started to clean the machine. As usual it clogged up on me, and I got it nearly all out. I didn't see it was cleaned out well enough, so I wanted to take out another handful, and just about the time I was reaching in for the rest of it, or the last handful, to get a little more out of there, the machine suddenly moved and caught my finger.

Q. Did this machine ever start like that before, on any occasion

when you cleaned it, without pressing on the belt?

A. The machine has never started that way before, and I was certain it would never start. If it had started, I would have been more careful and have looked out for it.

It is perfectly clear that it would have been the height of folly to have attempted to clean the machine when the rolls were revolving, for, even if the fingers would not touch, they would have been drawn down by the feed and particles that were being ground. The evidence shows that in the past this portion of the machine had frequently choked; and, although the other rolls were still turning on the occasion of the cleaning by the employer, and the particular rolls did not then revolve again until the belt was pushed against the wheel, had anyone the right to rely on such a fact? We think not. The method employed by the master was certainly a dangerous one, but this fact must have been apparent to anyone of any intelligence, and the evidence is far from showing that the plaintiff lacked ordinary intelligence in this respect. *Crowley v. Pacific Mills*, 148 Mass. 228, 19 N. E. 844; *De Souza v. Stafford Mills*, 155 Mass. 476, 30 N. E. 81; *Coullard v. Tecumseh Mills*, 151 Mass. 85, 23 N. E. 731; *Ciriack v. Merchants' Woolen Co.* 146 Mass. 182, 4 Am. St. Rep. 307, 15 N. E. 579; *Berger v. St. Paul, M. & M. R. Co.* 39 Minn. 78, 38 N. W. 814, 16 Am. Neg. Cas. 251; *Connolly v. Eldredge*, 160 Mass. 566, 36 N. E. 469; *Groth v. Thomann*, 110 Wis. 488, 86 N. W. 178; *Gardner v. Paine Lumber Co.* 123 Wis. 338, 101 N. W. 700; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615, 71 N. W. 1034; *Kroger v. Cumberland Fruit Package Co.* 145 Wis. 433, 35 L.R.A. (N.S.) 473, 130 N. W. 513.

We realize that there are cases where an employee is entitled to rely upon the superior knowledge of his employer. Even, however, if the action of the employer in clean-

ing the roller in the way that he did could in any way be construed to be an instruction, it can hardly be believed that he had any superior knowledge in this respect. Surely, everyone who has worked on a farm or anywhere else knows that it is dangerous to try to remove particles from between turning wheels, and that, while machinery is in operation and the engines are working, the rolls are liable at any time to start revolving, even though they may be temporarily clogged, and this even though the pressing of the belt thereon may increase the friction and more surely and immediately produce the result.

It is perfectly true, as pointed out by the plaintiff, that it is a general rule that, where there is a safe and unsafe way of doing the work, the master must give the servant instructions how to do it to avoid injury. Missouri P. R. Co. v. Watts, 64 Tex. 568.

There is, however, no reason to believe that in the case at bar the question of skill was involved. It was a mere question of the ordinary knowledge which everyone possesses. The plaintiff himself testifies that there was a way to stop the rolls and to thus clean the machinery with safety, and that was either to throw off the belt or to stop the engine. The question is not one of contributory negligence or of the assumption of risk. It is a question of negligence merely. The case comes within the rule that "there is no duty of warning and instruction, if the employee's duties are simple and the danger obvious, or if, by any other means, he possesses knowledge of the risk to which he is subjected. The rule requiring the employer to instruct his employee and to warn him of danger is only for the purpose of supplying him with information, which he is not presumed to have, and, if it is shown that the employee did, in fact, possess the knowledge [and an appre-

ciation of the danger] the failure to warn can in no sense be said to be the proximate cause of the injury, and, if not the proximate cause of the injury, of course it cannot be actionable negligence. The employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience, and with the same capacity for estimating their significance, would see and understand." 18 R. C. L. 569, 570.

The authorities upon the subject are very numerous, and are practically all to the same effect. In *Marsden v. Johnson*, 89 Ill. App. 100, the plaintiff, a boy of sixteen years, was injured while trying to remove a cornstalk, which had clogged the machine. Among other things the court said: "A boy sixteen years old, if of ordinary intelligence, is possessed with sufficient discretion to avoid obvious and apparent dangers, and certainly must know, if he puts his fingers into revolving rollers of the character of those of the machine in question, he cannot escape injury. It would hardly occur to the appellant, or its foreman, as necessary to warn the employee not to put his fingers into these revolving rollers. The danger appears to have been patent and obvious to the most casual observer, as it seems to us, and hence we are of the opinion that it was not negligence on the part of the appellant not to have given this warning."

In the case of *Lowcock v. Franklin Paper Co.* 169 Mass. 313, 47 N. E. 1000, 3 Am. Neg. Rep. 659, it was held that the employer was not negligent in failing to instruct a boy of fifteen "that his hand would be caught, like the paper, if he put it in too far between revolving cylinders, as the danger was apparent." It was also held that "the statement of an employer to an employee, putting paper between a revolving cylinder and a moving belt with the

Master and  
servant—  
safe and unsafe  
method of work  
—instruction.

—warning—  
knowledge.

—presumption.

—obvious risk—  
machinery in  
motion.

use of a split stick, that he could use his hands, and it would not be dangerous, does not assert or suggest that his hands would not be caught and drawn along like the paper, when in contact with the inward moving surfaces."

In the case of *Crowley v. Pacific Mills*, 148 Mass. 228, 19 N. E. 344, the court said: "The plaintiff's injury was received, according to his own testimony, in consequence of his putting his finger in between the roll and the cylinder, in order to smooth the cloth just before it passed upon the cylinder, by taking out a 'double edge,' as it was called, that being a term applied to the turning over or under of the edge of the cloth. The plaintiff was seventeen years old, and had been at work for about six months upon a machine substantially like that upon which he received the injury, except that the distance between the roll and the cylinder was less upon the latter machine; and he had been at work upon the latter machine nearly two weeks. The operation of the machine was simple. In view of the plaintiff's age and experience prior to the time of the accident, no duty then rested on the defendant to give him instruction in reference to the risk of possible injury. It could not be deemed necessary at that time to tell him that, if he should put his hand in between the cloth and the revolving cylinder, just at or just before the place where the cloth came in contact with the cylinder,

there was danger that his hand would be caught. The omission to do this did not constitute negligence on the part of the defendant."

In the case of *Kuich v. Milwaukee Bag Co.* 139 Wis. 101, 120 N. W. 261, it was held that "where an employee about fourteen and one-half years old, feeding bags into a printing machine, could not fail to appreciate the danger if her fingers were grasped by the nippers grasping and drawing the bags into the machine, and the employee had been engaged in the operation of such machines for several months, and she possessed the intelligence and information to understand the danger incident to her work, the employer was not required to instruct her, or to give her warning as to the danger of her fingers being caught by the nippers."

Numerous holdings to the same effect are everywhere to be found. See 18 R. C. L. 569, 570, and note to *Cronin v. Columbian Mfg. Co.* 29 L.R.A. (N.S.) 111; *Ewing v. Lanark Fuel Co.* 65 W. Va. 726, 29 L.R.A. (N.S.) 487, 65 S. E. 201.

Most of the cases cited are cases of minors. If the rule is applicable to minors, much more must it be applicable to adults.

We, therefore, hold that no negligence was shown, and the judgment of the District Court is reversed, with directions to dismiss the complaint.

Grace, J., dissents.

## ANNOTATION.

### Duty to warn servant of danger of cleaning, adjusting or repairing machinery while in motion.

I. Mature servants, 1036.

II. Minor servants:

a. In general, 1036.

b. Presumptions, 1037.

c. Questions for jury, 1037.

The present annotation is confined to a treatment of the cases involving the question of the duty of the master to warn his servants as to the neces-

sity for stopping machinery while cleaning, adjusting or repairing it. This limitation, of course, excludes cases which merely determine the duty of the master to warn or instruct a servant as to the proper methods of cleaning, adjusting or repairing machinery while it is in motion, and which do not involve the element of



stopping it while such duties are being performed.

### *I. Mature servants.*

A master is under no duty to warn a servant of mature years and average intelligence of the dangers of cleaning a machine without stopping it, where such servant, by reason of familiarity with machinery in general, and with the particular machine in question, knows or ought to know that it is dangerous to clean it without stopping it, and that it may be easily stopped for that purpose. *H. D. Williams Cooperage Co. v. Kittrell* (1913) 107 Ark. 341, 155 S. W. 119. And see *Henry v. King Philip Mills* (1892) 155 Mass. 361, 29 N. E. 581.

And where a mature servant puts his hand into a machine while it is in motion for the purpose of cleaning it, but without knowing the construction of the machine, or what he will meet, no action can be maintained on the ground that the master should have warned the servant against doing so while the machine was in motion. *Robinska v. Lyman Mills* (1899) 174 Mass. 432, 75 Am. St. Rep. 364, 54 N. E. 873, 6 Am. Neg. Rep. 571.

Nor is a master in duty bound to warn a mature servant of the dangers of attempting to unclog or clean a machine containing rapidly revolving knives, rollers or gears, without stopping it, where such danger is obvious. *Chmiel v. Thorndike Co.* (1902) 182 Mass. 112, 65 N. E. 47 (holding such to be the rule even in the case of a stupid foreigner who was slow in learning to use the machine); *HANEL v. OBRIGKEWITSCH* (reported herewith) ante, 1029; *Stoll v. Hoopes* (1888) 10 Sadler (Pa.) 291, 14 Atl. 658. And this is especially true where the servant of his own volition attempts to make the adjustment instead of calling upon machinists employed to perform such duties. *McCue v. National Starch Mfg. Co.* (1894) 142 N. Y. 106, 36 N. E. 809.

But even though the servant is of mature years he must be warned of the dangers of unclogging a machine while it is in motion if it appears that because of hidden or concealed dan-

gers, or because of inexperience or general lack of intelligence, or because he has been misled, he is ignorant of the dangers in question and the master knows or ought to know of such conditions. *De Costa v. Hargraves Mills* (1898) 170 Mass. 375, 49 N. E. 735; *Kasjeta v. Nashua Mfg. Co.* (1904) 73 N. H. 22, 58 Atl. 874; *Tucker v. Lowe* (1917) — N. H. —, 102 Atl. 376; *Rice v. Dewberry* (1906) — Tex. Civ. App. —, 93 S. W. 715.

### *II. Minor servants.*

#### *a. In general.*

Where a minor employee has knowledge of the dangers attached to the cleaning, adjusting or repairing of a machine while in motion, the master need not warn him that it should be stopped while such duties are performed. *Brammer v. Pettijohn* (1907) 154 Ala. 616, 45 So. 646; *Bedgood v. T. R. Miller Mill Co.* (1918) — Ala. —, 80 So. 364.

And where a minor employee is capable of understanding the obvious dangers of unchoking or adjusting a machine without stopping it, the master is under no duty to warn the servant of such danger (*Brammer v. Pettijohn* (Ala.) supra; *Hess v. Escanaba Woodenware Co.* (1906) 146 Mich. 566, 109 N. W. 1058); at least, unless the master knew that the servant was inexperienced and did not fully understand and appreciate the danger (*Birmingham Candy Co. v. Shepherd* (1915) 14 Ala. App. 312, 70 So. 193; *Bedgood v. T. R. Miller Mill Co.* (Ala.) supra).

Of course where a minor servant, either because of immaturity or inexperience, does not know of the dangers attending the cleaning, adjusting or repairing of a machine without stopping it, and the master is or should be aware of such ignorance, it is his duty to warn the servant. *Glover v. Dwight Mfg. Co.* (1888) 148 Mass. 22, 12 Am. St. Rep. 512, 18 N. E. 597; *Driscoll v. Rolfe* (1908) 75 N. H. 586, 71 Atl. 379; *Owens v. Ernst* (1892) 1 Misc. 388, 21 N. Y. Supp. 426, affirmed without opinion in (1894) 142 N. Y. 661, 37 N. E. 569; *Walters v. Rocky Mount Sash & Blind Co.* (1911) 154 N. C. 323,

70 S. E. 635; *White v. San Antonio Waterworks Co.* (1895) 9 Tex. Civ. App. 465, 29 S. W. 252; *Greenville Oil & Cotton Co. v. Harkey* (1899) 20 Tex. Civ. App. 225, 48 S. W. 1005; *Texas & N. O. R. Co. v. Plummer* (1909) 57 Tex. Civ. App. 563, 122 S. W. 942; *United States Leather Co. v. Showalter* (1912) 113 Va. 479, 74 S. E. 400. And see *Vanesler v. Mason Cigar & Paper Box Co.* (1904) 108 Mo. App. 621, 84 S. W. 201.

So where a minor inexperienced servant has been misled as to the safety of removing things from the rollers of a moving machine upon which they had caught, by watching others do it while in motion and with the evident consent of the master, it has been held that the master should warn such servant of the dangers of so removing things without stopping the machine. *Manning v. Excelsior Laundry Co.* (1905) 189 Mass. 231, 75 N. E. 254.

#### *b. Presumptions.*

The presumption is that a minor of tender years does not understand or appreciate the danger, though patent and obvious, of unchoking with the hand a machine containing revolving knives without stopping it, so as to relieve the master of the duty to warn such a servant of the dangers of such a practice. *Birmingham Candy Co. v. Shepherd* (1915) 14 Ala. App. 312, 70 So. 193.

And in Texas it has been held that the presumption as to knowledge, intelligence, and obviousness of dangers attending the cleaning of dangerous machinery while in motion does not attach to a minor that applies to an adult. *White v. San Antonio Waterworks Co.* (1895) 9 Tex. Civ. App. 465, 29 S. W. 252.

So in Virginia it has been held that the mere fact that a servant was over fourteen years of age did not of itself relieve the master of the duty of informing him that it was dangerous to clean a machine while it was in motion. *United States Leather Co. v. Showalter* (1912) 113 Va. 479, 74 S. E. 400.

On the other hand it has been held that there is no presumption that a

minor seventeen years of age, acting as off-bearer for a ripper saw lacks either the experience or the intelligence which would warn him of the danger involved in replacing a belt upon a rapidly revolving pulley and, therefore, that the master in the absence of proof of a lack of knowledge need not warn him that he should not attempt to replace a belt while the pulley was revolving. *Bedgood v. T. R. Miller Mill Co.* (1919) — Ala. —, 80 So. 364.

And where the servant was eighteen years of age it has been held that the presumption was that he had sufficient understanding to appreciate the obvious danger of unclogging with the hand a machine running at high speed and known to contain revolving knives so as to relieve the master of any obligation to warn him that the machine should be stopped for the purpose of unchoking it, at least in the absence of a showing that from inexperience or other causes he did not so understand and that the master knew that he did not. *Birmingham Candy Co. v. Shepherd* (Ala.) *supra*.

#### *c. Questions for jury.*

It has been held that the question whether or not a minor at the time of an accident had acquired sufficient knowledge of the dangers attached to the cleaning of a dangerous machine while in motion to exempt the master from liability in case of injury, upon the ground that he was excused from warning the servant as to such dangers, is one for the jury. *White v. San Antonio Waterworks Co.* (1895) 9 Tex. Civ. App. 465, 29 S. W. 252.

And whether the danger of cleaning or unchoking a machine while in motion is so obvious to a minor of ordinary intelligence as to relieve the master of warning a servant is for the jury where the evidence leaves such obviousness in doubt. *Birmingham Candy Co. v. Shepherd* (1915) 14 Ala. App. 312, 70 So. 193; *Doyle v. Pittsburgh Waste Co.* (1903) 204 Pa. 618, 54 Atl. 363; *Neilon v. Marinette & M. Paper Co.* (1890) 75 Wis. 579, 44 N. W. 772. And see *O'Connor v. Adams* (1876) 120 Mass. 427.

And the question of the master's knowledge as to the minor servant's lack of understanding of the obvious danger is a jury question where the facts tend to show that he must or ought to have known that the servant was continually unchoking his machine without stopping it. *Birmingham Candy Co. v. Shepherd* (Ala.) *supra*.

So the master's negligence in not giving proper instructions as to the starting, stopping and cleaning of a machine upon which a minor servant is put to work is for the jury where the evidence, both as to the knowledge and experience of the servant, and the amount of instructions actually given, is conflicting. *Glover v. Dwight Mfg.*

*Co.* (1888) 148 *Mass.* 22, 12 *Am. St. Rep.* 512, 18 *N. E.* 597.

And it has been held that even though a servant of "tender years" (boy sixteen years of age, 5 feet 7 inches in height and bright and well developed) knew that there were knives in a feed cutter and that if his hands came in contact with them he would be injured, it should be left to the jury to determine whether the servant should have been instructed that the machine might safely be unclogged by stopping it and that he should not use his hands for that purpose while it was in motion. *Ertz v. Pierson* (1902) 130 *Mich.* 160, 89 *N. W.* 680, 11 *Am. Neg. Rep.* 599.

G. J. C.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Bayonne, New Jersey, Plff. in Err.,

v.

MARY A. VREELAND.

*United States Supreme Court — June 2, 1919.*

(— U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 438.)

**National banks — liability of shareholder — knowledge of transfer.**

1. The mere transfer of stock in a national bank from husband to wife, without the latter's knowledge and consent, does not impose upon her the individual liability attached by law to the position of a shareholder, and she cannot be deemed to have approved, ratified, or acquiesced in such transfer so as to assume the position of a shareholder by indorsing the certificates in blank, in the belief that she was enabling her husband to correct his avowed mistake.

[See note on this question beginning on page 1049.]

**Appeal — review of facts — directed verdict requested by both parties.**

2. When both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn therefrom. And upon review a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it.

[See 2 R. C. L. 204 et seq.]

**Evidence — relevancy — negating inference — ratification.**

3. Facts and circumstances concerning a wife's indorsement in blank of national bank stock certificates are admissible in evidence to negative the inference that by such indorsement she ratified a prior unauthorized transfer of such stock to her by her husband and assumed the duty promptly to remove her name from the bank books or suffer the liability imposed upon duly registered shareholders.

[See 13 R. C. L. 1169, 1170.]

**ERROR** to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the District Court for the District of New Jersey in favor of defendant in a suit to enforce an assessment against her as an alleged stockholder of the First National Bank of Bayonne. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Barber, Watson, & Gibbon-ey, for plaintiff in error:

Defendant was a record shareholder.

Cecil Nat. Bank v. Watson town Bank, 105 U. S. 217, 26 L. ed. 1039; Harvey v. Stowe, 134 C. C. A. 635, 219 Fed. 17.

Defendant is liable as an owner, for the assessment.

Matteson v. Dent, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419; Kenyon v. Fowler, 83 C. C. A. 567, 155 Fed. 107, affirmed in 215 U. S. 593, 54 L. ed. 341, 30 Sup. Ct. Rep. 409; Keyser v. Hitz, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290; Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344; Scott v. Deweese, 181 U. S. 202, 45 L. ed. 822, 21 Sup. Ct. Rep. 585.

The acceptance of the bond and mortgage of William H. Vreeland as collateral security for the payment of the assessment was not a waiver of the right to recover of Mrs. Vreeland.

Pauly v. State Loan & T. Co. 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465; Hubbell v. Houghton, 86 Fed. 547, affirmed in 33 C. C. A. 574, 63 U. S. App. 31, 91 Fed. 453; Re California Nat. Bank, 53 Fed. 38; Price v. Yates, Fed. Cas. No. 11,418.

Mr. Pierre P. Garven, for defendant in error:

Defendant was not a shareholder and liable for the assessment.

Richmond v. Irons, 121 U. S. 27-66, 30 L. ed. 864-877, 7 Sup. Ct. Rep. 788; Keyser v. Hitz, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290; Pauly v. State Loan & T. Co. 165 U. S. 606-612, 41 L. ed. 844-847, 17 Sup. Ct. Rep. 465; Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344; Finn v. Brown, 142 U. S. 56, 35 L. ed. 936, 12 Sup. Ct. Rep. 136.

The admission of conversation relating to bond and mortgage of William H. Vreeland was not error.

Donnelly v. State, 26 N. J. L. 511; Webster v. Hudson County, 86 N. J. L. 256, 90 Atl. 1110.

Mr. Justice McReynolds delivered the opinion of the court:

Williams, as receiver, sued defendant in error in the United States district court for New Jersey to enforce an assessment against her, levied by the Comptroller of the Currency (Rev. Stat. § 5151), because she apparently owned certain stock of the First National Bank when it failed, December 6, 1913. She admits that the certificates were made out in her name, and at time of the failure were so entered on the bank books. But she claims that, without her knowledge or consent, her husband caused them to be thus issued and entered. And further, that although she signed blank powers of attorney indorsed thereon, and thereby made it possible to transfer the stock from her name, she never really approved, ratified, or acquiesced in the transfer to herself.

Each side asked for an instructed verdict without more; the trial judge directed one in favor of Mrs. Vreeland, and in support of this action said: "Although the burden was upon the defendant to show that she was not in fact the owner of the stock (Finn v. Brown, 142 U. S. 56, 67, 35 L. ed. 936, 939, 12 Sup. Ct. Rep. 136), I think that she has borne the burden by proving that the placing of the stock in her name in the first instance was unauthorized,—without her knowledge and consent,—and that she did not thereafter acquiesce in this act or in any way ratify it. . . . I am constrained to hold, therefore, that the defendant is not liable and that a verdict should be directed in her favor." Final judgment entered upon the consequent verdict was approved by the circuit court of appeals (156 C. C. A. 632, 244 Fed. 346).

In respect of the evidence and its

conclusions therefrom the latter court said:

"The plaintiff proved that the defendant was a shareholder of record and that she did nothing to remove her name as such. This was sufficient to establish prima facie the defendant's liability. *Finn v. Brown*, supra; *Matteson v. Dent*, 176 U. S. 521, 530, 44 L. ed. 571, 575, 20 Sup. Ct. Rep. 419. The burden then shifted to her (*Finn v. Brown*) to show that the act of making her a shareholder was in the first instance unauthorized; that it was without her knowledge or consent; and that she has not since acquiesced in or ratified it. That she has sustained the burden upon the first two points is not disputed; therefore the remaining question is as to evidence of her ratification. . . . Considering this testimony in connection with corroborating testimony, it appears to us that what Mary A. Vreeland did, in legal effect, was to make a valid execution of a power of attorney for the transfer of stock. That act, in so far as it authorized a transfer of stock, she cannot avoid by pleading ignorance. As the question here does not involve the validity of the act to effect a transfer, but concerns its evidential imputation of the knowledge with which it was done, we are of opinion that the circumstances which attended the act were a part of it and affected the evidential inferences to be drawn from it. These circumstances show that before acting, the defendant requested to be informed as to what she was asked to do; this information was denied her. It was denied her under representations and influences which, when she acted, led her to believe she was doing something entirely different from that which she was actually doing; that is, she was made to believe she was correcting a mistake of her husband,—a mistake affecting his affairs—not that she was dealing with or assigning away her own property. Therefore, we think the circumstances were such as to negative the knowl-

edge which otherwise it is presumed her act would have imparted. They contradicted the normal imputations of her act, and left her without that knowledge which was a prerequisite to a valid ratification of her husband's unauthorized act."

It further held: "Instead of submitting the case to the jury, however, each party asked the court for binding instructions in his favor, which, under *Beuttell v. Magone*, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566, is not a submission to the court without the intervention of a jury, within the intent of Rev. Stat. §§ 649, 700, Comp. Stat. 1916, §§ 1587, 1668, 6 Fed. Stat. Anno. 2d ed. pp. 130, 205, but is equivalent to a joint request for a finding of fact by the court, and when the court, acting upon such request, directs the jury to find for one of the parties, both are concluded on its finding. In this case the parties submitted to the court the question of the wife's ratification of her husband's unauthorized act; that question was one of fact; upon it depended her liability. The court's decision, as evidenced by its instruction to the jury that they render a verdict for the defendant, was a finding of fact, which concluded both parties as effectually as if the same fact had been found by the jury."

The established rule is: "Where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed, and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom." And upon review, a finding of fact by the trial court under such circumstances must stand, if the record discloses substantial evidence to support it. *Anderson v. Messenger*, 85 C. C. A. 468, 158 Fed. 250, 253; *Beuttell v. Magone*, 157 U. S. 157, 39 L. ed. 655, 15 Sup. Ct. Rep. 566; *Empire State Cattle Co. v. Atchison*, T. & S. F. R. Co. 210 U. S. 1, 8, 52 L. ed.

Appeal—review of facts—directed verdict requested by both parties.

931, 936, 28 Sup. Ct. Rep. 607, 15 Ann. Cas. 70; *Sena v. American Turquoise Co.* 220 U. S. 497, 501, 55 L. ed. 559, 561, 31 Sup. Ct. Rep. 488; *American Nat. Bank v. Miller*, 229 U. S. 517, 520, 57 L. ed. 1310, 1311, 33 Sup. Ct. Rep. 883; *Mead v. Chesbrough Bldg. Co.* 81 C. C. A. 184, 151 Fed. 998, 1002; *American Nat. Bank v. Miller*, 107 C. C. A. 456, 185 Fed. 338, 341.

Counsel for the receiver maintained that, when Mrs. Vreeland indorsed the certificates in blank at the request of her husband, who declared this necessary to enable him to correct his mistake, she thereby indisputably ratified his unauthorized transfer of the stock to her and assumed the duty promptly to remove her name from the bank books or suffer the liability imposed upon duly registered shareholders. But we think the courts below rightly held that facts and circumstances concerning this indorsement could be shown in order to negative

the inference which would have followed if unexplained. *Glenn v. Garth*, 133 N. Y.

18, 36, 37, 30 N. E. 649, 31 N. E. 344. And as without doubt there is substantial evidence tending to show she had no actual intention to ratify, affirm, or acquiesce in her husband's unauthorized act, we must accept that as finally established.

In *Keyser v. Hitz*, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290, which involved the liability of a married woman for an assessment levied against national bank stockholders, speaking through Mr. Justice Harlan, this court approved a charge: "If the stock in controversy was transferred upon the books of the German-American Savings Bank to and in the name of the defendant without her knowledge and consent, she was entitled to a verdict, unless she subsequently ratified and confirmed such transfer." And it was further said: "We must not be understood as say-

3 A.L.R.—66.

ing that the mere transfer of the stocks on the books of the bank, to the name of the defendant, imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done,—nothing more appearing,—she would not be held to have assumed or incurred liability for the debts, contracts, and engagements of the bank. But if, after the transfers, she joined in the application to convert the savings bank into a national bank, or in any other mode approved, ratified, or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank, she was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholders of national banks."

Approval, ratification, and acquiescence all presuppose the existence of some actual knowledge of the prior action and what amounts to a purpose to abide by it. *Owings v. Hull*, 9 Pet. 607, 629, 9 L. ed. 246, 254; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 352, 38 L. ed. 470, 473, 14 Sup. Ct. Rep. 572; *Glenn v. Garth*, supra. When defendant in error signed blank powers of attorney she did not know what her husband had done and certainly entertained no purpose to approve transfer of the certificates to herself. She thought she was merely doing something to enable him to correct his avowed mistake, and nothing else. Nobody was misled or put in a worse position as the result of her act.

National banks—liability of shareholder—knowledge of transfer.

"As between the original parties that could not be deemed a ratification which was accompanied by a refusal to ratify, and a declared purpose to undo the unauthorized act. The form adopted, by itself and unexplained, would tend to an infer-

ence of ratification, but it is not left unexplained. The actual truth is established, and that truth must prevail over the form adopted as between parties who have not been misled, to their harm, by the form of the transaction as distinguished from its substance. . . . The presumption which might have flowed from the form of the transaction disappears upon the explanation made, and in view of the substantial truth proved by the evidence."

Glenn v. Garth, 133 N. Y. 36, 37, 30 N. E. 649.

The record reveals no material error and the judgment below is affirmed.

#### NOTE.

The liability of one whose name appears upon corporate books as a stockholder without his consent is discussed in the note, beginning at page, 1049, post.

FRANK SHEAN, Appt.,

v.

VIOLET N. COOK, Admr., etc., of Carrie M. Cook, Deceased, et al.,  
Respts.

*California Supreme Court (In Banc) — February 28, 1919.*

(— Cal. —, 179 Pac. 185.)

#### Corporation — liability of stockholder — stock standing in name.

1. Where the constitutional definition of stockholder is one who owns shares in a corporation, a woman is not liable to creditors for shares standing in her name, where, upon being notified by her husband that he had placed them in her name, she immediately repudiated the transaction and reassigned them to him, although he did not transfer them on the books, and the statute provides for liability of such persons as appear on the books to be stockholders.

[See note on this question beginning on page 1049.]

#### Appeal — view of evidence — conclusion of court.

2. Upon appeal from a judgment in defendant's favor in an action to enforce the liability of an alleged stockholder for the debts of the corporation, on the ground that defendant was not a stockholder, the evidence must be considered in the view most favorable to the conclusions of the court.

[See 2 R. C. L. 202 et seq.]

#### Definition — stockholder.

3. The term "stockholder," in a constitutional provision imposing upon stockholders of a corporation liability for corporate debts, must be construed in the light of a statutory definition of the term existing at the time the Constitution was adopted.

[See 6 R. C. L. 50.]

#### Estoppel — to deny liability as stockholder.

4. One is not estopped to deny liability as a stockholder of a corporation in favor of one who was ignorant, when credit was given the corporation, that the name of the one against whom the estoppel is claimed was upon the books as a stockholder.

[See 10 R. C. L. 732.]

#### Evidence — report to probate court.

5. That a man, while guardian of his wife, reported stock standing in her name on the books of a corporation as belonging to her, is not conclusive against his testimony, in an action to hold her estate liable as a stockholder to creditors of the corporation, that he placed the stock in her name, but she immediately repudiated the transaction and he neglected to retransfer the stock.

[See 7 R. C. L. 402.]

**APPEAL** by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendants, in an action brought to enforce the liability of the feme defendant as stockholder of a certain corporation. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Pillsbury, Madison, & Sutro and A. E. Roth, for appellant:

One who appears as a stockholder on the books of a corporation must be held liable for the debts of the corporation.

Hurlburt v. Arthur, 140 Cal. 106, 98 Am. St. Rep. 17, 73 Pac. 734; Baines v. Babcock, 95 Cal. 593, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; Moore v. Cloyd, 74 Cal. 174, 15 Pac. 670; Cook, Corp. § 260; Knowles v. Sandercock, 107 Cal. 636, 40 Pac. 1047; Duke v. Huntington, 130 Cal. 274, 62 Pac. 510; Hughes Mfg. & Lumber Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871; Irons v. Manufacturers' Nat. Bank, 27 Fed. 593, 121 U. S. 58, 30 L. ed. 874, 7 Sup. Ct. Rep. 788; Finn v. Brown, 142 U. S. 56, 67, 35 L. ed. 936, 939, 12 Sup. Ct. Rep. 136; Kenyon v. Fowler, 83 C. C. A. 567, 155 Fed. 107; Abbott v. Jack, 136 Cal. 510, 69 Pac. 257; O'Connor v. Witherby, 111 Cal. 529, 44 Pac. 227; Thomas v. Matthiessen, 232 U. S. 221, 58 L. ed. 577, 34 Sup. Ct. Rep. 312; McCabe Constr. Co. v. Utah Constr. Co. 199 Fed. 976.

The statements contained in the inventory relative to the ownership of the stock were admissible as statements made by a sworn officer of the court, who was acting under a duty imposed by law in making the inventory.

Seavey v. Seavey, 37 N. H. 130; Smalley v. Paine, 62 Tex. Civ. App. 52, 130 S. W. 739; Gentry v. Field, 143 Mo. 399, 45 S. W. 286.

A person whose name has been entered on the books of a corporation without his consent may thereafter do certain acts which, as a matter of law, constitute an acceptance of the stock issued in his name.

Keyser v. Hitz, 133 U. S. 139, 149, 33 L. ed. 534, 537, 10 Sup. Ct. Rep. 290; Greene v. Sigua Iron Co. 31 C. C. A. 458, 88 Fed. 203; Simmons v. Hill, 96 Mo. 679, 2 L.R.A. 478, 10 S. W. 61.

The assignment of the certificate of stock by Carrie M. Cook constituted an acceptance thereof and made her liable to the stockholders.

O'Connor v. Witherby, 111 Cal. 523, 44 Pac. 227; Abbott v. Jack, 136 Cal. 510, 69 Pac. 257.

The courts will presume that the creditors relied upon the entries which appeared on the corporation books.

United States Wind-Engine & Pump Co. v. Davies, 2 Kan. App. 611, 42 Pac. 590; Plumb v. Bank of Enterprise, 48 Kan. 484, 29 Pac. 699; Irons v. Manufacturers' Nat. Bank, 27 Fed. 593.

The fact that a married woman is incapable of entering into a contract does not relieve her from her statutory liability as a stockholder.

Witters v. Sowles, 1 L.R.A. 64, 35 Fed. 640; Christopher v. Norvell, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. Rep. 502, 5 Ann. Cas. 740.

Mr. Bert Schlesinger, for respondents:

One who does not accept stock is not a stockholder, although his name is entered as such upon the books.

Welch v. Gillelen, 147 Cal. 576, 82 Pac. 248; Abbott v. Jack, 136 Cal. 510, 69 Pac. 257; Hughes Mfg. & Lumber Co. v. Wilcox, 13 Cal. App. 27, 108 Pac. 871; Mudgett v. Horrell, 33 Cal. 29; Shattuck & D. Warehouse Co. v. Gillelen, 154 Cal. 779, 99 Pac. 348; People's Home Sav. Bank v. Stadtmuller, 150 Cal. 108, 88 Pac. 281; Simmons v. Hill, 96 Mo. 679, 2 L.R.A. 478, 10 S. W. 61; Glenn v. Garth, 133 N. Y. 18, 30 N. E. 651, 31 N. E. 344; Stephens v. Follett, 43 Fed. 845; Sigua Iron Co. v. Greene, 31 C. C. A. 477, 59 U. S. App. 555, 88 Fed. 212.

Defendants' objections to the admission in evidence of the inventory and appraisalment in the matter of the guardianship of the person and estate of Carrie M. Cook, an incompetent, were properly sustained.

Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120; Kidwell v. Ketler, 146 Cal. 12, 79 Pac. 514; Belknap Sav. Bank v. Lamar Land & Canal Co. 28 Colo. 326, 64 Pac. 215; Putnam v. Lincoln Safe Deposit Co. 87 App. Div. 13, 83 N. Y. Supp. 1092; Shumway v. Leakey, 67 Cal. 459, 8 Pac. 12; Hoyt v. Zumwalt, 149 Cal. 384, 86 Pac. 600; Baker v. Brickell, 87 Cal. 342, 25 Pac. 489, 1067; Anthony v. Chapman, 65 Cal. 76, 2 Pac. 889; Knights Templars & M. Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1071; Westenfelter v. Green, 24 Or. 448, 34 Pac.



24; *Hammon v. Huntley*, 4 Cow. 493; *M'Intire v. Morris*, 14 Wend. 90.

Carrie M. Cook should not be held liable for the negligence of the officers of the corporation.

*Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *Shattuck & D. Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Mudgett v. Horrell*, 33 Cal. 25; *Hughes Mfg. & Lumber Co. v. Wilcox*, 13 Cal. App. 27, 108 Pac. 871; *Carey v. Williams*, 25 C. C. A. 227, 51 U. S. App. 204, 79 Fed. 912.

Mr. S. C. Wright also for respondents.

Messrs. *Heller, Powers, & Ehrman*, as amici curiæ, for San Francisco Stock and Bond Exchange:

The actual owner of stock in a corporation is liable in the case of non-banking corporations, and not the person whose name appears upon the books of the corporation as a stockholder, unless there is some equitable reason to estop the person whose name appears upon the books from denying his ownership.

*Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *Hughes Mfg. & Lumber Co. v. Wilcox*, 13 Cal. App. 27, 108 Pac. 871.

A different rule of stockholders' liability is applicable in the case of banking corporations.

*O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227; *Abbott v. Jack*, 136 Cal. 510, 69 Pac. 257; *Kenyon v. Fowler*, 83 C. C. A. 567, 155 Fed. 107; *Hurlburt v. Arthur*, 140 Cal. 103, 98 Am. St. Rep. 17, 73 Pac. 734.

If there was any duty on the part of Carrie M. Cook to have her name (entered without her knowledge or consent) removed from the books of the corporation, such duty was performed when she informed the president, who in turn informed the secretary, that she would not become a stockholder in the corporation.

*Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248; *Shattuck & D. Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348; *Hughes Mfg. & Lumber Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871.

*Wilbur, J.*, delivered the opinion of the court:

This action was brought by plaintiff to recover from Carrie M. Cook upon her stockholder's liability for indebtedness incurred by the Morton L. Cook Company, a corporation, in which it was alleged she owned

49,095 shares of the total capital stock of 50,000 shares. Morton L. Cook, her husband and guardian, was joined as defendant. The court found that Carrie M. Cook was not a stockholder in the corporation, and rendered judgment in favor of defendants. Plaintiff appeals. Mrs. Cook has since died, and the administratrix of her estate with the will annexed has been substituted. The main question presented by the appeal is as to the sufficiency of the evidence to support the finding of the court that Mrs. Cook was not a stockholder in the corporation. In determining that question we must consider the evidence from the view most favorable to the conclusion of the court.

Appeal—view of evidence—conclusion of court.

The corporation was organized March 6, 1903. Morton L. Cook was the owner of 49,095 shares. On the 28th of October, 1908, he caused a new certificate for these shares to be issued to Carrie M. Cook. Mr. Cook took this certificate to his wife, telling her that they had decided to make her the principal stockholder of the Morton L. Cook Company. She immediately repudiated the transaction and refused to accept the stock or to have anything to do with the matter. Two or three days later her husband told her that, if she was not going to have anything to do with the corporation, she should sign an indorsement that he had written upon the back of the stock as follows:

October 28, 1908.

I hereby assign any and all int. I may have to this stock to Morton L. Cook.

She thereupon signed said indorsement. Mr. Cook, who was during this whole period president of the corporation, took the stock to Mr. Alderson, who was the secretary, and said: "Mr. Alderson, that is all off; just let that matter remain in abeyance; I will take it up again at a later date." The stock certificate ever since October, 1908, has

remained in the custody of Morton L. Cook in his safe deposit box in San Francisco. Mrs. Cook never had anything to do with the corporation or with said stock, other than as stated. The corporation was actively engaged in business, and the indebtedness upon which plaintiff sued was incurred by the corporation between the 1st day of January, 1912, and the 1st day of February, 1914. Before that time Mrs. Cook, on December 10, 1910, had been declared an incompetent, and her husband had been appointed her guardian. She was under this guardianship up to the time of her death. It is obvious that there never was any contract or agreement between Mrs. Cook and the corporation that she should become a stockholder. Upon being tendered the stock, she refused the same, and returned it to the president of the corporation, who had presented it to her, and for the purpose of perfecting her repudiation and permitting the ownership of the stock to appear upon the books in conformity with the real fact she indorsed the same, so that such stock might be transferred on the books of the corporation in the usual and proper manner. Morton L. Cook was at all times the owner of the stock. Appellant's contention is that, as Mrs. Cook was shown by the books of the corporation to be a stockholder, and, by reason of the presentation to her of the stock certificate and her indorsement thereof, must have known that fact, she was liable for her proportionate share of the indebtedness of the corporation during such period as the stock continued to appear upon the books of the corporation in her name. This contention is based upon the following provision contained in § 322 of the Civil Code relating to stockholders' liability: "The term stockholder, as used in this section, applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the

books in the name of another.  
. . . "

The statutory liability of stockholders is declared by our Constitution (art. 12, § 3): "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association."

At the time this constitutional amendment was adopted, the Civil Code, in accordance with the general law concerning the subject, declared: "The owners of shares in a corporation which has a capital stock are called stockholders." Civ. Code, § 298, enacted 1871.

The term "stockholder," therefore, as used in the Constitution, must be construed in the light of this definition, and the liability, therefore, attaches to the owner of the stock. Section 322 of the Civil Code uses the exact language with reference to stockholders' liability as that contained in the Constitution, excepting that the words, "of joint-stock association," and the words, "or association," are omitted in the statutory declaration of liability. The remaining provisions of § 322 are obviously and necessarily for the purpose of carrying out the constitutional and statutory liability thus declared. Under the constitutional declaration of liability, carried into § 322, that liability is predicated upon ownership of the stock. *Western P. R. Co. v. Godfrey*, 166 Cal. 346, 136 Pac. 284, Ann. Cas. 1915B, 825. It is evident that the legislature, in its declaration that "the term stockholder . . . applies not only to such persons as appear by the books of the corporation to be such," etc., had in mind the provisions of § 324, Civil Code, relating to transfers of stock upon the books of the corporation,

Definition—  
stockholder.

and the effect of such books as evidence of ownership. The term "stockholder" had already been defined (Civ. Code, § 298), and it was neither necessary nor desirable to again define the term. By the terms of § 324, Civil Code, it is provided that title to the stock may be transferred "by indorsement . . . and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation." In considering whether the fact that the name of Mrs. Cook appeared upon the books of the corporation as a stockholder made her liable under the statute to plaintiff, it will be necessary to consider some of the previous decisions of this court upon the subject. In *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248, and *Shattuck & D. Warehouse Co. v. Gillelen*, 154 Cal. 778, 99 Pac. 348, the court had under consideration the statutory liability of a stockholder in a nonbanking corporation, where the books of the corporation showed the defendant to be a stockholder at the time the indebtedness sued upon was incurred. *Gillelen* was a pledgee of the stock, but by mistake, which he endeavored to correct, the stock was issued to him personally, and he was shown by the books of the corporation to be a stockholder. In the latter case it was said, with reference to § 322, Civil Code: ". . . The only rational construction of the section that the language, 'such persons as appear by the books,' etc., must be limited to persons who knowingly or voluntarily permit their names to appear as stockholders."

In both cases it was held that a construction of the section which would lead to the result that "would necessarily preclude one from showing that, while upon the face of the corporate books he appeared to be a stockholder, yet in fact he was not, that he had never owned or subscribed for any stock or authorized the issuance of any to him by the

corporation, . . . cannot seriously be considered."

In *Welch v. Gillelen*, *supra*, it was held that the relation of the stockholder to the corporation was one of contract; that one could not become a stockholder, and liable to the creditors of the corporation, because of entries in the stock book of the corporation made without his consent. See also *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 108, 88 Pac. 280; *Geary Street, P. & O. R. Co. v. Bradbury Estate Co.* — Cal. —, 175 Pac. 457. In *Shattuck & D. Warehouse Co. v. Gillelen*, *supra*, concerning appellant's contention that the stockholders were liable, it was said: "The decisions relied on by the appellant in that case [*Welch v. Gillelen*, *supra*] were shown to be cases where the party asserting that he was not a stockholder had either knowingly and voluntarily assumed that position upon the books of the corporation, or, if he had not originally done so, had, by his subsequent conduct, estopped himself from denying the relationship."

The case of *Hurlburt v. Arthur*, 140 Cal. 106, 98 Am. St. Rep. 17, 73 Pac. 734, involved the statutory liability of stockholders in a banking corporation under §§ 321 and 322 of the Civil Code. The question of an unauthorized issuance or transfer of stock was not involved or considered. While the construction of §§ 321 and 322, Civil Code, is there considered, the effect of the opinion must be determined in the light of the point under discussion, namely, the liability of stockholders in a banking corporation. In such case the stock books and public notice of transfers are by statute declared to be conclusive evidence of the ownership of stock. Civ. Code, § 321. It was therefore held that, where the holder of stock as pledgee had the stock transferred to him in his own name and was shown on the books as owner thereof, and not as a pledgee, he was liable as a stockholder to creditors. The same rule also holds good in other corporations. *Welch v. Gillelen* and *Shat-*

tuck & D. Warehouse Co. v. Gillelen, supra; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776. In Baines v. Babcock, supra, the defendant, who was shown by the books of the corporation to be the owner of stock, offered to prove that he was the real owner of only 425 shares issued to him by the corporation, and that the others standing in his name on its books were owned by other parties, and that they were issued to him as matter of convenience to enable him to negotiate a loan for such owners. The evidence was excluded because of the rule, which was there stated to be well settled, "that one to whom stock is issued by the corporation, and who has the same placed in his name on the corporation books as the owner, is liable to the creditors of the corporation as though he were the absolute owner; and this whether he was in fact a pledgee, agent, or trustee for the real owner."

As was suggested in Hurlburt v. Arthur, supra, the construction placed upon the sections of the National Banking Act by the Federal courts is of assistance in construing §§ 321 and 322 of the Civil Code. Section 5151 of the U. S. Revised Statutes provides: "Shareholders of every national banking association shall be individually responsible," etc.

Section 5210 of the U. S. Revised Statutes (Comp. Stat. 1916, § 9773, 6 Fed. Stat. Anno. 2d ed. p. 789), like § 321 of our Civil Code, requires the keeping of a list of stockholders for the inspection of shareholders and creditors, but it does not provide that such lists shall be "conclusive evidence as to who are stockholders," as does § 321, Civil Code. The general tenor of the decisions of the Federal courts is very well set forth in Williams v. Vreeland, 156 C. C. A. 632, 244 Fed. 346, circuit court of appeals, third district. In that case the facts were very similar to the instant case. There the wife indorsed a dividend check, which, however, was issued in her

husband's name, and also signed a power of attorney upon the back of the stock authorizing its transfer. She did not know that the stock had been issued in her name, and her signature to the power of attorney for the transfer of the stock was procured without her seeing the face of the certificates or knowing what they were. Her husband placed the certificates before her, face down, and said: "Mary, will you sign these papers for me?" She said: "What are they?" He replied: "They are some bank stock; I have made a mistake." The court states the rule to be applied in testing the question of liability to the creditors of the corporation, of the wife, under the circumstances, as follows: "The test of liability, therefore, seems to be the fact of being a record shareholder, knowledge of that fact, and some act in approval or ratification of it. Along this line the cases have been tried."

The court cited with approval the decision of the court of appeals of New York in Glenn v. Garth, 133 N. Y. 35, 43, 30 N. E. 651, 31 N. E. 346, and quoted therefrom a part of the opinion pertinent here, as follows: "It [a ratification] implies a conscious and intended approval of the act done. It rests upon the actual and existing purpose to make such approval. Hence the courts say that it must occur with full knowledge of all the facts. . . . Where the shareholder consciously accepts that relation, he ought to bear its burdens as well as enjoy its benefits, and it is easy to imply a promise to perform that duty. But where he does not accept the relation, where it was put upon him by another without authority and against his will, where, instead of accepting its benefits, he repudiates them at serious loss, where his mind and that of the company never met in any contractual relation, where it was not his duty to pay, and he explicitly refused to take what was offered, all foundation for an implied promise is gone. The facts do not admit of it, for the law does not raise a

fiction to accomplish a wrong. And thus again we come to the proposition that the real truth must be ascertained, and when ascertained must control. And that real truth is that the defendants repudiated and did not ratify the unauthorized act of McKim. The whole force of a ratification lies in conscious and intended assent with full knowledge of the facts. If there is no such intent and no such volition, but a contrary intent and an opposite purpose, there is no ratification. The absence of any such intent and the presence of a different one is clearly disclosed by the facts."

The United States circuit court of appeals sustained the finding of the trial court that Mrs. Vreeland was not liable as a stockholder of the bank to the creditors of the corporation. In the instant case Mrs. Cook refused to accept the stock offered her, and her indorsement is not the usual power of attorney consistent with an assumption of ownership of the stock, but is more in the nature of a quitclaim. There is

no element of estoppel in the case. The creditors did not know at the time credit was extended that Mrs. Cook was shown by the books of the corporation to be a stockholder.

Appellant relies upon the case of *Abbott v. Jack*, 136 Cal. 510, 69 Pac. 257. In that case, at the request of the husband, a certificate for 330 shares of stock had been issued to Mrs. Jack as owner, March 14, 1896, and the same stood in her name on the books of the corporation until July 17, 1899, when it was surrendered and canceled, "and her acceptance of the stock is shown by her written assignment of it to R. E. Jack, her husband, of date March 16, 1896." It was there held: "From this it appears that she became a stockholder of the corporation on or before March 16, 1896, and that she continued to appear as such on the books of the company

until the cancelation of the certificate, July 17, 1899. She therefore continued to be a stockholder, as the term is defined in § 322 of the Civil Code, and under the provisions of that section (no facts being found to exonerate her) she continued to be liable, along with her husband. Civ. Code, §§ 322, 324; *Duke v. Huntington*, 130 Cal. 274, 62 Pac. 510; *Baines v. Babcock*, 95 Cal. 593, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *Moore v. Boyd*, 74 Cal. 174, 15 Pac. 670; *O'Connor v. Witherby*, 111 Cal. 528, 44 Pac. 227."

The holding of the court would thus seem to be that the issuance of the certificate, coupled with the indorsement and the fact that her name appeared upon the books of the corporation, ipso facto created Mrs. Jack a stockholder, and the finding of the court to the contrary was erroneous. The court added: "R. E. Jack indeed testified that on notifying her of the issue of the stock she refused to receive it; and he further testified that he told her, if she would not receive it, she must assign to him. . . . On a new trial the question of her liability as affected by the facts testified to by R. E. Jack, or otherwise appearing, can be considered; and as it is clear that there is a liability on her or her husband, or on both, the plaintiff, if he be so advised, should be permitted to amend his complaint by charging the latter with such liability."

The reversal of the trial court in that case seems to be based rather upon the condition of the record than upon the substantive rights of the parties. It is said: "But there is no finding as to these or other facts tending to exonerate her, and their effect cannot, on the record as presented, be considered."

The necessary implication from the decision is that, if the court had found the fact to be that the wife had refused to receive the stock and had assigned it to her husband for the purpose of making effective her

**Estoppel—to deny liability as stockholder.**

repudiation, she should not be held as a stockholder. In view of the construction placed upon the record in that case, the decision cannot be said to be an authority for the plaintiff in this case, but rather, on the whole, either leaves open the question as to the effect of the repudiation by the wife of the transaction, or decides that question in favor of the nonliability of the wife. In the case of Abbott v. Jack, the fact that § 321 of the Civil Code makes the books conclusive evidence of the liability of the stockholder is apparently not relied upon by the court. In so far, however, as this case can be considered an authority for the proposition that the stock books of the corporation are conclusive as to the liability of stockholders in a nonbanking corporation, the case has been overruled by the subsequent cases of Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248, and Shattuck & D. Ware-

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stockholder—  
stock standing  
in name.

house Co. v. Gillelen, 154 Cal. 778, 99 Pac. 348. See also Western P. R. Co. v. Godfrey, 166 Cal. 346, 136 Pac. 284, Ann. Cas. 1915B, 825.

In addition to the facts heretofore stated, it may be said that M. L. Cook, the husband, while acting as guardian, reported to the court sitting in probate, on several occasions, that the stock in question belonged to his wife and was a part of her estate. These declarations, however, merely went to the question of his credibility, and the court having based its decision upon the truth of his statement concerning the original transaction, if we hold his statement sufficient to support the finding that she was not a stockholder, as we must do upon the authorities above quoted, the judgment must be affirmed.

Evidence—  
report to  
probate court.

The judgment is affirmed.

We concur: Angellotti, Ch. J.; Shaw, J.; Sloss, J.; Melvin, J.; Lawlor, J.

## ANNOTATION.

### Liability of one whose name appears upon corporate books as a stockholder without his consent.

This note includes the effect of estoppel, by negative conduct of the person in whose name the stock is entered on the corporate books, in failing to take proper steps to remove that misleading appearance, but does not include the effect of affirmative conduct consistent with his status as a stockholder, with the exception of a purported transfer or assignment for the purpose of correcting the corporate books.

The liability of assignees for the benefit of creditors, trustees in bankruptcy, etc., has been excluded.

It is held, generally, in a number of cases that one whose name is put upon the books of a corporation as a stockholder without his knowledge is not thereby subjected to the liability of a stockholder. WILLIAMS v. VREELAND (reported herewith) ante, 1038; Carey

v. Williams (1897) 25 C. C. A. 227, 51 U. S. App. 204, 79 Fed. 906; Foote v. Anderson (1903) 61 C. C. A. 5, 123 Fed. 659; O'Connor v. Witherby (1896) 111 Cal. 529, 44 Pac. 227 (obiter); Robinson v. Lane (1856) 19 Ga. 337; Girard Life Ins. Annuity & T. Co. v. Loving (1905) 71 Kan. 558, 81 Pac. 200; Glenn v. Garth (1892) 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344.

Even if stock is issued to one with his knowledge, but without his consent, it has been held that this fact alone does not render him liable as a stockholder. Greene v. Sigua Iron Co. (1896) 22 C. C. A. 636, 45 U. S. App. 162, 207, 76 Fed. 947; Carey v. Williams (1897) 25 C. C. A. 227, 51 U. S. App. 204, 79 Fed. 906; Sigua Iron Co. v. Greene (1900) 44 C. C. A. 221, 104 Fed. 854, certiorari denied in (1901)

180 U. S. 637, 45 L. ed. 710, 21 Sup. Ct. Rep. 920; *Foot v. Anderson* (1903) 61 C. C. A. 5, 123 Fed. 659; *Grier v. Union Nat. L. Ins. Co.* (1914) 217 Fed. 287; *Mudgett v. Horrell* (1867) 33 Cal. 25; *Girard Life Ins. Annuity & T. Co. v. Loving* (1905) 71 Kan. 558, 81 Pac. 200.

As stated in one case, the entry of the name of one upon the corporate books does not preclude him from showing that he was in fact not a stockholder, and that the issuance of stock in his name was unauthorized. *Welch v. Gillelen* (1905) 147 Cal. 571, 82 Pac. 248.

A statutory provision that "a person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as regards the company" has been held to mean only that the corporation which has acknowledged such a person as a stockholder, and admitted him to be such upon its record, shall not be at liberty to dispute the relation; it does not mean that the books are evidence that the person whose name has been entered is in fact a stockholder, as against him. *Carey v. Williams* (1897) 25 C. C. A. 227, 51 U. S. App. 274, 79 Fed. 906.

A person cannot be compelled to become a member of a corporation without his knowledge or consent. *Kisner's Estate* (1916) 254 Pa. 597, 99 Atl. 168.

One who has not consented cannot be made a member of a corporation incorporated, by an act of the legislature, for the purpose of laying out a street, and thus subjected to assessments for the expense of making the street. *Ellis v. Marshall* (1807) 2 Mass. 269, 3 Am. Dec. 49.

In the case of issuance without consent, liability, if it exists, must exist by virtue of some act or omission on the part of the person whose name is thus placed upon the corporate books, after knowledge of the fact.

It seems clear that one whose name has been put upon corporate books as a stockholder without his knowledge or consent may ratify the act. If he does ratify the act, he becomes a stockholder. *Musgrave v. Morrison* (1880) 54 Md. 161. The silence for

seven years of a large stockholder in a corporation in whose name some of the other officers subscribed for stock, notifying him of the same, has been held to be evidence of ratification to be submitted to the jury. *Philadelphia, W. & B. R. Co. v. Cowell* (1857) 28 Pa. 329, 70 Am. Dec. 128. Although the mere transfer of stock by a husband to his wife's name without her knowledge or consent, on the books of a savings bank, afterwards converted into a national bank, would not make her liable as a shareholder of the national bank, yet if, after such transfer, she joined in the application to convert the savings bank into a national bank, or ratified such transfer, or accepted the benefits of the ownership of the stock, she is liable to be treated as a shareholder. *Keyser v. Hitz* (1889) 183 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290. In *Glenn v. Garth* (1892) 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344, a broker purchasing stock for a customer under a custom by which the broker took an assignment of the certificate from the vendor in blank, and held the certificate so assigned as security, but did not have the stock transferred to himself upon the corporate books, was held not to become a stockholder and liable to an assignee for the unpaid part of the stock, because of the fact that an agent, without authority, caused the stock purchased to be transferred to the broker upon the books of the corporation. The court, after stating that the broker did not authorize or consent to this transfer, states that he could only become responsible by estoppel or ratification. There was held to be no ratification from the fact that, upon the discovery of the mistake, the broker wrote to the agent, repudiating the transfer and denying his authority to make it, and directing him as the means of undoing the mischief to sell and transfer the stock, and, to enable him to do so in accordance with established form, signed and executed and assigned such blank of the stock. The fact that the assignment was executed is stated to be an act recognizing ownership, if unexplained, but in view of the circumstances which were shown it did

not amount to a ratification. It was further held that the act of the broker in paying for the stock did not amount to ratification. A statute providing that a person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as regards the company is held not to be conclusive, but only *prima facie*, evidence of the ownership. That the mere transfer of stock in a national bank from husband to wife, without the latter's knowledge and consent, does not impose upon her the individual liability attached by law to the position of stockholder, is held also in *WILLIAMS v. VREELAND*, (reported herewith) ante, 1038. And it is further held in this case that the wife cannot be deemed to have approved, ratified, or acquiesced in such transfer, so as to assume the position of a shareholder, by indorsing the certificate in blank in the belief that she was enabling her husband to correct his avowed mistake. The facts and circumstances concerning the indorsement of the certificate are held to be admissible in evidence to negative the inference that by such indorsement she ratified the unauthorized transfer to her, and assumed the duty promptly to remove her name from the bank books, or suffer the liability imposed upon duly registered shareholders. The assignment of the stock certificate by the person in whose name it was issued was given great weight as evidence of an acceptance, in *Abbott v. Jack* (1902) 136 Cal. 510, 69 Pac. 257. One who had accepted a transfer of shares of the capital stock in an association merely for the purpose of attending a meeting of shareholders to form a quorum, and who subsequently signed a power of attorney to retransfer the shares when the meeting was over, was held liable as a contributor where no retransfer was made under the power, although he remained in ignorance that the share still stood in his name, in *Ontario Invest. Asso. v. Leys* (1893) 23 Ont. Rep. 496.

Ratification presupposes consent. This note has been confined to cases in which there has been no consent,

hence ratification in general has been excluded. Assuming that there has been no consent at any time by the person whose name has been placed upon corporate books as a stockholder, it seems clear that his liability, if any exists, must be based upon the principle of estoppel. Estoppel has been confused with ratification in this regard. In *McHose v. Wheeler* (1863) 45 Pa. 32, it is stated that if one is named as a member in a charter, which is a public act, and does not disavow the relation as soon as he discovers the use made of his name, he cannot evade his liability as member merely by showing that he was not in fact a subscriber and never paid in any stock. He must, according to the court, immediately and publicly disavow the act, or be deemed as ratifying it as relating to creditors. The holding in *McHose v. Wheeler* is more properly attributable to the principle of estoppel from the failure to disavow the act.

One case stated that one to whom stock is transferred without his knowledge or consent can only be made liable on the ground of fraud. *Robinson v. Lane* (1856) 19 Ga. 337. In this case it was held that, if the person to whom stock is transferred without his knowledge or consent acquiesces in such transfer after it is brought to his knowledge, he is presumptively liable as a stockholder.

Estoppel has not been discussed in many cases. One case takes the broad view that there must be some act done by the party or with his assent, creating the apparent relation, before there can be an estoppel. *Glenn v. Garth* (1892) 133 N. Y. 18, 31 N. E. 344. The court, in denying that there was an equitable estoppel, states that that question is not reached, "because, before it can be reached, there must be shown to exist some act of the party, done by him or with his assent, creating the alleged apparent relation. That fact must be established before any question of estoppel can arise. If the act done, the false appearance created, is the act not of the party, but of some third person, such party is in no manner bound or affected by



it, unless he either originally authorized it or subsequently ratified it. Only by the one process or the other can it become his act, and until he can be held responsible for it there can be no question of estoppel; and there is not a case cited on the original argument or on the brief now presented, in which the rule of estoppel was applied, which failed to show that necessary and conscious and voluntary act of the party estopped." The action in this case was by a trustee for the benefit of creditors, and the court specifically states that neither the company nor any of the creditors did anything or forbore anything upon the faith of defendant's ownership of the stock. It is from this viewpoint, that is, whether any creditor relied upon the person as a stockholder, that most cases approach the question. No estoppel exists in favor of a creditor who had no knowledge at the time credit was extended that the defendant appeared as a stockholder on the books. *SHEAN v. COOK* (reported herewith) ante, 1042; *Glenn v. Garth* (1892) 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344, supra. Some cases which seemingly approve of the theory that no estoppel exists in favor of a creditor who had no knowledge that the defendant appeared on the books as a stockholder have not rested the denial of the existence of an estoppel wholly on this principle, but have relied in part upon other equitable incidents in the defendant's favor. *Welch v. Gillelen* (1905) 147 Cal. 571, 82 Pac. 248; *Shattuck & D. Warehouse Co. v. Gillelen* (1908) 154 Cal. 778, 99 Pac. 348. In these cases there was held to be no estoppel in favor of a creditor who did not know that the defendant's name appeared on the stock book as a stockholder, where the defendant, who was a pledgee of the stock, had issued in his name, a certificate which erroneously omitted to characterize him as a pledgee and where, upon the issuance of the cer-

tificate, the pledgee made prompt and reasonable efforts to have the correction made, but some time, including that in which the debt sued upon was incurred, elapsed before the correction was actually made.

A subscriber to stock in a proposed increase of the capital stock of a bank, to whom, without his knowledge or consent, old stock is issued, is not liable as a stockholder, nor is he estopped by receiving dividends which he believes to be dividends on the new stock, but which in fact are dividends on the old stock thus issued to him. *Stephens v. Follett* (1893) 43 Fed. 842.

In *May v. Genesee County Sav. Bank* (1899) 120 Mich. 330, 79 N. W. 630, a pledgee of stock who requested the corporation to issue a new certificate to him as pledgee was held not liable as a stockholder, where the certificate was issued to him as absolute owner, and, upon his request to have it issued to him as pledgee, the corporate officer replied that it was just as well to let it stand as it was, and this was done. The court states that the pledgee did not know that his name had been entered upon the books of the corporation as an absolute owner, and that he did not hold himself out as owner, and that he cannot, therefore, be held liable under the statute, although he received a certificate absolute in form, the court stating that "the certificate is no notice to creditors of the bank. It is the record of stockholders kept in the bank, upon which depositors and other creditors rely. A transfer absolute upon its face may always be shown to be an assignment as collateral security. . . . Mr. May, the cashier, knew that this stock was held in pledge, to secure a loan to Mr. Bement. It was his duty, for the protection of his own bank if for no one else, to so enter the transfer upon its books. His failure to do so cannot affect the rights of the defendant."

W. A. E.

FOUR CORNERS BUILDING & LOAN ASSOCIATION, Respt.,  
v.  
FRANK SCHWARZWAELDER, Appt.

*New Jersey Court of Errors and Appeals — March 4, 1918.*

(88 N. J. Eq. 545, 103 Atl. 240.)

**Corporations — failure of director to disclose lien — liability.**

1. A building and loan association loaned money on a mortgage of a city lot; its solicitor certified that the mortgage was a first and valid lien; in fact, there was a prior mortgage held by an estate of which the defendant, one of the directors of the association, was an executor; the property was described by reference to the street lines as the only monument and by a number on a land company map; the name of the mortgagor in the mortgage held by the estate was different from the name of the mortgagor in the association's mortgage; the defendant had nothing to do with making the loan; he had no actual knowledge that the property covered by the two mortgages was identical; he held as executor many mortgages and in the course of his business examined many properties; he knew his mortgages by street numbers and not by numbers on a land company map; the association's mortgage was accompanied by a regular abstract of title in which defendant's mortgage was not mentioned, and attached to which was a certificate by the association's solicitor, then a lawyer in good standing, that the association's mortgage was a first and valid lien. Held, that the defendant could not be found guilty of negligence for failing to apprise the association of the existence of the prior mortgage; that the directors had the right to pursue the usual business custom and trust the solicitor to close the loan and record the mortgage, and that as the loss did not come until the solicitor turned aside the money from its proper destination—the satisfaction of the first mortgage—the association had already suffered the loss without the defendant having had any opportunity to prevent it, and he cannot be held for negligence.

[See note on this question beginning on page 1058.]

**— building and loan association consent to loan — proximate cause — liability.**

2. A building and loan association loaned money on a mortgage of a city lot; its solicitor certified that the mortgage was a first and valid lien; in fact, there was a prior mortgage held by an estate of which the defendant, one of the directors of the association, was an executor. The defendant had examined and valued the property for the purpose of a loan on the application of one Wagner, and had reported to the association; the estate's mortgage was given by Daly; the title was at the time of Wagner's application in Crocker, the solicitor

of the association; the minutes of a subsequent meeting of the directors, at which defendant was not present, recite that Wagner had sold the property (which was untrue); that all the committee, including the defendant, reported in favor of a loan to Sims (which was untrue as far as defendant is concerned). The defendant never actually had to do with the loan to Sims; his knowledge is claimed to have come from hearing the minutes with these false recitals read over at a later meeting; this fact was not sufficiently proved, but if the defendant knew all the facts, he knew the loan was large enough to enable Sims to satisfy the prior mortgage to the es-

tate, and, up to the time the check of the association for the loan was cashed, might anticipate that the estate mortgage would be paid before the solicitor closed the loan with Sims; the defendant had no reason to anticipate that the solicitor would forge a discharge of the estate mortgage; when the check had been cashed and the money turned aside from the satisfaction of the prior mortgage, the loss was already incurred. Held, the proximate cause of the loss was the rascality of the complainant's own

solicitor, and the defendant cannot be held for negligence.

[See 4 R. C. L. 363; 22 R. C. L. 119 et seq.]

**Building and loan association — duty of director in passing loan.**

3. A director of a building and loan association owes to the association in passing upon loans to be made by it, only the duty of ascertaining that the usual papers, bond, mortgage, insurance policy, and abstract of title are at hand, and that the company solicitor has certified that the title is clear.

[See 4 R. C. L. 362.]

**APPEAL** by defendant from a decree of the Court of Chancery in favor of plaintiff in an action brought to recover for losses alleged to have been sustained through defendant's negligence in the performance of his duties as director of the plaintiff association. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Thomas S. Henry and Francis Child, for appellant:

Without establishing fraud or gross negligence or misuser on the part of the defendant, he cannot be held responsible for complainant's loss.

Citizens' Bldg. Loan & Sav. Asso. v. Coriell, 34 N. J. Eq. 383; Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924.

Defendant is not chargeable as a matter of law with knowledge of the prior mortgage.

Asbury Park Bldg. & L. Asso. v. Shepherd, — N. J. Eq. —, 50 Atl. 65; Hallmark's Case, L. R. 9 Ch. Div. 332, 47 L. J. Ch. N. S. 868, 38 L. T. N. S. 660, 26 Week. Rep. 824.

It was not any negligence of the defendant, but the rascality of Crocker, the complainant's solicitor, that caused the loss to complainant.

Conklin v. People's Bldg. & L. Asso. 41 N. J. Eq. 20, 2 Atl. 615.

Directors of a building and loan association have the right to rely upon their solicitor to pass upon the title to premises offered as security for loans.

Thornton & Bl. Bldg. & L. Asso. § 110, p. 111; Citizens' Bldg. Loan & Sav. Asso. v. Coriell, 34 N. J. Eq. 383.

Damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency.

Citizens' Bldg. Loan & Sav. Asso. v. Coriell, *supra*; Wiley v. West Jersey R. Co. 44 N. J. L. 247; Styles v. F. R. Long Co. 70 N. J. L. 301, 57 Atl. 448; Davis v. Williams, 4 Ind. App. 487, 31

N. E. 204; Warwick v. Hutchinson, 45 N. J. L. 61; Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 18, 10 Am. Rep. 205; Guinn v. Delaware & A. Teleph. Co. 72 N. J. L. 278, 3 L.R.A. (N.S.) 988, 111 Am. St. Rep. 668, 62 Atl. 412, 19 Am. Neg. Rep. 389; Rhad v. Duquesne Light Co. 255 Pa. 409, L.R.A. 1917D, 864, 100 Atl. 262; Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924.

Mr. Andrew Van Blarcom for respondent.

Swayze, J., delivered the opinion of the court:

The complainant seeks to recover of the defendant the loss on two mortgages in which it had invested. This loss was caused by Crocker, the complainant's solicitor, falsely certifying that the mortgages were first liens, when, in fact, there were prior mortgages which he had procured to be canceled of record by false discharges.

The case differs from cases brought by receivers in the interest of creditors or stockholders, of which Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775, 46 N. J. Eq. 25, 18 Atl. 824, is the leading instance. It differs also from cases brought by stockholders suing in their own right (Gerhard v. Welsh, 80 N. J. Eq. 203, 82 Atl. 871), and from cases where there was habitual neglect of duty, and the loss

might have been prevented by proper attention; and from cases where the loan on its face was illegal or forbidden by the by-laws. The present case is more like Citizens' Bldg. Loan & Sav. Asso. v. Coriell, 34 N. J. Eq. 383. There the defendant was held liable for losses on loans made on personal security, which on their face were in violation of a by-law, but not liable for loss due to a defective acknowledgment of a mortgage, because, as the chancellor held, the directors properly relied on the knowledge and attention of the solicitor for the legality of the mortgages. In the present case, the proximate cause of the loss was the fraud of the solicitor; the complainant is seeking to hold the defendant for the fraud of its own agent, who either paid the money to the mortgagors improperly and without seeing to it that prior liens were lawfully discharged, or more probably embezzled that money himself. To sustain the complainant's claim, reliance is had upon the fact that the defendant, as one of the executors of an estate, held a prior mortgage on each property. The real question, therefore, is whether the defendant was under any duty to the complainant to give actual notice of the existence of the mortgages held by the estate. Mortgages on two properties are involved, one of which may be called the Aschenbach East Orange mortgage, and the other the Sims South Orange mortgage.

The Aschenbach mortgage was on a city lot on North Eighteenth street, East Orange, described by metes and bounds referring to the street lines as the only monument; the number of the section and lot on a land company's map is also stated. There are no other identifying marks. The prior mortgage held by the estate of which defendant was an executor was given by William L. Daly. It is not shown that the defendant had anything to do with making the Aschenbach loan; the appraisal was made by a committee of which the defendant was

not a member. It is not claimed that he had any actual knowledge of what property was covered by the Aschenbach mortgage, but it is sought to hold him on the theory that he was negligent in failing to discover that a mortgage given by Aschenbach was on the same property on which the estate held a prior mortgage given by Daly. As there was no similarity in the names of the two mortgagors, he can only be held in case we are prepared to say that he ought to have examined the description in the Aschenbach mortgage and recalled that it was the same description as in the Daly mortgage.

Cases might arise where a director of a building and loan association should be held even to so stringent a liability. It would depend on the circumstances of each case. Here the defendant as executor held many mortgages; in the course of his business he examined many properties; the description in the Aschenbach mortgage contained nothing to excite attention; it must have differed little from the description of adjoining lots; the defendant knew his mortgages by street numbers and not by numbers on a land company map. The name of the mortgagor was different. Above all that, the Aschenbach mortgage was accompanied by a regular abstract of title in which the Daly mortgage was not mentioned, and a certificate by the complainant's solicitor, then a lawyer in good standing, that the Aschenbach mortgage was a first and valid lien. We think that the most that could be required of defendant by way of care, upon an examination of the affairs of the association would be to ascertain that the usual papers, bond, mortgage, insurance policy, and abstract were in hand, and that the solicitor had certified, as he had. In most cases this would be more satisfactory even than an actual reading of the mortgage.

But even if the defendant could

Building and  
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director in  
passing loan.

be found guilty of negligence in this respect, there would still remain an insuperable difficulty in the complainant's way. It is not claimed that the defendant should have been present when the mortgage was executed and the money paid. As business is done, that would be obviously impracticable. The directors had the right to pursue the usual business custom and trust the solicitor to close the loan and record the mortgage; in fact, such were the solicitor's duties under the by-laws. He alone could properly attend to paying off prior encumbrances and making sure that complainant's mortgage was a first lien. The loss did not come until the solicitor turned aside the money from its proper destination,—the satisfaction of the first mortgage,—and either wrongfully paid it to Aschenbach or embezzled it himself.

When the money was thus turned aside, the association had already suffered the loss without the defendant having had any opportunity to prevent it. He might, indeed, have subsequently made an examination and discovered that the mortgage was not a first lien, but there is nothing in the case to show that this discovery could have made it possible for the complainant to prevent the loss. The solicitor could hardly have been solvent; his dishonesty speaks loud to the contrary; at any rate, in the absence of evidence, we cannot find that he was solvent.

As to Aschenbach, no suggestion is made that recovery could ever have been had of him. If it could, complainant ought not to seek it of defendant. The result is that if we could find negligence on the part of the defendant, it necessarily came too late to be the cause of complainant's loss, and the decree below was wrong. This is not a punitive proceeding, but an attempt to recover actual damages caused by defendant's negligence.

The facts as to the Sims South

Orange property are somewhat more complicated. The property belonged, in 1909, to Roland D. Crocker, who was the solicitor of the complainant. He conveyed to Mabel Daly, by deed dated October 1, acknowledged October 11, and recorded October 19, 1909. Mabel Daly and her husband, William H. Daly, mortgaged to the defendant and his coexecutor October 11, 1909, by a mortgage dated and acknowledged on that day and recorded October 21, 1909. The property was then reconveyed by the Dalys to Crocker by a deed dated October 11, acknowledged November 19, and recorded November 20, 1909, and the title remained in Crocker until as late as April 1, 1913, when he conveyed it to Sims. On October 10, 1912, Louis Wagner applied to the complainant for a loan on this property, which then belonged to Crocker, subject to the defendant's mortgage. The defendant and two others were appointed a committee to appraise the property. The defendant alone did so. Thereupon the directors ordered that the committee be continued, and report to the officers who were given power to grant the loan if a satisfactory report was made; and later, the officers were empowered to grant such amount as should be unanimously recommended by the committee. The defendant never formally joined with his fellow committeemen in recommending a loan. Wagner never owned the property; and proceedings for a loan to him were dropped. It seems probable that both Wagner and Sims were merely tools of Crocker. On April 25, 1913, the complainant's minutes recite that Wagner had sold the property to Sims (which was untrue), that all of the committee (including the defendant) reported in favor of a loan to Sims (which was untrue, as far as the defendant is concerned); it was then ordered that the committee's recommendation be received and granted. The defendant was not present at this meeting. He never actually had to do with the loan to Sims. The

Corporations—  
failure of direct-  
or to disclose  
lien—liability.

effort is to bind him by the acts of the others, because at a later meeting on May 23, at which he is said to have been present, the minutes of the meeting of April 25 are said to have been approved. The fact is doubtful, since the approval of May 23 seems on its face to relate to a special meeting of April 30, and not to the regular meeting of April 25. The secretary, however, testifies that the approval of May 23 covers both the meetings, April 25 and April 30. The defendant denies that he ever heard the resolution of April 25 read. The point is of some importance, since it is all there is to show that the defendant knew anything about a Sims loan. In view of the defendant's denial, and the secretary's admission of the careless way in which the minutes were kept, we think the complainant has failed to sustain the burden of proof. This question, however, loses much of its importance in the view we take of the case. If we assume that the defendant knew that the Sims loan was to be on the same property as the abandoned Wagner loan, and that he ought to have recalled that the estate held a mortgage given by Daly on the same property, that would not charge him with knowledge that the Sims mortgage would be a second mortgage. The amount proposed to be loaned was \$1,500 more than the mortgage held by him and his coexecutor. He had the right to assume that his mortgage would be paid out of the money loaned by the association on the new mortgage. He must assume that, if he believed that Crocker, the solicitor, was an honest man; the complainant itself so held Crocker out by making him its solicitor. If we assume that the defendant knew all the facts that the most careful investigation would have disclosed, he knew that, although the loan had been authorized in April, the check had not been cashed until July 10. Up to that time he certainly might anticipate that his mortgage would

be paid, and it would serve no useful purpose, and would no doubt be regarded by his fellow directors as a foolish intrusion for him to inform them of the existence of a mortgage of which the law charged them with constructive notice. Their very proper answer to him would be: "Our solicitor will find the existing liens when he examines the title, and attend to their satisfaction."

The prior lien would have been satisfied in the ordinary course; but the complainant's solicitor, instead of taking the ordinary course, undertook to satisfy the record by a forged discharge. The defendant had no reason to anticipate the solicitor's crime. Until the check had actually been cashed, and sufficient time had elapsed for Crocker to pay off defendant's mortgage without his in fact doing so, the defendant might properly trust that the complainant's own solicitor would protect his client's interests. A delay of three months is not unusual when prior liens have to be satisfied. When the check was cashed and the money misappropriated, the loss was already incurred, as in the case of the Aschenbach mortgage. Nothing that the defendant could do would save the complainant from the loss. If there had been proof that by prompt action the money could have been saved, the case would be different; the failure to take prompt action might be negligence of the defendant, intervening between Crocker's act and the final loss to complainant. In that event, the failure to act promptly might well be the proximate cause; but in the absence of such evidence, the proximate cause is the rascality of the complainant's own solicitor.

—building and  
loan associa-  
tion—consent to  
loan—proximate  
cause—liability.

The decree must be reversed and the record remitted in order that there may be a decree dismissing the bill. The defendant is entitled to costs in both courts.

## ANNOTATION.

**Duty of director to disclose existence of lien or claim against property on which corporation or association lends money.**

A search has brought to light no decision other than that in the reported case (*FOUR CORNERS BLDG. & L. ASSO. v. SCHWARZWAELEDER*, ante, 1053), on the question of the duty of a director to disclose the existence of a lien or claim against the property on which the corporation or association of which he is a director lends money.

In that case it appeared that the plaintiff association sought to hold the defendant, one of its directors, on the theory that he was negligent in failing to discover that a mortgage given to secure a loan by the association was on the same property on which an estate, of which the defendant was an executor, held a prior mortgage. It appeared that the defendant as executor held many mortgages; that the description in the mortgage in question contained nothing to excite attention; that the defendant knew his mortgages by street numbers, and not by numbers on a land company's map; and that the name of the mortgagor was different. In addition, the mortgage in question was accompanied by a regular abstract of title in which the mortgage to the estate was not mentioned, and a certificate by the complainant association's solicitor, then a lawyer in good standing, that the mortgage in question was a first and valid lien. The court holds that the most that could be required of a director by way of care, on an examination of the affairs of a building and loan association and in making a loan on property, would be to ascertain that the usual papers,—bond, mortgage, insurance policy, and abstract,—were in hand, and that the association's solicitor had certified that the loan was a first and valid lien; that the directors had the right to pursue the usual course of business, and trust the solicitor to close the loan and record the mortgage; and that as the loss did not come until the solicitor turned aside the money from its

proper destination, the loss had already occurred without the director having had any opportunity to prevent it. It further appeared that an application was made for a loan on another piece of property, on which the defendant as executor also held a mortgage, and he examined the property as one of a committee appointed to appraise it. This application was dropped; but, subsequently, the minutes of the association recited that the person making the application had sold the property to another (which was untrue), and that all of the committee had reported in favor of a loan to the purchaser (which was untrue so far as the defendant was concerned, he not having been present at the meeting). The court holds that, assuming that the defendant knew that this loan was to be on the same property as the abandoned loan, and that he ought to have recalled that the estate held a mortgage on the same property, this would not charge him with knowledge that this loan would be a second mortgage. The amount being greater than that of the mortgage held by him and his coexecutor, he had the right to assume that his mortgage would be paid out of the money loaned by the association on the new mortgage. Also, the court says that, since the check for the amount was not cashed until practically three months later, up to that time he certainly might anticipate that his mortgage would be paid, and that it would have been useless, and probably would have been regarded as a foolish intrusion, for him to have informed his fellow directors of the existence of a mortgage of which the law charged them with constructive notice, and that, when the check had been cashed and the money misappropriated, the loss had already been incurred.

The decision in *Toledo Sav. Bank v. Johnston* (1895) 94 Iowa, 212, 62 N. W. 748, is of interest in this connec-

tion, as passing on the duty of a director to advise his associates of claims against a firm to which they were lending money. In this case it appeared that the defendant had for many years been a director of the plaintiff bank, and a member of its investment committee, it being his duty, as such, to examine the loans made by the bank, and report to the other directors on the propriety and safety thereof. While acting in this capacity, he sold a general stock of merchandise owned by him to a firm composed of his brother and another, wholly on time, the firm executing its notes to the defendant for the purchase price, which was secured by a mortgage on the entire stock of goods, and all additions thereto. This chattel mortgage was never recorded, nor its existence disclosed to others. Subsequently, a new firm was organized, composed of the defendant's two brothers, but which was never responsible for its debts. This firm made large overdrafts on the bank from time to time, which were merged into notes, often renewed, and, at the time it quit doing business, was indebted to the plaintiff bank in the sum of more than \$4,500. The defendant was aware at all times of these transactions with the bank, and frequently, in his official capacity as director and member of the committee aforesaid, approved of the loans made; but he never at any time disclosed to the bank, or to any of its officers, the fact that the firm was indebted to him for the full value of their stock, or that he held a mortgage thereon to secure the purchase price. On the contrary, he allowed the firm to appear to the bank and its officers as solvent and responsible, by reason of being apparently full and absolute owners of the stock of merchandise, free and clear of all liens. Later, the defendant took a new mortgage on the stock of goods to secure the purchase price thereof, but this he withheld from the record, and concealed from the bank, but, learning that suit was to be commenced by the bank to collect the amount owing it from the firm, the defendant placed his chattel mortgage

on record the day before it was instituted, and afterward, by virtue of an arrangement between himself and his brothers, took the whole stock in satisfaction of his claim, and delivered up and canceled the notes he held against the firm. The bank attached the stock of goods, caused it to be sold as perishable property, and applied the proceeds, less costs, on its claim against the firm, there still remaining due the bank, after making this credit, the sum of about \$1,300. The court affirmed a decree declaring that the stock of goods was subject to the bank's attachment; that the defendant's chattel mortgage was fraudulent and void, as against it; that the defendant was enjoined from asserting his mortgage against plaintiff, or from bringing an action at law against it,—also granting an accounting and a personal judgment against the defendant for the balance due it from the firm, which it alleged it had lost through the negligence, fraud, and breach of duty and of trust of the defendant. The court said: "But little is said in argument upon the real merits of the case. Indeed, we doubt if much could be said in justification of defendant's conduct. He, as a director in the plaintiff bank and as a member of its investment committee, was in duty bound to exercise the most scrupulous good faith and perfect honesty, and at least the same degree of care and prudence which is generally exercised by business men in the management of their own affairs. By voluntarily assuming these relations, he invited confidence, assumed to possess the requisite skill and knowledge needed in the conduct of the business, and impliedly represented that he would bring them to bear in the discharge of his duties. He, among others, invited depositors to confide to it their savings, and undertook to carefully, prudently, and honestly loan them in such manner that they would not be lost. It was his duty, as a member of the investment committee, to advise his associates of any and every thing known to him affecting the financial condition and situation of proposed borrowers, and this



without being asked. He impliedly contracted to give this information. That he did not do so he concedes, and his excuse is, first, that he was not asked about the financial condition of W. S. Johnston & Company, and, second, that the officers of the bank knew of the condition of the firm, or that he was justified in believing they did know. The first is no excuse whatever. Defendant owed an active duty to the bank, its stockholders, and depositors, which he did not discharge, and cannot shield himself by saying no one asked for the information he possessed. The second is not sustained by the evidence. The other officers did not know of the exact financial condition of the firm. They had the right to assume, as there were no encumbrances of record against the stock owned by the firm of Johnston & Company, that the goods were clear, and that the bank stood on an equal footing with other creditors. They

had the right, also, to assume that none of their own directory would attempt to enforce his private claims upon the stock, to the prejudice of the bank and its interests. It may be that these officers, or some of them, knew that the firm did not have much money when it commenced business, but they did not know that it owed one of the directors for the entire stock. They did not know that but little, if any, of this indebtedness to defendant had been paid; and they had the right to assume that, if the firm was not doing a successful business, defendant would inform them of this fact. They might reasonably assume, had they known of this indebtedness to defendant for the stock, that it was being extinguished from time to time, and could rely upon defendant's informing them if such were not the fact. We think the decree in this case is a just and equitable one."

H. D. B.

W. K. STODDART, Respt.,

v.

JOHN GOLDEN et al., Appts.

*California Supreme Court (Dept. No. 2) — February 3, 1919.*

(— Cal. —, 178 Pac. 707.)

#### **Contract — construction — punctuation.**

1. Punctuation is always subordinate to the text in the construction of a contract, and is never allowed to control its meaning.

[See note on this question beginning on page 1062.]

#### **Interest — construction of note — when payable.**

2. The second and third instalments bear interest at the prescribed rate under a note promising to pay \$7,200 as follows: The sum of \$1,000 on or before a specified date, with interest at the rate of 7 per cent per annum, payable at maturity; the sum of \$2,000 on or before one year; the sum of \$2,000 on or before two years; the sum of \$2,200 on or before three years with interest at the rate of 7 per cent per annum, payable semiannually.

[See 15 R. C. L. 25.]

#### **Contract — construction — choice.**

3. Where one construction would make a contract unusual and extraordinary, and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction will prevail.

[See 6 R. C. L. 841.]

#### **Costs — allowance of damages — frivolous appeal.**

4. Damages may be allowed for the taking of a frivolous appeal.

[See 7 R. C. L. 804.]

**APPEAL** by defendants from a judgment of the Superior Court for Imperial County in favor of plaintiff in an action brought to foreclose a mortgage given to secure a promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Eshleman & Swing for appellants.

Messrs. U. F. Lewis and Conkling & Brown, for respondent:

Punctuation is no part of the English language.

Holmes v. Phenix Ins. Co. 47 L.R.A. 308, 39 C. C. A. 45, 98 Fed. 240.

The contract is to be interpreted against the promisor.

Lassing v. James, 107 Cal. 348, 40 Pac. 534; Keith v. Electrical Engineering Co. 136 Cal. 178, 68 Pac. 598; Union Oil Co. v. Stewart, 158 Cal. 154, 110 Pac. 313, Ann. Cas. 1912A, 567; Metzler v. Thye, 163 Cal. 97, 124 Pac. 721.

Lennon, J., delivered the opinion of the court:

This is an action to foreclose a mortgage securing a promissory note in words and figures as follows:

Redlands, Cal., August 15, 1912.  
\$7,200.

In instalments, for value received, we, or either of us, promise to pay to W. K. Stoddart, or order, the sum of seventy-two hundred dollars (\$7,200), payable as follows: The sum of \$1,000 on or before October 27, 1912, with interest at the rate of 7 per cent per annum, payable at maturity; the sum of \$2,000 on or before one year; the sum of \$2,000 on or before two years; the sum of \$2,200 on or before three years, with interest at the rate of 7 per cent per annum, payable semiannually. Should the interest not be so paid it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any instalment of interest when due, or in any instalment of the principal when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States of the

present standard. This note is secured by mortgage of even date.

John Golden.

Anna Golden.

The appeal is from a judgment in plaintiff's favor and comes here on the judgment roll alone. The court in its judgment allowed interest on the entire sum, which is assigned as error. It is contended by counsel for appellants that the second and third instalments mentioned in said note were not to bear any interest. Respondent contends that each of said instalments bears interest from the date of the note at the rate of 7 per cent per annum, payable semiannually.

Although the note is awkwardly drawn, its sense in all respects is easy to determine. It is divided into four instalments, the first one being for \$1,000, which fell due within a period of six months from the date of the note, and the interest at 7 per cent per annum is provided to be paid at the maturity of this instalment, which makes it apparent why interest was mentioned in connection with this instalment separately. The three other instalments, payable in one, two, or three years, naturally group themselves as the part of the loan for which interest was to be paid at the rate of 7 per cent per annum, payable semiannually. If, instead of the semicolons used in the note, commas had been used, we think there could not have been a suggestion that any of the instalments were to run without interest, or, if the first semicolon had been used, and, in place of the second and third semicolons, commas, then we think no suggestion of the kind could be made. Aside from the mere matter of punctuation, there is not a circumstance suggested why the second and third instalments should not bear interest. Punctua-

tion, at best a most fallible guide, is always subordinate to the text, and is never allowed to control its meaning. *Contract—construction—punctuation.* *Contract—construction—choice.* *Interest—construction of note—when payable.* *Costs—allowance of damages—frivolous appeal.* *Phenix Ins. Co. 47 L.R.A. 308, 39 C. C. A. 45, 98 Fed. 240.* It would be doing violence to accepted rules of construction to uphold the contention that the parties by their agreement manifestly intended to exclude the instalments in question from the payment of interest, and intended that only the first and fourth instalments should bear interest.

A principle of construction well settled is that where one construction would make a contract unusual and extraordinary, and another con-

struction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail. *Stein v. Archibald, 151 Cal. 220, 90 Pac. 536.*

The appeal is frivolous to the point of precluding the possibility of its having been taken in good faith, or for any purpose save to delay the satisfaction of the judgment, and therefore, in addition to affirming the judgment, it is ordered that the plaintiff have and recover from the defendants the sum of \$100 damages because of the appeal.

The judgment is affirmed.

We concur: Wilbur, J.; Melvin, J.

## ANNOTATION.

### Punctuation as affecting construction of contract.

- I. Introductory, 1062.
- II. Punctuation as controlling construction, 1062.
- III. Punctuation as aid to construction, 1067.
- IV. Insertion of punctuation, 1068.

#### I. Introductory.

The present note includes the effect of punctuation on the construction of contracts and deeds. Standard forms being required by statute, the effect of punctuation on the construction of insurance policies has been excluded, excepting in those cases where no resort was had in the decision to the statute standardizing the policy.

#### II. Punctuation as controlling construction.

Punctuation or the absence of punctuation in a contract or deed is ineffective to control its construction, as against the plain meaning of the language of the instrument.

*United States.*—*Holmes v. Phenix Ins. Co. (1899) 47 L.R.A. 308, 39 C. C. A. 45, 98 Fed. 240.*

*Illinois.*—*Osborn v. Farwell (1877) 87 Ill. 89, 29 Am. Rep. 47; Wilson v. Wilson (1915) 268 Ill. 270, 109 N. E.*

*86; Hawes v. Sternheim (1894) 57 Ill. App. 126, affirmed in (1895) 156 Ill. 341, 40 N. E. 947.*

*Indiana.*—*Elsay v. Fidelity & C. Co. (1915) — Ind. —, 109 N. E. 413.*

*Kentucky.*—*Spicer v. Spicer (1917) 177 Ky. 400, 197 S.W. 959.*

*Maine.*—*People's Nat. Bank v. Nickerson (1911) 108 Me. 341, 80 Atl. 849.*

*Maryland.*—*Olivet v. Whitworth (1896) 82 Md. 258, 33 Atl. 723.*

*Massachusetts.*—*Perry v. J. L. Mott Iron Works Co. (1911) 207 Mass. 501, 93 N. E. 798.*

*Michigan.*—*Thatcher v. St. Andrew's Church (1877) 87 Mich. 264.*

*Nebraska.*—*Rice v. Lincoln & N. W. R. Co. (1911) 88 Neb. 307, 129 N. W. 425.*

*North Carolina.*—*Bunn v. Wells (1886) 94 N. C. 67.*

*Pennsylvania.* — *White v. Smith (1859) 33 Pa. 186, 75 Am. Dec. 589; Abbott's Estate (1901) 198 Pa. 493, 48 Atl. 435.*

*Virginia.* — *Johnson v. McCoy (1911) 112 Va. 580, 72 S. E. 123.*

*Washington.*—*Skamania Boom Co. v. Youmans (1911) 64 Wash. 94, 116 Pac. 645.*

**West Virginia.**—O'Brien v. Brice (1883) 21 W. Va. 704.

Thus, in *Holmes v. Phenix Ins. Co.* (Fed.) supra, it was said: "Punctuation is no part of the English language. The Supreme Court says that it 'is a most fallible guide by which to interpret a writing.' *Ewing v. Burnet* (1837) 11 Pet. (U. S.) 41, 54, 9 L. ed. 624, 630. The *Century Dictionary* tells us, what is common knowledge, that 'there is still much uncertainty and arbitrariness in punctuation.' It is always subordinate to the text, and is never allowed to control its meaning."

In *Elsey v. Fidelity & C. Co.* (Ind.) supra, it was said: "The rules of punctuation are not absolutely fixed and inflexible, and all persons do not follow such rules as are established."

In *Abbott's Estate* (Pa.) supra, the court said: "Punctuation is an uncertain aid in the interpretation of written instruments, and is to be resorted to only when other means fail."

In *Holmes v. Phenix Ins. Co.* (Fed.) supra, it appeared that, in an action on an insurance policy, the insured contended that two members of a clause were merely separated by a comma, and that the clause, "unless other damages occur," related as well to the first member of the clause as to the second. The clause was as follows: "This company will not be liable for any loss or damage that may occur from hail or lightning, directly or indirectly, or by the blowing of chimneys, loose clapboards, weather vanes, and shingles, unless other damage occur." The court held, however, that the words, not the punctuation, were the controlling feature of the construction of a contract, saying: "But it is said that in the policy the two members of this clause are divided by a comma only, and stress is laid upon this fact. But in a contract the words, and not the punctuation, are the controlling guide in its construction."

In *Wilson v. Wilson* (1915) 268 Ill. 270, 109 N. E. 36, it appeared that in a deed the following clause was used: "But if said John Wilson and Julia Wilson, his wife, should die intestate (with no children), the above," etc.

The scrivener who drew up the deed testified that he understood that the words, "intestate" and "with no children," were synonymous, and that was why the words, "with no children," were parenthesized. The court held, however, that punctuation was ineffectual to change the apparent meaning of the instrument, saying: "The punctuation in this instrument will not be permitted to change the meaning, if, reading the instrument altogether, the meaning is clear."

In *Osborn v. Farwell* (1877) 87 Ill. 89, 29 Am. Rep. 47, the following paragraph in a lease was under construction: "If said Darling shall be required by the United States government to leave and vacate said premises before the termination of this lease, a proportionate allowance of rent shall be made to said Darling by said Farwell for the time his occupancy of said premises shall be abridged from such cause. And in case said premises shall be destroyed by fire, so as to be rendered untenable, a proportionate allowance of rent shall be made to said Darling by said Farwell for the time said premises shall thus remain untenable; and such allowance may be paid by said Farwell in said lands in Dunklin county, at the same price paid by Farwell, . . . at the election of said Farwell." The owner of the building claimed that he could make a payment in land for the abridgment of the term, while the lessee claimed payment in cash. The court held that, notwithstanding the period at the end of the sentence, "If said Darling, etc. . . . shall be abridged from such cause," the landlord was to make the payment, at his election, in land. The court said: "Punctuation in written contracts may sometimes shed light upon the meaning of the parties, but it must never be allowed to overturn what seems the plain meaning of the whole contract."

In *Elsey v. Fidelity & C. Co.* (1915) — Ind. —, 109 N. E. 413, the action was instituted on an insurance policy which contained the following clause: "Article 6. Any one of the following, namely—sunstroke, freezing, hy-

drophobia, asphyxiation — suffered through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane), shall be deemed a bodily injury within the meaning of this policy." The question became material whether the clause, "suffered through accidental means," qualified the word "sunstroke." In arriving at the conclusion that the clause did qualify the word, the court said that, while the punctuation of a contract should be considered in the construction thereof, still it should not be a controlling element.

In *Spicer v. Spicer* (1917) 177 Ky. 400, 197 S. W. 959, an action for the interpretation of a deed, the court said that, although the deed was almost wholly lacking in punctuation, still the meaning was reasonably clear.

In *People's Nat. Bank v. Nickerson* (1911) 108 Me. 341, 80 Atl. 849, a sheriff's deed was under construction. The court stated the facts and its conclusion as follows: "The language of the deed, so far as necessary to quote it, is: 'Having given notice in writing of the time and place of sale to the judgment debtors in the execution hereinafter mentioned and having given public notice of the time and place of sale by posting up notifications thereof in a public place in the town of Pittsfield, and also by posting up notices thereof in one public place in each of the adjoining towns of Palmyra and Detroit thirty days before the time of sale.' The defendant urges that the words, 'thirty days,' are applicable only to the notices posted in adjoining towns, and not to the notice given to the debtors. We think a fair construction requires that the words should be applied to all the notices. It was obviously so meant, and it should be so read. The comma after the word 'Pittsfield' raises the only doubt. But punctuation, or the want of it, is not decisive in the construction of an instrument, or a statute even, if the meaning is clear."

In *Olivet v. Whitworth* (1896) 82 Md. 258, 33 Atl. 723, an action to determine whether the heirs of the testatrix or her husband were entitled to a trust fund, the court said, in con-

struing a trust deed: "That punctuation alone is not necessarily conclusive must be conceded, as it is well known that draftsmen of legal instruments frequently ignore all the rules on that subject, to which grammarians and rhetoricians attach great importance. The most learned and accomplished lawyers oftentimes pay but little attention to it in their preparation of legal documents. This may be because the copyist or the writer to whom the paper is dictated has not followed the directions or intonations of the author, or it may be because it is known that the cases are few that are determined by punctuation, or for other reasons. But when there is an ambiguity which may be wholly or partially solved by it, provided the punctuation itself has not created the ambiguity, it can be considered (*Weatherly v. Mister* (1874) 39 Md. 629; *Black v. Herring* (1894) 79 Md. 149, 28 Atl. 1063), but it can never be permitted to overturn what seems the plain meaning of the whole instrument."

In *Thatcher v. St. Andrew's Church* (1877) 37 Mich. 264, an action of ejectment, the construction of a trust deed became material. After granting, bargaining, selling, conveying, and describing the land, the grantor provided as follows: "Together with the appurtenances; and does also bargain, sell, assign, and transfer to said trustees and the survivors or survivor, or successors of them as such trustees, all my household goods and personal property of any and every kind, to have, hold, use, and enjoy the same, and lease or dispose of the same, or cause the same to be used, and to receive the rents, profits, and income thereof, and to use or dispose of the same on trust, and for the uses and purposes following." The question arose whether the clause, "to receive the rents, profits, and income thereof," related to the personalty only or to both the personalty and the realty. Holding that the clause related to both realty and personalty, the court said: "Had the punctuation in this deed been different, and the words, 'to have, hold, use,' etc., been introduced as the

commencement of a new sentence, no reasonable doubt could have existed as to its being applicable to the different kinds of property which preceded it. It is laid down as a rule in reading and construing deeds that no regard is had to punctuation, since no estate ought to depend upon the insertion or omission of a comma or semicolon. And although stops are sometimes used, they are not regarded in the construction or meaning of the instrument."

In *Rice v. Lincoln & N. W. R. Co.* (1911) 88 Neb. 307, 129 N. W. 425, wherein the construction of an option contract was involved, the court said: "The second proposition of defendant on this point, that the contract should be construed to limit the exercise of the option to the time of the construction of the road, we think is right. 'We further agree that said company may proceed in the construction of said road over said land, and we will sell to the said railroad company such additional right of way as they may require at the rate of \$60 per acre, with the privilege of changing any watercourse necessary in the construction of said road.' By the first paragraph of the contract plaintiff agreed to convey 'the right of way for the railroad of said company.' The company was to 'proceed with the construction of said road over said land,' and might need for that purpose 'additional right of way.' The evidence shows that orchard, farm buildings, and other valuable improvements are located so near to the right of way that, if this contract should be construed to mean that after the road was completed the company might take such part of the farm as it saw fit, it would be too unconscionable to be enforced in a court of equity. Punctuation marks in a contract will not be allowed, in a court of equity, to give the contract an unconscionable and inequitable meaning. If this contract were written with the clause, 'with the privilege of changing any watercourse necessary,' in parentheses, it would perhaps be patent to all that the words following, 'in the con-

struction of said road,' limit the words, 'as they may require.' The agreement is that, if the company should require 'additional right of way . . . in the construction of said road,' plaintiff shall convey it and be paid therefor at \$60 per acre. The exercise of the option, then, was limited to the two years in which the construction was to be completed, and the rule against perpetuities is not violated."

In *Bunn v. Wells* (1886) 94 N. C. 67, it appeared that in a deed the habendum was separated from the clause of warranty by a semicolon. The court held that the use of the semicolon had no effect upon the construction of the deed, saying: "Some importance may be attached to the fact that the habendum in the deed for our construction is separated from the clause of warranty by a semicolon, but that can have no effect in controlling the construction, for it is a rule in reading and construing deeds 'that no regard is had to punctuation, since no estate ought to depend upon the insertion or omission of a comma or semicolon, and, although stops are sometimes used, they are not regarded in the construction or meaning of the instrument.' 3 Washb. Real. Prop. 343, and cases cited in the note."

In *White v. Smith* (1859) 33 Pa. 186, 75 Am. Dec. 589, the action was on the following contract of guaranty: "I hereby bind myself to the aforesaid White for the true and faithful performance of the aforesaid agreement on the part of the aforesaid Smith in case Smith should die within the three years I agree to pay up to that time and deliver the property to White as above stated. Jonathan Smith Elijah Robinson." It was contended that, in order to give every part of the writing its meaning, a period should be placed after "aforesaid Smith" and before "in." The court said: "The want of proper punctuation is, if objectionable at all, no more allowable in vitiating the contract, or in destroying its effect, than bad grammar, the rule against which is a maxim of the law. To allow the contractor to punctuate in mitiori

sensu of his own words would be something of a novelty. I think no case can be found upon which the sense of a contract has depended upon the absence of punctuation marks—words are the most usual evidence of intent, and, formed into sentences, are to be taken to express the meaning of the party using them. Punctuation may aid in ascertaining the true reading of a production, but the production may be read and interpreted without such aids."

In *Abbott's Estate* (1901) 198 Pa. 493, 48 Atl. 435, a claim was presented against the estate of a decedent for a balance due for a bond and mortgage. The bond contained the following provision: "It is hereby agreed that any judgment entered by virtue of this bond shall be restricted in its lien operation and effect to the premises described in a certain mortgage bearing even date herewith, given by said obligors to the obligee." The claimants contended that as there was no comma after the word "lien" it should be considered as an adjective qualifying the nouns, "operation" and "effect," and that the restriction in the bond of the judgment was in its operation and effect as a lien only. The court held, however, that punctuation could not be resorted to to give words an unusual meaning.

In *Skamania Boom Co. v. Youmans* (1911) 64 Wash. 94, 116 Pac. 645, it appeared that in a deed of conveyance the following reservation was made: "All the timber on the above-described premises, and the right to enter into and upon the same for the purpose of removing said timber, and the construction and maintenance of a logging road thereon forever." Through several mesne conveyances the defendants became the owners of the land, and cut some of the timber thereon. In an action for damages the defendants contended that the word "forever" merely applied to the maintenance of the logging road, while the plaintiff contended that it applied to the timber as well as the road. The court held that punctuation was of little aid in construing a deed, saying: "The appellants first contend

that the word 'forever' in the reservation clause in the first deed refers only to the construction and maintenance of the logging road, and that the respondent had only a reasonable time in which to remove the timber; whilst the respondent insists that the word 'forever' has reference to both the right to remove the timber and to construct and maintain a logging road. The appellants argue that the punctuation in the reservation clause compels a construction in their favor. The original deed is not before us, but assuming that the certified copy carries the punctuation of the original deed, we do not think that the reservation clause is susceptible of the construction contended for by the appellants. It is elementary that a deed, like any other written instrument, will be read as an entirety for the purpose of determining its true meaning. The punctuation of an instrument is ordinarily of little aid in construing it. As was said in *Ewing v. Burnet* (1837) 11 Pet. (U. S.) 41, 9 L. ed. 624. 'Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail; but the court will first take the instrument by its four corners in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.'"

But in *Aylwin v. Robertson* (1904) 7 Terr. L. R. (Can.) 164, an action to recover possession of premises leased for a certain term of years, under a lease also containing a provision fixing the rental to be paid should the lessee continue in possession after the expiration of the term, it appeared that a notice of three months to quit the premises was required by the lease. The notice was given a few months after the lessee was let into possession. The question became material whether the provision requiring a three-months' notice related to the provision for the term of years, or to the provision after the term of years. It was held that in construing an instrument inter partes punctuation could be relied on. It was said: "In

view of the peculiar ground stated for not relying on the punctuation of an act of Parliament, I infer that if it had been the practice to punctuate the act on the roll that such punctuation might have been relied on, and in the absence of any authority to the contrary I have come to the conclusion that the punctuation may be relied on in construing a deed or agreement or any other instrument inter partes, and when one considers what an entirely different meaning may, in many instances, be given to a sentence by punctuation, I see no reason why parties to any such document might not choose to make their intention clear by punctuation. At the same time I concede that in view of the careless manner in which deeds and agreements are punctuated, even by the most careful conveyancers, if punctuated at all, the courts should be very careful indeed, and in many cases scrutinize the document very carefully and examine it from other standpoints before they give effect to the punctuation. In the case of the clause in the lease in question the punctuation is peculiar and somewhat marked. The whole clause has only two punctuation marks in it, one a comma at the end of the word 'agree,' and the other a semicolon after the word 'specified,' that is, between the provision for the month to month tenancy and that for the notice terminating the possession."

*II. Punctuation as aid to construction.*

While punctuation is ineffective as against the plain meaning of the language used by the parties to a contract, still the rules of punctuation may be used to assist in determining the intent of the parties. *Joy v. St. Louis* (1890) 138 U. S. 1, 34 L. ed. 843, 1 Sup. Ct. Rep. 243, affirming (1886) 9 Fed. 546; *Holmes v. Phenix Ins. Co.* (1899) 47 L.R.A. 308, 39 C. C. A. 5, 98 Fed. 240; *Allen v. United States Fidelity & G. Co.* (1915) 269 U. S. 234, 109 N. E. 1035; *Olivet v. Whitworth* (1896) 82 Md. 258, 33 Atl. 723; *White v. Smith* (1859) 33 Pa. 186, 75 Pa. Dec. 589; *Johnson v. McCoy* (1911) 112 Va. 580, 72 S. E. 123.

In *Olivet v. Whitworth* (1896) 82

Md. 258, 33 Atl. 723, it was said: "Although punctuation alone is not a safe standard by which to interpret a writing, yet if there be an ambiguity it may shed light on the meaning of the language to be interpreted, and in this case we must ignore it if we adopt the construction contended for on behalf of the appellees."

In *Joy v. St. Louis* (1890) 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243, affirming (1886) 29 Fed. 546, on construing a doubtful clause in a tripartite agreement whereby three railway companies entered into an agreement for the use of a right of way, the court gave effect to a comma, saying: "I know that the matter of punctuation is never relied upon to defeat the obvious intent; but when the meaning is doubtful, the punctuation is certainly a matter tending to throw light upon it."

So, it was said in *Holmes v. Phenix Ins. Co.* (1899) 47 L.R.A. 308, 39 C. C. A. 45, 98 Fed. 240: "The court will take the contract by its four corners, and determine its meaning from its language, and, having ascertained from the arrangement of its words what its meaning is, will construe it accordingly, without regard to the punctuation marks, or the want of them. The sense of a contract is gathered from its words and their relation to each other, and after that has been done, punctuation may be used to more readily point out the divisions in the sentences and parts of sentences. But the words control the punctuation marks, and not the punctuation marks the words. If there was not a punctuation mark in this whole clause, its meaning would be plain, and whether a comma or a semicolon is placed between the two members of the sentence, the two members are there, separate and distinct, as a result of the obvious meaning of the words and their arrangement. The comma and semicolon are both used for the same purpose, namely, to divide the sentences and parts of sentences, the only difference being that the semicolon makes the division a little more pronounced than the comma; but at the last it is the sense



of the words, taken together, that dictates where the punctuation marks are to be placed, and what they shall be."

In *Allen v. United States Fidelity & G. Co.* (1915) 269 Ill. 234, 109 N. E. 1035, affirming (1915) 193 Ill. App. 193, it appeared in an action against a guaranty company on an indemnity bond in favor of the sureties of a county treasurer, the sureties contended that the clause, "amounting to larceny or embezzlement," qualified only the word "dishonesty" in the clause which provided that the defendant company should "pay and reimburse the obligees aforesaid all costs, losses, damages, and expenses which they may sustain or suffer by reason of any act of fraud or dishonesty, amounting to larceny or embezzlement on the part of said David Hamilton Lyons, in connection with the duties of his said office, and which shall have been committed during the period from December 1, 1902, to December 1, 1903." The court, in holding that the punctuation supported the construction of the defendant, said that punctuation in the construction of a contract was not controlling, but it could be used to shed light on the meaning of the parties.

#### *IV. Insertion of punctuation.*

In order to effectuate the intent of the parties the courts will insert the necessary punctuation. *English v. McNair* (1859) 34 Ala. 40; *Seay v. McCormick* (1881) 68 Ala. 549; *Burgess v. Badger* (1888) 124 Ill. 288, 14 N. E. 850; *United States Fidelity & G. Co. v. American Bonding Co.* (1911) 31 Okla. 669, 122 Pac. 142; *Doe ex dem. Willis v. Martin* (1790) 4 T. R. 65, 100 Eng. Reprint, 882.

In *Seay v. McCormick* (1881) 68 Ala. 549, it appeared that a mortgage was made conveying "my entire crop of corn cotton seed fodder peas potatoes and cane that I may make the present year on my place," no punctuation marks being used. The mortgagor sold a bale of cotton for which the mortgagee brought trover. Holding that the mortgage covered cotton as well as cottonseed, the court said:

"So, likewise, the instrument being artificially drafted and without any points or marks of punctuation, as appears from an inspection of the original, the rules of proper construction authorize these to be supplied by the court so as best to effectuate the intention of the parties."

In *English v. McNair* (1859) 34 Ala. 40, an action of detinue was instituted to recover certain slaves and other personal property. It became material to construe a written instrument, the essential portion of which was as follows: "Said property to be used and employed by us for our sole use and benefit, but nevertheless to be held subject to her order, and to be returned whenever she may make demand of us until the day of final settlement of said estate without recourse to said property being rendered necessary in order to pay off the debts and claims against said estate, and when the rights of said M. M. George as sole heir to said estate shall accrue to her, she will substitute for this instrument such other conveyance as she may deem proper." The court inserted the necessary punctuation as a matter of course, saying: "There is some obscurity in the instrument of writing given by English and wife to Mrs. George. The obscurity is increased by the want of punctuation, the omission of capitals, and the probable want of words intended to be inserted. After a careful examination of it, and endeavoring to so punctuate and construe it as to allow effect to all the words, and to secure consistency among them, we understand it as constituting a bailment by the latter, as administratrix, to the former, and determinable upon the demand of Mrs. George at any time before the final settlement of the estate. We understand it also to contain an agreement that, if recourse to the property for the payment of claims against the estate should not be necessary, Mrs. George would, when her right as sole heir to the estate accrued to her, substitute for that instrument such other conveyance as she might deem proper. It also contains a clause giving to Mrs. George's coadministrator, A. W.

Spaight, in the event of her death before a final settlement, all the rights of Mrs. George under the instrument for the purpose of making a final settlement, provided that English and wife should not be liable for the non-appearance of the property, if detained by death or accident. The correctness of our construction will be apparent to anyone who will look at the instrument and regard a period as inserted after the words, 'until the day of final settlement of said estate,' and the succeeding words, 'without recourse,' etc., as commencing a new sentence, and the initial 'w' as a capital."

In *Burgess v. Badger* (1888) 124 Ill. 288, 14 N. E. 850, it appeared that a contract was entered into between certain creditors of a bankrupt for the purpose of protecting the estate of the bankrupt against certain claims, and also for collecting the claims of creditors against his estate, which was worded and punctuated as follows: "Whereas for want of an agreement in writing, there may be some misunderstanding as to the contract existing between Joseph N. Barker, William T. Burgess and A. C. Badger in regard to prosecuting certain suits in the interest of the estate of S. J. Walker in bankruptcy, this memorandum is made for the purpose of putting said agreement in writing as follows: The suits prosecuted under this contract are: *The International Bank v. R. E. Jenkins*, assignee *Aug. Bauer v. Same*; *R. E. Jenkins assignee v. Union Trust Co.*, *Greenbaum & Foreman et al.*, and cross suit; *Eli Kinney v. Bauer et al.*, and the agreement is that of whatever fees may be realized either under contracts with creditors of Sam'l J. Walker or from *R. E. Jenkins assignee* out of the funds received by said estate from or by reason of said suits, *J. N. Barker* is to receive one fourth; *W. T. Burgess* one fourth and *A. C. Badger* one fourth; *A. C. Badger* retaining the remaining one fourth as a compensation for the raising of money which was necessary to carry the suits to the higher courts. Jan'y 15, 1881. *Joseph N. Barker, W. T. Burgess, A. C. Badger.*" In regard to the punctuation the court held that punctuation

would be inserted so as to give the agreement a reasonable rather than an unreasonable meaning. It was said: "Burgess admits that, punctuating the language of the operative part of the instrument one way, it will include secured as well as unsecured creditors. Since, therefore, the language, as the instrument was written, was not punctuated at all, it would seem plainly to be required to be punctuated in this way so as to give a reasonable, rather than an unreasonable, construction, as thus: 'And the agreement is that of whatever fees may be realized either under contracts with creditors of Samuel J. Walker, or from *R. E. Jenkins assignee* out of the funds received by said estate from or by reason of said suits,' etc. The word 'creditors,' not being qualified, includes, of course, junior lienors, as well as unsecured creditors."

In *United States Fidelity & G. Co. v. American Bonding Co.* (1911) 31 Okla. 669, 122 Pac. 142, an action by a surety for contribution, the material provision of the bond was as follows: "Now, therefore, the condition of the above obligation is such that if the said Capitol National Bank shall promptly collect all drafts, checks, and certificates of deposit which may be delivered to said depository by the territorial treasurer for collection and if said Capitol National Bank shall at all times solely keep and have forthcoming when required all moneys of the territory of Oklahoma, so collected in said bank; and shall in all respects duly account for all moneys according to law and shall also pay all drafts or checks that may be issued to the territorial treasurer by said depository and shall in all respects conform to all of the provisions of a certain contract entered into upon the 6th day of March, 1903, by *Cassius W. Rambo* as treasurer of the territory of Oklahoma, party of the first part, for the period of one year, beginning on this 6th day of March, 1903, then this obligation to be null and void; otherwise to be and remain in full force and effect." To make clear the condition which was interpolated by the draftsman of the bond, the court in-

serted a parenthesis as follows: "and shall in all respects conform to all provisions of a contract entered into . . . , party of the first part." The court held that the use of parentheses was permissible to show the intent of the parties, saying: "This intent is made clear by inserting parentheses as we have done supra, by the use of which is indicated the part to be excluded from a sentence or to indicate an interpolation. Webster, Int. Dict. To give effect to the whole, or to make clear the intent, the use of parentheses is permissible. Speaking of an act of Parliament, Lord Kenyon, Ch. J., in *Doe ex dem. Willis v. Martin* (1790) 4 T. R. 39, at page 65, 100 Eng. Reprint, 882, said: 'By putting stops or using the parenthesis, as pointed out by the plaintiff's counsel, it becomes perfectly clear; and we know that no stops are ever inserted in acts of Parliament, or in deeds; but the courts of law, in construing them, must read them with such stops as will give effect to the whole.' We see no reason why the same rule should not apply in construing other written instruments, or that other proper punctuation marks may not be used where, as here, the meaning seems otherwise doubtful. 17 Am. & Eng. Enc. Law, 20."

[ In *Doe ex dem. Willis v. Martin* (1790) 4 T. R. 65, 100 Eng. Reprint, 896, the court, in inserting punctuation in a marriage settlement under construction, said: "And that brings me to the next question, whether the children took estates for life or in fee, which arises on these words: 'And for want of such appointment, then to the use of all and every the child or children equally, share and share alike, to hold the same, if more than one, as tenants in common, and not as joint tenants; and if but one child, then to such only child, his or her heirs or assigns forever;' and the question is whether the words, 'his or her heirs,' may not with propriety, and ought not, considering the whole settlement and the manifest intention of the parties, to act as words of limitation on all the preceding words in the sentence? I cannot bring myself

to doubt but that they may. By putting the stops, or using the parenthesis, as pointed out by the plaintiff's counsel, it becomes perfectly clear; and we know that no stops are ever inserted in acts of Parliament, or in deeds; but the courts of law, in construing them, must read them with such stops as will give effect to the whole: if then, we use the points suggested by the counsel, the clause will read thus: 'To the use of all and every the child or children equally, share and share alike, his or her heirs or assigns forever.'"

But in *Lyles v. Lescher* (1886) 108 Ind. 382, 9 N. E. 365, it appeared that the grantor of a tract of land in the deed of conveyance used the expression, ". . . to Anna Lyles and Isaac Lyles' heirs. . . ." The court held that while the contention of the present owners, that the just construction of the deed was that it should read to Anna Lyles and the heirs of Isaac Lyles, would require the insertion of a word and a punctuation mark which were not authorized by the language used, saying: "Appellee's counsel, assuming that if the deed is to the heirs of Anna and Isaac Lyles jointly it is void, contend that this is not a just construction, but that the proper construction is that it is a grant to Anna Lyles, and to the heirs of Isaac Lyles. This contention cannot prevail. The deed on its face purports to be, and is prima facie, a grant to the heirs of Anna Lyles and Isaac Lyles jointly.

. . . No other construction can be placed upon it. Looking alone to the words employed, without directly violating the plain and well-known rules of grammar. To make the deed properly and fully express what the appellees claim would require us to supply a punctuation mark and an additional word. This we cannot do on the basis furnished by the language of the deed alone. The remaining inquiry is whether the acts of the parties gave such a construction to the deed as should protect the title in the hands of bona fide purchasers. It appears that possession was held by Anna and Isaac Lyles during the life

of the latter, that after his death it was held by Anna, and thenceforth by her immediate and remote grantees. It appears, also, that the grantor himself caused the deed to be placed on record. These acts, in our judgment, gave a construction to the deed which makes it effectual as a conveyance. As we have said, a change in the punctuation by adding a single mark, and one word, would make the deed mean exactly what the acts of the parties have construed it to mean, that is, that it divested the appellant of title, and we think their construction, as evidenced by their conduct, should prevail, at least as against intervening third parties. . . . Here a little insignificant change, nothing

more, perhaps, than the rejection of the sign of the possessive case, would make this deed operate as the grantor, by his acts, certainly declared it should operate, and we ought not to sacrifice the substantial rights of purchasers to so small a matter. If we should do so, we would make the deed inoperative, defeat the rights of intervening purchasers, and disregard the acts of the grantor; but in upholding the deed we do him no injustice, for it is evident that he meant to divest himself of title, and we do no more than carry that intention, so plainly manifested by his acts, into effect, and give protection to rights acquired on the faith of his deed and his acts."

R. C. L.

## H. S. CHASE & COMPANY

v.

LOUIS EVANS et al.

and

E. M. McCRAY, Appt.

*Iowa Supreme Court — December 16, 1916.*

(178 Iowa, 885, 160 N. W. 346.)

### **Landlord and tenant — reletting — release of tenant — reservation of obligation.**

1. An agreement between a landlord and creditors of the tenant, who take possession of the leasehold by permission of the landlord, that the reletting shall not constitute a release of the obligations of those liable on the original lease, does not bind one who signs the lease with the lessee, but who was not present or represented when the agreement was made.

[See note on this question beginning on page 1080.]

### **Trial — jury — termination of lease.**

2. The jury must determine whether or not there was a reletting of premises abandoned by a tenant under evidence tending to show that the landlord surrendered the possession to creditors of the tenant who obligated themselves for payment of a monthly rental, and were not permitted to terminate the agreement except on thirty days' notice in writing.

[See 16 R. C. L. 971-973.]

### **Evidence — surrender of lease — alteration of premises.**

3. Upon the question whether or not the landlord accepted the surren-

der of a lease by reletting the property, evidence is admissible that the new tenant altered the premises for the purpose of conducting a business different from that for which the premises were let.

[See 16 R. C. L. 970 et seq.]

### **— possession for benefit of tenant — notice.**

4. Upon the question of acceptance of a surrender of a lease, evidence is admissible that the tenant did not receive notice that the landlord had taken possession for his benefit.

[See 16 R. C. L. 969 et seq.]

**APPEAL** by defendant McCray, from a judgment of the District Court for Polk County in favor of plaintiff in an action brought to recover rent alleged to be due for certain business property. *Reversed.*

**Statement by Preston, J.:**

This is an action to recover rent alleged to be due for business property in the city of Des Moines. There was a trial to a jury. At the close of the testimony the court sustained plaintiff's motion to direct a verdict for \$2,795.22. Judgment was rendered against defendant E. M. McCray for that amount, and he appeals.

**Mr. Guy A. Miller, for appellant:**

Where a tenant abandons leased property and the abandonment is accepted by the landlord, the obligations of each party under the lease cease and determine.

*Kean v. Rogers*, 146 Iowa, 559, 123 N. W. 754; 24 Cyc. 1372; *MacKellar v. Sigler*, 47 How. Pr. 20.

Evidence of the fact that the leased premises were rented to other parties and remodeled is material as bearing upon the question as to whether or not the abandonment of the tenant was accepted by the landlord.

*Kean v. Rogers*, supra; 24 Cyc. 1374; *Meeker v. Spalsbury*, 66 N. J. L. 60, 48 Atl. 1026; *Buckingham Apartment House Co. v. Dafoe*, 78 Minn. 268, 80 N. W. 974; *Gray v. Kaufman Dairy & Ice Cream Co.* 162 N. Y. 388, 49 L.R.A. 580, 76 Am. St. Rep. 327, 56 N. E. 903; *White v. Berry*, 24 R. I. 74, 52 Atl. 682; *Higgins v. Street*, 19 Okla. 45, 13 L.R.A. (N.S.) 398, 92 Pac. 153, 14 Ann. Cas. 1086.

Where a landlord takes possession of leased premises abandoned by the lessee and rents them to another, he must notify the first tenant that the premises are rented for the tenant's benefit, or it will constitute an acceptance of the abandonment and put an end to the lease.

*Armour Packing Co. v. Des Moines Pork Co.* 116 Iowa, 723, 93 Am. St. Rep. 270, 89 N. W. 196; *Kean v. Rogers*, 146 Iowa, 559, 123 N. W. 754; 24 Cyc. 1374; *Gray v. Kaufman Dairy & Ice Cream Co.* 162 N. Y. 388, 49 L.R.A. 580, 76 Am. St. Rep. 327, 56 N. E. 903.

Upon abandonment by the tenant of leased premises, the landlord may give notice to the tenant of his refusal to accept a surrender and sublet the premises for the unexpired term for

the benefit of the lessee to reduce his damages.

*Higgins v. Street*, 13 L.R.A. (N.S.) 398, and note, 19 Okla. 45, 92 Pac. 153, 14 Ann. Cas. 1086.

**Messrs. Henry & Henry** for appellee.

**Preston, J.**, delivered the opinion of the court:

Defendant E. M. McCray is the only one appearing and contesting the action, and he is the only one against whom judgment was entered. Plaintiff's petition was filed December 16, 1914, and alleges that defendants are indebted to it in the sum of about \$2,700 on a lease of the premises for the period between the time the defendant and the Evans Company vacated the property and when it is claimed the plaintiff rented the same. The written lease was executed February 5, 1912, between H. S. Chase & Company, party of the first part, and the Evans Company and Louis J. Evans, John Evans, and E. M. McCray, parties of the second part. The lease is signed as follows: "H. S. Chase & Co., First Party, by H. S. Chase, Pres. The Evans Co., by Lou. Evans. Lou. Evans. John Evans. E. M. McCray."

The defendant E. M. McCray denies liability, alleging that after the premises were abandoned the landlord took possession of the same and leased them to other persons, and thereby released said defendant and accepted another tenant in his place; that this defendant surrendered the premises to the plaintiff, and the plaintiff accepted the surrender of the same, and permitted the same to be remodeled by a new tenant without the consent of this defendant, and therefore released him from any further obligation under the lease.

The Evans Company is a corporation, and E. M. McCray and the others were, at the time of the execution of the lease, members thereof. The lease was to run for a period of

ten years and eight months from February 1, 1912, at a monthly rental of \$275. The company began to conduct a restaurant therein. Some time thereafter defendant McCray sold out his interest in the company to John Evans, and ceased to be connected with the concern; some seven or eight months after that the company and John and Louis Evans ceased to operate the café, and closed the doors of the establishment, and, as defendant contends, abandoned the premises.

Appellant claims that alleged abandonment was about the 1st of January, 1914, but some of defendant's evidence at least tends to show that this was about the last of March or first of April, 1914. At any rate, a short time thereafter certain creditors of the Evans Company held a meeting, at which the plaintiff, one of the creditors of the Evans Company, was represented. The Evans Company and some of the others were also represented at this meeting by an attorney, but this defendant was not represented at any of the meetings of the creditors, and did not consent to anything that was done by the creditors with respect to the leased premises. The creditors decided to appoint from their number a committee of three for the purpose of reopening the restaurant and operating the same. The plaintiff, through its president, H. S. Chase, agreed with the creditors of the company that they might take possession of the premises and pay a monthly rental of \$300, \$275 per month being the rental charge to the creditors, for their use of the premises, and \$25 per month to be applied upon the back rent of the Evans Company. This contract was in writing, but had been lost and was not produced at the trial. Under this agreement, the creditors of the Evans Company took possession, but the exact date is not disclosed, for the reason that the court refused to permit such testimony to be given. But the creditors commenced to pay rent on April 15, 1914, and continued to pay rent until October 15,

1914, thirty days prior to which last-mentioned date written notice was served upon plaintiff by the creditors of an intention to surrender the property on October 15, 1914.

Defendant claims that during the time the creditors had possession of the premises they remodeled them, making a cigar store out of the front part and a cafeteria out of the rear part of the room, one C. C. Taft paying rent for the front part of the store. But the court refused to allow defendant to prove some of these circumstances.

When the creditors surrendered the premises to plaintiff, October 15, 1914, plaintiff took possession of the same, and made an effort to rent it, took possession of the personal property in the front end of the store, and either sold or credited the same on the rent account. The property was rented again by plaintiff May 1, 1915, and no claim for any rent is made subsequent to that date.

The foregoing is the substance of appellant's statement of the facts, and is not disputed by appellee, except it claims that the creditors' agreement contained a provision that nothing therein should affect the rights of the landlord under the original lease. There is evidence to this effect. But the question is, or one question, whether defendant McCray is bound thereby, he not having been represented at the time the agreement was made.

The real question in the case, we take it, is whether or not there was an abandonment of the premises by the lessees and an acceptance by the plaintiff, the lessor. As stated, the trial court excluded some of the evidence offered by defendant, and, as we think, erroneously so, because the evidence excluded would have a bearing upon the question as to whether there was an abandonment and an acceptance thereof by plaintiff, and would tend to sustain defendant's contention. This matter will be referred to later in the opinion.

We shall not attempt to go into

the evidence in detail, but state our conclusions that there was sufficient evidence to take the case to the jury on the questions above indicated. It is largely a question of fact whether there was a surrender and acceptance by plaintiff, or whether plaintiff took possession for the benefit of this defendant. We ought, perhaps, to refer to the testimony of the defendant as to the conversation this defendant testifies to with the president of the plaintiff company. He says: "I had a talk with H. S. Chase in the fall or winter of 1913 about my liability on this lease. It was before the company went out of business, about seven or eight months. The conversation was in Mr. Chase's store on Walnut street, and I told him that I wanted to be released from the lease, and asked him if I could get off of it. I told him I intended to sell out. He told me I didn't need to worry about it, or didn't need to be off, or something like that. He said he would be glad to have it himself in case it was possible to get, and that he would be glad to have the premises back. He said it was very cheap rent we were paying, and that he could probably rent for more than we were paying."

This evidence is not denied, although Chase was a witness. Whether this evidence alone was sufficient we do not determine. There are other circumstances in the case bearing upon the question as to whether there was a surrender of the premises to plaintiff, and an acceptance. As to the law, some of the cases relied upon are cited by both sides.

It is contended by appellee that where leased premises are abandoned by a tenant, the landlord has the right to take possession of the same for the protection of the tenant, and to attempt to relet the same for the benefit of the tenant, and such taking possession does not constitute a surrender of the lease by agreement of the parties or by operation of law. On the other hand, it is contended by appellant

that where a tenant abandons leased property and the abandonment is accepted by the landlord, the obligations of each party under the lease cease and determine, and they cite, to sustain this, *Kean v. Rogers*, 146 Iowa, 559, 123 N. W. 754; 24 Cyc. 1372. And they say that the evidence of the fact that the leased premises were rented to other parties, and remodeled, is material as bearing upon the question as to whether or not the abandonment of the tenant was accepted by the landlord, citing the same cases and *Higgins v. Street*, 13 L.R.A. (N.S.) 398, and note (19 Okla. 45, 92 Pac. 153, 14 Ann. Cas. 1086), and other cases.

They also contend that where a landlord takes possession of leased premises abandoned by the lessee, and rents them to another, the landlord must notify the first tenant that the premises are rerented for the tenant's benefit, or it will constitute an acceptance of the abandonment and put an end to the lease, citing again the two cases first before cited and *Armour Packing Co. v. Des Moines Pork Co.* 116 Iowa, 723, 93 Am. St. Rep. 270, 89 N. W. 196; *Gray v. Kaufman Dairy & Ice Cream Co.* 162 N. Y. 388, 49 L.R.A. 580, 76 Am. St. Rep. 327, 56 N. E. 903. And, further, that upon abandonment by the tenant of leased premises the landlord has three remedies: First, he may at once enter and terminate the contract and recover the rent up to the abandonment; or, second, he may suffer the premises to remain vacant and sue on the contract for the entire rent; or he may give notice to the tenant of his refusal to accept a surrender, and sublet the premises for the unexpired term for the benefit of the lessee to reduce his damages, citing *Higgins v. Street*, supra.

The trial court seemed to think that the relation of defendant McCray to the lease was that of a guarantor, and also seemed to think that there was no consideration for the surrender of the premises, but these questions are not pleaded nor argued. The trial court held, as indi-

cated by it, that it was agreed between defendant and plaintiff that the reletting of the premises to the creditors of the Evans Company should not constitute a release of the obligations of the defendant McCray under the lease. But we think this finding is not sustained by this record. The only testimony we discover concerning this is that given by H. S. Chase, who testifies that it was agreed between plaintiff and the creditors of the Evans Company

**Landlord and tenant—reletting—release of tenant—reservation of obligation.**

that taking of possession by creditors should not prejudice the rights of plaintiff in the original lease. But, as stated, it is not shown that McCray was present or represented at this meeting, and it is contended by appellant that he was not so present or represented.

The trial court also took the view that there was no lease between the creditors of the Evans Company and the plaintiff. Some of the witnesses say that there was no new lease to the creditors, but, from an examination of this evidence, we think the witnesses so testifying meant that there was no written evidence of the lease. If plaintiff surrendered or relet to the creditors of the company the leased premises whereby they became liable for the payment of \$300 per month as rent, and were not permitted to terminate the agreement until thirty days' notice

**Trial—jury—determination of lease.**

in writing had been given to plaintiff of an intention so to do, as we understand the written contract to provide, then there was a lease; at least, that was a question for the jury whether plaintiff did relet the property to the creditors, and whether the creditors were tenants of the plaintiff under a tenancy from month to month, especially as to the defendant McCray, who claims to have had an agreement with plaintiff for a surrender. In *Keane v. Rogers*, 146 Iowa, at page 63, 123 N. W. 755, supra, we said: So, also, reletting of the premises is not always conclusive. If the

landlord relets on account of the tenant, it is a circumstance of no value; but if the landlord relets on his own account without notifying the original lessee, and he does not consent thereto, such reletting is generally held to show an acceptance of the surrender, unless the lease itself provides for such reletting. There was no provision relating thereto in the lease in question, and the use of the premises by Mr. Emery, and the plaintiff's demand for rent therefor, furnished evidence tending to support the claim of the defendant that there was a mutual surrender of the lease. . . . It is also the general rule that an absolute and unqualified taking of possession by the landlord shows an acceptance, unless the landlord indicates to the tenant, at that time, his purpose to hold him liable for the rent. . . . In this case the plaintiff, through his agent, took such possession without a word to the defendant Hofmaster. It is true that several months thereafter he notified Hofmaster that he intended to hold him for the rent; but, when a complete surrender has taken place, a lease cannot be revived by the action of only one party thereto."

See also *Armour Packing Co. v. Des Moines Pork Co.* 116 Iowa, 723, 93 Am. St. Rep. 270, 89 N. W. 196.

2. We shall now refer as briefly as may be to some of the evidence excluded by the trial court, which we think would have a bearing upon the issue. Defendant should have been permitted to show that the front part of the leased premises was changed into a cigar store. And defendant should have been permitted

**Evidence—surrender of lease—alteration of premises.**

to show that he did not receive a notification from plaintiff subsequent to October 15, 1914, that plaintiff had taken possession of the premises for defendant's benefit. There may be other similar questions, but we shall not notice them specifically. The error is not likely to occur upon a retrial.

**—possession for benefit of tenant—notice.**



For the reasons given, the judgment of the District Court is reversed, and the cause remanded for a new trial.

Evans, Ch. J., and Deemer and Weaver, JJ., concur.

#### NOTE.

The landlord's reletting and efforts to relet after tenant's abandonment or refusal to enter as an acceptance of the surrender is discussed in the note beginning at page 1080, post.

NELLIE B. BERNARD, Resp't.,

v.

L. RENARD et al., as Trustees of the Creditors of the Cosmos Wine & Liquor Company et al., Appts.

*California Supreme Court (In Banc) — June 1, 1917.*

(175 Cal. 230, 165 Pac. 694.)

**Landlord and tenant — attempt to relet as termination of lease.**

1. Acceptance of a surrender of a lease will be effected if, after the lessee's refusal to take possession or be bound by the lease, the lessor assumes absolute control of the property and attempts to let it without any notice to the lessee that he is not acting in his own right.

[See note on this question beginning on page 1080.]

**Evidence — rescission of lease.**

2. The sale by a lessor of a building after the lessee has repudiated the lease and refused to take possession of the property, without notice to the lessee, is conclusive evidence that the lessor is then holding the property solely for his own benefit, and in no way for the benefit of the tenant.

[See 16 R. C. L. 971.]

**Pleading — answer — acceptance of surrender of lease.**

3. An answer in an action for rent alleged to be due under a lease, which seeks cancelation for fraud and alleges the giving of notice of rescission which the lessor refused, is not an admission that there never was an unqualified acceptance of lessee's surrender of the property.

[See 16 R. C. L. 1103.]

APPEAL by defendants from a judgment of the Superior Court for the City and County of San Francisco, and from an order denying a motion for new trial, in an action brought to recover rent alleged to be due under the terms of a written lease. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Joseph E. O'Donnell and Costello & Costello, for appellants:

There was a surrender of the lease by the tenant and an acceptance by the landlord of such surrender.

Welcome v. Hess, 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369; Hays v. Goldman, 71 Ark. 251, 72 S. W. 563; Re Mahler, 105 Fed. 428; Ledsinger v. Burke, 113 Ga. 74, 38 S. E. 313; Palmer v. Myers, 79 Ill. App. 409; Huling v. Roll, 43 Mo. App. 234; Sherman v. Engel, 18 Misc. 484, 41 N. Y. Supp. 959; Barkley v. McCue, 25 Misc. 738, 55 N. Y. Supp. 608; Crane v. Edwards,

80 App. Div. 333, 80 N. Y. Supp. 747; Gutman v. Conway, 45 Misc. 363, 90 N. Y. Supp. 290; Gray v. Kaufman Dairy & Ice Cream Co. 162 N. Y. 388, 49 L.R.A. 580, 76 Am. St. Rep. 327, 56 N. E. 903; White v. Berry, 24 R. I. 74, 52 Atl. 682; Pelton v. Place, 71 Vt. 430, 46 Atl. 63.

Mr. E. R. Hoerchner also for appellants.

Messrs. Houghton & Houghton, for respondent:

The abandonment of premises to a plaintiff, and the taking possession by him against his wish, and the sub-

sequent letting of the property to another tenant, are not a surrender and termination of the lease.

*Respini v. Porta*, 89 Cal. 464, 23 Am. St. Rep. 488, 26 Pac. 967; *Oliver v. Loydon*, 163 Cal. 124, 124 Pac. 731; *Rauer's Law & Collection Co. v. Third Street Improv. Co.* 21 Cal. App. 183, 131 Pac. 77; *Henne v. Sammers*, 23 Cal. App. 763, 139 Pac. 907.

It is not only the right but the duty of a lessor, circumstanced as was plaintiff herein, to endeavor to let the premises to some third person and so save the lessee in the amount of the damages for which he would become liable.

*West Side Auction House Co. v. Connecticut Mut. L. Ins. Co.* 186 Ill. 156, 57 N. E. 839; *Wilson v. Martin*, 1 Denio, 602.

The letting of the premises for any period short of the unexpired term of the lease does not constitute an acceptance of a surrender.

*Auer v. Penn.* 99 Pa. 370, 44 Am. Rep. 114; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25, 84 S. W. 216; *2 Tiffany, Land. & T.* § 190; *Sessinghaus v. Knocke*, 127 Mo. App. 300, 105 S. W. 283; *Lewis v. Scanlan*, 3 Penn. (Del.) 238, 50 Atl. 58; *Livermore v. Eddy*, 33 Mo. 547; *Oldewurtel v. Wiesefeld*, 97 Md. 165, 54 Atl. 969; *Marshall v. John Grosse Clothing Co.* 184 Ill. 421, 75 Am. St. Rep. 181, 56 N. E. 307; *Buck v. Lewis*, 46 Mo. App. 227; *Stewart v. Sprague*, 71 Mich. 60, 38 N. W. 678; *Scott v. Beecher*, 91 Mich. 590, 52 N. W. 20; *Miller v. Benton*, 55 Conn. 529, 13 Atl. 678; *Auer v. Hoffmann*, 132 Wis. 620, 112 N. W. 1090; *Higgins v. Street*, 19 Okla. 45, 13 L.R.A. (N.S.) 398, 92 Pac. 153; *Jacobson v. Miller*, 41 Mich. 90, 1 N. W. 1013.

*Angellotti, Ch. J.*, delivered the opinion of the court:

This is an action to recover a judgment for money alleged to be due as rent under the terms of a written lease, the defendants being the trustees of the creditors of the lessee corporation (a dissolved corporation), and the sureties on the bond given by the lessee for the payment of the stipulated rent and the observance of the other covenants of the lease. The cause was tried with a jury, which returned a verdict for plaintiff for \$7,500. De-

fendants appeal from the judgment and from an order denying their motion for a new trial.

The action was for rents at \$900 per month for the period commencing November 14, 1908, and ending June 14, 1910. The lease was one dated March 6, 1907, of a lot of land and a building to be erected by the lessor thereon, for the term of ten years; said term to begin when the building was completed and ready for occupancy, at \$900 per month for the first five years, and \$1,000 per month for the second five years. Before the completion of the building and in February, 1908, differences arose between the parties. During that month, a formal notice of rescission signed by the lessee was left on the premises and received by the lessor. It stated substantially that the lessee, by reason of the fact that it was induced to enter the lease by certain alleged false and fraudulent representations, and also because the building had not been completed as soon as promised, elected to rescind the lease, offered to restore all property in said building and premises, and demanded that the lease be rescinded and surrendered. The lessor on February 17, 1908, sent to the lessee the following notice, viz.: "Your notice of rescission I have received and the only answer I have to make to it is that the rescission of a lease requires the action of all parties thereto, or the judgment of a competent court. Your building will be ready for occupancy within the next forty days."

On May 14, 1908, the lessor notified the lessee that the building was completed, and tendered possession thereof, and demanded payment of the first month's rent, and the lessee refused to accept it or any portion thereof, or to pay any rent under the lease. This apparently ended the communications between the parties until the commencement of this action over four years later, November 14, 1912. The lessee never went into possession of the premises, and never paid any rent.

Almost immediately after May 14, 1908, the plaintiff began efforts to secure a tenant for the property. She, however, secured no permanent tenant, although she endeavored to do so. It was put into the hands of various real estate agents for that purpose, and there were large signs "painted on the building, placed on it" for the purpose of attracting tenants. Various "To let" signs were placed on the building by plaintiff, the first as early anyway as July, 1908. The premises were let by the lessor temporarily to various parties. They were first so let during the latter part of 1908 "for between a month or two months," \$324 rental being received. In the spring of 1909, the premises were so let for about three months at \$150 a month. Again they were so let to various tenants through a real estate agency, for "a trifle less than" \$600. On July 10, 1910, according to the allegations of the complaint, plaintiff finally disposed of said building. During all of the time after June, 1908, plaintiff apparently treated the property as absolutely at her disposal for her own benefit, just as though the lease to the defendant lessee was not in existence. After the refusal of the lessee to accept the premises, no word, oral or written, was conveyed to it to the effect that plaintiff did not hold possession of the premises solely in her own right and for her own benefit, and without regard to the lease. No suggestion was made to the lessee that she intended to let the premises for the benefit of the lessee, or at all, and no information was given as to the fact of any of the tenancies. And finally, in July, 1910, as we have seen, the building was permanently disposed of by plaintiff, apparently without any information as to the intention to dispose of it being given to the lessee.

Upon these facts, as to which there is no conflict, it seems clear to us that the doctrine of *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369, is applicable. It is true that the facts of this case

differ in some particulars from those of *Welcome v. Hess*, supra; but they differ in no such way as to make the conclusion arrived at there inapplicable here. The real thing there decided was that where the premises are abandoned by the tenant, who avows his intention not to be bound by his lease, the assumption of actual possession and absolute control of the premises by the lessor, including efforts to let and the actual reletting thereof to others, without saying or doing anything to so qualify his acts as to indicate that he is not acting in his own right and for his own benefit, as owner entitled to possession, without

saying or doing anything to indicate that he is acting for the benefit of the lessee or reletting on the lessee's account and for his benefit, he will not be heard thereafter to say that he has not accepted a surrender of the term. This is the settled law in this state, although there are cases to the contrary in some other states. The discussion of the question in *Welcome v. Hess*, supra, was such as to make it unnecessary to consider the matter at length in this opinion. The law on this question was very clearly stated by the district court of appeal of the second appellate district in an opinion written by Presiding Justice Conrey in *Rehkopf v. Wirz*, 31 Cal. App. 695, 161 Pac. 285, as follows: "Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet the same, and thereupon may maintain an action for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797. But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the

Landlord and tenant—attempt to relet as termination of lease.

benefit of the tenant, and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant, and does so unqualifiedly, he thereby releases the tenant. *Baker v. Eilers Music Co.* 26 Cal. App. 371, 146 Pac. 1056; *Welcome v. Hess*, supra. An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is inconsistent with the continuing force of the original lease. If done without the consent of the tenant to such interference, it is an eviction, and the tenant will be released. If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant."

It is clear that the mere fact that the lessee refused to accept possession at all and never went into possession does not present any material distinction, in view of the subsequent acts of the lessor. Nor does it materially affect the matter that the lessor, notwithstanding her efforts in that behalf, failed to obtain a permanent tenant for a term extending beyond the term prescribed by the lease to defendant corporation. Of course, such a letting without any act or word to qualify its effect would have very clearly shown an absolute acceptance of the surrender of the term, just as the permanent disposition by the lessor of the building in July, 1910, showed to a certainty that the lessor was then holding the premises solely in

her own right and in no way for the benefit of the tenant. But her efforts to obtain a permanent tenant were just as potent in their effect as showing her attitude with regard to the premises in this connection, as would have been her actual letting in the event of finding such a tenant, and her conduct in this regard, together with her conduct generally in relation to the premises from as early as July, 1908, bring the case within

the rule we have referred to, notwithstanding her failure to obtain a permanent tenant. The refusal to accept the offer of rescission made in February, 1908, and the subsequent tender of the premises and demand for one month's rent in May, 1908, are also of no importance in so far as the question we are considering is concerned. These things, of course, showed the then attitude of the lessor in the matter, and the desire that the lessee should accept the premises under the lease. But even then the lessor did not indicate that in the event of the lessee's refusal to accept possession she would nevertheless continue to regard the property as belonging to the tenant for the specified term. And, as we have seen, her subsequent conduct with regard thereto was a complete negation of any such attitude on her part.

Some reliance is placed by plaintiff in this connection upon certain allegations in defendants' pleadings by way of further answer and defense and cross complaint. In addition to their denials of the allegations of the complaint in this action commenced November 14, 1912, they sought a conclusion of rescission of the contract of lease on the ground of alleged false representations which induced the making thereof, and in this connection alleged the giving of the notice of rescission in February, 1908, to which we have referred, and that the plaintiff "refused and still refuses to rescind or cancel said lease." So far as the question of surrender that we have been discussing is concerned, the only force that can be attributed to this allegation in the connection in which it is used is, of course, by way of admission of the defendants that there never was any unqualified acceptance by the lessor of possession and control of the premises for her own exclusive benefit, notwithstanding the lease. We cannot read it as intended to have

Evidence—  
rescission of  
lease.

Pleading—  
answer—  
acceptance of  
surrender  
of lease.

or as having in fact any such meaning, or as being of any importance in the solution of the question we have discussed.

The judgment and order denying a new trial are reversed.

Shaw, Sloss, Melvin, and Henshaw, JJ., concur.

### ANNOTATION.

**When landlord's reletting or efforts to relet after tenant's abandonment or refusal to enter deemed to be acceptance of the surrender.**

- I. Introductory, 1080.
- II. Intention a question of fact, 1080.
- III. Application to various cases, 1087.

#### *I. Introductory.*

It is well settled that the parties to a lease may by agreement terminate the same and the landlord resume possession of the premises. Such a termination of a lease requires the consent of both parties. The consent of the lessor need not, however, precede the surrender. If it exists at any time, surrender is completed and the lease terminated. For example, if the landlord accepts a surrender or abandonment of leased premises that has already taken place with the intent to terminate the lease, the lease is terminated as effectually as if there had been a valid agreement of surrender in advance. What amounts to an acceptance of such a surrender is a broad question. Primarily, it is a question of the landlord's intention. There are, however, certain rules which preclude the giving effect to this intention in all instances. According to one line of authorities, a lessor cannot, upon an abandonment of the leased premises by the lessee, relet them without terminating the lease; at least, there can be no reletting without the consent, express or implied, of the lessee thereto. According to a second line of authorities there can be no reletting of the abandoned premises without accepting the surrender, unless notice of the refusal to accept the surrender and of the intention to relet on the tenant's account is given the tenant. If there is a notice of the lessor's refusal to accept the surrender, and that he will relet on account of the tenant, a reletting is not, as a matter of law, an acceptance of the surrender according

to this rule. According to a third line of cases, a reletting is not conclusive as a matter of law as an acceptance of such surrender, irrespective of the question of notice. The cases are agreed that mere attempts to relet do not conclusively show an acceptance of the surrender.

Under the first of these theories, and the second in the absence of notice, the intention of the landlord in reletting the premises is immaterial, for the rules conclusively ascribe to such reletting a certain effect, viz., an acceptance of the surrender and consequent termination of the lease. But under the third theory, and the second one in cases in which the requisite notice was given, the reletting is not as a matter of law an acceptance of the surrender. And this is true with reference to attempts at reletting. It does not follow, however, from the fact that the landlord may relet or attempt to do so without accepting the surrender, that he has done so in every instance. He may intend to accept the surrender, and thus terminate the lease; if he did thus intend to accept the surrender the lease is terminated; if he did not intend to accept such surrender, the lease is not terminated. In other words, the latter rules give free scope to the landlord's intention. The present note is concerned only with the bearing of a reletting or attempts to relet upon the determination of this intention.

#### *II. Intention a question of fact.*

The intent with which the landlord acts in reletting premises is primarily a question of fact, and therefore for the trier of facts, usually the jury.

Georgia.—Schachter v. Tuggle Co. (1910) 8 Ga. App. 561, 70 S. E. 93.

Iowa.—Chase v. Evans (1916) 178 Iowa, 885, 160 N. W. 346.

Missouri.—Huling v. Roll (1890) 43 Mo. App. 234.

New Jersey.—Zabriskie v. Sullivan (1911) 82 N. J. L. 545, 81 Atl. 1135; O'Neil v. Pearse (1915) 87 N. J. L. 382, 94 Atl. 312, affirmed in (1916) 88 N. J. L. 733, 96 Atl. 1102.

New York.—Hurley v. Sehring (1891) 62 Hun, 621, 43 N. Y. S. R. 240, 17 N. Y. Supp. 7; Stanley v. Koehler (1857) 1 Hilt. 354; Isaacson v. Wolfensohn (1903) 84 N. Y. Supp. 555; Feust v. Craig (1907) 107 N. Y. Supp. 637; Hodgkiss v. Dayton-Brower Co. (1915) 156 N. Y. Supp. 907.

North Carolina.—Everett v. Williamson (1890) 107 N. C. 204, 12 S. E. 187.

Oregon.—Bowen v. Clark (1892) 22 Or. 566, 29 Am. St. Rep. 625, 30 Pac. 430.

Pennsylvania.—Breuckmann v. Twibill (1879) 89 Pa. 58.

Canada.—Matthias v. Pace (1882) 15 N. S. 366.

In Hodgkiss v. Dayton-Brower Co. (1915) 156 N. Y. Supp. 907, there is held to be a question of fact as to whether there had been an acceptance, where the landlord repossessed himself of the premises, made alterations therein for the purpose of reletting, and made efforts to relet the same over the tenant's objection to any reletting on his account. Giving a tenant permission to leave some of his property on the premises after the date of his abandonment has been held to be evidence from which acceptance of the abandonment may be presumed. Stanley v. Koehler (1857) 1 Hilt. (N. Y.) 354. In Schachter v. Tuggle Co. (Ga.) supra, it was left to the jury to say what the intent of the landlord was where, upon being tendered the keys by an undertenant who was about to vacate the premises, the landlord replied that he would take the keys, but would have to hold for the rent the person responsible therefor, but that he was willing to try to relet the premises. In Huling v. Roll (1890) 43 Mo. App. 234, where the jury found there was an acceptance of the surrender, the court does not discuss the

evidence on which the findings are based, merely stating that the question was one for the jury. The facts, however, are interesting, and show that after the abandonment by the tenant the landlord took possession and, without consulting the tenant, set to work to rent it, putting it into the hands of a number of real estate agents, and a month after the abandonment, and after making several costly alterations and repairs upon the building, leased it for a period beyond the term of the original lessee. On the contrary, in Buck v. Lewis (1891) 46 Mo. App. 227, an instruction to the effect that if the landlord personally, or by his agent, accepted the keys to the leased premises from the tenant, and "took possession of said tenements, or rooms, during the month of July, and tried to rent the said [premises] to other parties on their own account, without the privity or consent of defendant, then the plaintiff cannot recover the rent for said month," was held erroneous. A reletting which was held not to amount to an acceptance took place in Leavitt v. Maykel (1911) 210 Mass. 55, 96 N. E. 51, but in this case there was an express written agreement that the lessor might relet without affecting the rights of the parties.

Even under a lease expressly providing that the landlord may relet on behalf of the tenant in case of abandonment there has been held to be a question whether or not the landlord intended to accept the surrender, in reletting the premises or attempting to do so. Vogel v. Piper (1903) 89 N. Y. Supp. 431. See Stern v. Thayer (1894) 56 Minn. 93, 57 N. W. 329, *infra*. The act of the landlord, who had a dispute with his tenant in which the tenant stated that he was going to move and the landlord replied that he was glad of it, in thereafter, and before the tenant had actually left the premises, entering upon the property and posting a notice that the same was for rent, is held to be an acceptance of the surrender, in Crane v. Edwards (1903) 80 App. Div. 333, 80 N. Y. Supp. 747. The fact that the landlord increased the rent upon reletting the

premises does not require a finding that there was an acceptance. *Payne v. Hall* (1912) 82 N. J. L. 362, 82 Atl. 518.

In some cases an express agreement has been entered into subsequently to the abandonment of the lease that the lessor should procure a tenant without affecting the rights of the parties. In some such cases the rerenting has not been urged as an acceptance. *Stekette v. Pratt* (1899) 122 Mich. 80, 80 N. W. 989. In *American Sav Bank & T. Co. v. Mafridge* (1910) 60 Wash. 180, 110 Pac. 1015, the lease was sold by agreement of the parties. In *Cox v. McKinley* (1911) 10 Ga. App. 492, 73 S. E. 751, there seems to have been express agreement that the landlord should relet for the tenant. But in others in which the taking possession under such an agreement has been urged as an acceptance, this contention has been denied, and the landlord held to have taken possession for the purpose of rerenting under the contract. *Morgan v. Smith* (1877) 70 N. Y. 537; *Hoster-Columbus Associated Breweries Co. v. Stag Hotel Corp.* (1910) 111 Va. 223, 68 S. E. 50.

The question of fact as to the landlord's intention is often stated in another form, viz., if the landlord relets on account of the tenant, there is no acceptance of the surrender; but if he relets on his own account there is an acceptance. *BERNARD v. RENARD* (reported herewith) ante, 1076; *Kean v. Rogers* (1910) 146 Iowa, 559, 123 N. W. 754, approved in *H. S. Chase & Co. v. Evans* (reported herewith) ante, 1071; *Dobbin v. McDonald* (1895) 60 Minn. 380, 62 N. W. 437; *Pelton v. Place* (1899) 71 Vt. 430, 46 Atl. 63. In *Kean v. Rogers* (1910) 146 Iowa, 559, 123 N. W. 754, the court, in discussing the evidence tending to show the acceptance of a surrender, observes, that the reletting of the premises is not always conclusive. "If the landlord relets on account of the tenant, it is a circumstance of no value; but if the landlord relets on his own account without notifying the original lessee, and he does not consent thereto, such reletting is generally held to show an ac-

ceptance of the surrender, unless the lease itself provides for such reletting." In this case, evidence that the lessor relet the premises to another, and demanded rent of him, was held to be evidence tending to support the claim that there had been an acceptance of the surrender. It is held in *Goodfield Realty Co. v. Wormser* (1910) 125 N. Y. Supp. 521, that the fact that the landlord relets the abandoned premises, without expressing in the new lease that he acted as agent of the original tenant, is not determinative that the landlord did not regard himself as acting for the original tenant. In *Buck v. Lewis* (1891) 46 Mo. App. 227, an instruction that if the landlord accepted the keys and took possession, and tried to rent to other parties on his own account without the privity or consent of the tenant, he could not recover rent, was held improper. But the phrase, "on his own account," did not receive special consideration.

It is held in some cases that the landlord's consent to a surrender cannot be inferred from unsuccessful attempts to relet. *Gaines v. McAdam* (1898) 79 Ill. App. 201; *West Side Auction House Co. v. Connecticut Mut. Ins. Co.* (1899) 85 Ill. App. 497, affirmed in (1900) 186 Ill. 156, 57 N. E. 839; *Bradley v. Walker* (1900) 93 Ill. App. 609; *Lane v. Nelson* (1895) 167 Pa. 602, 31 Atl. 864. In *Gaines v. McAdam* (Ill.) supra, the attempt was by an agent, and the court states that the unsuccessful attempt of an agent to rent premises does not raise an inference of the landlord's consent to the surrender. Apparently, however, it is assumed that the agent had authority, and the decision is based on the ground that the unsuccessful attempt to rent the premises does not raise an inference of acceptance. The mere fact that the landlord attempts to secure another tenant is not of itself any evidence that he intended to accept the surrender by the original tenant. *Duffy v. Day* (1890) 42 Mo. App. 638; *Reeves v. McComeskey* (1895) 168 Pa. 571, 32 Atl. 96. Accordingly there has been held to be no question of fact for the jury, where

the landlord has made such an attempt. *Scott v. Beecher* (1892) 91 Mich. 590, 52 N. W. 20; *Joslin v. McLean* (1894) 99 Mich. 480, 58 N. W. 467.

An attempt to relet is not such an act as of itself releases the tenant. *Pier v. Carr* (1871) 69 Pa. 326. Merely advertising the place for rent cannot be considered as an acceptance of the surrender. *Redpath v. Roberts* (1802) 3 Esp. (Eng.) 225; *Ontario Industrial Loan & Invest. Co. v. O'Dea* (1895) 22 Ont. App. Rep. 349. Whatever may be the effect of an actual renting of the premises, it has been held that unsuccessful attempts at reletting cannot be regarded as an acceptance, especially where the landlord has notified the tenant that he will relet on behalf of the tenant. *Dorrance v. Bonesteel* (1900) 51 App. Div. 129, 64 N. Y. Supp. 307. At least, unsuccessful attempts to relet or advertising for rent are not conclusive that the landlord has accepted.

**Louisiana.** — *Vincent v. Frélich* (1898) 50 La. Ann. 378, 69 Am. St. Rep. 436, 23 So. 373.

**Michigan.** — *Jacobson v. Miller* (1879) 41 Mich. 90, 1 N. W. 1013.

**Missouri.** — *Sessinghaus v. Knocke* (1907) 127 Mo. App. 300, 105 S. W. 283.

**New Jersey.** — *O'Neil v. Pearse* (1915) 87 N. J. L. 382, 94 Atl. 312, affirmed in (1916) 88 N. J. L. 733, 96 Atl. 1102 (holding that such an attempt does not, as a matter of law, amount to an acceptance of the surrender).

**New York.** — *Levitt v. Zindler* (1910) 136 App. Div. 695, 121 N. Y. Supp. 483; *Feust v. Craig* (1907) 107 N. Y. Supp. 637.

**Pennsylvania.** — *Marseilles v. Kerr* (1841) 6 Whart. (Pa.) 500; *Breckmann v. Twibill* (1879) 89 Pa. 58.

**England.** — *Oastler v. Henderson* (1877) L. R. 2 Q. B. Div. 575, 46 L. J. Q. B. N. S. 607, 37 L. T. N. S. 22 (holding this not to amount to a surrender as a matter of law); *Smith v. Blackmore* (1885) 1 Times L. R. 267.

**Canada.** — *McBride v. Ireson* (1915) 35 Ont. L. Rep. 173 (tenant was notified by landlord that premises would

be relet, but that until then the tenant would be held for the rent).

The declaration of a landlord that his tenant had given up his lease, accompanied by an unsuccessful attempt to lease to another, is not conclusive evidence that their relation has ceased. *Milling v. Becker* (1880) 96 Pa. 182.

One court, in discussing the effect of a statement by the landlord at the time the tenant delivered the keys to him that he would take them and hold them for the tenant so as to be able to let the premises for him as his agent, states that this conversation would seem unmistakably to negative any intent on the part of the landlord to accept the surrender of the term, and although not assented to by the tenant, that fact rendered no less emphatic the landlord's refusal to accept the surrender, and unless, therefore, the landlord did some act which would indicate a change of mind, it would be difficult to find a rule of law which would create an acceptance by her of an attempted surrender against her will. *Dorrance v. Bonesteel* (1900) 51 App. Div. 129, 64 N. Y. Supp. 307, holding that a receipt of the keys to the leased premises with the express intention of taking them as the agent of the tenant, together with a subsequent attempt to relet the premises, do not constitute, as matter of law, an acceptance of the surrender.

See *Crane v. Edwards* (1903) 80 App. Div. 333, 80 N. Y. Supp. 747, *supra*.

But it has been stated that, in the absence of a provision in the contract authorizing him to do so, the lessor's re-entry upon the premises and attempt to relet the same in his own name after the abandonment thereof by the lessee is evidence tending strongly to show an acceptance on his part of the surrender of the premises. *Feust v. Craig* (1907) 107 N. Y. Supp. 637. On a subsequent appeal of this case the silence of the landlord for two months after his agent had received the keys from the tenant, who notified him that he had abandoned the premises, and attempts to relet, were held to make a *prima facie* case of surrender. 109 N. Y. Supp. 742. The landlord had also been notified



of the tenant's intention to surrender the premises. When the keys were delivered to the agent, the tenant notified the agent that he surrendered the premises, to which the agent replied, "All right."

Some general observations appear in the reported decisions as to the weight to be given a reletting by the landlord, as evidence of such acceptance. The supreme court of Maryland states that the acceptance of keys by the landlord, repairs to the house, and the reletting of the premises are insufficient of themselves to show an acceptance, "unless, under all the circumstances, they are of such a character as to show a purpose on the part of the tenant to vacate, and on the part of the landlord to resume possession, to the exclusion of the tenant. If, at the time when the keys were returned to him, the landlord notified the tenant that he received them under protest, would rerent, and hold him for rent, and the defendant assented to such renting, the presumption which might otherwise arise that there was an acceptance of the property would not be reasonable; and if under such circumstances he rented the property, it would be plain that he would do so for the lessee's interest, and not with the intent of accepting the surrender. But if the landlord without such assent on the part of the tenant does an act, such as taking possession of and reletting the premises, which is utterly inconsistent with the relation of landlord and tenant, then a surrender is implied and the tenancy is at an end." *Biggs v. Stueler* (1901) 93 Md. 100, 48 Atl. 727. Temporarily taking possession by another tenant for a limited time, of part of the leased premises by the landlord, is not one of those unequivocal acts which will terminate the lease, but the effect of such an act depends upon the intention of the landlord. *Mickleborough v. Strathy* (1911) 23 Ont. L. Rep. 33.

It has been held in a case involving a lease containing a provision authorizing the lessor to rerent the premises upon an abandonment by the tenant, for and on behalf of the tenant, that to amount to an acceptance of the

surrender which will terminate the lease by operation of law, there must be some unequivocal act on the part of the landlord which unmistakably evinces an intention on his part to terminate the lease and the relationship of landlord and tenant, and that the proof is insufficient if there be no evidence of acts which will bind on the principle of estoppel. *Stern v. Thayer* (1894) 56 Minn. 93, 57 N. W. 329. Within this rule a direction of a verdict for the landlord was held proper, where the evidence showed that some time before the abandonment the tenant informed the landlord that he was going to vacate, and would get a good tenant to occupy when he moved out, but that the landlord objected to the lessee securing a tenant and told him not to do it; that he had a scheme for renting the rooms himself; for this reason he did not want the tenant to secure a tenant. It was further in evidence that the landlord had some conversation with a prospective lessee, who examined the rooms after the abandonment, but did not rent. Subsequently a "To let" sign was placed on the premises. This decision is based largely upon the estoppel theory, the court stating that in nothing that was said or done by the landlord were there any of the essential elements of an estoppel.

It is the doctrine of some cases that a reletting creates no prima facie case of acceptance. *Auer v. Penn* (1882) 99 Pa. 370, 44 Am. Rep. 114; *Lane v. Nelson* (1895) 167 Pa. 602, 31 Atl. 864. The renting of the premises to another tenant after notice to the lessee that the lessor will hold him for the rent does not raise a presumption of surrender. *Auer v. Penn* (Pa.) supra. The acceptance of the surrender cannot be implied from the fact that the landlord put the premises in the hands of an agent to rent, and caused the rent notice to be placed on the premises. *Lane v. Nelson* (Pa.) supra.

On the contrary, it has been stated that if the landlord takes possession of the abandoned premises and relets them he will be deemed to have accepted a surrender, unless there are

facts rebutting this inference. *Underhill v. Collins* (1892) 132 N. Y. 270, 30 N. E. 576; *Bloomer v. Merrill* (1865) 1 Daly (N. Y.) 485, 29 How. Pr. 259. *Winant v. Hines* (1887) 14 Daly (N. Y.) 187, holding contra, is thus overruled. Within this rule, there was held to be no acceptance of the surrender where, a short time prior to the surrender, the landlord had, in an interview with the tenant, refused to accept a surrender of the premises and told him that he should hold him for the rent, but would let the premises on account of the tenant, and under these circumstances the tenant left the premises and sent the keys by another person to the landlord. *Underhill v. Collins* (N. Y.) supra. The court states that the landlord, in reletting the premises, did only that which he had promised and had the right to do. A similar decision appeared in *Bloomer v. Merrill* (N. Y.) supra, where, after the lessor was advised that the lessee was intending to leave the premises, he told the lessee that he would let the premises on the lessee's account and would hold him responsible for the rent. The letting was held to be no evidence of the surrender. These cases are decided upon the theory that there was an implied consent by the tenant to the reletting. The *Underhill Case* is distinguished in the subsequent case of *Gray v. Kaufman Dairy & Ice Cream Co.* (1900) 162 N. Y. 388, 49 L.R.A. 580, 76 Am. St. Rep. 327, 56 N. E. 903, where a reletting was held to be an acceptance of the surrender, although the landlord expressly states in a letter to the tenant subsequent to the abandonment, that he would not release the tenant, but would relet on his account and hold him for any loss that might be sustained, to which letter the tenant did not reply; and where, subsequently thereto, some negotiations were had between the landlord and the tenant in regard to reletting, but finally the landlord relet without the consent of the original tenant. It is held that the consent of the tenant to the reletting cannot be implied from his silence and failure to answer the letters. The removal of the tenant

after a notice that the landlord would hold him responsible for the rent does not, it seems, raise an implied consent to the reletting, where the landlord does not state in addition thereto that he will relet the premises and hold the tenant for the deficiency. *Schmidt v. Vahjen* (1911) 143 App. Div. 479, 127 N. Y. Supp. 1038; *Gaffney v. Paul* (1899) 29 Misc. 642, 61 N. Y. Supp. 173; *Hodgkiss v. Dayton-Brower Co.* (1915) 156 N. Y. Supp. 907. In *Schmidt v. Vahjen* (N. Y.) supra, the occupancy by the subsequent tenant was gratuitous, and the court states that the landlord's case is not aided but harmed by the fact that he charged no rent. In *Hodgkiss v. Dayton-Brower Co.* (N. Y.) supra, it is stated that the landlord's statement to the tenant of intention to hold him liable for rent, "and to relet for the latter's account," does not sustain an implied agreement for such reletting. The question as to the necessity and sufficiency of the lessee's consent is, however, not exhaustively considered herein, as it is not within the scope of the note.

It is apparent that the landlord's intention is to be determined from all the circumstances, since it is, as stated above, primarily a question of fact. Accordingly, it has been held improper for the court to take the case from the jury and hold as a matter of law that there was no acceptance of the surrender, where a nonresident landlord, upon hearing that his tenant intended to abandon the premises, rented them to another before the tenant actually moved out, and without any notice to him. *Hays v. Goldman* (1903) 71 Ark. 251, 72 S. W. 563.

And so, where an agent of the landlord, upon hearing of the abandonment, instructed another to get the keys and put up a "For rent" sign on the premises, and had the water turned off, rubbish removed, and some of the rooms repapered, and had an offer of a little less than the original tenant was paying for the premises, but declined to accept it, but finally secured a tenant at the same price that the original tenant was paying. *Sessinghaus v.*

Knocke (1907) 127 Mo. App. 300, 105 S. W. 283.

A verdict for the plaintiff was reversed in *Fagelle v. Etna Importing Co.* (1912) 133 N. Y. Supp. 465, where, after the abandonment of the premises, the lessor visited them and left the keys with his housekeeper, ordered her to open and clean out the premises, and some day thereafter he placed a "To let" sign on the premises, the court stating that even if these acts, standing alone, should be held insufficient to constitute an acceptance of the surrender there seems little doubt that, if coupled with other circumstances showing an intent by the landlord to resume possession for his own benefit, they would be sufficient to show a valid acceptance.

A finding that there was no acceptance of the surrender is sustained by evidence that the lessor, upon a declaration by the lessee that he was unable to pay rent, consulted the surety for the lessee, who not only consented but advised that the premises should be relet, whereupon an agent for letting placed a notice upon the premises that they were "To let," and procured a tenant by that means, and after the tenant had been so procured, the original lessee removed from the premises with the sureties consent. *Ogden v. Rowe* (1854) 3 E. D. Smith (N. Y.) 312. The lease involved in this case contained a provision that the lessor might enter and relet in case of an abandonment.

Evidence that the landlord objected when told by the tenant that he was about to abandon the premises, and notified the tenant that he would be held for the remainder of the time, and that when the keys were sent to the landlord he retained them, and subsequently repaired the house and rented it to another tenant, does not require a finding of acceptance by the landlord. *Gerhart Realty Co. v. Brechte* (1904) 109 Mo. App. 25, 84 S. W. 216. The lease to the new tenant extended beyond the period covered by the original lease, but the court makes no mention of this fact.

There has been held to be evidence to support a finding that the landlord

had accepted the surrender, where the landlord improves the property so as to command a better rental, and asks an advanced rental of prospective tenants. *Duffy v. Day* (1890) 42 Mo. App. 638. The court, in this case, admits that the making of slight repairs in order to fit the premises for another tenant would afford no evidence that the landlord intended to take exclusive control of the premises, nor, it is held, is the fact that the plaintiff endeavored to secure another tenant of itself any evidence that the landlord intended to release the tenant from his obligation to pay rent while the house remained without a tenant; but the fact that he improved the property so as to command a better rental, and asks a higher rental, is held to be some evidence of an intent to rent on his own account. The court states that, if he intended to make the original tenant pay until another tenant could be secured, good faith required that the property should be offered on the same terms. In addition to facts above recited it appears that the landlord made no demand on the tenant for rent for some time, although the contract was for rent payable monthly in advance, and it was further shown that the institution of a suit grew out of the dispute between the parties as to another matter.

So, where the landlord consented to the affixing of a "To let" sign to the premises, and approved of another tenant secured by an agent, and received rent from such tenant, it was held that the evidence was sufficient to support a finding that the landlord had accepted the surrender. *Sherman v. Engel* (1896) 18 Misc. 484, 41 N. Y. Supp. 959.

In *Dobbin v. McDonald* (1895) 60 Minn. 380, 62 N. W. 437, there was held to be evidence sustaining the finding of facts made by the trial court that the landlord had accepted possession from a tenant who held over a few days beyond the expiration of his lease, so that he could not be regarded as holding over for another period equal to his original lease, where, a short time before the expiration of the lease, the tenant informed the lan

lord that he would move out at the expiration, whereupon the premises were placed in the hands of the rental agent by the landlord, and a placard put upon the house announcing it for rent, and a few days before the expiration of the lease the tenant wrote the landlord a letter, saying that he would vacate at the expiration of the lease, or within a few days of the time, to which the landlord made no reply or objection, and the last of the tenant's goods were removed four days after the expiration of the lease, and the keys of the house sent to the landlord's office; thereafter the landlord addressed a letter to the tenant, demanding that he call and settle for damage done to the property, and, upon receiving a sum sufficient to pay the rent for the four days' occupation, returned it to the tenant, saying that he would not accept it, but did not intimate that there was anything due him for rent, nor ever make a claim that the tenant held over for another period, until almost two years later. A part of the time, the premises were rented to another tenant at a reduced figure. In *White v. Berry* (1902) 24 R. I. 74, 52 Atl. 682, there was held to be evidence supporting a finding of the surrender, where the landlord, upon being informed by the tenant prior to the removal that the tenant intended to remove, made no definite objection, but advertised the premises for rent without consulting the lessee about the advertising, and never told the tenant that he expected or intended to hold him for rent after he went out, showed the premises to prospective tenants without consulting the original tenant, and endeavored to let the premises in the same way as he would have done if the original tenant had never lived there; and, subsequent to the removal, went to the premises and put up "To let" signs, never sent any bill to the original tenant for the rent, and, according to the original tenant's testimony, the landlord gave him to understand that he was anxious to have him get out. In *Palmer v. Myers* (1898) 79 Ill. App. 409, a holding of the trial court that there had been an acceptance and surrender was

sustained, where, before the abandonment, the landlord offered the premises to others, providing the tenant would get off, and where, shortly after the abandonment, the premises were actually leased to one who took possession thereof, and subsequently were leased to another tenant; and, further, that the landlord "seemed willing to have the appellee give up the farm so she could rent it to someone else." A finding of surrender is justified upon evidence that the receiver of the lessee directed a messenger to take the keys to the landlord, who, after telling the messenger to take the keys to his attorney, received them upon objection by the messenger that his orders were to leave the keys with the landlord, and retained the keys, entered upon possession of the property, had it cleaned and prepared for occupancy, and put it on the market for rent. *Re Heilbron Bros.* (1913) 226 Fed. 803.

The evidence may be such that a finding of acceptance is required. In *Buckingham Apartment House Co. v. Dafoe* (1899) 78 Minn. 268, 80 N. W. 974, there was held to be evidence requiring a finding of acceptance as a matter of law, where the tenant in an apartment house notified the manager, about two weeks before he vacated, that he was going out, and upon leaving, he paid the manager the rent due, and turned over the keys to the manager, who accepted and retained them without objections or conditions, and tried to re-rent the flat as soon as he received the keys, and had applications therefor, but did not succeed in re-renting while he remained in charge of the building; it further appeared that no demand was ever made upon the tenant for further rent until after there was a change in manager in the building.

### III. *Application to various cases.*

In some cases there has been held to be an acceptance of the surrender, apparently as a matter of law.

*United States.*—*Re Desmond & Co.* (1912) 198 Fed. 581, affirmed in (1913) 122 C. C. A. 663, 204 Fed. 1006.

**Arkansas.**—*Williamson v. Crossett* (1896) 62 Ark. 393, 36 S. W. 27.

**California.** — *BERNARD v. RENARD* (reported herewith) ante, 1076; *Baker v. Eilers Music Co.* (1915) 26 Cal. App. 371, 146 Pac. 1056; *Rehkopf v. Wirz* (1916) 31 Cal. App. 695, 161 Pac. 285.

**Georgia.** — *Ledsinger v. Burke* (1901) 113 Ga. 74, 38 S. E. 313; *Rucker v. Tabor* (1906) 127 Ga. 101, 56 S. E. 124.

**Maine.**—*Hesseltine v. Seavey* (1839) 16 Me. 212.

**Mississippi.**—*Stein v. Hyman-Lewis Co.* (1909) 95 Miss. 293, 48 So. 225.

**Missouri.** — *Matthews v. Tobener* (1866) 39 Mo. 115.

**New Jersey.** — *Fink v. Browe Co.* (1917) — N. J. Eq. —, 99 Atl. 926.

**New York.** — *Wood v. Walbridge* (1854) 19 Barb. 136; *Hegeman v. McArthur* (1851) 1 E. D. Smith, 147; *Krumdieck v. Ebbs* (1908) 84 N. Y. Supp. 525; *Feust v. Craig* (1908) 109 N. Y. Supp. 742; *Friedlander v. Gitron* (1911) 129 N. Y. Supp. 427.

**England.**—*Reeve v. Bird* (1834) 1 Crompt. M. & R. 31, 149 Eng. Reprint, 980, 4 Tyrw. 612, 3 L. J. Exch. N. S. 282; *Phéné v. Popplewell* (1862) 12 C. B. N. S. 334, 142 Eng. Reprint, 1171, 8 Jur. N. S. 1104, 31 L. J. C. P. N. S. 235, 8 Jur. N. S. 1104, 6 L. T. N. S. 247, 10 Week. Rep. 523, 15 Eng. Rul. Cas. 518.

See *Buckingham Apartment House Co. v. Dafoe* (1899) 78 Minn. 268, 80 N. W. 974, supra, II.

See *Meagher v. Eilers Music House* (1915) 77 Or. 70, 150 Pac. 266, infra.

The facts of the foregoing cases on which there was held to be an acceptance of the surrender are varied. In *Williamson v. Crossett* (1896) 62 Ark. 393, 36 S. W. 27, a letter written by the tenants of a farm to the landlord, stating that it would be impossible for them to furnish the seed to work the farm, that a part of it had been sublet, and that it would be possible for the landlord to rent to someone else and thereby lose nothing, is treated by the court as an offer to surrender, and it is held that the landlord accepted such offer by soon thereafter taking charge of the place and controlling it for the remainder of the year, accept-

ing as a tenant the subtenant of the lessee, and renting a portion of the place to another, without any notice to the tenants that he was managing the place on their account, or that he expected them to make good any deficiency in the rent. There was held to be an acceptance of the surrender, where the lessor took possession of premises and offered them for rent to others, in *Baker v. Eilers Music Co.* (1915) 26 Cal. App. 371, 146 Pac. 1056. It is stated that a lessor who takes possession of property delivered to him by his tenant, and does so unqualifiedly, thereby releases his tenant. It is further stated that "he may accept possession of the property for the benefit of the tenant and relet the same; in the latter case, he has no action except one for damages for the difference between what he was able in good faith to let the property for, and the amount provided to be paid under the lease agreement." Where the landlord, after the tenant had left the leased premises, made no demand upon him or in any manner informed him as to the course which he would pursue, but took possession and made a new lease of the land for a period longer than that of the unexpired term, and at a rate of rental less than that provided for in the original lease, there was held to be an acceptance in *Rehkopf v. Wirz* (1916) 31 Cal. App. 596, 161 Pac. 285. The court states that an unqualified taking of possession by the lessor and reletting of the premises by him as owner to a new tenant is inconsistent with the continuing force of the original lease. So, a surrender is completed where, after the abandonment of the premises, the landlord, through his authorized agent, called on the tenant for the keys without explanation or qualification, and, upon the surrender of the keys, the agent retained them, and advertised the house for rent. *Ledsinger v. Burke* (1901) 113 Ga. 74, 38 S. E. 313. Likewise, there is a completed surrender where, upon the abandonment by the tenant, the landlord did not refuse to receive the property, nor notify the tenant that he would hold him liable, but took possession of at

least a part of the land and relet it or had it cultivated on shares. *Rucker v. Tabor* (1906) 127 Ga. 101, 56 S. E. 124. In *Hesseltine v. Seavey* (1839) 16 Me. 212, it is stated by the court that if the lessors accept the key and put in another tenant, who remains to the end of the term, they may well be regarded as having so conducted that they cannot be permitted to deny that they have ousted the lessee, and in such case no rent is recoverable. The evidence in this case, however, showed a substitution of tenant by agreement of the original tenant, the second lessee, and the lessor. In *Stein v. Hyman-Lewis Co.* (1909) 95 Miss. 293, 48 So. 225, there was held to be an acceptance of the surrender of a parol lease, to begin at the expiration of the written lease under which the tenant was in possession, where, prior to the expiration of the written lease, the tenant notified the landlord that he would surrender the premises at the expiration of the then-existing lease, and the landlord made no objection to the proposed surrender, and failed to advise the tenant that he expected to hold him for the rent for the following year; but, on the contrary, made efforts to get other tenants for the building, and, upon the removal from the premises by the tenant, leased the premises to other persons for the year, and collected rent from them. A surrender was held to have taken place in *Matthews v. Tobener* (1866) 39 Mo. 115, where the tenant notified the landlord in writing that he would deliver and surrender the premises on or before a certain day, and, on his vacating the premises, sent the key to the landlord, who received it without objection and subsequently placed another tenant in possession, who continued in their use and occupation till after the time for which they were let to the original tenant. The court states, further, that there was no evidence to show that the second lessee took possession with privity, connivance, or consent of the original tenant, but, on the contrary, leased the premises from the landlord. There is an acceptance of the surrender where the landlord accepts from the receiver of the lessee

corporation the keys to the premises, without objection, and enters upon the premises without consulting the receiver, and makes changes and alterations therein, which are not necessary for the preservation of the building, advertises the premises for rent, and rents the greater part of them for less than the balance of the demised term, and for less than the annual rent fixed by the lease, without authority from the receiver, and without consulting him. *Fink v. Browe Co.* (1917) — N. J. Eq. —, 99 Atl. 926. In *Wood v. Walbridge* (1854) 19 Barb. (N. Y.) 136, where the lessee was asserting a right to a lease, there was held to have been a surrender by operation of law, where, upon the destruction of a house on the premises by fire, the lessee abandoned the same, whereupon the lessor took possession, erected a new building, and leased the same to another. The court states that the lessee must be taken to have assented to this action. In *Hegeman v. McArthur* (1851) 1 E. D. Smith (N. Y.) 147, where the landlord received the key from the tenant and did not declare any dissatisfaction, but entered into possession for the purpose of letting the same to another tenant, and placed upon the house the usual notice, "To let," and then delivered the key to an agent employed by him to let the same, there was held to be a surrender. In *Krumdieck v. Ebbs* (1903) 84 N. Y. Supp. 525, there was held to be a clear case of acceptance, where the lessee under a verbal lease from month to month removed all his property from the premises and surrendered the keys to the lessor's janitor, who gave them to the lessor, and where, prior to the delivery of the keys, the lessor had put a "To let" notice on the premises, and had entered into negotiations with other parties for the lease thereof, and allowed those parties to enter upon the premises, but without rent for the period for which a recovery from the original lessee was sought. A landlord's action was dismissed in *Feust v. Craig* (1908) 109 N. Y. Supp. 742, where the evidence showed that, prior to the abandonment, the tenant had written him of his intention to

leave, to which letters no reply was made, and subsequently, upon leaving, the lessee left the keys with the janitor, stating that he had surrendered the place, to which the janitor replied, "All right;" and showed, further, that the landlord made effort to rent the premises and made no demand of the lessee for two months. The court stated that this silence, taken in connection with the efforts to rent the premises, ratified the janitor's action in accepting the surrender. The reletting by the lessor of a floor in a building after the abandonment thereof by the tenant, together with the lower floor controlled by the lessor solely, at a gross rental in which there is no apportionment of the amount applicable to the two floors, severally, in the lessor's own name, for a period extending one year beyond the term of the original tenant's lease, is conclusive evidence that the new lease was not made by the lessor as agent for the lessee, but that it constituted an acceptance of the surrender of the old lease. *Friedlander v. Gitron* (1911) 129 N. Y. Supp. 427. A reletting by the landlord after an abandonment of the premises, and his refusal to accept the same, the reletting not being subject to the rights of the original tenant or for his benefit, but in exclusion of such rights, have been held to be a termination of the lease. *Meagher v. Eilers Music House* (1915) 77 Or. 70, 150 Pac. 266. Upon what is apparently a second appeal of this case, it appeared that the reletting was expressly subject to the rights of the original tenant, and the court held that there was no surrender. (1917) 84 Or. 33, 164 Pac. 373. In *Re Desmond & Co.* (1912) 198 Fed. 581, affirmed in (1913) 122 C. C. A. 663, 204 Fed. 1006, there was held to be a surrender of the premises, where an agent of the landlord went with a purchaser of the lessee's goods to the rented premises and, upon a dispute arising as to the ownership of certain fixtures therein situated, consented to a request of the purchaser that the fixtures might remain upon the premises, rent free, until the dispute was settled.

In *Reeve v. Bird* (1834) 1 Crompt. M. & R. 31, 149 Eng. Reprint, 980, 4 Tyrw. 612, 3 L. J. Exch. N. S. 282, there was held to be a surrender of the term where, upon the lessee becoming embarrassed, it was agreed to assign the premises to another, and the lessor accepted rent up to the time of the assignment, and subsequently let part of the premises to new tenants. In *Phené v. Popplewell* (1862) 12 C. B. N. S. 334, 142 Eng. Reprint, 1171, 31 L. J. C. P. N. S. 235, 8 Jur. N. S. 1104, 6 L. T. N. S. 247, 10 Week. Rep. 523, 15 Eng. Rul. Cas. 518, there was held to be an acceptance of the surrender so as to result in a surrender by operation of law, where the key to the premises was left with the landlord, who at first refused to accept it, but subsequently showed the premises with a view to letting them, knowing that the original tenant was insolvent, and put up a board announcing that the premises were to let, and subsequently took actual possession. The court states that, putting all facts together, no other conclusion can be reached, and that the landlord exercised his option to accept the surrender.

In *Welcome v. Hess* (1891) 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369, there was held to be an acceptance of the surrender by the landlord where, in taking possession, he did not announce his intention to continue to hold the tenants, but relet for a period longer than the remainder of their term without notifying the defendants that he should do so on their account. The court, it seems, in this case, tried not only the law, but the facts.

In other cases it has been held, apparently as a matter of law, that there was no acceptance of the surrender.

**United States.**—*Re Mullings Clothing Co.* (1916) L.R.A.1918A, 539, 151 C. C. A. 134, 238 Fed. 58, certiorari denied by United States Supreme Court in (1917) 243 U. S. 635, 61 L. ed. 941, 37 Sup. Ct. Rep. 399.

**California.**—*Respini v. Porta* (1891) 89 Cal. 464, 23 Am. St. Rep. 488, 26 Pac. 967.

**Georgia.**—*Lamb v. Gorman* (1915) 16 Ga. App. 663, 85 S. E. 981.

**Iowa.**—*Martin v. Stearns* (1879) 52

Iowa, 345, 3 N. W. 92; *Brown v. Cairns* (1898) 107 Iowa, 727, 77 N. W. 478.

Maryland.—*Oldewurtel v. Wiesenfeld* (1903) 97 Md. 165, 54 Atl. 969.

Minnesota.—*Nelson v. Thompson* (1877) 23 Minn. 508.

Mississippi.—*Alsop v. Banks* (1891) 68 Miss. 664, 13 L.R.A. 591, 24 Am. St. Rep. 294, 9 So. 895.

Missouri.—*Buck v. Lewis* (1891) 46 Mo. App. 227.

New York.—*Broadway Bldg. Co. v. Moore Filter Co.* (1914) 85 Misc. 385, 147 N. Y. Supp. 438.

Ohio.—*Bumiller v. Walker* (1917) 95 Ohio St. 344, L.R.A.1918B, 96, 116 N. E. 797.

Canada.—*Hard v. Jost* (1894) 27 N. S. 243.

See *Meagher v. Eilers Music Co.* (1917) 84 Or. 38, 164 Pac. 373, *supra*.

The facts under which there was held to be no completed surrender have been varied. Where, upon a demand by the landlord for the rent, the tenant replied that he was going to give up the premises, whereupon the landlord answered that he had not come to take possession of the property, but if the tenant was going to abandon the property he would take possession of the same to protect it, and did take possession, and a few days thereafter rented it to another. *Respini v. Porta* (Cal.) *supra*. The court states that it was properly held by the trial court that the abandonment of the premises to the landlord, and the taking possession by him against his wish, and the subsequent letting of the property to another tenant were not a surrender and termination of the lease under the circumstances. In *Lamb v. Gorman* (Ga.) *supra*, the action of the trial court in directing a verdict for the landlord, was sustained, where, after the surrender of the premises, an agent of the landlord made attempt to persuade the tenant to resume possession, suggesting a modification of the terms of the contract, but at no time consenting to the abandonment. The reletting in this case is not emphasized, further than to say that the lease provided that, upon an abandonment of the premises, the lessor might sublet as agent of the lessee. In *Martin v.*

*Stearns* (Iowa) *supra*, there was held to be no acceptance of the surrender of property by the acceptance of the keys and the leasing of the property to another tenant where, prior to the time of the alleged surrender, the landlord had brought an action to secure the payment of rent yet to accrue, and at the time of the surrender no word was said about dismissing the action or discharging the lessee from the claim made therein. This case is approved in *Brown v. Cairns* (Iowa) *supra*, where there was held to be no surrender of a farm where, immediately upon the announcement of the tenant's intention to abandon the premises, the landlord immediately notified him that he would hold him responsible for the rent accruing under the lease, and commenced an action for the rent and sued out a writ of attachment, but that thereafter, upon the actual abandonment, entered upon the premises and rerented the same for the purpose of protecting his reversionary interest and to reduce the damages which the tenant might otherwise be compelled to pay. In *Oldewurtel v. Wiesenfeld* (Md.) *supra*, evidence was held legally insufficient to show the acceptance of the surrender, which was to the effect that when the tenant left the keys to the leased premises at the lessor's office, the lessor wrote him a letter, notifying him of the refusal to accept the surrender, and a subsequent letter, stating that he would rent the premises for and on behalf of the tenant, and subsequently put a sign in the window of the premises that the property was for rent, and rented them from time to time. Where, upon the tender of key, the landlord expressly refused to receive it, except on the condition that the tenant be liable for the rent until he had opportunity of reletting the premises, there is no acceptance of the surrender. *Nelson v. Thompson* (1877) 23 Minn. 508. Reletting real estate at the best price obtainable, to a third person, after the death of the lessee before the expiration of the term, with notice to the latter's administrator who has abandoned the premises that he will be held for the rent and that the premises will



be let on account of his intestate estate, does not constitute an annulment of the original lease nor release the administrator from his liability for the rent. *Alsup v. Banks* (1891) 68 Miss. 664, 13 L.R.A. 598, 24 Am. St. Rep. 294, 9 So. 895. In *Buck v. Lewis* (1891) 46 Mo. App. 227, where, upon the abandonment by the tenant, he delivered the keys to the landlord, who thereupon went upon the premises and put up in the windows notices, "For rent," and endeavored to rent the same to others, but was unsuccessful for a month, the court states that an instruction to the jury to find for the landlord might have been given. There was held to be no acceptance of the abandonment in *Broadway Bldg. Co. v. Moore Filter Co.* (1914) 85 Misc. 385, 147 N. Y. Supp. 438, where the reletting took place in accord with a provision in the lease, and after the landlord had expressly refused to accept the surrender. Evidence that the landlord took the key, advertised for a new tenant, and rented the premises to others does not show an acceptance of the surrender in the absence of evidence tending to show consent or acquiescence in the surrender on the part of the landlord. *Bumiller v. Walker* (1917) 95 Ohio St. 344, L.R.A. 1918B, 96, 116 N. E. 797. Mere acceptance of the keys by the lessor and reletting the premises on dissolution of a corporate lessee, and repudiation of the lease by the receiver, are not sufficient to show acceptance of a surrender, where the lease gives a right to re-enter for condition broken, if rent remains unpaid for ten days. *Re Mullings Clothing Co.* (1916) L.R.A. 1918A, 539, 151 C. C. A. 134, 238 Fed. 58, certiorari denied by the Supreme Court of United States in (1917) 243 U. S. 635, 61 L. ed. 941, 37 Sup. Ct. Rep.

399. Allowing a tenant to whom the premises had been relet to enter upon them three or four days in advance of his tenancy, make fires to remove the dampness, and render them fit for occupation at the beginning of his tenancy, and moving his furniture into the house during those days, does not prevent a recovery by the landlord for rent from the former tenant. *Hard v. Jost* (1894) 27 N. S. 243.

In the absence of any testimony of a surrender to the landlord himself, or of any acceptance of the premises by him or his authorized agent, proving an intent to consent to an abandonment by the tenant, the delivery of the keys to an agent, and their retention and a subsequent offer by him to rent, are not, without further evidence, sufficient to relieve the tenant of rent due under the lease, for such time as the premises are vacant. *Blake v. Dick* (1895) 15 Mont. 236, 48 Am. St. Rep. 671, 38 Pac. 1072.

In *Stewart v. Sprague* (1888) 71 Mich. 50, 38 N. W. 673, on second appeal in (1889) 76 Mich. 184, 42 N. W. 1088, the landlord, upon a tender of the keys by an assignee of the lessee, refused to accept them upon any other theory or condition than that the lessee should be holden under the lease, and the landlord should do the best he could to procure another tenant and hold the defendant liable for any deficiency, without discussion of these facts it is held in the case that there was no showing of an agreement by the landlord to accept the surrender.

See *Stern v. Thayer* (1894) 56 Minn. 93, 57 N. W. 329, and *Dorrance v. Bonesteel* (1900) 51 App. Div. 129, 64 N. Y. Supp. 307, *supra*, II.

W. A. E.

ARTHUR SCOGGINS, Plff. in Err.,  
v.  
UNITED STATES OF AMERICA.

*United States Circuit Court of Appeals, Eighth Circuit—January 27, 1919.*

(255 Fed. 825.)

**Evidence — to prove sale — sufficiency — taking from person.**

1. One cannot be convicted of unlawfully selling intoxicating liquor upon testimony that the alleged buyer, upon meeting him on the street, threw his arms around him, took from his pocket a bottle containing liquor, and promised to see him on a specified day, when he made an unaccepted offer to pay for the liquor.

[See note on this question beginning on page 1096.]

**Intoxicating liquor — unlawful sale — conviction.**

2. One cannot be convicted of unlawfully selling intoxicating liquors in the absence of substantial evidence of a sale or an offer to sell.

[See 15 R. C. L. 350.]

**Sale — what constitutes.**

3. A contract of sale cannot be made without the assent of the minds of two parties at the same time to the terms of the sale, to the subject-matter and consideration of the sale.

[See 23 R. C. L. 1186.]

**Evidence — presumption — sale of liquor.**

4. There is a presumption against

the unlawful sale of intoxicating liquor.

[See 10 R. C. L. 875; 15 R. C. L. 394.]

**— quantity of proof.**

5. To warrant a conviction of unlawfully selling intoxicating liquor the government must prove an alleged sale beyond a reasonable doubt.

[See 8 R. C. L. 218 et seq.]

**— character of evidence.**

6. One cannot be convicted of unlawfully selling intoxicating liquor upon evidence that is as consistent with innocence as with guilt.

(Smith, Circuit Judge, dissents.)

**ERROR** to the District Court of the United States for the Eastern District of Arkansas (Trieber, District Judge) to review a judgment convicting defendant of selling whisky in less quantities than 5 wine gallons without paying the retail liquor dealers' tax. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Sanborn, Hook and Smith, Circuit Judges.

Messrs. Gardner K. Oliphint, James E. Hogue, Douglas Heard, and Edward B. Downie for plaintiff in error.

Messrs. W. H. Rector and W. H. Martin for the United States.

Sanborn, Circuit Judge, delivered the opinion of the court:

The defendant below was indicted and convicted of selling whisky in less quantities than 5 wine gallons at the same time without paying a tax as a retail liquor dealer. Comp. Stat. §§ 5971 and 5973. He com-

plains that the court refused to instruct the jury to return a verdict in his favor at the close of the evidence. The United States introduced testimony to the effect that the defendant received whisky in packages regularly up to November, 1915; that in that month he received two packages, one marked 24 pints, consigned to Jack McGee, and the other consigned to J. Burke; that these packages were delivered in an old outhouse where a German used to crate eggs; and that prior to the delivery of these packages the defend-

ant had received other packages of like character, consigned to himself. The United States called as a witness one McDaniel, who testified that he purchased one bottle of whisky of the defendant in November, 1915, on a Saturday night; that he did not give him the money, but told him he would see him Tuesday; that on Tuesday he offered him his money, but the defendant said he was not selling whisky and refused to take it; and that meanwhile the defendant had been arrested.

Being asked how he got the whisky, this colloquy followed:

A. I saw him on a side street, and took it out of his pocket, and told him I would see him Tuesday.

Q. How come you to do that?

A. Well, I saw the whisky, and took it out of his pocket.

Q. What did you say about paying him?

A. I told him I would see him Tuesday. . . .

On cross-examination he testified, among other things, in this way:

Q. Now, did you not put your arms around him and pull it out of his pocket?

A. Yes; I did.

Q. You did not say anything to him about paying for it?

A. I did. I told him I would see him Tuesday.

There was no other testimony tending to show any sale of any whisky by the defendant, if, indeed, this so tends. The defendant testified that he never sold any whisky to McDaniel or to any other person; that one Saturday night he and McDaniel had been drinking earlier in the evening, and he met him again; that he had a little whisky in a bottle in his pocket; that McDaniel grabbed hold of him, took it out of his pocket, and commenced to drink it right on the sidewalk; that he persuaded him to go into the alley, where they both took a drink; that he asked McDaniel to give the bottle back to him, but that he put it in his pocket; and that nothing was ever said between them about paying for

it. The defendant and Mr. Burke testified that the package of whisky consigned to Burke was Burke's, and was not the defendant's; that Burke bought it, and paid \$12 for it; that the defendant did not contribute to the purchase of it, and had no interest in it; that Burke gave him an order for it, and told him to take it out and take care of it for him. The defendant testified that he never received the package of whisky consigned to McGee, and that he never had any interest in it. Mr. Ernest Cook testified that McGee was his brother-in-law; that he and McGee occasionally bought whisky together, and had it consigned, sometimes to one of them, and sometimes to the other; that the package addressed to McGee was Cook's; that he told the express driver to deliver it to the defendant, but that it was in fact delivered to him (Cook). Mr. Burke and Mr. Cook both testified that McDaniel told them that he never bought any whisky of the defendant. There was no other substantial evidence in this case, and upon the testimony which has been recited the jury and the court below have founded a judgment against the defendant, and a sentence against him of a fine of \$100 and imprisonment for a year and a day.

But it is indispensable to the maintenance of this verdict and judgment that there should have been substantial evidence of a sale or of an offer to sell some of the whisky by the defendant.

"A sale is a contract for the transfer of property from one person to another for a valuable consideration." 7 Words & Phrases, "Sale," pp. 6291, 6292.

"To constitute such a sale, there must be the assent of the two parties; there must be a vendor and a vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties attempt to throw

Intoxicating  
liquor—unlaw-  
ful sale—convic-  
tion.

over the transaction, with a view of evading the penalty of the law, can avail them, if in truth such sale is found to have taken place." *Com. v. Thayer*, 8 Met. 525, 526.

But one party cannot make a contract of sale. No such contract can be made without assent of the minds of two parties at the same time to the sale and to the terms of the sale, to the subject-matter and the consideration of the

Sale—what constitutes.

sale; and as the alleged contract here was illegal, and its making criminal, the legal presumption was that the defendant did not make it, and this presumption prevailed until he was

Evidence—presumption—sale of liquor.

proved to have done so beyond a reasonable doubt. The burden was upon the government to

—quantity of proof.

make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Our

—character of evidence.

search for substantial evidence in this record that the defendant ever consented to sell any whisky to McDaniel has been in vain. The latter's testimony goes no further than this: That he saw the defendant on a side street on a Saturday night; that he put his arms around him and took a bottle of whisky out of the defendant's pocket; that he told him he would see him Tuesday; that he offered to pay him something on that day, and the defendant refused to take the money. The statements in his testimony that he bought the whisky and that he said something about paying for it, to wit, that he would see the defendant Tuesday, are nothing but his inferences from what he testified was said and done on that Saturday night, and they are immaterial. There is no evidence here that the defendant ever consented to the

—to prove sale—sufficiency—taking from person.

taking of the whisky by McDaniel; there is no evidence that he consented to receive any promise to pay any price

or any consideration for the whisky; there is no evidence of the agreement of the minds of McDaniel and the defendant to the amount of the pretended price for it, or to any contract of any kind about it. Not only this, but the evidence is not only as consistent with the innocence of the defendant as with his guilt,—as consistent with the conclusion that he did not consent to make a contract to sell the whisky as that he did,—but it is more so. It is more consistent with the view that on that Saturday night McDaniel and the defendant were drinking together in a jovial mood; that such a thought as the selling of whisky to his companion never entered the mind of the defendant.

As there is no substantial evidence of the alleged sale, the judgment below must be reversed, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

**Smith**, Circuit Judge, dissenting:

I find myself unable to concur in the foregoing opinion.

The defendant was indicted for selling liquor at retail without having first paid the special tax therefor, as required by the United States statutes. The opinion says that "as the alleged contract here was illegal, and its making criminal, the legal presumption was that the defendant did not make it, and this presumption prevailed until he was proved to have done so beyond a reasonable doubt."

As I understand it, this case in no wise involved the legality of the sale, except coupled with the failure to pay the special tax as a retail liquor dealer, as required by the United States statutes. That the defendant at one time owned the liquor in question there can be no doubt. The witness McDaniel got the liquor from the possession of the defendant and consumed it. He either bought it or stole it. He testified that he purchased the bottle one Saturday night, and told the defendant he would see him Tuesday. Before Tuesday the defendant had been ar—

rested. On Tuesday he was offered the money for the whisky, and then defendant said he was not selling whisky. The opinion says: "To constitute such a sale, there must be the assent of the two parties; there must be a vendor and a vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties may attempt to throw over the transaction, with a view of evading the penalty of the law, can avail them, if in truth such sale is found to have taken place."

If this were a case against McDaniel, and he had been convicted of larceny of this liquor, I should unhesitatingly say that the conviction should be reversed; that, so far from there being any evidence of larceny, the evidence quite conclusively showed the acquiescence of Scoggins in the acquirement of the liquor by

McDaniel; and, if that is the way I should feel about a conviction of larceny of McDaniel, I see no reason why I should not feel that a conviction of the defendant should be affirmed.

If the defendant acquiesced in the acquirement of this liquor by McDaniel, he was guilty of the offense charged, and this judgment should be affirmed. If he did not so acquiesce, McDaniel stole the liquor; and I think neither one of my associates would claim there was sufficient evidence of that fact. The whole question of how McDaniel acquired the liquor was submitted to the jury, and no exception was taken to any of the instructions, and the jury found that Scoggins sold the bottle of liquor to McDaniel.

Manifestly, from my viewpoint, this case ought to be affirmed upon the authorities and the reasoning of the opinion.

### ANNOTATION.

#### **Taking intoxicating liquor from person of defendant as a sale.**

Although the question as to the evidence which will establish a sale of intoxicating liquor within the criminal statutes has been presented with reference to a wide variety of facts and circumstances, a diligent search has failed to disclose any cases other than the reported case (*SCOGGINS v. UNITED STATES*, ante, 1093) in which the liquor was taken from the person of the defendant, and, as he claims, without his consent. It has been held quite generally, however,

that tricks or subterfuge will not be permitted to prevent the transaction being a sale. If the intent to pass title to the liquor for a consideration exists, the form which the transaction takes has not been regarded as material. Obviously, a slight variation in the evidence in the reported case would have made the question a proper one for the jury. The dissenter was of the opinion that the evidence as it stood was sufficient for the purpose.  
W. A. E.

JOHN GRIBBLE, Appt.,

v.

STATE OF TEXAS.

*Texas Court of Criminal Appeals — February 12, 1919.*

(— Tex. Crim. Rep. —, 210 S. W. 215.)

#### **Homicide — negligence — overturning boat.**

1. One who, with knowledge that an occupant of a boat cannot swim, overturns the boat and causes the death of the occupant, is guilty of negligent homicide.

[See note on this question beginning on page 1104.]

**Appeal — time — construction of statute.**

2. A statute providing thirty days after adjournment of court for preparing statement of facts and bill of exceptions in case of appeal from a judgment in a county court will not be construed to mean a county court having an official stenographer.

[See 2 R. C. L. 144.]

**Statute — construction — rules.**

3. The court need look to rules of construction only when the statute is ambiguous and its language not clear.

**— repeal — scope.**

4. All former provisions of statutes relating to time for preparing statements of fact and bills of exceptions for appeals were repealed by a statute fixing the time to be allowed for such matters and expressly repealing a specified statute "and all other laws and parts of laws in conflict with this act."

**Homicide — negligence — degree.**

5. Under the Texas statute, unless a negligent homicide was a misdemeanor or an act which would support a civil action, it is in the first degree.

[See 13 R. C. L. 774-776.]

**Evidence — hearsay — character.**

6. Hearsay opinion that a man charged with negligent homicide in overturning a boat and causing the death of an occupant was a cautious man is not admissible.

[See 10 R. C. L. 961; 13 R. C. L. 914.]

**Appeal — material evidence.**

7. Comment by the court upon the

weight of material and admissible evidence in the presence of the jury is reversible error.

**— refusal to charge — general instructions.**

8. Refusal of a requested instruction which is substantially covered in the general charge is not reversible error.

[See 14 R. C. L. 751.]

**Trial — requested instruction — refusal.**

9. A requested instruction on the weight of the evidence is properly refused.

[See 14 R. C. L. 741 et seq.]

**Homicide — negligence — co-operation.**

10. One indicted alone for negligent homicide in overturning a boat and causing the death of an occupant is guilty if he committed the offense alone or by the aid of another.

[See 13 R. C. L. 858.]

**On Petition for Rehearing.**

**Appeal — comments on evidence — error.**

11. Comments by the trial court upon evidence will not be considered reversible error unless it reasonably appears that injury could have resulted therefrom.

**— comment on inadmissible evidence.**

12. The statement by the court, in overruling the state's objection to evidence offered by accused, that he will admit the evidence because it will do so little harm, is a comment on evidence requiring reversal, although the evidence is not in fact admissible.

**APPEAL** by defendant from a judgment of the Coryell County Court (Bell, J.) convicting him of negligent homicide. *Reversed.*

The facts are stated in the opinion of the court.

Mr. T. R. Mears, for appellant:

The statement of the court in the presence and hearing of the jury, that he would admit certain evidence because it would do so little harm, was error.

Wilson v. State, 17 Tex. App. 525; McCuller v. State, 36 Tex. Crim. Rep. 213, 61 Am. St. Rep. 847, 36 S. W. 585; Kirk v. State, 35 Tex. Crim. Rep. 224, 32 S. W. 1045; Kemper v. State, 63 Tex. Crim. Rep. 1, 138 S. W. 1025; Melton v. State, 58 Tex. Crim. Rep. 86, 124 S. W. 910.

It was the duty of the court to charge that before defendant could be

convicted, the complete destruction of the life of the deceased must be caused by the action of the defendant.

Armstrong v. State, 48 Tex. Crim. Rep. 413, 88 S. W. 216.

Where the state introduces evidence to the effect that the death of the deceased was caused by another person than the defendant, the court should charge that the burden rested on the state to disprove that the death or drowning was caused by another person than the defendant, and on failure to do so, the defendant should be acquitted.

Giesecke v. State, 64 Tex. Crim. Rep. 531, 142 S. W. 1179; Pharr v. State, 7 Tex. App. 479; Roberts v. State, 60 Tex. Crim. Rep. 23, 129 S. W. 611; Grant v. State, 60 Tex. Crim. Rep. 358, 132 S. W. 350.

The charge of the court must be limited by the case set forth by the indictment, and must follow the indictment.

Tooney v. State, 5 Tex. App. 163; Sharpe v. State, 17 Tex. App. 498; Lott v. State, 17 Tex. App. 598; Jones v. State, 22 Tex. App. 680, 3 S. W. 478; Levine v. State, 22 Tex. App. 683, 3 S. W. 660; Bradford v. State, 25 Tex. App. 723, 9 S. W. 6; Surrell v. State, 29 Tex. App. 321, 15 S. W. 816; Whitcomb v. State, 30 Tex. App. 270, 17 S. W. 258; Otero v. State, 30 Tex. App. 454, 17 S. W. 1081; Ham v. State, 4 Tex. App. 645; Clubb v. State, 14 Tex. App. 192.

It is error for state counsel, in his closing argument, to get before the jury a fact which he would not be entitled to prove, the effect of which is damaging to the defendant.

Jenkins v. State, 49 Tex. Crim. Rep. 461, 123 Am. St. Rep. 812, 93 S. W. 726; Rodrigues v. State, 125 S. W. 404; McKinley v. State, 52 Tex. Crim. Rep. 184, 106 S. W. 342; Askew v. State, 54 Tex. Crim. Rep. 416, 113 S. W. 287.

Mr. E. B. Hendricks, Assistant Attorney General, for the State.

Lattimore, J., delivered the opinion of the court:

This is a misdemeanor case, and it appears from the record that appellant's bills of exceptions were filed more than twenty days after the adjournment of court. An order was made by the court, when overruling appellant's motion for a new trial, allowing him thirty days after adjournment of court in which to file statement of facts and bills of exceptions. The statement of facts and bills of exceptions were filed within thirty days after such adjournment.

The assistant attorney general has moved to strike out the bills of exceptions on file herein on the ground that they were not filed within twenty days after the adjournment of the county court, and consequently came too late, even

though filed within thirty days after the said adjournment.

There has been much misapprehension among the courts and litigants as to the course to be pursued in regard to filing statements of facts and bills of exceptions in misdemeanor cases, and many cases have been dismissed in recent years when the parties at interest seemed to think themselves within what appeared to be the direction of the statute in these matters. In view of this fact, we wish to review some of the legislation and decisions bearing upon the question of the time for filing such matters in appeals from county courts, in the hope of arriving at some harmony of understanding.

The 30th legislature, Acts 1907, p. 446, granted to parties trying causes in both district and county courts, the right, by having an order to that effect entered on the docket twenty days after adjournment of the court within which to file statements of facts and bills of exceptions. The same legislature, later in the term, by an act which appears on page 509 of the acts of said legislature, passed a bill which was the re-enactment of what is commonly called the "Stenographers' Bill," a part of which bill provided that all statements of facts and bills of exceptions which were filed as provided in said act would be in time if filed within thirty days after the adjournment of the court. This session of the legislature adjourned April 12, 1907, and said bill took effect thirty days after adjournment. This court, in a number of cases arising during the latter part of 1907 and 1908, pointedly held that under the provisions of the act appearing on page 509, which is chapter 24 of the laws of said 30th legislature, statements of facts and bills of exceptions, in cases appealed from district courts, were properly filed within thirty days after adjournment, but that said act did not apply to appeals from county courts. The act in question did not, in ex-

press terms, repeal the act first passed by said legislature, allowing twenty days for filing such matters in both district and county courts; but this court seemed to construe that said law no longer had application to appeals from district courts, the inference being from said decisions that it appeared to the court that said Stenographer's Bill, by implication, at least, repealed said act giving twenty days after adjournment, in so far as it affected district court cases. As stated, these decisions frequently pointed out that in appeals from county courts no change had been made in the law on the point under consideration. See *Howard v. State*, 53 Tex. Crim. Rep. 378, 111 S. W. 1038; *Dobbs v. State*, 54 Tex. Crim. Rep. 579, 113 S. W. 921; *Nichols v. State*, 55 Tex. Crim. Rep. 211, 115 S. W. 1196; *Webb v. State*, — Tex. Crim. Rep. —, 117 S. W. 131.

Such was the situation when the legislature met in 1909 and passed a law on this subject. See Acts 1909 (1st Called Sess.) p. 374. Section 7 of this act reads as follows: "When an appeal is taken from the judgment rendered in any cause in any district court or county court, the parties to the suit shall be entitled to and they are hereby granted thirty days after the day of adjournment of court in which to prepare and file a statement of facts and bills of exception; and upon good cause shown the judge trying the cause may extend the time in which to file a statement of facts and bills of exception. Provided, that the court trying such cause shall have power in term, time or in vacation, upon the application of either party, for good cause, to extend the several times as hereinbefore provided for the preparation and filing of the statement of facts and bills of exception, but the same shall not be so extended so as to delay the filing of the statement of facts, together with the transcript of record, in the appellate court within the time prescribed by law, and when the parties fail to agree upon a statement of facts, and that

duty devolves upon the court, the court shall have such time in which to do so, after the expiration of the thirty days as hereinbefore provided, as the court may deem necessary, but the court in such case, shall not postpone the preparation and filing of such statement of facts and bills of exception so as to delay the filing of same, together with a transcript of the record in the appellate court within the time prescribed by law. Provided, if the term of said court may by law continue more than eight weeks, said statement of facts and bills of exception shall be filed within thirty days after final judgment shall be rendered unless the court shall by order entered of record in said cause extend the time for filing such statement and bills of exception."

The language of this quoted enactment is plain and unambiguous. It says: "When an appeal is taken from the judgment . . . in any . . . county court, the parties . . . shall be entitled to . . . thirty days after the day of adjournment . . . in which to prepare and file statement of facts and bills of exception."

We cannot believe the legislature wrote county courts and county court procedure in this act carelessly or without purpose. They very well knew that such courts had no official stenographers, and if it be asserted that they only intended giving the right to file such statements and bills within thirty days after adjournment, to county courts in cases where stenographers were appointed, an adequate reply would be that such construction would be a contradiction of the plain words of the statute as written, and would be construing into the law that which the legislature could and would have so stated in a few words had it been their intention.

As we understand it, we need only look to rules of construction when the law is ambiguous and its language not clear, which is not the case in this act.

Appeal—time—  
construction of  
statute.

Statute—con-  
struction—rules.



The first misdemeanor appeal to come before this court after the taking effect of the Act of 1909, in which this question was involved, was *Sanders v. State*, 60 Tex. Crim. Rep. 34, 129 S. W. 605, in which Judge McCord held the act to apply to statements of fact in an appeal from a county court of Erath county, in which he held that the court might consider a statement of facts filed more than thirty days after the adjournment of the term, where the court had made a proper order during the term, extending the time for such filing. In the *Sewall Case*, — Tex. Crim. Rep. —, 130 S. W. 1003, an aggravated assault conviction in 1910, Judge Ramsey says the statement of facts was filed more than thirty days after adjournment, and therefore was not filed in time. In *Brunk v. State*, 60 Tex. Crim. Rep. 263, 131 S. W. 1125, appealed from the county court of Hamilton county, Judge Davidson says: "The court adjourned on the 23d of October. The statement of facts was filed on the 23d of November. This filing occurred one day too late. A statement of facts must be filed within thirty days . . . after adjournment of the term."

These cases are cited as showing what seems to have been their construction of the Act of 1909 prior to the rendition of the opinion in the *Mueller Case*, 61 Tex. Crim. Rep. 544, 135 S. W. 571, in which the court struck out a statement of facts in a county court cause upon the ground that the statement, being filed more than twenty days after adjournment, came too late. The court in the *Mueller Case* uses the following language: "By many it seems to have been thought that chapter 39 of the act of the 31st legislature, p. 374, repealed chapter 7 of the act of the 30th legislature. By referring to that act it will be seen that it repeals only chapter 24 of the act of the 30th legislature (the Stenographers' Act), providing their appointment, etc. In the

act of the 31st legislature, in § 1, it is provided that the terms of the latter law apply only in the event of the appointment of a court stenographer. In this law there is no provision for the appointment of a court stenographer in criminal cases tried in the county court. By its terms it only applies to and authorizes the appointment of stenographers in criminal cases in district courts."

We think the court is wrong in saying that the Act —repeal—scope. of 1909 repealed only chapter 24, Acts of the 30th Legislature. The repealing clause of chapter 39, Acts of the 31st Legislature, page 374, Acts 1909, is as follows: "That chapter 24, p. 509, Acts of the First Called Session of the Thirtieth Legislature of the State of Texas, providing for the appointment of court stenographers, prescribing their duties, and regulating their charges, and all other laws or parts of laws in conflict with this act, be and the same are hereby expressly repealed; provided, however, that nothing in this act shall be so construed as to prevent parties from preparing statements of facts on appeal independent of the transcript of the notes of the official shorthand reporter. Provided, the provisions of this act as to preparing and filing statements of facts and bills of exception shall apply only to cases hereafter tried; as to cases heretofore tried the law now in force shall govern."

From which it clearly appears that not only was chapter 24 repealed, but also all other laws in conflict therewith. We might observe, in this connection, that neither chapter 24 of the Acts of the 30th Legislature, nor chapter 39 of the Acts of the 31st Legislature, expressly repealed chapter 7 of the Acts of the 30th Legislature with reference to appeals from district courts; but it has apparently been conceded by this court, in all its opinions, that said chapter 7 has been repealed as to such district

court procedure, because it was in necessary conflict with the later enactments.

The Mueller Case was followed by the Mosher Case, 62 *Tex. Crim. Rep.* 42, 136 S. W. 467, and by others subsequently; the effect of which decisions was to hold that a statement of facts and bills of exceptions filed more than twenty days after the adjournment of a county court came too late.

The latest statute on the subject seems to be the Act of 1911, chapter 119, § 7, p. 264 of the Acts of the Regular Session (Vernon's Sayles's Anno. Civ. Stat. 1914, art. 2073), which almost in terms re-enacted § 7 of the Act of 1909, quoted above, and said section is carried into our Code Criminal Procedure as article 845. An examination of said section and of article 845, Code Crim. Proc. discloses that the plain language directs the litigant how he may appeal his case as far as the time for filing statement of facts and bills of exception is concerned.

That much confusion has resulted from the efforts of litigants to get their cases before this court under the apparent direction of this article, which, under the Mueller and Mosher Cases cited, was held to have no application to appeals from county courts in criminal matters, is very evident from the number of those cases appealed since the decisions in the above-mentioned cases, and in which statements of facts and bills of exceptions filed well within the time fixed for such action in appeals from county courts under the provision of article 845 have been stricken out, upon motion, because not filed in time.

This, in the opinion of the writer, at least, is very unfortunate. The requisites of appeal in all matters of practice are not easily kept in mind, and most careful litigants go to the statutes to find the same, and our experience is that able lawyers representing them from time to time need to do the same, and we think it is very unfortunate both for the profession and for the appellants to

find any lack of harmony between the plain language of the statute and the holdings of this court.

We are not sufficiently wedded to the doctrine of stare decisis, in matters of criminal procedure at least, to deny entrance and consideration here to one who has followed the plain road indicated by a statutory signboard in trying to get here with what he believes to be his wrongs suffered on a trial in the court below.

We overrule the motion of the assistant attorney general to strike from the record these bills of exceptions, and hope to bring about harmonious understanding of the rules by saying that the provisions of article 845 of our Code Crim. Proc. in the opinion of this court, govern appeals in misdemeanor cases as applied to filing of statements of facts and bills of exceptions.

Appellant was convicted in the county court of Coryell county of negligent homicide of the first degree, and his punishment fixed at one year's confinement in the county jail.

It is charged against appellant that he negligently and carelessly turned over a boat in which was a small boy, whose death by drowning was caused therefrom.

Appellant's first contention was that the indictment was defective, in that he claims that the charge of negligent homicide was of the second degree, and not of the first degree. To this we cannot agree. The act, if any, of appellant which caused the death of the boy, was the turning over of the boat, and this act is not a misdemeanor, nor, per se, would the same give just occasion Homicide—negligence—degree. for a civil action.

See Penal Code, art. 1124. Unless the causative act fall within one of these two classes named in the statute referred to, the negligent homicide would be of the first degree.

We think the evidence sought to be elicited from appellant's witness Harris, as set out in his second as-

signment of error, was clearly erroneous, and that the witness should not have been permitted to state that he considered appellant a

**Evidence—  
hearsay—character.**

cautious man. This was merely hearsay opinion of said witness and was not admissible. The remark of the court was erroneous; but, as the evidence was inadmissible in itself, such error on the part of the court was not reversible. The authorities cited by appellant

**Appeal—material  
evidence.**

correctly hold that comments of the court on matters material and admissible, where same are upon the weight of the evidence, and in the presence of the jury, are error.

The charge complained of in appellant's third assignment was substantially given by the court in his main charge, and

**—refusal to  
charge—general  
instructions.**

**Trial—requested  
instruction—  
refusal.**

the other special charge of appellant was on the weight of the testimony and erroneous.

We fail to see any error on the part of the trial court in telling the jury that appellant, who was indicted alone, but who was accompanied by another person who seemed to be

**Homicide—  
negligence—  
co-operation.**

acting with him, would be guilty if he, or he and his companion, acting together, committed the offense. This disposes of the fifth ground of complaint made by the appellant.

The remarks of the county attorney in closing the case for the state, as explained by the court in his qualification to the sixth bill of exceptions, seem to have been in response to the argument of counsel for the appellant.

We have carefully reviewed the evidence in this case. The testimony of the six or seven boys, who were in swimming when the appellant and his companion came up to where they were and stated they were going to turn over the boat in which the deceased was, seems to

agree as to the main facts; that is, as to what appellant said when he came up, and further, that he was told by the deceased and several of the others that the deceased could not swim; and also to the fact that he did turn over the boat and that thereby deceased was drowned. Appellant denied all these substantial facts; said he did not turn over the boat, that, in fact, it was not turned over, and that he did not make the statements attributed to him by the boys. All these issues were fairly submitted to the jury and by them decided against appellant, and we see no sufficient reason to disturb their verdict.

The cause is affirmed.

A motion for rehearing having been granted, the following additional opinion was handed down on March 12, 1919:

In this case appellant has filed an able and well-prepared motion for rehearing, each ground of which has been carefully examined, and we are unable to sustain any of appellant's contentions, except that we believe we were in error in not upholding his first contention as set forth in his second bill of exceptions.

It therefore appears that, when appellant was introducing his evidence, he asked the witness Harris, in view of his knowledge of appellant, whether he would or would not say that appellant was a cautious, prudent man. To this the state objected for various reasons, and we think the question subject to objection. Thereupon the court made the following remark to state's counsel: "Well, you may be right, but it will do so little harm that I believe I will admit the testimony."

It will be observed that this remark of the trial court was in direct violation of article 787, Code Crim. Proc. which is as follows: "In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case but shall simply decide whether or

not it is admissible; nor shall he, at any stage of the proceedings previous to the return of a verdict, make any remark calculated to convey to the jury his opinion of the case."

Violations of the injunctions of this article have been the subject of much discussion by the courts, and have given rise to conflicting opinions as to whether this remark or the other, of the trial court, was calculated to convey to the jury the judge's opinion of the case on trial.

It is clear that the framers of our law recognized the strategic position occupied by the judge of a trial court and the weight which the jury attach to his words and acts; and in article 736, Code Crim. Proc., the judge is forbidden to discuss the facts or use any argument in his charge calculated to arouse the sympathy or excite the passion of the jury; and we also see in article 842, Code Crim. Proc., that a judge is forbidden to sum up, discuss, or comment on the evidence in granting or refusing a motion for a new trial. Article 787, *supra*, is plain, and it is to be regretted that departures from its provisions make difficult the question as to which are, and which are not, reversible errors.

In the McGee Case, 37 Tex. Crim. Rep. 668, 40 S. W. 967, this court held it was not reversible error for the trial court to say, in overruling the objection of the state: "It is not very material, but it may go to the jury." The trial courts were also, in that opinion, admonished of the danger of expressing an opinion in such matters; but the court held that if the offered testimony was immaterial, or slightly material, and could have had no appreciable effect on the jury, this court would not reverse for such comment.

See similar expressions in *Huntley v. State*, — Tex. Crim. Rep. —, 34 S. W. 948. But in the *Simmons Case*, 55 Tex. Crim. Rep. 441, 117 S. W. 141, citing the *Moore Case*, 33 Tex. Crim. Rep. 306, 26 S. W. 403, and ruling on an objection made by defendant which was sustained, ac-

companied by the following comment of the trial court, "If there had been any objection made at the start, I might have sustained it on the ground that it was immaterial and irrelevant," Mr. Justice Ramsey, rendering the opinion, says: "The rule laid down in the first case quoted [*Moore Case, supra*] ought to be strictly and literally observed; that is, the court ought, without discussion or comment, to rule and either admit or reject proffered testimony. The fact that a statement of the court as to the importance or unimportance of testimony is stated from the bench would often make it no less hurtful than if contained in the written charge. The trial judge is to the jury the Lord's anointed; his language and his conduct have, to them, a special and peculiar weight. Literally, in such matters, his communications should be, yea, yea, and nay, nay."

In approving substantially the opinion of Judge Ramsey, we would not be understood as abrogating the well-settled rule, found in many cases, that remarks of trial courts, in particular comments on evidence, are not necessarily

**Appeal—com-  
ments on evi-  
dence—error.**

reversible error; the rule being that they should not be so considered unless it reasonably appears that injury could have resulted therefrom.

In the instant case, upon more mature reflection upon the effect of the remarks of the court, we are convinced that we were in error in the original opinion in holding that no injury could have resulted from same.

The state had rested its case, and, as disclosed by the statement of facts, the witness Harris was placed upon the stand as appellant's first witness and was asked the question, as above set forth. As stated, the court overruled the state's objection with the statement that "it will do so little harm I believe I will admit the testimony." The average juror very well knows that the court will not admit testimony unless he thinks it to be ma-

terial, and we think the very admission of this evidence would carry with it to the jury the impression that the court believed it material. Now, when the court says, "It can do no harm," or, "It can do so little harm," there seems to us serious danger that this, in the minds of the jury, would give rise to the belief that the court was of the opinion that the state's case was so strong, or so thoroughly made out, as that the material evidence of the appellant could do little harm. This is more than the expression of the court in the McGee Case or in the Huntley Case; we

—comment on inadmissible evidence.

think it is more in line with the Simmons Case, *supra*, Chancey v. State, 58 Tex. Crim. Rep. 56, 124 S. W. 426, Moore Case, 33 Tex. Crim. Rep. 306, 26 S. W. 403, and the Bradshaw Case, 44 Tex. Crim. Rep. 222, 70 S. W. 217, 15 Am. Crim. Rep. 608. There can be no question but that it is a direct comment on the weight of the evidence, and we cannot say it was not calculated to convey to the jury the court's opinion of the merits of the case.

The motion for rehearing is therefore granted, and the judgment is reversed, and the cause remanded for a new trial.

### ANNOTATION.

#### Negligent homicide by overturning boat.

The reported case (GRIBBLE v. STATE, *ante*, 1096) is probably a case of first impression; and the books seem to afford no cases of "rocking the boat," which has caused so many drownings and added a proverbial phrase to the language.

Reference may be made in this connection to *Rex v. Waters* (1834) 6 Car. & P. (Eng.) 328, where the prisoner was a seaman on board a schooner lying in the river Thames, and the deceased was a person in the habit of going about in a boat among the ships, selling spirits, etc., and they had a dispute about paying for some spirits,

both being intoxicated. After a good deal of rough joking between them, the deceased's boat being alongside the schooner, the prisoner pushed it with his foot to get rid of deceased, who, in endeavoring to prevent his boat from drifting away, lost his balance and fell overboard and was drowned. It was held that the facts shown did not amount to manslaughter.

Collisions and the accidental upsetting of one boat by another, or the upsetting of a boat through poor or careless management, are beyond the scope of this note. B. B. B.

J. E. YODER, Appt.,

v.

EDITH YODER, Respt.

*Washington Supreme Court (Dept. No. 2) — February 7, 1919.*

(— Wash. —, 178 Pac. 474.)

**Divorce — dismissal of action — effect on order for attorneys' fees.**

1. Parties to a divorce suit cannot, after an order has been passed allowing the wife suit money and attorneys' fees, deprive the attorneys of the allowance made them by effecting a reconciliation and dismissing the action.

[See note on this question beginning on page 1109.]

— duty — with respect to reconciliation.

2. It is the duty of both trial and appellate courts to lay no straw in the way of the reconciliation of estranged spouses at any stage of a proceeding for divorce.

[See 5 R. C. L. 878; 9 R. C. L. 260, 261.]

— cutting off compensation of counsel.

3. Parties to a divorce suit cannot, by effecting a reconciliation, summarily and without consideration dispose of counsel who in good faith performed services and expended money in behalf of the defendant wife.

[See 2 R. C. L. 1002, 1050.]

— encouragement of defense.

4. The law encourages the thorough defense of divorce actions.

Attorney and client — ownership of attorneys' fees.

5. The sum awarded the wife in a divorce action as an attorney's fee is not hers, but her attorneys'.

[See 1 R. C. L. 910.]

Judgment — power to satisfy — attorneys' fees.

6. Although a judgment awarding attorneys' fees to a wife in a divorce

action stands in her name, she is a mere trustee without power to satisfy the judgment until the attorneys have been paid.

[See 1 R. C. L. 919.]

Attorney and client — right to suit money.

7. An allowance of suit money to a wife in a divorce proceeding belongs to her attorneys only to the extent of their actual necessary expenses in the efficient preparation of her defense in order to secure a fair and impartial trial.

Divorce — reconciliation — effect on allowance.

8. A reconciliation terminates a divorce action, and the allowance for temporary alimony falls therewith, as also any unexpended balance of an allowance of suit money.

[See 1 R. C. L. 915.]

Attorney and client — fees after termination of suit.

9. Upon reconciliation of the parties to a divorce suit the attorneys can recover through such action only the fees which have already been allowed them by the court.

[See 1 R. C. L. 915, 916.]

APPEAL by plaintiff from an order of the Superior Court for Stevens County allowing temporary alimony and counsel fees in a suit for a divorce, and motion to vacate, set aside, and annul the order appealed from because of settlement between the parties. *Motion denied. Order affirmed.*

The facts are stated in the opinion of the court.

Messrs. F. M. Turner and W. W. Zent, for appellant:

If defendant was entitled to any allowance the court grossly abused its discretion in entering the order complained of, and the sums ordered paid are excessive and unreasonable.

1 R. C. L. 893; 14 Cyc. 749, 755, 757; Harding v. Harding, 144 Ill. 588, 21 L.R.A. 310, 32 N. E. 206; Sullivan v. Sullivan, 49 Wash. 508, 95 Pac. 1095; Jones v. Jones, 72 Wash. 517, 130 Pac. 1125.

The complaining party in a divorce proceeding may dismiss his or her suits at any time before the final decree, provided there has been no cross bill or answer asking affirmative relief.

Eisenbach v. Eisenbach, Ann. Cas. 1917A, 1197 and note, 176 Mich. 354, 142 N. W. 345; Coon v. Coon, 163 Mich. 644, 129 N. W. 12.

3 A.L.R.—70.

The husband is not liable for compensation to his wife's attorneys in a divorce case.

Zent v. Sullivan, 47 Wash. 315, 13 L.R.A. (N.S.) 244, 91 Pac. 1088, 15 Ann. Cas. 19; Humphries v. Cooper, 55 Wash. 376, 133 Am. St. Rep. 1036, 104 Pac. 606; 1 Cyc. 20; State ex rel. Arthur v. Superior Ct. 58 Wash. 97, 107 Pac. 876; State ex rel. Bogle v. Superior Ct. 63 Wash. 96, 114 Pac. 905; Hutts v. Martin, 134 Ind. 587, 33 N. E. 676.

Defendant's attorneys have no right or authority to appear for or represent her in any capacity, and we believe cannot prevent the parties to the action from settling and adjusting their matrimonial difficulties.

Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480; Kuntz v. Kuntz, 80 N. J. Eq. 429, 83 Atl. 787; McCulloch v. Murphy, 45 Ill. 256; Gordon v. United

States Fidelity & G. Co. 76 Misc. 203, 134 N. Y. Supp. 891; Weaver v. Weaver, 33 Ga. 172.

Messrs. Turner, Nuzum, & Nuzum for respondent.

**Holcomb, J.**, delivered the opinion of the court:

Appellant on August 7, 1918, filed his complaint in the superior court against respondent, praying for a divorce, alleging two statutory grounds in two separate causes of action. August 27, 1918, respondent filed her answer, admitting the marriage, denying the grounds alleged for a divorce in toto and in detail, prayed for the dismissal of the action, and at the same time filed her motion, supported by affidavits, for temporary alimony, suit money, and attorneys' fees, to all of which appellant replied. This motion being heard by the court on August 28, 1918, on the pleadings, affidavits, and counter affidavits, the trial court made and entered an order allowing temporary alimony in the sum of \$200 per month from August 1, 1918, the first month's instalment to be paid instanter and thereafter on the 1st day of each month; \$1,500 suit money to be paid to respondent's attorneys or into the registry of the court, on September 3, 1918, and to be disbursed by them in preparing her defense; and the sum of \$3,000 attorneys' fees to be paid into the registry of the court or to respondent's attorneys or their order, on September 3, 1918.

The court reserved the power to make other and further allowances for suit money and attorneys' fees, either pendente lite or at the final hearing, as justice might require.

From this order appellant forthwith appealed and gave his appeal and supersedeas bonds in the sum fixed by the court.

The cause pending here on appeal and a notice to dismiss the appeal were set to be heard on December 17, 1918. On December 9, 1918, respondent made her affidavit to the effect that she and her husband, the appellant, had voluntarily settled, compromised, and adjusted all their

differences, resumed their marital relations, were again living together as man and wife, and that she had so notified her attorneys, Messrs. Turner, Nuzum & Nuzum, in writing, on December 9, 1918, and dismissed them as her attorneys and notified them not to appear further in her behalf; that she "is ready, able, and willing to settle with her attorneys for all compensation due them for services rendered her in said cause," etc. Appellant's attorneys presented their motion to vacate, set aside, and hold for naught the order of the lower court appealed from, upon the day of the hearing, and supported the same by the affidavit above mentioned of respondent, and affidavit of appellant to the effect that the parties had voluntarily and amicably settled, adjusted, and compromised all their differences involved in the action, and resumed the relations of husband and wife. A written consent signed by respondent was also filed at the same time, "consenting and stipulating that the motion of appellant to vacate and set aside the order appealed from may be granted" by this court, and counsel for appellant also suggest that the entire controversy is limited by the fact that this or the lower court has no jurisdiction further than to vacate and set aside the order complained of, although not abandoning the appeal on the merits. They also earnestly insist that the attorneys who represented respondent have been discharged and have no status before the court.

On December 5, 1918, prior to notice of discharge, Messrs. Turner, Nuzum, & Nuzum filed in the superior court, where the cause was brought, a written notice and claim of lien as attorneys, for their fees in the proceeding, upon all funds ordered to be paid into the registry of the court under the order of August 28th "by virtue of services rendered under special agreement with defendant, and whereby they were to receive as compensation from her as attorneys in the action all sums which the court should allow as at-

torneys' fees, either on the preliminary order or on final decree and which they were to accept as their compensation."

No part of the attorneys' fees or suit money has been paid to the attorneys who represented respondent, or into court for them.

The situation now is that both appellant and respondent are asking the reversal, or the annulment, of the order appealed from, without first satisfying respondent's attorneys of record, and respondent, in effect, asks that result through the attorneys for appellant. While she has made affidavit that she is "ready, able, and willing to pay all compensation due the attorneys" who represented her, she has not done so; and she, while they duly represented her under proper authority, invoked the jurisdiction of the court having the subject-matter in its jurisdiction, to compel the payment of her attorneys for their services pending the litigation in part, and for the expense of her defense, out of the property of the plaintiff, her husband. In so proceeding and in support of her application, she made affidavit that she had no money or means, but was penniless and wholly unable to provide suit money or attorneys' fees, while her husband was possessed of property of the value of a million dollars or more.

The allegations against respondent were very defamatory, and she made a very strong showing, in support of her application, that she was wholly innocent of the charges, that her husband was the dupe of business associates and of a conspiracy, of which she was being made the victim, that her defense was in good faith, that she desired no divorce but desired reconciliation with her husband and the resumption of the marriage relations, and that her proper defense would entail very great expense and the procuring of evidence over a vast stretch of territory in and out of this state, and that \$10,000 would be a reasonable sum to allow her attorneys and for

suit money, preliminarily. At the hearing on the application there were several affidavits and counter affidavits presented to the trial court, and upon the pleadings and the showing made we are quite convinced that there was no abuse of judicial discretion on the part of the trial court in making the preliminary order for allowances to respondent for temporary alimony, suit money, and attorneys' fees. We are obliged so to decide on the merits of the appeal in determining that alone. We are now confronted with the question whether the attorneys who represented respondent can now enforce that order. We are ever ready to encourage the amicable settlement of litigation, more especially of divorce suits. We believe it to be the duty both of trial

~~Divorce—duty—  
with respect to  
reconciliation.~~

courts and appellate courts to lay no straw in the way of the reconciliation of estranged spouses, at any stage of the proceedings. But we do not believe that by such voluntary act of the estranged parties to a divorce suit they can so summarily and without consideration dispose of counsel who, in good faith, performed very valuable services and expended money in behalf of the wife, who is peculiarly protected in such cases by our law.

~~—cutting off  
compensation of  
counsel.~~

It is asserted that our decision in *Hillman v. Hillman*, 42 Wash. 595, 114 Am. St. Rep. 135, 85 Pac. 61, is authority for the contention that the attorneys who represented respondent have now no standing as such in this proceeding to have their attorneys' fees settled, but that such fees must be adjusted in actions brought for that purpose. The situation in that case, however, differed from the situation here in that, while an application on behalf of the wife for suit money and attorneys' fees, preliminarily, was pending but no order made, the parties voluntarily composed their differences, and the wife, individually, stipulated to dismiss her action. When the stipu-



lation was presented to the court for action, her attorneys appeared and opposed dismissal on the ground that they had an interest in the action to the extent of their attorneys' fees, and that the parties were powerless to dismiss the action without their consent. The trial court took their view of the matter and allowed them to intervene for their costs and fees, and ordered a hearing, which resulted in findings as to the amount and value of their expenses and services as attorneys and judgment therefor in their favor. True, it was observed in that case that "the measure and mode of compensation of attorneys are, under our statute [Bal. Code, 5165], a matter of private agreement between client and attorney," and that "actions for divorce . . . should not be kept alive merely to settle the claims of counsel for . . . fees."

In the present case the attorneys for the wife have not "intervened." They have already a valid order or judgment for the payment to them of their partial attorneys' fees and suit money. Appellant brought respondent into court at his suit, and she was compelled to employ attorneys for defense to clear her name of the charges brought against her, and to resist the granting of a divorce. The law encourages the thorough defense of all divorce actions. The statute

—encourage-  
ment of defense. (Rem. & Bal. Code, § 988) empowers the trial court to make such preliminary order to "insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof," which is no more than was ordered in this case. This statutory provision has many times been invoked and invariably sustained. True, as we held in *Zent v. Sullivan*, 47 Wash. 315, 13 L.R.A.(N.S.) 244, 91 Pac. 1088, 15 Ann. Cas. 19, and in *Humphries v. Cooper*, 55 Wash. 376, 133 Am. St. Rep. 1036, 104 Pac. 606, that "in view of the liberal provisions of this statute [supra], we see no possible reason why the wife

is under a necessity to pledge her husband's credit for the expenses of prosecuting or defending an action for divorce in this state, or why she should have any implied power in that regard."

She did not pledge her husband's credit. The law was invoked to render him liable, and the court adjudged him liable. Here the liability of the husband is already fixed and the rights of the attorneys already, to that extent, fixed and acquired. Until reversed, that preliminary liability is final, and we held in *State ex rel. Surry v. Superior Ct.* 74 Wash. 689, 134 Pac. 178, that such an order for temporary alimony, suit money, and preliminary attorneys' fees is a final judgment, and appealable as such. This being true, and believing the order assailed was well within the discretion of the trial court under the issues and facts presented, we cannot allow the contention of appellant that the attorneys

for respondent, upon the cessation of the controversy, have no right to enforce the payment of their attorneys' fees and suit money under the order. The sum awarded the wife in a divorce action as an attorneys' fee is not hers, but her attorneys'. The allowance was made to her for the use and benefit of her attorneys. While the judgment stands in her name she is a dry trustee without power to satisfy the judgment, until her attorneys have been satisfied. The allowance for suit money stands upon the same footing, by virtue of the terms of the order or judgment, but only to the extent of their actual necessary expenses in the "efficient preparation of her defense, in order to secure a fair and impartial trial."

—dismissal of  
action—effect on  
order for attor-  
neys' fees.

Attorney and  
client—own-  
ership of attor-  
neys' fees.

Judgment—  
power to satisfy  
—attorneys'  
fees.

Attorney and  
client—right to  
suit money.

The reconciliation incontestably

terminates the divorce action, and the allowance for temporary alimony falls therewith, as also any unexpended balance of the suit money. Nor can the attorneys now recover any other compensation unless by private and separate recovery from the wife

Divorce—  
reconciliation—  
effect on  
allowance.

Attorney and  
client—fees after  
termination of  
suit.

(Zent v. Sullivan, supra), and are probably estopped therefrom by the force and effect of their affidavits in support of the motion for attorneys' fee pendente lite, and their notice of lien claim. But to the extent of the allowance fixed, the same is presumed to be earned, unless the court exceeded a just discretion in making the order, which we cannot find. "The laborer is worthy of his hire," even though an attorney.

The motion to vacate, set aside, and annul the order is denied; the order appealed from is affirmed.

It is probably proper to determine how the remainder of the allowance should be adjusted by the trial court in view of the present situation of the parties and status of the case.

The temporary alimony allowance will, of course, be remitted. Within ten days from the filing of the remittitur from this court in the superior court, the attorneys who represented respondent may file their verified cost bill of all necessary and proper expenditures paid out in preparing her case for trial, which may be moved against by appellant in the usual statutory manner. The lower court may then examine the cost bill and showing made resisting the same and make an order in the premises as the law and facts may dictate. A further order may then be made for the payment of such suit money as may be found due and payable, which, together with the allowance of attorneys' fees, shall be paid to the attorneys who represented respondent, or their order, and execution, or personal attachment, may be had therefor, as provided by § 988, Rem. & Bal. Code. Costs are allowed to respondent or the attorneys who represented her, according to who paid them, as may duly appear.

Main, Fullerton, Mount, and Parker, JJ., concur.

### ANNOTATION.

#### Effect of reconciliation of parties to divorce suit on allowance of counsel fees previously made.

The reported case (YODER v. YODER, ante, 1104) holds that the reconciliation of the parties to a divorce suit terminates the action, and the allowance for temporary alimony falls therewith, as does the unexpended balance of the suit money, if any there be; but that an allowance for attorneys' fees, already fixed by the court, is presumed to have been earned, and is unaffected thereby.

In McMakin v. Wickliffe (1894) 16 Ky. L. Rep. 240 (abstract) which is apparently the only other case passing on the question, the court, in an action by a wife for a divorce, fixed the fee

for the wife's attorney and ordered it to be taxed as costs against the husband. Subsequently, but before the trial, the parties became reconciled. It was held that the reconciliation and the dismissal of the action by the wife did not relieve the husband of his liability to pay the fee of his wife's attorney, since the husband was bound to pay the costs of both parties, including a reasonable compensation to the attorney of his wife, no matter by what cause the action had been terminated, unless the wife was in fault and had ample estate to pay the costs.

R. C. L.

JOSEPH WATTS et al., Appts.,  
v.  
BOROUGH OF PLYMOUTH.

*Pennsylvania Supreme Court — October 2, 1916.*

(255 Pa. 185, 99 Atl. 470.)

**Highway — negligence in crossing — failure to use crossing.**

1. One is negligent, as matter of law, in attempting to cross a street at a place other than at a regular crossing which is only 200 feet away and well lighted, in darkness so dense that the ground cannot be seen, and so encumbered with parcels that the arms are of little use in defending against possible accident, and he, therefore, cannot hold the municipality liable for injuries caused by a defect in the roadway.

[See note on this question beginning on page 1113.]

**— negligence in failing to use street crossing.**

2. Although pedestrians are not restricted to established street crossings when attempting to pass from one side of a street to the other, when, without reasonable cause, they fail to use a regular crossing they assume the risk of danger arising out of municipal neglect that would have been avoided by using the crossing.

[See 13 R. C. L. 292, 468.]

**Trial — question for jury — crossing street.**

3. Ordinarily the jury must decide whether or not the excuse advanced

by a pedestrian, who attempts to cross a street at a place other than a regular crossing, is reasonable in case he is injured by so doing.

[See 13 R. C. L. 297, 298.]

**— question for court.**

4. The court must rule that the attempt of a pedestrian to cross a street at a place other than at a regular crossing was negligence, where no reason for so doing is expressed and no conclusion is derivable from the facts and circumstances of the case except that the choice of the way was negligently made.

[See 13 R. C. L. 298.]

**APPEAL** by plaintiffs from a judgment of the Court of Common Pleas for Luzerne County refusing to take off a compulsory nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Paul J. Sherwood, for appellants:

The evidence clearly supports the allegation, to wit, the negligent condition of that street as to holes.

Kraut v. Frankford & S. P. City Pass. R. Co. 160 Pa. 327, 28 Atl. 783.

The burden was on plaintiff to show that the street had been negligently maintained, that the city either had constructive or actual notice of the defective condition in time to make repairs, and that the defective condition was the proximate cause of the injuries.

McDonald v. Philadelphia, 248 Pa. 147, 93 Atl. 959; Toglatti v. Carrick, 61 Pa. Super. Ct. 244; Cox v. Westchester Turnp. Road Co. 33 Barb. 419; Williams, Mun. Liability for Tort, p. 215; Brownlee v. Alexis, 39 Ill. App.

143; Weisenberg v. Appleton, 26 Wis. 56, 7 Am. Rep. 39; Sisson v. Philadelphia, 248 Pa. 140, 93 Atl. 936.

Ground to found the inference of constructive notice to defendant of the defect complained of was amply laid.

Hibberd v. Philadelphia, 245 Pa. 265, 91 Atl. 486; Von Steuben v. Central R. Co. 185 Pa. 293, 39 Atl. 1118; 2 Addison, Torts, Dudley & B. ed. pp. 1308, 1310.

Mrs. Watts was guilty of no negligence whatever.

Williams, Mun. Liability for Tort, p. 214; Barker v. Ohio River R. Co. 51 W. Va. 423, 90 Am. St. Rep. 808, 41 S. E. 148, 12 Am. Neg. Rep. 580; Lewis v. Wood, 247 Pa. 550, 93 Atl. 605; 2 Cooley, Torts, 3d ed. p. 1317; Thompson v. Bridgewater, 7 Pick. 187; Cox

v. Westchester Turnp. Road Co. 33 Barb. 414; Allen v. Willard, 57 Pa. 380; Ash. v. Wilmington & N. R. Co. 148 Pa. 133, 23 Atl. 898.

It is the duty of the court to draw not the most unfavorable, but the most favorable, inferences which the jury might, with the least degree of propriety, draw in favor of the plaintiffs.

Feay v. Decamp, 15 Serg. & R. 227; Fisher v. Monongahela C. R. Co. 131 Pa. 292, 18 Atl. 1016; Baker v. Westmoreland & C. Natural Gas Co. 157 Pa. 593, 27 Atl. 789; Cox v. Westchester Turnp. Road Co. 33 Barb. 414; Elston v. Delaware, L. & W. R. Co. 196 Pa. 595, 46 Atl. 938, 8 Am. Neg. Rep. 345; Davidson v. Lake Shore & M. S. R. Co. 179 Pa. 227, 36 Atl. 291, 1 Am. Neg. Rep. 182.

Messrs. J. Q. Creveling and Charles Kuschke, for appellee:

Plaintiff was guilty of contributory negligence, and not entitled to recover.

Hentz v. Somerset, 2 Pa. Super. Ct. 225; Buzby v. Philadelphia Traction Co. 126 Pa. 559, 12 Am. St. Rep. 919, 17 Atl. 895; Delaware, L. & W. R. Co. v. Cadow, 120 Pa. 559, 6 Am. St. Rep. 730, 14 Atl. 450; Tolan v. Philadelphia, 35 Pa. Super. Ct. 311; Burns v. Bradford, 137 Pa. 361, 11 L.R.A. 726, 20 Atl. 997; Haven v. Pittsburgh & A. Bridge Co. 151 Pa. 620, 25 Atl. 811.

Plaintiff under a general allegation cannot recover or prove damages for injuries and consequences which do not necessarily or immediately flow from the injury.

Clark v. Metropolitan Street R. Co. 68 App. Div. 49, 74 N. Y. Supp. 267.

Stewart, J., delivered the opinion of the court:

Plaintiff received her injury while attempting to cross over the main street in the borough of Plymouth to a point alongside the track of an electric street railway occupying the middle of the street where she intended to board an approaching car. The point where she expected to take the car was not a scheduled stopping place, but, because of greater convenience it afforded to shoppers, cars were allowed to stop at that point, on signal, to receive passengers. The scheduled stopping place was but a short distance above, and there was there a public crossing. The accident occurred between

6 and 7 o'clock on the evening of the 9th of October, 1909. The plaintiff had been trading in one of the stores facing on this particular street, almost directly opposite the point where she expected to take the car. She left the store carrying three packages of merchandise in her right arm, and a pail containing other merchandise with her left hand. When she stepped from the store and reached the pavement, it was dark, too dark to permit of her seeing what was immediately about her, but, being entirely familiar with her surroundings from frequent visits to this store, and knowing well of the existence of a public crossing a short distance above, and observing from where she stood on the pavement that the crossing was lighted, for no apparent reason other than to avoid the necessity of following the pavement until she reached the crossing, encumbered as she was she stepped from the pavement into the street. She had proceeded but a little way when she stepped into a depression in the street and fell upon the pail she was carrying, thereby receiving the injury of which she complains. In the immediate neighborhood where she fell there were several depressions in the street, but into which one of these the plaintiff stepped is a fact not clearly disclosed. On cross-examination she admitted that she had often alighted from the car at its regular stopping place; that in going to and from the store on such occasions she had walked up and down the sidewalk leading to and from the store, and that it and the crossing together made a perfectly safe way for her to travel. At the conclusion of the evidence a nonsuit was granted, and the appeal is from the refusal of the court to take it off.

Pedestrians are not restricted to the use of established street crossings when they attempt to pass from one side of the street to the other. They have a right to cross at whatever point they elect. But, since it is matter of common knowledge that crossings, where they exist,

have been constructed for their exclusive accommodation and use, and that the individual pedestrian is less exposed to accident in using the crossing than when he attempts to cross the street elsewhere, it is only reasonable to expect him to use the crossing, except as he has sufficient ground to reject it. When without reasonable excuse he does reject it and adopt another way, he takes upon himself the risk of every danger

**Highway—  
negligence in  
failing to use  
street crossing.**

arising out of municipal neglect that would have been avoided had he used the established crossing. The rule of law governing in such case is thus stated by Judge Dillon in his work on Municipal Corporations, vol. 2, 4th ed. § 1008: "Street crossings are constructed for the use of foot passengers; but if these happen to be obstructed or to be in such a dangerous condition as to deter an ordinarily prudent man from using them, then one may walk elsewhere. If he does so, however, without sufficient reason, and is injured, his injury cannot be imputed to the negligence of the city." Ordinarily it must be for the jury to decide whether an excuse advanced for rejecting a cross-

**Trial—question  
for jury—  
crossing street.**

ing is reasonable or otherwise; but cases arise, and this is one of them, where no reason at all is expressed, and no conclusion is derivable from the facts and circumstances of the case, except that the choice of way was inconsiderately and negligently made. When this appears, it is the duty of the court to so pronounce.

**—question for  
court.**

The plaintiff charges culpable negligence on the part of the municipality in allowing the depression into which she stepped to exist. Let the negligence be conceded; yet this

concession is so manifestly unfair to the defendant in the light of plaintiff's own testimony that we reluctantly make it, even for the purpose of argument, for she testified, notwithstanding several of her witnesses speak of a number of more or less serious depressions in the street at this particular point, that she was entirely familiar with the place, having repeatedly crossed the street at the same place, and had never noticed any depressions, and had no reason to believe any existed on the way she had adopted for her crossing. But let it be so. What she attempted to do was to cross over a public street at nighttime where there was no defined pathway, when it was so dark that she could not see the ground before her, and with her arms so encumbered that she could make little or no use of them in defending herself against possible accident.

**Highway—  
negligence in  
crossing—failure  
to use crossing.**

She chose this way, knowing that by passing down the sidewalk a distance of 150 or 200 feet she could reach a public crossing which she was familiar with, well lighted, and which afforded, as she admits, a safe way. Even admitting that she did not know of the existence of the defect she encountered in the highway, there was more than enough in the circumstances under which she advanced upon the street to put her on guard, and charge her with voluntarily and unnecessarily undertaking to test the safety of a public street when she knew that the dangers such as she there encountered and which caused her injury would be avoided by adopting another and entirely convenient course which the municipality had provided for pedestrians. The nonsuit in the case was properly entered. The judgment is affirmed.

## ANNOTATION.

**Crossing street elsewhere than at regular crossing as contributory negligence precluding recovery for injury from defect or obstruction.**

- I. General rule, 1113.
- II. Application of rule, 1114.
- III. Rule in Missouri, 1119.
- IV. Rule in Pennsylvania, 1119.
- V. Rule in Canada, 1119.

*I. General rule.*

It is generally held that it is not, as a matter of law, contributory negligence precluding a recovery for injuries received on account of a defect or obstruction in a street, to cross the street elsewhere than at a regular crossing.

**United States.**—*Denver v. Sherret* (1898) 31 C. C. A. 499, 60 U. S. App. 104, 88 Fed. 226, 5 Am. Neg. Rep. 520.

**Alabama.**—*Dobbins v. Western U. Teleg. Co.* (1909) 163 Ala. 222, 136 Am. St. Rep. 69, 50 So. 919.

**District of Columbia.**—*District of Columbia v. Duryee* (1907) 29 App. D. C. 327, 10 Ann. Cas. 675.

**Georgia.**—*Augusta v. Tharpe* (1901) 113 Ga. 152, 38 S. E. 389; *Southern Bell Teleph. & Teleg. Co. v. Howell* (1905) 124 Ga. 1050, 53 S. E. 577, 4 Ann. Cas. 707, 20 Am. Neg. Rep. 35.

**Indiana.**—*Indianapolis v. Schoenig* (1911) 48 Ind. App. 76, 95 N. E. 324; *Princeton v. Gutheridge* (1918) — Ind. App. —, 118 N. E. 584.

**Iowa.**—*Bell v. Clarion* (1902) 115 Iowa, 357, 88 N. W. 824; *Rea v. Sioux City* (1905) 127 Iowa, 615, 103 N. W. 949; *Middleton v. Cedar Falls* (1915) 178 Iowa, 619, 153 N. W. 1040. Compare *O'Laughlin v. Dubuque* (1876) 42 Iowa, 539, second appeal in (1879) 52 Iowa, 746, 3 N. W. 655.

**Kansas.**—*Olathe v. Mizee* (1892) 48 Kan. 435, 30 Am. St. Rep. 308, 29 Pac. 754; *Junction City v. Blades* (1898) 59 Kan. 774, 52 Pac. 444; *Williams v. Parsons* (1912) 87 Kan. 649, 125 Pac. 60.

**Kentucky.**—*Louisville v. Johnson* (1902) 24 Ky. L. Rep. 685, 69 S. W. 803; *Glasgow v. Gillenwaters* (1902) 113 Ky. 140, 67 S. W. 381; *Covington v. Whitney* (1907) 30 Ky. L. Rep. 659,

99 S. W. 337; *Louisville v. Haugh* (1914) 157 Ky. 643, 163 S. W. 1101, 5 N. C. C. A. 218.

**Louisiana.**—*Lorenz v. New Orleans* (1905) 114 La. 802, 38 So. 566; *Weber v. Union Development & Constr. Co.* (1907) 118 La. 77, 42 So. 652, 12 Ann. Cas. 1012; *Nessen v. New Orleans* (1914) 134 La. 455, 51 L.R.A.(N.S.) 324, 64 So. 286.

**Maryland.**—*Magaha v. Hagerstown* (1902) 95 Md. 62, 93 Am. St. Rep. 317, 51 Atl. 832.

**Massachusetts.**—*Raymond v. Lowell* (1850) 6 Cush. 524, 53 Am. Dec. 57; *Woodman v. Metropolitan R. Co.* (1889) 149 Mass. 335, 14 Am. St. Rep. 427, 4 L.R.A. 213, 21 N. E. 482, 12 Am. Neg. Cas. 80; *Slee v. Lawrence* (1894) 162 Mass. 405, 38 N. E. 708; *Keith v. Worcester & B. V. Street R. Co.* (1907) 196 Mass. 478, 14 L.R.A.(N.S.) 648, 82 N. E. 680.

**Michigan.**—*Lincoln v. Detroit* (1894) 101 Mich. 245, 59 N. W. 617; *Baker v. Grand Rapids* (1897) 111 Mich. 447, 69 N. W. 740, 1 Am. Neg. Rep. 90; *Monje v. Grand Rapids* (1900) 122 Mich. 645, 81 N. W. 574; *Finch v. Bangor* (1903) 133 Mich. 149, 94 N. W. 738.

**Minnesota.**—*Collins v. Dodge* (1887) 37 Minn. 503, 35 N. W. 368.

**New York.**—*Brusso v. Buffalo* (1882) 90 N. Y. 679; *Bennett v. Sing Sing* (1891) 38 N. Y. S. R. 347, 14 N. Y. Supp. 463; *Crowther v. Yonkers* (1891) 39 N. Y. S. R. 748, 15 N. Y. Supp. 588; *Fox v. Manchester* (1905) 183 N. Y. 141, 2 L.R.A.(N.S.) 474, 75 N. E. 1116, 19 Am. Neg. Rep. 416.

**North Dakota.**—*Heckman v. Evenson* (1897) 7 N. D. 173, 73 N. W. 427.

**Ohio.**—*Durbin v. Napoleon* (1900) 21 Ohio C. C. 160, 11 Ohio C. D. 584; *Barnesville v. Ward* (1911) 85 Ohio St. 1, 96 N. E. 937, Ann. Cas. 1912D, 1234, 40 L.R.A.(N.S.) 94 and note. Compare *Groveport v. Bradfield* (1887) 2 Ohio C. C. 145, 1 Ohio C. D. 411, and *Dayton v. Taylor* (1900) 62

Ohio St. 11, 56 N. E. 480, 7 Am. Neg. Rep. 328.

Texas. — *Ft. Worth v. Johnson* (1892) 84 Tex. 137, 19 S. W. 362; *Dallas v. Webb* (1899) 22 Tex. Civ. App. 48, 54 S. W. 398.

Virginia. — *Winchester v. Carroll* (1901) 99 Va. 727, 40 S. E. 37.

"The use of the public streets between crossings is not limited solely to animals and vehicles, but may be used by footmen, due caution being exercised." *Denver v. Sherret* (Fed.) *supra*.

"The traveler has the right to use the street by passing across it at a point where there is no crosswalk, and in doing so he does assume a greater risk from passing vehicles and animals using the main thoroughfare than he does when passing over a crosswalk, but he does not in doing so assume any greater risk from obstructions other than those necessary for the use of some public utility, such as water plugs, telegraph and telephone poles, and the like." *Augusta v. Tharpe* (Ga.) *supra*.

"A person who attempted to cross a street at a place other than the crossing provided for that purpose is bound to use care proportionate to the known danger; but if he knows of no dangerous excavation or obstruction, he has a right to assume that all parts of the street intended for travel are reasonably fit for that purpose." *Indianapolis v. Schoenig* (Ind.) *supra*.

"A divergence or departure from the crosswalks is ordinarily not an evidence of want of care. Pedestrians have a right to cross a street at any point, and it is the common practice to do so." *Olathe v. Mizee* (Kan.) *supra*.

"The law does not require a pedestrian to confine himself to the sidewalks of a city. He may, through caprice or for pleasure, use the street as well." *Junction City v. Blades* (1898) 59 Kan. 774, 52 Pac. 444.

"The rule in this state is that a pedestrian may cross the street at any point without the imputation of negligence." *Louisville v. Haugh* (Ky.) *supra*.

"If a municipality provides suitable

and convenient crossings, pedestrians cannot expect the whole of the thoroughfare to be kept as clean and smooth as the sidewalks; but unless he has notice of some defect, or by the use of due care could discover it, a person who crosses a street at a place other than a fixed crossing cannot be said to be thereby necessarily guilty of negligence." *Magaha v. Hagerstown* (Md.) *supra*.

"There is no law, or principle of law or of reason, which confines foot passengers to particular crossings. Such a restriction would be very inconvenient and annoying. The street should be kept in such condition that foot passengers may be able to cross with a reasonable degree of safety, using proper care themselves, at any and all places." *Raymond v. Lowell* (Mass.) *supra*.

"A person desiring to cross the street, either in the nighttime or in the daytime, is not confined to a crossing. He has a right to assume that all parts of the street intended for travel are reasonably safe; and if in the nighttime he desires to cross from one side to the other, and knows of no dangerous excavation in the street or other obstruction, he may cross at any point that suits his convenience, without being liable to the imputation of negligence." *Brusso v. Buffalo* (N. Y.) *supra*.

## II. Application of rule.

In *Denver v. Sherret* (1898) 31 C. C. A. 499, 60 U. S. App. 104, 88 Fed. 226, 5 Am. Neg. Rep. 520, it appeared that the plaintiff was injured by the fall of an electric light pole, while crossing a street diagonally, and not at a regular crossing. It was held that the plaintiff was not guilty of contributory negligence in crossing at a point other than a regular crossing, as there was nothing to charge her with notice that she incurred greater danger in crossing diagonally. The mere fact of crossing a street diagonally, the court said, did not in itself amount to contributory negligence, as she had the right to cross at any point.

In *Dobbins v. Western U. Teleg. Co.* (1909) 163 Ala. 222, 136 Am. St. Rep.

69, 50 So. 919, it was held that a pedestrian was not guilty of contributory negligence as a matter of law in crossing a street at a point other than a regular crossing and running into a "stump" of a telegraph pole. The question whether or not he used due care was held to be for the jury.

In *District of Columbia v. Duryee* (1907) 29 App. D. C. 327, 10 Ann. Cas. 675, it was held that the plaintiff had the right to cross a street at a place other than a regular crossing without the imputation of negligence, but was bound to use more care than would be necessary at a regular crossing, because of the probability of lawful obstructions being along the curb.

In *Augusta v. Tharpe* (1901) 113 Ga. 152, 38 S. E. 389, it appeared that a barbed wire had been stretched between two poles at the curb, and about 4 feet from the ground. The plaintiff, a boy about twelve years of age, in attempting to run across the street at this point, which was not a regular crossing, ran into the wire and was cut about the face. It was held that the plaintiff was not guilty of contributory negligence.

In *Southern Bell Teleph. & Teleg. Co. v. Howell* (1905) 124 Ga. 1050, 58 S. E. 577, 4 Ann. Cas. 707, 20 Am. Neg. Rep. 35, it was held that it was not contributory negligence for a pedestrian to cross a street at a point where there was no crosswalk, and that he did not assume any greater risk from obstructions than if he used the crosswalk, although he might assume a greater risk from passing vehicles and animals using the main thoroughfare.

In *Indianapolis v. Schoenig* (1911) 48 Ind. App. 76, 95 N. E. 324, it was held that the plaintiff was not guilty of contributory negligence in crossing a street at a point other than a regular crossing, the court saying: "If a person in walking diagonally across a street which he knows to be paved with brick or asphalt were to be injured by falling into an excavation in said street, negligently left open and unguarded, he surely ought not to be held guilty of contributory negligence as a matter of law, merely because he

was not using the crossing. If he knew the dangerous condition of the street a different question would be presented."

In *Princeton v. Gutheridge* (1918) — Ind. App. —, 118 N. E. 584, it appeared that the plaintiff stepped into a hole in a public street, in crossing the street diagonally near a crossing. This hole was formed by the absence or removal of bricks which formed the pavement, and was filled with leaves. It was, therefore, not easily discoverable. It was held that the plaintiff was not guilty of contributory negligence in crossing the street diagonally.

In *Bell v. Clarion* (1902) 115 Iowa, 357, 88 N. W. 824, it appeared that the plaintiff's intestate crossed a street at a point not a regular crossing, and was killed in attempting to reach the sidewalk, by the giving way of a board on which she was walking. It was held that she was not guilty of negligence per se in crossing where she did.

In *Rea v. Sioux City* (1905) 127 Iowa, 615, 103 N. W. 949, it was held that it was not negligence per se for the plaintiff to attempt to reach a sidewalk from a point in the street not a regular crossing point. The plaintiff tripped over a stake in the sidewalk, of which he had knowledge, but the exact location of which he did not remember. The court held that the question of his negligence was for the jury.

In *Middleton v. Cedar Falls* (1915) 173 Iowa, 619, 153 N. W. 1040, it was held that no negligence could be charged against the plaintiff in crossing a street diagonally instead of at a regular crossing, as a pedestrian may cross at any point, providing he uses ordinary care and caution in doing so.

But see *O'Laughlin v. Dubuque* (1876) 42 Iowa, 539, wherein it was held that a pedestrian must use the crosswalks in crossing a street unless they are obstructed or dangerous, and if without sufficient reason he crosses elsewhere he will be guilty of contributory negligence, and cannot recover. On a second appeal, however, (1879) 52 Iowa, 746, 3 N. W. 655, it was held that there was sufficient evidence to



show that the crossing was dangerous, and that the plaintiff had the right to cross elsewhere.

In *Olathe v. Mizze* (1892) 48 Kan. 435, 30 Am. St. Rep. 308, 39 Pac. 754, it appeared that the plaintiff was crossing a street at a narrow crosswalk, and, in stepping aside to avoid persons coming toward her, fell into an excavation at the side of the crossing and was injured. It was held that she was not guilty of contributory negligence in diverging from the crosswalk, as she had the right to cross at any point without the imputation of negligence.

In *Junction City v. Blades* (1898) 59 Kan. 774, 52 Pac. 444, it was held that a pedestrian may use any part of a street and is not necessarily obliged to use the sidewalks, but he must use reasonable care to avoid such dangers as he knows or has reasonable ground to believe will beset him.

In *Williams v. Parsons* (1912) 87 Kan. 649, 125 Pac. 60, it appeared that the plaintiff tripped over a guy wire stretched from a telephone pole across or near to a path used by pedestrians, although there was no sidewalk. The court held that negligence could not be imputed to the plaintiff from the mere fact that she crossed the street where there was no crosswalk, although there was a crosswalk on the other side of the street.

In *Louisville v. Johnson* (1902) 24 Ky. L. Rep. 685, 69 S. W. 803, it appeared that the plaintiff was injured by one end of a heavy iron plate falling on his foot. The plate had been raised by a wagon passing over the other end of it. This plate was used as a gutter cover, and was close to a regular crossing. It was held that the plaintiff was not guilty of contributory negligence in crossing over this iron plate instead of using the regular crossing, as pedestrians might cross at any point in the street.

In *Glasgow v. Gillenwaters* (1902) 113 Ky. 140, 67 S. W. 381, it was held that the plaintiff was not guilty of contributory negligence in leaving the sidewalk and crossing a street at a point not a regular crossing, whereby he was injured by running into a barbed wire stretched across the road-

way at a height of 5 feet from the ground. It did not appear that the plaintiff had knowledge of this obstruction, and as it was nighttime, he could not see it.

In *Covington v. Whitney* (1907) 30 Ky. L. Rep. 659, 99 S. W. 337, it appeared that the plaintiff was injured by tripping over a plank which projected above the curb at a part of the street which was not a regular crossing. It was held that she was not guilty of contributory negligence in crossing at this point, as she had the right to cross at any point which she believed safe, provided she used ordinary care in so doing.

In *Louisville v. Haugh* (1914) 157 Ky. 643, 163 S. W. 1101, 5 N. C. C. A. 213, it appeared that the plaintiff was injured by stepping into a hole in a street, while attempting to cross the street at a place other than a regular crossing. It was held that no negligence could be imputed to the plaintiff from the fact that she attempted to cross at a point not a regular crossing, as persons might cross at any point in a street, the only question being whether they exercised ordinary care.

In *Lorenz v. New Orleans* (1905) 114 La. 802, 38 So. 566, it was held that a child nine years old could not be held guilty of contributory negligence in crossing a street diagonally instead of at the regular crossing, it appearing that while so doing he was injured by reason of a rotten cover of a fire well giving way.

In *Weber v. Union Development & Constr. Co.* (1907) 118 La. 77, 42 So. 652, 12 Ann. Cas. 1012, it appeared that the plaintiff, while running diagonally across a street at night, in order to catch a street car on the far side of the street, fell over a barrier which had been thrown down and was lying on the ground. It was held that the plaintiff might cross at any point in the street without being guilty of contributory negligence, and was not confined to the regular crossing.

In *Nessen v. New Orleans* (1914) 134 La. 455, 51 L.R.A.(N.S.) 324, 64 So. 286, it was held that a person might run across a street to catch a

car at any place along the street, and would not be guilty of contributory negligence in failing to use the regular crossing.

In *Magaha v. Hagerstown* (1902) 95 Md. 62, 93 Am. St. Rep. 317, 51 Atl. 832, it appeared that the plaintiff fell on a ridge of ice in the middle of a street while crossing at a point not a regular crosswalk. It was held that the plaintiff had the right to cross at any place without negligence being imputed to him, provided he did not know of the obstruction, and used ordinary care.

In *Raymond v. Lowell* (1850) 6 Cush. (Mass.) 524, 53 Am. Dec. 57, it was held that it is not negligence to attempt to cross a strip between the sidewalk and the street, but that the pedestrian must exercise a caution and prudence adapted to the nature of the case, and has no right to assume that such a space is smooth and even. Pedestrians, it was held, may cross a street at any and all places, and are not confined to particular crossings.

In *Woodman v. Metropolitan R. Co.* (1889) 149 Mass. 335, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N. E. 482, 12 Am. Neg. Cas. 80, it was held that a person was not necessarily guilty of contributory negligence in crossing a street at a point other than a regular crossing, but might cross at any point, provided he used due care; and a recovery was allowed against a railroad company which had torn up the street to lay rails.

In *Slee v. Lawrence* (1894) 162 Mass. 405, 38 N. E. 708, it appeared that the plaintiff was injured by falling over a pile of rails which was in the street near the curb. The place where the rails were piled was dark and was not a regular crossing point. It was held that the plaintiff had the right to cross the street at the point where he did, and that the question of whether he used due care was for the jury.

In *Keith v. Worcester & B. V. Street R. Co.* (1907) 196 Mass. 478, 82 N. E. 680, it appeared that the plaintiff tripped over some rails as she was about to cross a street to board a street car. It was held that she was

not guilty of contributory negligence in crossing a street at a point other than a regular crossing, as she had a right to cross at any point, and was not bound to exercise any greater degree of care than in using a regular crossing.

In *Lincoln v. Detroit* (1894) 101 Mich. 245, 59 N. W. 617, it was held that the plaintiff was not negligent in crossing a street at a place other than a crosswalk, and in passing over a manhole, the cover of which was defective.

In *Baker v. Grand Rapids* (1897) 111 Mich. 447, 69 N. W. 740, 1 Am. Neg. Rep. 90, it appeared that the plaintiff, in attempting to cross a street diagonally in the nighttime, fell into an excavation being made for a catch-basin, and was injured. It was held that he had the right to cross the street at any point, whether a regular crossing or not, and was not guilty of contributory negligence in so doing.

In *Monje v. Grand Rapids* (1900) 122 Mich. 645, 81 N. W. 574, it appeared that the plaintiff attempted to board a car by crossing a street diagonally, and fell into a trench near the car track. The court held that the question of contributory negligence was for the jury.

In *Finch v. Bangor* (1903) 133 Mich. 149, 94 N. W. 738, it was held that the plaintiff was not necessarily guilty of contributory negligence in crossing a street diagonally, 10 or 15 feet from a street corner. The accident occurred at night, and was caused by the plaintiff tripping over a board left by the village authorities in constructing a sidewalk.

In *Collins v. Dodge* (1887) 37 Minn. 503, 35 N. W. 368, it was held that the plaintiff was not guilty of contributory negligence in attempting to cross a street at a point not a regular crossing, by reason whereof he fell into an excavation in the street and was injured.

In *Heckman v. Evenson* (1897) 7 N. D. 173, 73 N. W. 427, it was held that the plaintiff was not guilty of contributory negligence as a matter of law in attempting to cross a street

in the nighttime, at a point not a regular crossing; but that he had the right to cross at any point which might suit his convenience, and that in so doing he had the right to presume that the street was reasonably safe for its entire width, and free from dangers to travelers.

In *Brusso v. Buffalo* (1882) 90 N. Y. 679, it appeared that the plaintiff was injured by falling into an excavation in a street while attempting to cross the street at a point not a regular crossing. It was held that the plaintiff had the right to cross at any point which suited his convenience, without being liable to the imputation of negligence, provided he did not know of the defect and used due care.

In *Bennett v. Sing Sing* (1891) 38 N. Y. S. R. 347, 14 N. Y. Supp. 463, it was held that the plaintiff had the right to cross a street at any point without being guilty of contributory negligence, as she had the right to assume that all parts of the street were reasonably safe.

In *Crowther v. Yonkers* (1891) 39 N. Y. S. R. 347, 15 N. Y. Supp. 588, affirmed without opinion in (1892) 133 N. Y. 602, 30 N. E. 1149, it appeared that the plaintiff had attempted to cross a street at a place other than a regular crossing, and fell into a trench 8 feet deep, which was unlighted and unguarded, and could not be seen in the darkness. It was held that she had the right to cross at other points than at the regular crossings, and that she was free from contributory negligence.

In *Fox v. Manchester* (1905) 183 N. Y. 141, 2 L.R.A.(N.S.) 474, 75 N. E. 1116, 19 Am. Neg. Rep. 416, it was held that the plaintiff's intestate was not guilty of contributory negligence, as a matter of law, because he crossed the street at a point other than at a crosswalk, and in so doing came in contact with a live wire and was killed.

In *Durbin v. Napoleon* (1900) 21 Ohio C. C. 160, 11 Ohio C. D. 584, it appeared that the plaintiff fell into an excavation in a street while attempting to cross the street at a point not a regular crossing. It was held that the plaintiff was not guilty of negligence

per se in attempting to cross a street at a place not a regular crossing, and could recover if she used ordinary care, and did not know of the defect.

In *Barnesville v. Ward* (1911) 85 Ohio St. 1, 40 L.R.A.(N.S.) 94, 96 N. E. 937, Ann. Cas. 1912D, 1234, it was held that it was not negligence per se to attempt to cross a street other than where there were passageways, over a parked space between the curb and the sidewalk. The plaintiff tripped over a wire attached to stakes, which was intended to keep people off the park strip, but of which the plaintiff had no notice. Compare *Groveport v. Bradfield* (1887) 2 Ohio C. C. 145, 1 Ohio C. D. 411, wherein it was held that the plaintiff was guilty of contributory negligence in crossing a street in a diagonal direction, and not at a regular crossing, the court saying that a person in crossing a street must do so by using the most direct route, and that any deviation therefrom will be negligence per se.

In *Dayton v. Taylor* (1900) 62 Ohio St. 11, 56 N. E. 480, 7 Am. Neg. Rep. 328, it appeared that the plaintiff crossed a street diagonally in the nighttime, and in some way slipped and fell into a catch-basin used to drain off surface water, which was off the traveled way of pedestrians. The court held that he was guilty of contributory negligence as a matter of law, and could not recover; saying that in departing from the crosswalks he assumed all of the risks which lay in the path which he chose for himself.

In *Ft. Worth v. Johnson* (1892) 84 Tex. 137, 19 S. W. 362, it appeared that the plaintiff fell into a ditch in the roadway of a street, while attempting to cross the street in the nighttime in a diagonal direction. It was held that no negligence could be imputed to the plaintiff from the mere fact that he crossed the street in this manner. He had the right to assume that the highway was safe, as he had no knowledge of the existence of the ditch.

In *Dallas v. Webb* (1899) 22 Tex. Civ. App. 48, 54 S. W. 398, it appeared that the plaintiff was injured by stepping on a grating over a drain pipe

on a city street, at a point not a regular crossing. It was held that the plaintiff was not guilty of contributory negligence in crossing at this point, but could cross the street at any point without negligence being imputed to her.

### III. Rule in Missouri.

There is a conflict in the cases in Missouri. In *Plummer v. Milan* (1899) 79 Mo. App. 439, it was held that the plaintiff was not necessarily guilty of such negligence as to preclude a recovery, from the mere fact that she attempted to leave the sidewalk at a point other than a public crossing of the street. The court said: "We are not aware of any case in this state or elsewhere that has gone to the extent of holding it to be negligence per se in a pedestrian who is injured while passing from a sidewalk into a public street, with a view of crossing the same at a point other than at a public crossing. . . . The law does not pronounce plaintiff's act negligent, neither did it pronounce such act prudent."

In *Holding v. St. Joseph* (1902) 92 Mo. App. 143, it was held that the plaintiff was guilty of contributory negligence in attempting to cross a street at a place not a regular crossing, which she had reached by crossing a vacant lot. It was held that she was not using the street in the usual and ordinary manner, and that she could not recover for the injury sustained. The earlier case of *Plummer v. Milan*, supra, was not referred to in deciding this case.

### IV. Rule in Pennsylvania.

In Pennsylvania there is a conflict in the decisions. The earlier cases followed the general rule as heretofore stated, that it is not contributory negligence to cross a street elsewhere than at a regular crossing. *Miller v. Lewistown Electric Light, Heat & P. Co.* (1905) 212 Pa. 593, 62 Atl. 32; *McIlhenney v. Philadelphia* (1906) 214 Pa. 44, 63 Atl. 368.

In *Miller v. Lewistown Electric Light, Heat & P. Co.* supra, it appeared that the plaintiff came in contact with a live wire, and was killed.

The accident occurred at a point not a regular crossing, and the defendant claimed that the plaintiff was guilty of contributory negligence in crossing at a point other than a regular crossing. It was held that the plaintiff was not necessarily negligent in crossing where he did, but it was for the jury to determine from all the facts of the case.

In *McIlhenney v. Philadelphia*, supra, it was held that the plaintiff, a pedestrian, could cross a street at any point to suit her convenience, and was not confined to the regular crossings at the intersections of streets, but in so doing she was bound to exercise care according to the circumstances, and as it appeared she did not look where she was going, and tripped over a curbstone, it was held she had been properly nonsuited.

But in the reported case (*WATTS v. PLYMOUTH*, ante, 1110), it is held that it is contributory negligence for a person to attempt to cross a street on a dark night at a place not a regular crossing, when there is a perfectly safe and well-lighted crossing a short distance away.

In *Tolan v. Philadelphia* (1908) 35 Pa. Super. Ct. 311, the fact that the plaintiff crossed the street diagonally was not emphasized, but she was held to be negligent because in so crossing she did not look where she was going, and stepped into a plainly visible hole in the pavement. See to the same effect, *Easton v. Philadelphia* (1904) 26 Pa. Super. Ct. 517.

### V. Rule in Canada.

In Canada, the cases do not follow the general rule. In *Belling v. Hamilton* (1902) 3 Ont. L. Rep. 318, it appeared that the plaintiff fell into a slight depression in the asphalt paving of a street, while attempting to cross in a diagonal direction at a point 30 feet from a crossing. It was held that, as the roadway was not sufficiently out of repair to be at all dangerous to horses or vehicles, the plaintiff could not recover.

In *Breen v. Toronto* (1910) 2 Ont. Week. N. 87, 17 Ont. Week. Rep. 41, it appeared that the plaintiff attempt-

ed to cross a boulevard on which there were street car tracks, and which was being repaired, at a point which was not a regular crossing, and in so doing fell over some blocks of stone and broke her leg. It was held that,

as there was a city ordinance prohibiting persons from crossing boulevards except at crossings, the plaintiff had no right to cross where she did, and therefore could not recover.

B. F. D.

## ASSERINA NEILLSON

v.

## CITY OF WORCESTER.

*Massachusetts Supreme Judicial Court—October 23, 1914.*

(219 Mass. 88, 106 N. E. 579.)

### Highway — depression in walk — defect — slippery condition.

1. A slight depression to carry water along the center of a sidewalk constructed on a grade is not a defect so as to render the municipality liable for injury to a pedestrian, caused by falling upon the walk when the depression was filled with ice, under a statute relieving the municipality from liability for injuries caused by the slippery condition of a walk if the place where the accident occurred was otherwise reasonably safe and convenient for travelers.

[See note on this question beginning on page 1130.]

### — absence of railing along sidewalk — defect.

2. The removal by a municipality of a portion of a railing which it had erected along a sidewalk ascending a hill, to assist pedestrians up and down, is not a defect which will render the municipality liable for injuries caused by its absence, if it was not required by law to maintain it.

[See 13 R. C. L. 381.]

### Proximate cause — depression in sidewalk — ice.

3. A slight depression in a sidewalk laid on a steep grade, to carry away surface water, is not the proximate cause of injury to a pedestrian falling upon ice which had filled the depression.

[See 13 R. C. L. 446 et seq., 454.]

### Highways — defective walk — projecting stone.

4. A city cannot be held liable for injuries caused by the fall of a pedestrian upon a sidewalk because there was a stone projecting from the surface of the walk in the vicinity of the accident, if there is nothing to show that it contributed in anyway to the accident.

[See 13 R. C. L. 398, 446 et seq.]

EXCEPTIONS by plaintiff to rulings of the Superior Court for Worcester County (Sanderson, J.) made during the trial of an action brought to recover damages for personal injuries alleged to have been sustained by a fall on a defective sidewalk, which resulted in a verdict for defendant. *Overruled.*

The facts are stated in the opinion of the court.

Messrs. Marvin M. Taylor, Marvin C. Taylor, and John H. Mathews, for plaintiff:

The hand rail upon George street, as erected in pursuance of the order of the city council, was a part of the structure of the street and sidewalk, which

the city was bound to maintain in proper repair, and it is liable to the plaintiff for the injuries suffered by her as a result of its failure to do so.

Pinkham v. Topsfield, 104 Mass. 78; Fitzgerald v. Woburn, 109 Mass. 204; Hodges v. Waterloo, 109 Iowa, 444, 80

N. W. 523; Ford v. Des Moines, 106 Iowa, 94, 75 N. W. 630; 10 Cyc. 1155 et seq; Hoyt v. Danbury, 69 Conn. 341, 37 Atl. 1051, 3 Am. Neg. Rep. 524; Miller v. Bradford, 186 Pa. 164, 40 Atl. 409; Coles v. Revere, 181 Mass. 175, 63 N. E. 430; Leonard v. Boston, 183 Mass. 68, 66 N. E. 596; Alger v. Lowell, 3 Allen, 402; Hinckley v. Somerset, 145 Mass. 326, 14 N. E. 166; Thompson v. Boston, 212 Mass. 211, 98 N. E. 700; Powers v. Boston, 154 Mass. 60, 27 N. E. 995; McMahon v. Harvard, 213 Mass. 20, 99 N. E. 458; Barron v. Watertown, 211 Mass. 46, 97 N. E. 622; Palmer v. Andover, 2 Cush. 600.

The city, by erecting the rail as an assistance in making the ascent or descent of the street in times of snow or ice, voluntarily assumed the duty of giving such assistance, and of maintaining the rail as constructed for that purpose, and it is a question for the jury whether the duty was performed and whether, if not, that was the cause of the plaintiff's injury.

Black v. New York, N. H. & H. R. Co. 193 Mass. 448, 7 L.R.A.(N.S.) 148, 79 N. E. 797, 9 Ann. Cas. 485; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Cleveland v. Boston Elev. R. Co. 211 Mass. 75, 97 N. E. 623; Miller v. Bradford, 186 Pa. 164, 40 Atl. 409; Collins v. Greenfield, 172 Mass. 78, 51 N. E. 454; Dickinson v. Boston, 188 Mass. 595, 1 L.R.A.(N.S.) 664, 75 N. E. 68; Freeport v. Isbell, 83 Ill. 440, 25 Am. Rep. 407; Baltimore v. Beck, 96 Md. 183, 53 Atl. 976, 13 Am. Neg. Rep. 313.

Messrs. C. S. Anderson and Ernest H. Vaughan for defendant.

Crosby, J., delivered the opinion of the court:

This is an action under Rev. Laws, chap. 51, § 18, to recover for personal injuries received by the plaintiff by reason of falling upon a sidewalk on the northerly side of George street, a public way in the defendant city. George street runs westerly from Main street, and its grade rises from Main street over 3 feet in the first 25 feet, and 15 feet in the first 100 feet. The plaintiff fell upon the sidewalk at a point 8 or 10 feet from the intersection of George street with the west line of Main street, and nearly at the foot of the grade. The sidewalk was constructed with a slight depression in the

center running up the hill, for the purpose of conveying away water which came upon the sidewalk.

There was evidence to show that from Main street for the first 10 feet the sidewalk was of concrete, and that in the surface of the walk cobblestones of different sizes were embedded, some of which had been worn smooth, and some projected a little way above the surface,—one of them a large cobblestone, standing up 1 inch above the surface of the walk.

The evidence further showed that an iron railing had been constructed along the outer edge of the walk; that it was erected in the year 1896, by order of the city council, "as an assistance in making the ascent or descent of that street in times of snow or ice." This railing, when originally erected, extended along the walk from the intersection of George street with Main street, but at the time of the accident the lower end of it, for a distance of 4 or 5 feet, had been removed. The plaintiff testified that she had hold of this railing as she descended the hill, and when she reached the end of the railing she started to cross to the northerly side of the walk, stepped upon an accumulation of ice, and fell, receiving the injuries complained of.

1. The city was under no legal obligation to erect the railing or to maintain it afterwards; and the fact that a portion of it had been removed did not create any liability on the part of the defendant. It was not such a railing as may be required under Rev. Laws, chap. 51, § 18, but apparently was constructed for the convenience and assistance of travelers upon the street, and not in the performance of a legal duty. It is plain that the removal of a portion of it did not constitute a defect in the way.

Highway—  
absence of railing along sidewalk—defect.

2. The plaintiff contends that the sidewalk was defective by reason of the depression caused by the channel in the center.

The immediate cause of the plaintiff's fall was the presence of slippery ice upon the walk at the place where she attempted to cross over. Since the passage of Stat. 1896, chap. 540, now Rev. Laws, chap. 51, § 19, a city or town is not liable for an injury received upon a way by reason of snow or ice thereon, "if the place at which the injury was sustained was, at the time of the accident, otherwise reasonably safe and convenient for travelers."

One Thompson, a civil engineer, testified that he made measurements of the walk about three years after the accident, and that "the width of the sidewalk between the buttress and the south edge of the curb is close to 4 feet; then the path covered with concrete is 3 foot 6 inches, the curb being 6 inches wide." This witness also testified that the method adopted by him in making measurements for the purpose of ascertaining the depression in the walk was by laying a straight edge from the curb to the northerly line of the street; and that such measurement indicated a depression in the center of the walk, at the point where the plaintiff testified she fell, of from  $1\frac{1}{4}$  to  $1\frac{1}{2}$  inches.

When the steep grade upon this street is considered, we do not think that so slight a depression in the walk, made for the purpose of carrying away surface water, could be

found to be a defect in the absence of snow or ice, and that the latter must

be found to be the sole proximate cause of the accident. We are of opinion also that, if the depression could be found to be a defect, it was not operative as such at the time of the accident, and was not, either

wholly or in part, the proximate cause of it. Further, the

plaintiff is precluded from recovering by the law as stated in *Newton v. Worcester*, 174 Mass. 181, 54 N. E. 521, in which *Hammond, J.*, used the following language (p. 187): "We think the proper and only rea-

sonable interpretation of the statute is that, wherever ice or snow is the sole proximate cause of the accident, there shall be no liability; but where at the time of the accident there is any other defect, to which as a proximate cause the accident is in part attributable, there may be a liability notwithstanding the fact that it also may be attributable in part to ice or snow. This other defect, however, is not a proximate cause within the meaning of this rule, simply because it causes the accumulation of the ice or snow."

3. As to the contention that the ice upon the walk was caused by water which the city allowed to come from the adjoining building and discharge upon the walk, without considering other objections to this claim, there is no evidence to show that the ice upon which the plaintiff fell was caused by water which came from this building. The only testimony upon this matter came from the witness Thompson, who described the conditions as they existed three years after the accident.

4. The plaintiff further contends that the street was defective because of a large cobblestone which "stood up 1 inch above the surface of the walk" in the vicinity of the place where the plaintiff fell, and that it was rough and uneven. But there was no evidence to show that the plaintiff's fall was caused by this stone, or that it constituted a defect that contributed as

a proximate cause, either in whole or in part, to the plaintiff's injury.

We do not think the jury would have been warranted in finding upon the evidence that this sidewalk, when bare, was not reasonably safe and convenient for travelers. *Newton v. Worcester*, 169 Mass. 516, 48 N. E. 274, 174 Mass. 181, 54 N. E. 521; *Bailey v. Cambridge*, 174 Mass. 188, 54 N. E. 523; *Hadden v. Somerville*, 197 Mass. 480, 83 N. E. 1105; *Hitchcock v. Boston*, 201 Mass. 299, 87 N. E. 470.

Highways—  
defective walk—  
projecting stone.

Proximate cause  
—depression in  
sidewalk—ice.

—depression in  
walk—defect—  
slippery condi-  
tion.

The ruling of the judge of the Superior Court was correct.  
Exceptions overruled.

**NOTE.**

The reported case (NEILLSON v. WORCESTER, ante, 1120) rests upon the ground that the slight depression in the sidewalk, in view of its purpose, the grade of the walk, and other circumstances, was not a defect in the walk, or, if so, was not a proximate cause of the accident, and hence did

not deprive the municipality of the statutory immunity from liability for injuries by reason of snow or ice, if the place is otherwise reasonably safe and convenient for travelers. The general subject of the liability of municipalities for injuries resulting from the slippery condition of walks, concurring with defects therein, is treated in the annotation beginning at page 1130, post. Other cases involving the construction and effect of the Massachusetts statute referred to in the reported case will be found at page 1143 of that note.

P. M. WREN, Respt.,  
v.  
CITY OF SEATTLE, Appt.

*Washington Supreme Court (Dept. No. 2)—February 1, 1918.*

(100 Wash. 67, 170 Pac. 342.)

**Highway — defect in sidewalk — contribution of ice.**

1. The excusable existence of snow and ice on a sidewalk, operating merely as a contributing condition in causing an injury by some inherent defect in the walk, does not relieve the municipality from liability for injuries caused by the inherent defect.

[See note on this question beginning on page 1130.]

**— slippery sidewalks — liability.**

2. A municipal corporation is not ordinarily liable for accidents occasioned by mere slipperiness caused by natural accumulations of snow or ice on its sidewalks not so prominent or rough as in themselves to constitute an obstruction, provided they have not been permitted to remain for an unreasonable length of time in view of all the circumstances.

[See 13 R. C. L. 411-415.]

**Trial — requested instruction — refusal.**

3. A requested instruction in an action to recover damages for injuries caused by a fall on a sidewalk, that there can be no recovery if the fall was caused by smooth ice or snow, is properly refused if it does not contain the qualification that the icy condition had not been permitted to remain for an unreasonable time in view of all the circumstances.

[See 13 R. C. L. 412-414.]

**— comment on evidence.**

4. A requested instruction is properly refused if it presents a comment on evidence and assumes a fact contrary to all the evidence.

[See 14 R. C. L. 730, 731, 738.]

**Highway — icy sidewalk — assumption of risk.**

5. One attempting to use a slippery sidewalk does not assume the risk of injury from a break or crack in the walk which is sufficient to admit and catch his foot in case he should slip.

[See 13 R. C. L. 412 et seq.]

**Trial — instruction outside issues.**

6. Requested instructions are properly refused if directed to matters wholly outside the issues as presented by the pleadings and made by the evidence.

[See 14 R. C. L. 784 et seq.]

**Appeal — instruction outside issues.**

7. An instruction as to the duty of a city to mark dangerous places in its sidewalks, which is outside the issues



in an action to recover damages for injury caused by falling on the walk, is nonprejudicial error if the jury are expressly charged that plaintiff cannot recover unless he proves that the injury was caused as charged in the complaint.

[See 14 R. C. L. 784 et seq.]

**Trial — motion for judgment non obstante — contrary to evidence.**

8. A motion for judgment non obstante veredicto or for new trial cannot be maintained on grounds contrary to the decided preponderance of the evidence.

[See 20 R. C. L. 273.]

**APPEAL** by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages for personal injuries sustained through a fall on a defective sidewalk maintained by defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Hugh M. Caldwell and Frank S. Griffith, for appellant:

Defendant's motion for judgment notwithstanding the verdict should have been granted.

Kieburz v. Seattle, 84 Wash. 196, 146 Pac. 400; Mattson v. Griffin Transfer Co. 90 Wash. 1, 155 Pac. 392; Roe v. Standard Furniture Co. 41 Wash. 546, 83 Pac. 1109; Spokane Grain Co. v. Great Northern Exp. Co. 55 Wash. 545, 104 Pac. 794.

Where the physical facts make the happening of an injury impossible as claimed, a court will not sustain a verdict although the jury may have returned one.

Lloyd v. Calhoun, 82 Wash. 35, 143 Pac. 458, adopting dissenting opinion of 78 Wash. 438, 139 Pac. 231; Allison v. Chicago, M. & St. P. R. Co. 83 Wash. 591, 145 Pac. 608.

The city is not liable for accidents occasioned by the mere slipperiness caused by ice upon the walk.

Calder v. Walla Walla, 6 Wash. 377, 35 Pac. 1054; Bull v. Spokane, 46 Wash. 237, 13 L.R.A.(N.S.) 1105, 89 Pac. 555.

It was error to refuse to give instructions covering the defense of ice and snow on the sidewalk.

Calder v. Walla Walla, *supra*; Seacor v. Oregon Improv. Co. 15 Wash. 35, 45 Pac. 654; 38 Cyc. 1615; Frost v. Ainslie Lumber Co. 3 Wash. 241, 28 Pac. 354, 915; Einseidler v. Whitman County, 22 Wash. 388, 60 Pac. 1122; Brabon v. Seattle, 29 Wash. 6, 69 Pac. 365; Washington Iron Works v. McNaught, 35 Wash. 10, 76 Pac. 301; Johnson v. Caughren, 55 Wash. 125, 104 Pac. 170, 19 Ann. Cas. 1148; Gage v. Springston Lumber Co. 47 Wash. 141, 91 Pac. 558; Caywood v. Seattle Electric Co. 59 Wash. 566, 110 Pac. 420; Johnson v. Heitman, 88 Wash.

595, 153 Pac. 331; Williams v. Wurde-mann, 71 Wash. 390, 128 Pac. 639; Wainwright v. United States Lumber Co. 73 Wash. 222, 131 Pac. 820; Dignan v. Spurr, 3 Wash. 309, 28 Pac. 529; Jones v. Seattle, 23 Wash. 753, 63 Pac. 553; Childs v. Childs, 49 Wash. 27, 94 Pac. 660.

Messrs. Griffin & Griffin for respondent.

Ellis, Ch. J., delivered the opinion of the court:

This is an action for personal injuries suffered by plaintiff through a fall on a board sidewalk maintained by defendant. Plaintiff alleged, in substance, that the accident happened on the west side of Fourth avenue west, between West Smith and West Holliday streets, in the city of Seattle, while he was walking north thereon on February 8, 1916, between 5 and 5:30 o'clock P. M. The sole negligence charged was that the sidewalk was two boards wide; that a sufficient number of supports were not placed beneath these boards to maintain them in a reasonably safe manner; that the boards were not nailed to such supports as were there, and that one of the boards was, and long had been, broken and split, leaving a large crack between the boards and a large crack in the board which was broken, split, and splintered. It was alleged that plaintiff caught his right foot in this defective board and in the opening caused thereby, and fell with great force and violence, breaking his right leg above the ankle, breaking the third finger of his right hand, and necessitating

the amputation of the leg, which amputation took place about April 1, 1916, all to his damage, for the permanent injury, physical and mental, pain and suffering, medicines, medical services, and hospital expenses, in the aggregate sum of \$15,000. It was further alleged that plaintiff, within thirty days after the injury, but before the amputation, presented to the city council and filed with the city clerk his claim for the injuries as required by law. Defendant answered, denying the foregoing allegations, and pleading in general terms contributory negligence as an affirmative defense. This matter of defense was traversed by reply.

The evidence shows that the sidewalk in question ran north and south on the west side of the street and consisted of two boards, each 12 inches wide, 1½ inches thick, and 16 feet long, laid side by side and resting upon 3 x 12 inch crosspieces, one in the middle of the boards and one at each end. The west board was split from the inside corner of the north end for about 4 feet back, and diagonally across almost to the other side. It had been in this condition for several months. Plaintiff testified, in substance, that he had passed over the sidewalk in question but once or twice before, and had never noticed its condition; that, at the time of his fall, there had been a heavy snow which had been shoveled off the sidewalk, but that there remained thereon sufficient snow to conceal the condition of the broken board and the crack between the boards; that he stepped upon the broken board, which bent under his weight, causing his right foot to pass under the edge of the other board, so that the side of his foot was caught between the boards, causing him to fall heavily, breaking both bones of the right ankle, and that, in endeavoring to catch himself, he also broke the third finger of his right hand; that, in the fall and in releasing his foot, the snow was removed from the boards so that he then observed the condition of the

broken board, and that it was loose, not being nailed to the crosspiece at the north end. No one else was present at the time of the accident, but several persons arrived soon afterwards. Four or five of these corroborated plaintiff as to the condition of the broken board, and that it was not nailed to the north crosspiece. Two or three of these testified that the split board would bend down 4 or 5 inches under a man's weight. A section about 8 inches long, of the north end of the walk, was in evidence as an exhibit. It shows both boards nailed to the crosspiece. No one testified that it was in the same condition as at the time of the accident, but the two men who procured it over a year after the accident testified that the boards were nailed to the crosspiece when they procured it, and the nails and nail holes were apparently old. These two men testified that, at that time, the split board would not bend under their weight more than "a scant ½ inch" below the other board, and that it then rested upon solid ground. Several witnesses testified that, in winter, the ground under the boards was soft and wet, so that, when the broken board was stepped upon, it would bend down and splash water upon the feet. One woman testified that in this way her own foot had been caught, throwing her down at the same place.

One of the men in charge of the ambulance which removed plaintiff to the city hospital about an hour after the fall testified that plaintiff told him he slipped upon "the icy sidewalk, that is, on the snow—on the ice." Plaintiff denied this, and there was no evidence that there was any ice. The evidence was conclusive that it had been raining since about four o'clock that day, and that the snow was soft and "slushy."

One bone of the same leg had been broken about 2 inches above the break here in question almost three years before this, but the evidence was uncontradicted that the break had completely healed, though plaintiff sometimes walked with a cane.

when in the city as a matter of caution, and was using a cane when he fell. For a considerable time prior to the injury here involved he had been doing the heaviest kind of work on ranches and in the woods. The leg was amputated below the knee on April 1, 1916, by a surgeon of plaintiff's own selection, but there is no evidence that the amputation could have been avoided or that the treatment throughout was not skillful and proper.

The court, after stating the issues as presented by the pleading, instructed the jury specifically that: "Before the plaintiff can recover against the defendant, it is necessary for the plaintiff to prove the following things: (1) That he was injured by catching his foot in and falling upon a defective sidewalk as alleged in the complaint. (2) That said sidewalk was in such a defective condition as to make it dangerous to travelers using such sidewalk. (3) That said defective sidewalk was not marked by any light or beacon so as to warn persons approaching or using the same of the probable danger. (4) That the city had either actual or constructive notice of the defective condition of said sidewalk. (5) That the defective condition of the walk as complained of was the proximate cause of the injuries the plaintiff suffered. (6) That within thirty days after the accident the plaintiff filed a claim with the city of Seattle. (7) The nature and extent of the injuries."

These were elaborated, but not materially changed, by subsequent instructions. The jury was told that the city would only be liable in case of notice of the defect, either actual or through its existence for such length of time before the injury occurred as to give the city an opportunity to repair such defect, and was faultlessly instructed as to what would constitute constructive notice. As to proximate cause, the court instructed as follows: "I have instructed you that the plaintiff must show that some one or more of the acts of negligence complained

of was the proximate cause of his injuries. By proximate cause we mean probable cause, direct cause, and a general test as to whether negligence is the proximate cause of an accident is whether or not it is such negligence as a person of ordinary intelligence, prudence, care, and caution should have foreseen that an accident was liable to be caused thereby. The proximate cause of an injury is that cause which in natural and continuous sequences, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not occur."

Touching the burden of proof, the jury was told that: "The burden of proof is upon the plaintiff in every case to satisfy you as to the truth of the material allegations of the complaint before plaintiff will be entitled to recover. . . . In order for the plaintiff to recover in this case he must satisfy you by a fair preponderance of the evidence, of the truth of the material allegations contained in his complaint."

The court then instructed faultlessly as to the rule of preponderance of evidence, told the jury that negligence is never presumed, and defined negligence, in substance, as the doing of something which an ordinarily prudent person would not do, or failing to do that which an ordinarily prudent person would do, and continued: "If, tried by this definition, you find that the defendant, the city of Seattle, was not guilty of negligence as alleged in the complaint, whereby the plaintiff, P. M. Wren, suffered the injury described in his complaint, then your verdict should be for the defendant. On the other hand, if, tried by the same definition, you find from a preponderance of the evidence that the defendant was guilty of negligence in the manner alleged in plaintiff's complaint, and that such negligence was the proximate cause of the accident whereby plaintiff sustained the injuries complained of, then your verdict should be for the plaintiff, unless you further find that the injuries to the plaintiff were caused

by his own negligent acts to which he himself contributed."

The court gave correct instructions as to the law governing contributory negligence, and instructed that it is the duty of the city to keep its sidewalks in a reasonably safe condition, but that the city is not an insurer, and then told the jury: "You are further instructed that a municipal corporation, such as the defendant city of Seattle, is only liable for such defects in its streets as are in themselves dangerous, or such that a person exercising reasonable care and caution for his own safety cannot avoid danger in passing over them, and if you believe in this case that the sidewalk over which the plaintiff traveled was not in itself dangerous to the safety of persons using the same with reasonable care, and that the alleged injury claimed to have been suffered by plaintiff was the result of a mere accident or from want of reasonable care for his own safety on the plaintiff's part, then your verdict should be for the defendant."

The jury returned a verdict for plaintiff in the sum of \$7,500. Defendant moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. Both motions were denied. Defendant appeals.

Appellant's main contention is that the court committed fatal error in refusing to give the following requested instructions which, for convenient reference, we number:

"(1) The city is not liable for accidents occasioned by mere slipperiness caused by ice and snow upon the sidewalk, and if you find from the evidence that plaintiff's accident was caused solely by the slippery condition of the sidewalk, then I instruct you that he cannot recover.

"(2) If you find from the evidence that the plaintiff knew, or by the exercise of reasonable care should have known, of the slippery condition of the sidewalk by reason of its being covered with a coating of smooth ice and snow, and that he was likely to slip and fall thereon,

then I charge you that, by walking upon said sidewalk, he assumed all the risks, and cannot recover damages from the city for any resulting injury.

"(3) I charge you, as a matter of law, that a municipality is not liable for injuries resulting merely from the slippery condition of a sidewalk caused by smooth ice and snow, and if you find in this case that the sidewalk on which the plaintiff claims to have slipped and fallen was in a reasonably safe condition, but that it was covered by smooth ice or snow, and the plaintiff slipped and fell, the city would not be liable, and your verdict should be for the defendant."

It is undoubtedly the law that a municipality is not ordinarily liable for accidents occasioned solely by mere slipperiness caused by natural accumulations of snow or ice upon its sidewalks, not so

Highway—  
slippery sidewalks—liability.

prominent or rough as in themselves to constitute an obstruction, and provided they have not been permitted to remain for an unreasonable length of time in view of all the circumstances. *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054; *Bull v. Spokane*, 46 Wash. 237, 13 L.R.A. (N.S.) 1105, 89 Pac. 555. But, considered as mere legal abstractions, neither of the above requests was correct. None of them contained the qualifications requisite to immunity, that the jury should find that the ice or snow, though not so accumulated as to

constitute an obstruction, had not

Trial—requested instruction—refusal.

been permitted to remain for an unreasonable length of time in view of all the circumstances. The request which we have numbered (2) presented a palpable comment upon the evidence. Even as a comment it assumed a fact contrary to all the evidence, viz., that the sidewalk was covered with "a

—comment on evidence.

smooth coating of ice and snow." Moreover, even assuming as a fact that the sidewalk was slippery from snow or ice, respondent did not, as

a matter of law, assume the risk of a broken board or crack in the sidewalk itself sufficient to admit his foot should he slip, nor the risk of

Highway—icy sidewalk—assumption of risk.

injury from any other defect inherent in the walk itself. In any view

of the case, this second request was properly refused.

But, aside from the fact that these instructions incorrectly stated the law, they were properly refused. They were directed to matter wholly

Trial—instruction outside issues.

outside the issue as presented by pleadings and made by

the evidence, and to which respondent's right to recover was strictly confined by the instructions which were given. Through these requests appellant was evidently trying to evade liability for an inherent defect in the sidewalk itself, which respondent alleged in his complaint and positively testified caused his injury, by magnifying the adventitious circumstance that the sidewalk was partly covered with snow or slush, more or less slippery, as a possible cause of the accident. See *Waters v. Kansas City*, 94 Mo. App. 413, 68 S. W. 366.

The case of *Calder v. Walla Walla*, supra, is cited as authority for these requests, but that case is readily distinguishable from this, both on pleadings and evidence. In that case, the city was charged with negligence in permitting snow and ice so to accumulate as to constitute a dangerous obstruction on the walk. That was the sole negligence charged. Though the instructions there given are not set out, the court had evidently instructed that for injury from such an obstruction the city would be liable. This court held that the instruction there requested should have been given in qualification of the instruction which was given, and as addressed to that sole issue. It did not hold that the existence of snow or ice, though so smooth and even and so recent of ac-

cumulation as not in itself to constitute negligence, is an excuse for defects inherent in the walk which, even through the aid of the snow or ice, caused an injury. No court, so far as we are advised, has ever held that the excusable existence of snow or ice, operating merely as a contributing condition in causing an injury by some defect inherent in the sidewalk itself, can be successfully asserted in absolution from liability for injuries caused by such inherent defect. The pertinent decisions are the other way. It is said by the supreme court of Kansas in a case closely analogous to this: "There is in this case the defective sidewalk, for which the city is responsible; there is, perhaps (at least that possibility is involved in the instruction), the slippery condition of the sidewalk, for which no one is responsible; and there is the passing over it of the plaintiff, for which she alone is responsible—unless, indeed, she was compelled by causes unknown, operating in endless succession upon each other, to walk over it. Indeed, she might have reached her destination by walking on another street. But in all these causes, proximate or remote, real or fancied, there was negligence in but one party, the plaintiff in error. Where the sufferer is in no fault, using ordinary care and diligence, and is injured by a defect in a public sidewalk, although the slippery state thereof may have combined with the defect to produce the accident, we cannot but hold that the city that constructs the walk, and invites people to walk upon it, and then permits it to remain in an unsafe and dangerous condition, is liable. So holding, the instruction was properly refused." *Atchison v. King*, 9 Kan. 550, 558, 559.

Highway—defect in sidewalk—contribution of ice.

By the supreme court of Rhode Island it is said: "Where two causes combine to produce the injury, both in their nature proximate, the one

being the defect in the highway, and the other some occurrence for which neither party is responsible, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway.' Dill. Mun. Corp. 1881, ed. § 1007. It seems to us that this doctrine, at least where the concurring cause is a natural cause, or a pure accident for which no person is responsible, is the more reasonable doctrine. Indeed, we think it is the duty of the town, in making and mending its highways, to consider the natural effects of rain and snow and ice as affecting the safety and convenience of travel thereon, except so far as the statute exonerates them from duty in that regard." *Hampson v. Taylor*, 15 R. I. 83, 85, 28 Atl. 732.

See also *Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41; *Waters v. Kansas City*, 94 Mo. App. 413, 68 S. W. 366; *Hodges v. Waterloo*, 109 Iowa, 444, 80 N. W. 523; *Hill v. Fond du Lac*, 56 Wis. 242, 14 N. W. 25; *Stilling v. Thorp*, 54 Wis. 528, 41 Am. Rep. 60, 11 N. W. 906; *Salzer v. Milwaukee*, 97 Wis. 471, 73 N. W. 20; *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128; *Ziegler v. Spokane*, 25 Wash. 439, 65 Pac. 752.

If respondent was injured as he alleged in his complaint and as he testified, namely, by his foot passing between the boards of the walk, then the fact, if it be a fact, that this was facilitated or even caused by slippery snow or ice, would not absolve the city from liability. Any sidewalk is liable in winter to become slippery from snow or ice; anyone is liable to slip on such snow or ice; but no one's foot will catch in a properly constructed sidewalk even though he slip on snow or ice. These things are as well known to city officials as to other people. They should be anticipated. They augment, rather than diminish, the duty of the city to keep the sidewalk itself free from inherent defects which may make such slipping more likely to result in injury. *Perkins*

*v. Fond du Lac*, 34 Wis. 435; *Hill v. Fond du Lac*, 56 Wis. 242, 14 N. W. 25; *Atchison v. King*, supra, and *Hodges v. Waterloo*, 109 Iowa, 444, 80 N. W. 523. When, therefore, the trial judge instructed, as he did repeatedly, that respondent could only recover by proving that the city was negligent "as alleged in the complaint," and specifically that he could not recover unless he proved "that he was injured by catching his foot in and falling upon a defective sidewalk as alleged in the complaint," and finally, that the city "is only liable for such defects in its streets as are in themselves dangerous," it was not incumbent upon the court to further instruct that the city was not liable for accidents resulting from snow and ice alone, or resulting from any other specific causes neither alleged in the complaint nor attempted to be proved as negligence. Respondent, in his testimony, merely mentioned the snow as concealing the condition of the walk. He testified that he did not slip on the snow. There was no evidence that there was any ice. The complaint did not mention either snow or ice. In every view of the case, the requested instructions were properly refused.

Appellant also predicates a claim of fatal error upon the giving of the following instruction: "It is the duty of the city at all times to keep its sidewalks on its public streets in a reasonably safe condition for public use, and not to permit anything that will make the use of the sidewalk in the ordinary manner unsafe. To this end, it is the duty of the city to inspect its sidewalks in a reasonably careful and reasonably frequent manner, for the purpose of ascertaining whether or not they are safe for public use. It is the duty of the city to mark dangerous places in its sidewalks upon the public streets, by warning signals or lights, and for any breach of this duty, proximately resulting in damages to

persons using said sidewalks, the city is liable."

The last sentence of this instruction was outside the issues and should not have been given. But it could not have been prejudicial, in

**Appeal—instruction outside issues.**

view of the fact that the jury was repeatedly told that respondent could not recover unless he proved that he was injured as alleged in his complaint, and, specifically, that he could not recover unless he had proved "that he was injured by catching his foot in and falling upon a defective sidewalk, as alleged in the complaint."

Finally, it is claimed that the court should have granted the motion for judgment non obstante veredicto, or, in any event, the motion for a new trial. It is argued that the evidence shows that respondent

was injured solely by slipping upon snow or ice. The answer is that this theory is contrary to the decided preponderance of the evidence. It is next argued that the slippery condition of the sidewalk was a concurring cause of the accident, exonerating the city from liability. The answer is that this theory, even were it sustained by any evidence worthy of the name, is contrary to the law. The further argument that the notice of claim filed with the city was insufficient is without merit. We have examined the notice in the light of the evidence, and are satisfied that it fully meets the law and the facts.

**Trial—motion for judgment non obstante—contrary to evidence.**

The judgment is affirmed.

Mount, Holcomb, Morris, and Chadwick, JJ., concur.

## ANNOTATION.

### Liability of municipality for injury resulting from slippery condition of walk, concurring with defect therein.

I. General rule, 1130.

II. Illustrations of rule:

a. Defect consisting of hole, 1131.

b. Defect consisting of incline, 1134.

c. Other defects, 1136.

III. Limitations of rule, 1139.

IV. Effect of act or liability of abutting owner, 1142.

V. Rule in Massachusetts, 1143.

#### *I. General rule.*

It is generally held that a municipality is not liable for injuries resulting from the mere temporary slipperiness of a walk, due to natural causes. See 13 R. C. L. title Highways, pp. 408 et seq. It also seems to be the rule, however, that when two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate,—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible,—the municipality is liable, provided the injury would not have been sustained but for

the defect. *Ring v. Cohoes* (1879) 77 N. Y. 83, 33 Am. Rep. 574. Consequently, where an injury results from the slippery condition of a walk, together with a defect in the walk, the municipality is liable therefor, if the defect in the walk is a proximate cause of the injury.

**Illinois.**—*Chicago v. Chase* (1889) 33 Ill. App. 551; *Richmond v. Marcellles* (1914) 190 Ill. App. 227; *Dra-cass v. Chicago* (1915) 193 Ill. App. 75.

**Iowa.**—*Langhammer v. Manchester* (1896) 99 Iowa, 295, 68 N. W. 688; *Ford v. Des Moines* (1898) 106 Iowa, 94, 75 N. W. 630, 4 Am. Neg. Rep. 379; *Shumway v. Burlington* (1899) 108 Iowa, 424, 79 N. W. 123; *Hodges v. Waterloo* (1899) 109 Iowa, 444, 80 N. W. 523.

**Kansas.**—*Atchison v. King* (1872) 9 Kan. 550; *Columbus v. Neise* (1901) 63 Kan. 885, 65 Pac. 643.

**Kentucky.**—*Covington v. Billiter* (1907) 30 Ky. L. Rep. 650, 99 S. W. 318.

**Michigan.**—Burrell v. Greenville (1903) 133 Mich. 235, 94 N. W. 732, 14 Am. Neg. Rep. 82.

**Missouri.**—Waters v. Kansas City (1902) 94 Mo. App. 413, 68 S. W. 366; Heether v. Huntsville (1906) 121 Mo. App. 495, 97 S. W. 239.

**New York.**—Conklin v. Elmira (1896) 11 App. Div. 402, 42 N. Y. Supp. 518; Gillrie v. Lockport (1890) 122 N. Y. 403, 25 N. E. 357.

**Ohio.**—Circleville v. Sohn (1900) 20 Ohio C. C. 368, 11 Ohio C. Dec. 193; Bloom v. Toledo (1903) 25 Ohio C. C. 235.

**Pennsylvania.**—Kauffman v. Harrisburg (1902) 204 Pa. 26, 53 Atl. 521; Bucher v. Sunbury (1906) 216 Pa. 89, 64 Atl. 906; Holbert v. Philadelphia (1908) 221 Pa. 266, 20 L.R.A.(N.S.) 201, 70 Atl. 746; McDonnell v. Philadelphia (1891) 12 Pa. Co. Ct. 672; Wertz v. Girardville (1905) 30 Pa. Super. Ct. 260.

**Rhode Island.**—Hampson v. Taylor (1885) 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

**South Dakota.**—Smith v. Yankton (1909) 23 S. D. 352, 121 N. W. 848.

**Washington.**—Ziegler v. Spokane (1901) 25 Wash. 439, 65 Pac. 752; Smith v. Tacoma (1908) 51 Wash. 101, 21 L.R.A.(N.S.) 1018, 98 Pac. 91. And see the reported case (WREN v. SEATTLE, ante, 1123).

**Wisconsin.**—Perkins v. Fond du Lac (1874) 34 Wis. 435; Hill v. Fond du Lac (1882) 56 Wis. 242, 14 N. W. 25; West v. Eau Claire (1894) 89 Wis. 31, 61 N. W. 313.

## II. Illustrations of rule.

### a. Defect consisting of hole.

A number of cases support the rule that a municipality is liable for an injury resulting from the slippery condition of one of its walks, concurring with a defect therein consisting of a hole.

**Illinois.**—Chicago v. Chase (1889) 33 Ill. App. 551; Richmond v. Marseilles (1914) 190 Ill. App. 227.

**Kansas.**—Atchison v. King (1872) 9 Kan. 550; Columbus v. Neise (1901) 63 Kan. 885, 65 Pac. 643.

**Kentucky.**—Covington v. Billiter

(1907) 30 Ky. L. Rep. 650, 99 S. W. 318.

**Michigan.**—Burrell v. Greenville (1903) 133 Mich. 235, 94 N. W. 732, 14 Am. Neg. Rep. 82.

**Missouri.**—Waters v. Kansas City (1902) 94 Mo. App. 413, 68 S. W. 366.

**Pennsylvania.**—Wertz v. Girardville (1905) 30 Pa. Super. Ct. 260.

**Rhode Island.**—Hampson v. Taylor (1885) 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

**Washington.**—Ziegler v. Spokane (1901) 25 Wash. 439, 65 Pac. 752.

**Wisconsin.**—West v. Eau Claire (1894) 89 Wis. 31, 61 N. W. 313.

Thus, in *Atchison v. King* (1872) 9 Kan. 550, the plaintiff brought an action against a city to recover damages for an injury to her leg, caused by stepping through a hole in the sidewalk. It appeared that the sidewalk was in a wet and slippery condition. An instruction to the effect that if the accident was partly caused by the wet and slippery condition of the sidewalk from the fall of rain, snow, or sleet, without the fault or negligence of the defendant, and partly from the defective sidewalk, then the plaintiff could not recover, was held properly refused. The court said: "The first impression on reading the instruction is that it is erroneous; for it lays down a principle that at a time when, from the condition of the sidewalks in a city by reason of a recent fall of rain, snow, or sleet, one most requires a good and safe walk, then is when the liability of a city for a defect in the sidewalk substantially ceases; for it is on such occasions that most accidents happen. . . . In such an injury as the one in this case there must always be two or more causes contributing to the injury, without any carelessness on the part of the sufferer. There is in this case the defective sidewalk, for which the city is responsible; there is, perhaps (at least, that possibility is involved in the instruction), the slippery condition of the sidewalk, for which no one is responsible; and there is the passing over it of the plaintiff, for which she alone is responsible; unless, indeed, she was compelled by causes unknown, operat-



ing in endless succession upon each other, to walk over it. Indeed, she might have reached her destination by walking on another street. But in all these causes, proximate or remote, real or fancied, there was negligence in but one party, the plaintiff in error. Where the sufferer is in no fault, using ordinary care and diligence, and is injured by a defect in a public sidewalk, although the slippery state thereof may have combined with the defect to produce the accident, we cannot but hold that the city that constructs the walk, and invites people to walk upon it, and then permits it to remain in an unsafe and dangerous condition, is liable. So holding, the instruction was properly refused."

In *Chicago v. Chase* (1889) 33 Ill. App. 551, the facts were stated by the court as follows: "Appellee recovered a judgment in this case against the city for the sum of \$2,000 for an injury received by her, by her foot being caught in a hole in the sidewalk, which caused her to fall over and break her leg. . . . It is shown that appellee was walking along the sidewalk on the north side, east of Oakley street, in the nighttime. That snow covered the walk, and that a path was trodden wide enough for one person to walk on. That appellee, in walking along said trodden path, slipped, and stepped with one foot one side of said trodden path; that her foot went through a hole in the sidewalk, which hole was hidden from view by the snow which covered the walk. These facts were uncontradicted. The evidence tended to show that the sidewalk at the point where the accident occurred was old and out of repair, and for a period of from a month to half a year before the accident there were planks missing and holes and spaces in the sidewalk, caused by planks having been broken." It was held that the city was charged with notice of the dangerous condition of the sidewalk, and the verdict for the plaintiff was affirmed.

In *Richmond v. Marseilles* (1914) 190 Ill. App. 227, it appeared that there was a hole or broken place in a sidewalk and, as a pedestrian was

stepping over it, he slipped because the walk was wet, and caught his toe in the hole and was thrown and injured. He brought an action against the city to recover damages for his injuries, alleging that the walk was unsafe and dangerous, and that the defendant knew of its condition, or in the exercise of ordinary care might have known of it. A recovery in favor of the plaintiff was affirmed.

In *Columbus v. Neise* (1901) 63 Kan. 885, 65 Pac. 643, an action was brought against a city to recover damages for an injury sustained by the plaintiff by reason of a defective sidewalk. The petition alleged that the principal cause of the injury was an opening in the sidewalk. It was held that a further allegation that the sidewalk became more dangerous because of its damp and slippery condition at the time the accident occurred did not relieve the city from responsibility for negligently leaving the opening in the walk, it appearing that the plaintiff was without fault.

In *Covington v. Billiter* (1907) 30 Ky. L. Rep. 650, 99 S. W. 318, it appeared that the plaintiff broke his leg by means of a fall caused by his stepping in a hole in a pavement. At the time of the accident there were snow and ice on the pavement. In an action against the city to recover damages for the injury, an instruction to the effect that if the plaintiff slipped on any ice or snow and fell into the hole, and was thereby thrown and injured, and the presence of the hole was a concurring and contributing cause of his injury, without which his injury would not have been sustained, the jury should find for him, was held not to be subject to any substantial objection.

In *Burrell v. Greenville* (1903) 133 Mich. 235, 94 N. W. 732, 4 Am. Neg. Rep. 82, it appeared that the plaintiff stepped into a hole in a sidewalk and was injured. The sidewalk was old, rotten, and had several holes in it. The sidewalk was wet and slippery, because of which the plaintiff's foot slipped into a hole when she stepped on an adjacent plank. In an action against the city to recover damages

for the injury, the defendant's negligence being conceded, it was held that the plaintiff was not guilty of contributory negligence, and that her slipping was not the proximate cause of the accident.

In *Waters v. Kansas City* (1902) 94 Mo. App. 413, 68 S. W. 866, it appeared that the plaintiff stepped in a hole in a wooden crosswalk, at a time when the defect was at least partially concealed by snow. In an action against the city to recover damages for injuries resulting from the misstep, an instruction assuming that the plaintiff "was caused to slip and fall" by the snow was held erroneous, because there was no evidence showing that she slipped and fell by reason of the snow except as it was connected with the defect in the walk.

In *West v. Eau Claire* (1894) 89 Wis. 31, 61 N. W. 818, an action was brought against a city to recover damages for injuries sustained by the plaintiff by a fall on a sidewalk. The evidence on the part of the plaintiff, as stated by the court, "tended to prove that at the place of the accident was a ridge of snow and ice along the track of the travel on the sidewalk, caused by the travel over the snow which had been allowed to remain and accumulate there; that such ridge was uneven and slippery; that beside and near the ridge was a hole in the plank of the sidewalk; that at the time of the accident the plaintiff's attention was momentarily diverted; that she slipped, her foot went through the hole, and was held there until she fell in such a way as to break her ankle; and that this hole had been there from the previous summer." It was held that the evidence was sufficient to support a verdict for the plaintiff, and that the plaintiff was not guilty of contributory negligence as a matter of law. It was also said: "Either the ridge or the hole might be so serious a defect as to sustain plaintiff's action. Both together, or the hole alone, might be sufficient cause to produce plaintiff's accident."

In *Hampson v. Taylor* (1885) 15 R. I. 88, 23 Atl. 782, an action was brought against a town to recover

damages for injuries sustained by the plaintiff by slipping and falling on a walk. It appeared that at the place of the accident there was a gully nearly a foot deep. There were some cobblestones left exposed in the gully, and it was one of these that caused the plaintiff to slip and fall. The entire walk and street were covered with a thin film of ice. The trial court instructed the jury as follows: "If the sidewalk where the accident happened was so defective as to render the town liable in case an accident had happened by reason of the defect, in the absence of the obstruction caused by the ice, and this accident happened by reason of such defect and would not have happened but for it, then the town is liable, even though the ice was one of the proximate causes of the accident." On appeal the instruction was held to be correct.

In *Wertz v. Girardville* (1905) 30 Pa. Super. Ct. 260, it appeared that the plaintiff was injured by slipping and falling on a walk in the nighttime. At the place of the accident there was a hole in the walk caused by the removal of a paving stone when a telephone pole was set. The plaintiff stepped on a stone near the pole, when her foot slipped and went into the hole, resulting in a fracture of her ankle. The walk was covered with snow and the plaintiff had left the beaten track and was about to go on the street because she thought it was safer. In an action to recover damages for the injury, it was held that the questions as to the liability of the defendant and the plaintiff's negligence were for the jury, and a judgment in favor of the plaintiff was affirmed.

In *Ziegler v. Spokane* (1901) 25 Wash. 439, 65 Pac. 752, the facts were stated by the court as follows: "The evidence tended to show that the sidewalk upon which the respondent fell was old and worn out, full of holes, caused by the decay of the materials of which it was constructed, and in a generally unsafe condition for ordinary travel; that on the day preceding the accident a fall of snow occurred, which, owing to the temperature,

was wet and slushy; that during the night it froze hard, leaving the walk at the time of the accident in a very slippery condition." It was held that it was for the jury to determine whether the mere slipperiness or the defective condition of the walk was the proximate cause of the accident, and it was not error on the part of the trial court to submit the question of the city's liability to them.

*b. Defect consisting of incline.*

It is hardly reasonable to suppose that municipalities would be liable for every injury resulting from the slippery condition of inclined walks, inasmuch as their liability does not extend to injuries resulting from icy condition of walks alone, as hereinbefore stated; and in nearly all municipalities there are, of necessity, walks built at an incline. See *infra*, III. But where the incline is built at a greater angle than the necessities of the case require, or where, in addition to the grade made necessary by the grade of the adjoining street, there is an added unreasonable side slope, or where the walk is constructed of materials which are peculiarly subject to slipperiness under conditions which are likely at times to prevail, then the incline may become a defect, which, concurring with a slippery condition of the walk to cause an injury, will make the municipality liable therefor. *Laughammer v. Manchester* (1896) 99 Iowa, 295, 68 N. W. 688; *Ford v. Des Moines* (1898) 106 Iowa, 94, 75 N. W. 630, 4 Am. Neg. Rep. 879; *Shumway v. Burlington* (1899) 108 Iowa, 424, 79 N. W. 123; *Hodges v. Waterloo* (1899) 109 Iowa, 444, 80 N. W. 523; *Circleville v. Sohn* (1900) 20 Ohio C. C. 368, 11 Ohio C. Dec. 193; *Smith v. Yankton* (1909) 23 S. D. 352, 121 N. W. 848; *Perkins v. Fond du Lac* (1874) 34 Wis. 435.

Thus, in *Langhammer v. Manchester* (Iowa) *supra*, an action was brought to recover damages resulting from an injury to the plaintiff, caused by a fall on a stone step leading from a sidewalk to a walk crossing a street in the defendant city. The following in-

struction was given: "You are instructed that if you find that the injury sustained by the plaintiff was produced by two causes, namely, the slant of the step in question, and a coating of ice thereon, the result of the storm of the night before, the latter being a cause for which no one was responsible, the plaintiff cannot recover, unless she has shown by a preponderance of the credible testimony that the slant of the step was the real cause of the injury, and but for which it would not have happened; neither can a recovery be had if it is equally as probable that the injury came from the one cause as from the other." The instruction was held to be correct, and to follow in effect the rule in New York, which was stated as follows: "When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided that the injury would not have been sustained but for such defect."

In *Ford v. Des Moines* (1898) 106 Iowa, 94, 75 N. W. 630, 4 Am. Neg. Rep. 379, it appeared that by the authority of a municipality a temporary sidewalk 40 feet long was constructed. The slope was about 5 feet, and the planks constituting the walk were placed lengthwise, but no cleats were fastened on them, nor were hand rails placed at the sides. In attempting to pass down the walk the plaintiff slipped and fell, sustaining injuries. The evidence tended to show that the walk was made slippery by a snow which had fallen shortly before the accident. In an action against the municipality to recover damages for the injuries, it was held that whether the defendant was negligent in constructing the walk and whether it should have provided against the contingency of the walk becoming slippery by the fall of snow were questions for the jury, the rule that a municipality is not liable for injuries caused by fresh snow or ice on a prop-

erly constructed walk not being applicable.

In *Shumway v. Burlington* (1899) 108 Iowa, 424, 79 N. W. 123, an action was brought against a city to recover damages for personal injuries sustained by the plaintiff by reason of a fall on one of the defendant's sidewalks. It appeared that water accumulated on premises adjacent to the place of the accident, and was discharged through a hole in a fence over the walk. This condition had existed for several years. The walk was made of planks laid crosswise, and sloped towards the center of the street, the side next to the fence being 10 inches higher than the other. The evidence tended to show that there was ice on the walk at the time of the accident. An ordinance providing that no person should lay a sidewalk unless it conformed to the established grade of the street, and that "the outer edge of the walk so laid shall not be more than 6 inches above the top of the curbstone, and shall have a descent from the line of the lot towards the street of 3 inches, without obtaining permission from the city council," was offered in evidence and rejected on motion by the trial court, and a verdict for the defendant was directed. Both rulings were held erroneous. The court said: "The effect of a freezing temperature upon water flowing onto a sidewalk, and the dangers to be apprehended from ice on a sloping walk, were, it must be presumed, known to the defendant. Whether, under all the circumstances disclosed by the evidence, it was negligent in not anticipating the dangerous condition of the walk, and providing against it, was a question for the determination of the jury. . . . We are of the opinion that, if the ordinance rejected had been received in evidence, the jury would have been authorized to find for the plaintiff."

In *Hodges v. Waterloo* (1899) 109 Iowa, 444, 80 N. W. 523, it appeared that the specifications adopted by a city for grading, paving, and curbing provided that "the approaches connecting the streets or avenues and alleys shall be graded as directed by the

engineer." At one of the alley crossings in the city the walk was 14 feet wide, and from the buildings towards the curb, for a distance of 9 feet, the fall was 2½ inches. From that point to the curb, a distance of about 5 feet, the descent was 7½ inches. The plaintiff at a time when the walk was covered with snow and ice slipped and fell on the outer incline of the walk, she having moved aside to permit other pedestrians to pass. She brought an action against the city to recover damages for injuries sustained by her fall, alleging negligence on the part of the defendant in constructing the walk with an abrupt declivity in its surface. It was held that there was no evidence that the walk was constructed in pursuance of a plan adopted by the city and prepared by a competent engineer, so as to relieve the city from liability, and that the case should have gone to the jury.

In *Perkins v. Fond du Lac* (1874) 34 Wis. 435, an action was brought to recover damages for injuries sustained by the plaintiff by reason of slipping and falling on an approach to a bridge. It appeared that the approach was constructed of planks running parallel with the street, and had a slope of about two feet and a half in twenty. Strips of wood about an inch square were nailed crosswise on the planks a foot apart. At the time of the accident the whole surface of the walk was covered with packed snow and ice, and was very smooth and slippery. It was dark at the time and the plaintiff fell while descending the slope, having just shortly before come from the other side of the street. The plaintiff was aware that the approach sloped. The walk of which the approach was a part was one of the principal ones of the city. The approach on the other side of the street was more nearly level. It was held that the questions as to negligence of the city in constructing the walk in a faulty and unsafe manner, which unnecessarily increased the dangers and perils to persons passing over when it was covered with ice, and the

contributory negligence of the plaintiff, were for the jury.

In *Smith v. Yankton* (1909) 23 S. D. 352, 121 N. W. 848, an action was instituted against a city to recover damages for injuries sustained by the plaintiff in slipping and falling on a crosswalk. It appeared that the accident happened on a wooden approach to a stone crosswalk at a time when all the sidewalks were covered with smooth, slippery ice. There were no cleats or boards nailed across the approach. The plaintiff knew that the approach was slippery, but it did not appear that there was a safer route reasonably convenient. It was held that an instruction that the municipality would be liable if the slippery condition of the slope was one which should have been anticipated by the city, and that if the jury found the condition one that should have been anticipated, and this condition, taken in connection with the manner in which the walk was constructed, showed a negligence on the part of the city in constructing the approach, the municipality would be liable, was held correct. As to a contention of the defendant that if there was a defect in the approach, it was in the judgment of the members of the city council in adopting the plans for walks and grades, and that, therefore, it could not be held liable, it was noted that there was nothing in the evidence tending to show that any general plan for the grading of the streets and the construction of the walks had been adopted by the corporation and that the approach was constructed in accordance with such plan. It was also held that the question as to the contributory negligence of the plaintiff was one for the jury. A judgment in favor of the plaintiff was affirmed.

In *Circleville v. Sohn* (1900) 20 Ohio C. C. 368, 11 Ohio C. Dec. 193, an action was brought against a city to recover damages for an injury which the plaintiff claimed to have received from a fall at an alley crossing, and resulting from the negligent and defective construction of the crossing, together with ice and snow that had accumulated thereon and made it slip-

pery. In the trial court the following instruction was given: "If the alley crossing in question was negligently constructed by giving it too abrupt and steep a slope or grade, or if the alley crossing became defective in the respects charged, and the city negligently, that is, after reasonable notice, failed to remedy such defect, and those matters, or any of them, in connection with the slippery condition of the surface of the alley crossing, were the cause of the plaintiff's slipping and falling, and if she wouldn't have fallen had said alley crossing been carefully constructed, or kept in repair after construction, then her accident was chargeable to the negligence of the city, unless she was at fault herself." It was held that the instruction should have been qualified as follows: "If the jury also find that such accumulation of snow and ice might reasonably have been anticipated as the natural and probable result of such defective construction and lack of repair."

#### *c. Other defects.*

In *Bloom v. Toledo* (1903) 25 Ohio C. C. 235, the plaintiff brought an action against a city to recover damages for injuries received from slipping and falling on an icy spot in a walk. It appeared that the icy spot was in a depression wherein water would accumulate, and, in cold weather, freeze. The depression was caused by one end of a stone having sunk lower than the rest of the walk. The ice in the depression at the time of the accident had existed for some time. The direction of a verdict for the defendant was held to be erroneous, as it was a question for the jury whether the defect in the walk was dangerous.

In *Kauffman v. Harrisburg* (1902) 204 Pa. 26, 53 Atl. 521, it appeared that plaintiff's wife slipped and fell on some ice on a walk. The ice was formed from some water which had accumulated in a depression in the walk and had existed for a considerable time, and at the time of the accident was covered with a slight fall of snow. A telephone pole stood in the depression. In the action against the city to

recover damages for the injury, there was evidence that "the plaintiff's wife fell just as she was starting around the outside of this pole." The plaintiff testified that "the pole stood in the sidewalk, with a space between it and the curb on the one side, and a space between it and the fence on the other; that the depression in the sidewalk began a foot or 10 inches from the outside of the pole, and extended to and around the pole, and from the pole to the fence; and that his wife attempted to pass around the pole on the lower side, and slipped in the depression in the sidewalk between the pole and the gutter." It was held that the case was one for the jury, and a judgment for the plaintiff was affirmed.

In *Dracass v. Chicago* (1915) 193 Ill. App. 75, it was said in an abstract decision: "A city is charged with knowledge of the condition of a sidewalk in which, for a length of time, a depression has existed, and in which ice and snow have been allowed to accumulate. . . . Where an injury is caused by slipping on ice which has accumulated in a depression in the sidewalk, and had been covered that morning by a fall of snow, the proximate causes of the injury were the depression and the ice, and the city cannot relieve itself from liability on the ground that it did not know and could not have known of the presence of the snow."

In *Gillrie v. Lockport* (1890) 122 N. Y. 403, 25 N. E. 357, it appeared that the plaintiff, because of stepping on a mound of ice, slipped and fell, breaking her arm. The surrounding sidewalk was free from ice, and the mound of ice was due to the fact that a gutter, channeled in the sidewalk to carry away water drained into it from an adjacent building, had become somewhat clogged because of the breaking of one of the gutter stones, so that the water was thrown on the walk, where it froze. The drain pipe also discharged some of its water on the pavement because it had become disjointed. In an action against the city to recover damages for the injuries, it was held that a finding by

the jury that the defendant was negligent was proper.

In *Bucher v. Sunbury* (1906) 216 Pa. 89, 64 Atl. 906, an action was brought against a borough to recover damages for injuries sustained by the plaintiff by reason of a fall on a slippery sidewalk. The evidence tended to show that at the place of the accident there were irregular and rough places which had become filled with ice and snow to such an extent as to make the pavement unsafe, and that the borough had permitted this condition to continue for several weeks. The evidence showed that the walk was in general use on the day of the accident. It also appeared that there was a storm shortly before the accident, which aggravated the existing conditions. The liability of the defendant was held to be a question for the jury, as was the question whether the dangers were so obvious as to cause a prudent man to avoid them; and a judgment for the plaintiff was affirmed.

In *Hill v. Fond du Lac* (1882) 56 Wis. 242, 14 N. W. 25, an action was brought against a city to recover damages for injuries to the plaintiff, suffered by reason of her falling on a slippery walk at a place where there was a sudden declivity. A judgment for the plaintiff was affirmed. The court said: "The question was not whether the mere sudden declivity in the sidewalk, in the absence of any storm or freezing, would have been dangerous, nor whether the mere storm and freezing weather, in the absence of the walk in question, and with a walk differently constructed, would have caused danger, but whether that walk, so constructed, with such ice and snow as would ordinarily accumulate upon it during such severe storms and freezing weather as ordinarily occurred at that season of the year, at the place of the injury, would be unsafe for travelers upon it. If in that condition and under such circumstances it was unsafe, then it was defective. It was clearly the province of the jury to determine that question."

In *Smith v. Tacoma* (1908) 51

**Wash.** 101, 21 L.R.A.(N.S.) 1018, 98 Pac. 91, an action was brought against a city to recover damages for injuries received by the plaintiff by slipping and falling on the iron cover of a coal hole placed in the sidewalk. It appeared that the cover was very smooth and slippery, which condition had existed for several years, and that a number of persons had slipped and fallen there at different times. At the time of the accident the dangerous condition of the cover was aggravated because of its being wet with rain. It was held that the negligence of the defendant was for the jury, its liability not being affected by the fact that the cover was wet, and a judgment for the plaintiff was affirmed.

In *Conklin v. Elmira* (1896) 11 App. Div. 402, 42 N. Y. Supp. 518, it appeared that the plaintiff, when she stepped on the top of an icy ridge in a sidewalk, slipped into a depression by the side of the ridge, causing her to fall and break her arm. The icy ridge was formed over the bricks of the walk, which had been upheaved by the roots of a tree. The ice had formed of melted and trodden snow, and was concealed by a thin layer of freshly fallen snow. In an action against the city to recover damages for the injury, it was held that the case was one for the jury, and a verdict for the plaintiff was affirmed. The court said: "The inequality in the walks made the ice the more dangerous,—a danger which was increased by the thin layer of freshly fallen snow which concealed it. It is not a case of uncertainty between two proximate causes, for one of which the city would be liable and not liable for the other; but it is a case where three causes concur, namely, the bad sidewalk, the snow, and the ice; and, as we should hold after verdict, without the bad walk the injury would not have happened. It is plain that each cause made the other worse. The real proximate cause, however, was the bad sidewalk, which, as should have been foreseen, had become more dangerous by its covering of ice, and still more dangerous by the light snow hiding the ice. It is unlike *Taylor v. Yonkers*

(1887) 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642, in that here the condition of the permanent walk was the proximate cause, or one of the concurring proximate causes. We think the case was one for the jury."

In *Heether v. Huntsville* (1906) 121 Mo. App. 495, 97 S. W. 239, it appeared that the plaintiff slipped and fell on a crosswalk covered with snow and ice. The walk was made of vitrified brick, was 3 feet wide and from 1½ to 3 inches higher in the center than at either edge. It was of a dangerous construction when covered with snow or ice. The snow and ice on the walk at the time of the accident had become uneven by reason of pedestrians walking over it. In an action against the city to recover damages for the injuries resulting from the fall, a recovery for the plaintiff was held proper. It was also held that the fact that the plaintiff did not use rubber overshoes did not show a lack of due care on her part, as a matter of law, that being a question for the jury.

A ridge or ball of ice on the sidewalk, caused by the overflow or leak from a down spout projecting from an adjoining building, concealed by a covering of snow, was held in *Abbott v. Springfield* (1919) — Mo. App. —, 210 S. W. 443, to constitute a condition rendering the municipality, which knew, or in the exercise of care ought to have known, of it, liable for an injury to a pedestrian proximately resulting therefrom.

A condition for which the municipality was responsible was held in *Schmidt v. Newport* (1919) 184 Ky. 342, 212 S. W. 113, to be presented by a declaration which alleged that the city had permitted an amusement company to take up a part of the concrete pavement in front of its entrance, and replace the same with tiling, having a slippery, smooth, glazed, and glossy surface which rendered the sidewalk unreasonably unsafe and dangerous for public travel by pedestrians, especially during and immediately after it had rained, or while the tiling sidewalk was wet. It was so held, notwithstanding the declared rule that a municipality is not responsible for

injury to one falling upon a pavement unless the pavement was inherently dangerous, or was constructed and maintained according to a plan which was not reasonably safe, and which reasonably prudent persons would not have adopted or maintained.

In *McDonnell v. Philadelphia* (1891) 12 Pa. Co. Ct. 672, it is said in the headnote: "In an action for damages caused by slipping on a sidewalk, it appeared that the sidewalk had been in a bad condition for a long time, was uneven and some of the bricks sunken, that water, flowing from under a fence on the inside, formed a pool extending from the middle of the sidewalk to the curb and rendered all of the bricks slippery. Held, that a woman, who had never been along the street, and was using care, and who fell and was injured, could recover."

In *Holbert v. Philadelphia* (1908) 221 Pa. 266, 20 L.R.A.(N.S.) 201, 70 Atl. 746, the following rule was laid down: "It is the duty of a municipality to keep its streets, including its sidewalks, in a reasonably safe condition so that pedestrians using the sidewalks and exercising care may do so with safety. A sidewalk may be made defective or dangerous by the accumulation of ice or snow, as well as in other ways and by other means. The municipality, however, is not responsible unless the defective condition of the walk is attributable to its negligence. That is the general rule, and one which applies as well where the sidewalk is defective by reason of the slippery condition of the ice thereon as well as by reason of excavations or other obstructions in the walk." The question involved in that case was as to the liability of a municipality for an injury caused by the icy condition of an underground walk, resulting from the fact that water was negligently allowed to enter.

### III. *Limitations of rule.*

A number of cases support the rule that where the defect in a sidewalk is so slight, as to be harmless in itself, the fact that it concurs with a slippery condition of the walk to produce an accident does not make the municipi-

ality liable for any resulting injuries. *Jenkins v. Wilmington* (1915) 5 Boyce (Del.) 471, 94 Atl. 768; *Free v. District of Columbia* (1893) 21 D. C. 608; *Safford v. Green Island* (1893) 74 Hun, 306, 26 N. Y. Supp. 669; *Hamilton v. Buffalo* (1902) 173 N. Y. 72, 65 N. E. 944, 13 Am. Neg. Rep. 173, reversing (1900) 55 App. Div. 423, 66 N. Y. Supp. 990; *Beaton v. Milwaukee* (1897) 97 Wis. 416, 73 N. W. 53; *Koepke v. Milwaukee* (1901) 112 Wis. 475, 88 N. W. 238.

Thus, in *Free v. District of Columbia* (1893) 21 D. C. 608, it appeared that a defect in a sidewalk was harmless in itself, and only became dangerous in combination with snow and ice, of which fact the authorities had no notice. An instruction that the municipality would be liable for injuries to a pedestrian simply because it had notice of the pre-existing defect in the sidewalk was held to be erroneous.

In *Beaton v. Milwaukee* (1897) 97 Wis. 416, 73 N. W. 53, an action was brought against a city to recover damages for injuries sustained by the plaintiff because of a fall on a walk. The complaint contained the following allegations: "Plaintiff fell and was greatly injured by reason of the insufficiency and want of repair of said sidewalk; that said sidewalk was then and there insufficient, in this: that the same consisted of three boards or plank, 8 inches in width, laid upon the pavements of said street, and so narrow that two persons could not pass thereon, and was then unsafe and dangerous; and as the plaintiff, in the exercise of due and ordinary care, was walking thereon, and while passing or attempting to pass a lady, who was also on said walk, said walk and pavement at the time being in an icy and slippery condition, was caused to slip and fall." It was held that the complaint did not state a cause of action. The court said: "While the sidewalk described by the complaint is not an ideal sidewalk, it cannot be said to be a dangerous one. Its condition did not make an accident imminent to a person walking upon it. Even one board laid upon a smooth pavement



may very well be tolerated during temporary repairs of a sidewalk. The city was not responsible for the slippery condition of the street unless some defective condition of the street concurred with it to produce the accident."

In *Jenkins v. Wilmington* (1915) 5 Boyce (Del.) 471, 94 Atl. 768, it appeared that there was a defect in a street crossing, consisting of a depression about 1 inch deep and "somewhat larger than an ordinary writing tablet." Some water which had accumulated in the depression became frozen and was partially concealed by snow. A pedestrian was injured by slipping and falling on the ice, and brought an action against the city to recover damages. It was held that the depression was not sufficiently dangerous to charge the defendant with negligence for allowing it to remain under ordinary circumstances, and that, if the defect became dangerous because of the presence of ice, the defendant could not be held liable in the absence of actual or constructive notice of its dangerous character.

In *Hamilton v. Buffalo* (1902) 173 N. Y. 72, 65 N. E. 944, reversing (1900) 55 App. Div. 423, 66 N. Y. Supp. 990, it appeared that the plaintiff was injured by falling on a crosswalk. The fall was caused by his foot slipping in a hole in the walk, when the latter was in a slippery condition. The hole was wedge-shaped, and was about 84 inches long, 12 inches wide, and 4 inches deep, with rounded edges, and was formed by the wheels of heavily laden trucks. In an action against the city to recover damages for the injuries, it was held that the defect was too slight to charge the city with responsibility for the accident.

In *Koepke v. Milwaukee* (1901) 112 Wis. 475, 88 N. W. 238, it appeared that the plaintiff was injured by a fall on a walk covered with ice and snow. At the place of the accident there was a depression, the decline of which was  $\frac{1}{2}$  of an inch to the foot one way, with a lateral pitch of  $\frac{1}{4}$  of an inch to the foot. The ice and snow were an ordinary accumulation and were some-

what rough and lumpy. It was held that the depression in the walk was not an actionable defect, and that the trial court would have been justified in taking the case from the jury.

In *Safford v. Green Island* (1893) 74 Hun, 306, 26 N. Y. Supp. 669, an action was brought against a village to recover damages for injuries sustained by the plaintiff by a fall on an icy sidewalk. The facts were stated by the court as follows: "It appears in this case that a ridge had been formed across the sidewalk by excavating to put in a water pipe, and the earth afterwards filled in had not been sufficiently packed down, but formed a ridge from 4 to 6 inches in height. This ridge was covered with ice, and, in the language of the plaintiff's daughter, 'so that the ridge was slippery, glary, glassy. It was clear ice, glassy ice; shiny, like the surface of glass, and very slippery.' The thermometer had been below zero for some days prior to the accident in question, and the streets of the village were generally slippery." The grant of a nonsuit was held proper. The court said: "It is impossible to determine from the evidence whether the plaintiff would or would not have fallen, except for the ridge upon the sidewalk. The jury could have merely guessed whether it was the ridge or the ice, or both combined, that caused the accident. The defendant was not responsible for the slippery condition of the sidewalk, or for the ice upon the ridge; and such being the case, and the plaintiff not establishing that the accident would not have occurred but for the presence of the ridge, she was not entitled to recover, and the nonsuit was proper."

The mere fact that an accident results from the slippery condition of a walk, concurring with a slope therein, does not render the municipality liable for any resulting injuries. *Beirness v. Missouri Valley* (1913) 162 Iowa, 720, 51 L.R.A.(N.S.) 218, 144 N. W. 628; *Gower v. Madisonville* (1918) 182 Ky. 89, 206 S. W. 27; *Wesley v. Detroit* (1898) 117 Mich. 658, 76 N. W. 104, 4 Am. Neg. Rep. 651; *McCarty v. Lockport* (1897) 13 App.

Div. 494, 43 N. Y. Supp. 693, 1 Am. Neg. Rep. 497; *Taylor v. Yonkers* (1887) 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; *Ayres v. Hammondsport* (1891) 130 N. Y. 665, 29 N. E. 265, reversing (1889) 26 N. Y. S. R. 634, 7 N. Y. Supp. 174; *Grossenbach v. Milwaukee* (1886) 65 Wis. 31, 56 Am. Rep. 614, 26 N. W. 182.

Thus, in *Gower v. Madisonville* (1918) 182 Ky. 89, 206 S. W. 27, the action was to recover damages for personal injuries sustained by the plaintiff by slipping and falling on a pavement. The place of the accident was on a slope at a street crossing. The slope was about 4 feet long and the lower end about 7 inches below the top of the slope, and at the time was covered with ice and snow. It was held that the slope was not so steep as obviously to be dangerous in itself, and the fact that when it was covered with ice it became less safe for pedestrians did not make the city liable in damages for the injuries.

In *Wesley v. Detroit* (1898) 117 Mich. 658, 76 N. W. 104, 4 Am. Neg. Rep. 651, the facts were stated in the dissenting opinion of Moore, J., as follows: "Perry street intersects Grand River avenue at right angles. Until the fall of 1892 the sidewalks on the two streets were on the same level. Late in the fall of 1892 the two streets were paved, and the crosswalks on both streets were lowered, as was the sidewalk on Grand River avenue. This left the walk on Perry street about 18 inches higher where it joined the sidewalk on Grand River avenue than the sidewalk on the last-named street. About 3 feet of the sidewalk on Perry street was cut off, leaving a drop from the top of the plank to the ground of about 6 inches. From the end of the walk as cut off to the walk on Grand River avenue the earth was left exposed, and the earth wore away, so it became inclined. The incline reached to the Grand River avenue walk. The drop in the earth was about 12 inches in the 3 feet. . . . This was a much traveled highway. This portion of the sidewalk became partially covered with snow and ice. In February, 1898,

plaintiff attempted to pass over it. He slipped and fell, and sustained injuries for which this action was brought. The learned trial judge directed the jury to return a verdict in favor of the city, upon the ground that the proximate cause of the injury was not the defect in the walk, but was the natural accumulation of ice and snow. The plaintiff brings the case here by writ of error." The action of the trial court was affirmed, the court saying: "All inclined sidewalks become dangerous for pedestrians when covered with ice. All the law requires is that the municipality shall keep them, otherwise, in a reasonably safe condition."

In *Beirness v. Missouri Valley* (1913) 162 Iowa, 720, 51 L.R.A. (N.S.) 218, 144 N. W. 628, it appeared that the plaintiff fell on a small spot of ice on the sidewalk, which had been covered by a light fall of snow. The grade of the sidewalk at the place of the accident was nearly 15 per cent, while the grade of the adjoining street was 18 per cent. An ordinance provided that the establishment of a grade for the center of the street operated to establish a grade for the adjoining sidewalks. It was held that the city was not negligent as a matter of law in failing to follow the established grade in constructing the sidewalk, and, there being no substantial proof that the increased slope of the sidewalk was a contributing cause to the injury, a direction of the verdict in favor of the defendant by the trial court was proper.

In *Taylor v. Yonkers* (1887) 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642, it appeared that the plaintiff fell on ice which had recently formed over an old accumulation of ice and snow, on a sidewalk, which the city had negligently allowed to have a slope of 8 inches from its inner to its outer edge. In an action against the city to recover damages for injuries resulting from the fall, the jury were instructed that the new ice furnished no ground of negligence on the part of the defendant, but that if the slope of the walk was a concurring cause

of the fall, without which the accident would not have happened, the defendant was liable. A judgment for the plaintiff was reversed because the facts did not permit the jury to find the slope of the walk to have been a concurrent cause of the fall. The court said: "The plaintiff slipped upon the ice. That by itself was a sufficient, certain, and operating cause of the fall. No other explanation is needed to account for what happened. It is possible that the slope of the walk had something to do with it. It is equally possible that it did not. There is not a particle of proof that it did. To affirm it is a pure guess and an absolute speculation." In *Ayres v. Hammondsport* (1891) 130 N. Y. 665, 29 N. E. 265, reversing (1889) 26 N. Y. S. R. 634, 7 N. Y. Supp. 174, the facts were substantially similar to those of the preceding case, and the court followed the ruling of that case. And in *McCarty v. Lockport* (1897) 13 App. Div. 494, 43 N. Y. Supp. 693, 1 Am. Neg. Rep. 651, the same rule was applied. It appeared that the plaintiff slipped and fell on a stone made slippery by snow, and which sloped about  $3\frac{1}{2}$  inches in 2 feet and 1 inch.

In *Grossenbach v. Milwaukee* (1885) 65 Wis. 31, 56 Am. Rep. 614, 26 N. W. 182, it appeared that the plaintiff fell on an icy apron connecting a crosswalk with a sidewalk. The apron was about 8 feet long and inclined to an extent of about 10 inches. The plaintiff testified that he fell backwards as he was ascending the apron. He also testified that his foot was caught as in a vise, but he gave no explanation as to the cause and there was no evidence from which it could be inferred. Melting snow and ice were passing over the crosswalk and apron at the time of the accident. There was no evidence of any deformity or want of conformity in the apron. The apron was alleged to be defective in that it was only about 4 feet wide and without any crosspieces on the surface to prevent people from slipping down. It was held that a verdict for the city was properly directed.

In *Pringle v. Detroit* (1908) 152

Mich. 445, 116 N. W. 362, it appeared that the sidewalk at the place where the accident occurred consisted of leveled cinders which were placed there as a foundation for a cement walk, work on which had been suspended because of the lateness of the season. It was held that the walk was not defective or dangerous, and that the city was not responsible for a fall on ice which had accumulated thereon.

#### *IV. Effect of act or liability of abutting owner.*

In *Bucher v. Sunbury* (1906) 216 Pa. 89, 64 Atl. 906, an action was brought against a borough to recover damages for injuries sustained by the plaintiff by reason of a fall on a slippery sidewalk. The evidence tended to show that at the place of the accident there were irregular and rough places which had become filled with ice and snow to such an extent as to make the pavement unsafe, and that the borough had permitted this condition to continue for several weeks. The evidence showed that the walk was in general use on the day of the accident. It also appeared that there was a storm shortly before the accident, which aggravated the existing conditions. In affirming a judgment for the plaintiff it was held that the liability of the defendant was not affected by the question of the nonliability of the abutting property owner.

In *Hill v. Fond du Lac* (1882) 56 Wis. 242, 14 N. W. 25, an action was brought against a city to recover damages for injuries to the plaintiff suffered by reason of her falling and slipping on a slippery walk at a place where there was a sudden declivity. A judgment for the plaintiff was affirmed, and it was held that the liability of the city was not affected by the fact that the walk was constructed by an adjoining lot owner.

But in *Ellingson v. Leeds* (1918) — N. D. —, 169 N. W. 85, an action to recover damages for injuries to the plaintiff occasioned by his falling on the steps in front of a postoffice building, it appeared that the steps were placed on the sidewalk, and that the

plaintiff slipped and fell as she was ascending them. It was alleged that the accident occurred "on account of the dangerous condition of the steps, due to steepness and narrowness, and, further, on account of the accumulation of snow and ice thereon, making them slippery." It was held that the municipality was not liable.

*V. Rule in Massachusetts.*

In Massachusetts, it is provided by statute (Stat. 1896, chap. 540) as follows: "No city or town shall be liable for any injury . . . to person . . . hereafter received or suffered in or upon any part of a highway, town way, causeway, or bridge, by reason or in consequence of snow or ice thereon, if the place at which the injury or damage was received or suffered was at the time of the accident otherwise reasonably safe and convenient for travelers." Under this statute the rule seems to obtain that a municipality is liable for injuries resulting from the slippery condition of a walk, where there is a defect in the walk to which, as a proximate cause, the accident is in part attributable. *Newton v. Worcester* (1897) 169 Mass. 516, 48 N. E. 274; *Bailey v. Cambridge* (1899) 174 Mass. 188, 54 N. E. 523; *McCabe v. Whitman* (1905) 187 Mass. 484, 73 N. E. 535. See also the dictum in *Newton v. Worcester* (1899) 174 Mass. 181, 54 N. E. 521; *NEILLSON v. WORCESTER* (reported herewith) ante, 1120.

In *Newton v. Worcester* (1897) 169 Mass. 516, 48 N. E. 274, the statute was construed as providing that a way should not be deemed unsafe by reason of snow or ice thereon, if it was otherwise reasonably safe and convenient for travelers. It was held that an instruction embodying this construction should have been given at the request of the defendant in an action against a city to recover damages for injuries sustained by the plaintiff, by reason of a fall caused by ice in a small depression in a sidewalk.

In (1899) 174 Mass. 181, 54 N. E. 521, a second appeal of the same case, the statute hereinbefore set out was construed as follows: "We think the

proper and only reasonable interpretation of the statute is that, wherever ice or snow is the sole proximate cause of the accident, there shall be no liability; but where, at the time of the accident, there is any other defect to which, as a proximate cause, the accident is in part attributable, there may be a liability notwithstanding the fact that it also may be attributable in part to ice or snow. This other defect, however, is not a proximate cause within the meaning of this rule, simply because it causes the accumulation of the ice or snow. In considering whether, 'at the time of the accident, the way is otherwise reasonably safe and convenient,' the attention is to be directed to the actual physical condition of the way, for the purpose of ascertaining whether there is at that time any other danger to the steps of the traveler than that arising from the presence of ice or snow. If there be no other danger, then for the time being the way is 'otherwise reasonably safe and convenient.'" The evidence showed that the plaintiff fell on some ice which had formed. At the place where the plaintiff fell there were some depressions varying from  $\frac{1}{2}$  inch to 2 inches in depth, caused by some of the bricks being depressed and some being elevated. But there were no projections or sharp corners and the surface of the depression was smooth. It was held that the jury was not warranted in finding that the walk, when bare, was not reasonably safe and convenient for public travel.

In *Barley v. Cambridge* (1899) 174 Mass. 188, 54 N. E. 523, it appeared that the plaintiff fell on a crosswalk at a time when it was covered with ice. At the place of the accident there was a ridge of earth. In an action against the city to recover damages for the injuries resulting from the fall, it was held that the questions whether the way, when bare, was defective, and whether the accident was wholly or partly caused by this defect, were for the jury, and a verdict for the plaintiff was affirmed.

In *McCabe v. Whitman* (1905) 187 Mass. 484, 73 N. E. 535, the action was

to recover damages for injuries to the plaintiff, resulting from a fall into a depression in the sidewalk. It was contended by the defendant that it was entitled to a verdict as a matter of law because the depression was a part of the gutter outside of the walk across which the plaintiff was walking. The plaintiff testified that he fell into the depression when walking across the sidewalk. Another witness testified that "there was a depression that extended almost to the inside of the sidewalk." A third witness testified that the "gully was about 3 or 4 feet long on the center of the walk." The exceptions of the defendant were overruled.

In *NEILLSON v. WORCESTER* (reported herewith) ante, 1120, an action to recover damages for personal injuries received by the plaintiff by reason of falling on a sidewalk, it appeared that the plaintiff fell at the bottom of a long slope, her fall being caused by stepping on an accumulation of ice in a depression. The city had erected an iron railing along the outer edge of the walk to assist pedestrians in making the ascent or descent of the slope when there was snow or ice on the walk, but before the time of the accident the lower portion of it, for a space of 4 or 5 feet, had been removed. The depression was about 1½ inches deep, and near by, embedded in the walk, was a cobblestone which stood up 1 inch above the surface of the walk. The plaintiff was descending the slope, using the iron rail to assist her, and fell only after leaving the rail to cross the intervening portion of the slope. It was held that the removal of a portion of the iron railing did not constitute a defect in the way, nor did the depression in the walk, though it may have caused the accumulation of the ice or snow. And as to a contention that the way was defective because of the cobblestone, it was held that there was no evidence to show that the plaintiff's fall was caused in whole or in part by the stone.

In *Hughes v. Lawrence* (1894) 160 Mass. 474, 36 N. E. 485, which was decided before the passage of the

statute hereinbefore referred to, the action was to recover damages for an injury sustained by the plaintiff by reason of a fall on a sidewalk. At the place of the accident there was a gutter 14 inches wide and 1½ inches deep into which a water conductor from the roof of an adjoining building had formerly discharged. The water conductor discharged into a sewer, but at the time of the accident it had so become defective that it discharged some of the water on the sidewalk. The water froze and the resulting ice covered the gutter and part of the walk on either side. Some evidence showed that the plaintiff slipped on the ice in the gutter, and other evidence showed that she fell on the outer edge of the ice. In submitting the case to the jury the court instructed them that it was for them to determine where the plaintiff fell, and whether at that place the way was defective. A verdict for the plaintiff was rendered, which, on appeal, was affirmed, and the appellate court held that it was competent for the jury to find that the gutter constituted a defect in the way, and that its construction was such as to cause a special deposit of ice at that particular place.

In *Adams v. Chicopee* (1888) 147 Mass. 440, 18 N. E. 281, an instruction that "the freezing of smooth, level ice does not constitute a defect in any way, and the fact that there are such hollows or basins in the sidewalk as to make them fill with level water which cannot pass off, and that level water freezes, if it freezes into smooth, level ice, does not constitute a defect in the way," was held subject to a general exception.

In *Crocker v. Springfield* (1872) 110 Mass. 135, it appeared that the plaintiff slipped and fell on a spot of ice about 3 feet square, in a depression in a sidewalk. The ice was 2 or 3 inches thick. The adjoining land was so graded that water ran into this depression and stayed there in summer until it evaporated and in winter till it froze. On the day before the accident it rained and drizzled, and on the morning of that day an icy coat was over everything. In

an action against the city to recover damages for injuries sustained by the plaintiff, it was held that if the condition of the sidewalk at the time of the accident was such as to warrant

the jury in finding it to have been defective, there was no evidence that the defect had existed for twenty-four hours, or that the city had notice thereof.

R. J. B.

### MARGARET TIDD, Respt.,

v.

C. B. SKINNER et al., Doing Business under the Name, Style, and Title of C. B. Skinner & Company, Appt.

*New York Court of Appeals — January 28, 1919.*

(225 N. Y. 422, 122 N. E. 247.)

#### Parent and child — recovery for loss of services — habit-forming drug.

1. A father may recover for loss of services of his minor child due to the wrongful act of another, such as the sale of a habit-forming drug, and in case of the father's death the mother may recover.

[See note on this question beginning on page 1152.]

#### Poison — heroin as.

2. Heroin, a derivative of morphine, is within the operation of a statute prohibiting the sale of morphine without affixing certain labels to the packages and recording the sale in a book kept for that purpose.

[See 9 R. C. L. 700.]

#### Appeal — extent of review.

3. So far as the facts are concerned the court of appeals can review only errors in the admission or rejection of evidence or in the charge to the jury, where, by the Constitution, the unanimous affirmance by an intermediate appellate court of a judgment entered upon a verdict conclusively establishes that the verdict is supported by the facts.

[See 2 R. C. L. 180.]

#### Evidence — pawning of articles from house.

4. In an action by a mother against a druggist for selling heroin to her minor son, evidence is admissible that he took articles from the house and pawned them to obtain the drug and also of other efforts to obtain money to purchase it, as showing the influence it had on him.

#### Trial — jury — extent of sales of heroin.

5. In an action by a mother against a druggist for selling heroin to her minor son, the jury may be permitted

to consider the purpose and extent of the sales in determining whether or not the sales were lawful.

#### — knowledge of druggist.

6. In an action by a mother against a druggist for selling heroin to her minor son the jury may infer that defendant had knowledge of the drug and its consequences when sold in the quantity shown by the evidence.

#### — refusal to charge as to improper use.

7. Refusal to charge, in an action by a mother against a druggist for selling heroin to her minor son, that defendants were not liable for improper use of the drug by the purchaser, is not error where the court has charged that plaintiff cannot recover unless defendant sold the drug to the son, knowing that he was making an improper use of it, and that its use was injuriously affecting his health.

[See 14 R. C. L. 751.]

#### Appeal — considering refusal of instructions.

8. In considering exceptions to the court's refusal to give requested instructions, the requests must be regarded in connection with all that the court said in connection therewith, and with the facts necessarily found by the jury.

[See 2 R. C. L. 261.]

**Parent and child — negligence of child — effect.**

9. A parent's action for loss of services through wrongful injury to his minor child is defeated, if the child's negligence was the efficient cause of the injury.

[See 20 R. C. L. 617.]

**— wilful injury — effect.**

10. Contributory negligence of the child will not defeat the parent's action for loss of services through its injury, if defendant's conduct was so deliberate, persistent, and intentional as to be equivalent in law to positive and wilful injury.

**Trial — jury — rule applicable.**

11. The jury must determine whether or not an action by a parent for loss of services through injury to his minor child is within the rule that contributory negligence of the child de-

feats the action, or the rule that such negligence will not defeat a wilful injury unless the evidence is without conflict.

[See 20 R. C. L. 166 et seq.]

**Master and servant — action for injury to servant — property rights.**

12. The common-law action which a master or parent has for loss of services of a servant or minor child is based upon an injury to a property right.

[See 20 R. C. L. 614 et seq.]

**Damages — punitive — selling heroin to child.**

13. Punitive damages cannot be allowed in an action by a mother against a druggist for selling heroin to her minor son, by reason of which she lost the benefit of his services.

[See 8 R. C. L. 595; 20 R. C. L. 618.]

**APPEAL** by defendants from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Schenectady County in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to recover damages for loss of services of plaintiff's minor son because of the alleged unlawful sale to him by defendants, of a certain drug. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Mr. Christopher J. Heffernan, for appellants:

Plaintiff did not establish any cause of action against the defendants.

Elsev v. Metcalf, 1 Denio, 323; Miller v. King, 88 Hun, 181, 34 N. Y. Supp. 425; King v. MacKellar, 94 N. Y. 317; Rogers v. Murray, 3 Bosw. 357.

The trial judge clearly erred in his charge to the jury, in his refusal to charge defendants' requests, and erroneously instructed the jury on the question of damages.

Whitney v. Hitchcock, 4 Denio, 461; 1 Sedgw. Damages, 9th ed. pp. 687, 733; 13 Cyc. 240; 29 Cyc. 1653; Lawyer v. Fritcher, 130 N. Y. 239, 14 L.R.A. 700, 27 Am. St. Rep. 521, 29 N. E. 267; Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. 169; Curl v. Chicago, R. I. & P. R. Co. 63 Iowa, 417, 16 N. W. 69, 19 N. W. 308; New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607, 97 Am. Dec. 478; Cole v. Tucker, 6 Tex. 266; Gould v. Christianson, Blatchf. & H. 507, Fed. Cas. No. 5,636; Jay v. Almy, 1 Woodb. & M. 262, Fed. Cas. No. 7,236; Chicago & N. W. R. Co. v. Jackson, 55 Ill. 492, 8 Am. Rep. 661; Louisville, N. A. &

C. R. Co. v. Wurl, 62 Ill. App. 381; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Black v. Carrollton R. Co. 10 La. Ann. 33, 63 Am. Dec. 586; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475.

Mr. Frank Cooper, with Mr. J. J. Barry, for respondent:

Plaintiff clearly established a substantial cause of action for the wrongful acts of the defendants.

Maxson v. Delaware, L. & W. R. Co. 112 N. Y. 559, 20 N. E. 544; Riddle v. MacFadden, 201 N. Y. 215, 94 N. E. 644; Bennett v. Bennett, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; Gorlitzer v. Wolffberg, 208 N. Y. 475, 102 N. E. 528, Ann. Cas. 1914D, 357; Hoard v. Peck, 56 Barb. 202; Holleman v. Harward, 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972; Flandermeyer v. Cooper, 85 Ohio St. 327, 40 L.R.A. (N.S.) 360, 98 N. E. 102, Ann. Cas. 1913A, 983; Lawyer v. Fritcher, 130 N. Y. 239, 14 L.R.A. 700, 27 Am. St. Rep. 521, 29 N. E. 267; Hewitt v. Prime, 21 Wend. 81; White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 282; Ingerson v. Miller, 47 Barb. 47; Badgley v. Decker, 44 Barb. 588; Reed v. McCord, 160 N. Y. 330, 54 N. E. 737; Hutton v.

Smith, 175 N. Y. 378, 67 N. E. 633; Leahy v. Essex Co. 164 App. Div. 903, 148 N. Y. Supp. 1063; Race v. Krum, 162 App. Div. 911, 146 N. Y. Supp. 197, affirmed in 222 N. Y. 410, L.R.A. 1918F, 1172, 118 N. E. 853; Marino v. Lehmaier, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572, 13 Am. Neg. Rep. 403; Koester v. Rochester Candy Works, 194 N. Y. 92, 19 L.R.A. (N.S.) 783, 87 N. E. 77, 16 Ann. Cas. 589; Dean v. Raplee, 145 N. Y. 319, 39 N. E. 952; Racine v. Morris, 201 N. Y. 240, 94 N. E. 864; Graham v. Wallace, 50 App. Div. 101, 63 N. Y. Supp. 372; Fitzwater v. Warren, 206 N. Y. 358, 42 L.R.A. (N.S.) 1229, 99 N. E. 1042; Racine v. Morris, 201 N. Y. 245, 94 N. E. 864.

The rulings of the trial judge on admissions of evidence were not erroneous nor prejudicial to the defendants.

People v. Marrin, 205 N. Y. 275, 43 L.R.A. (N.S.) 754, 98 N. E. 474.

There was no error committed in the trial court's charge to the jury, nor in his refusal to charge defendants' requests. The amount of compensatory damage was amply justified by the evidence, and punitive damages supported by authority.

Lawyer v. Fritcher, 130 N. Y. 239, 14 L.R.A. 700, 27 Am. St. Rep. 521, 29 N. E. 267; Ingerson v. Miller, 47 Barb. 47; Hamilton v. Lomax, 26 Barb. 617; Badgley v. Decker, 44 Barb. 577; Neu v. McKechnie, 95 N. Y. 632, 47 Am. Rep. 89; Holmes v. Jones, 147 N. Y. 67, 49 Am. St. Rep. 646, 41 N. E. 409; Reid v. Terwilliger, 116 N. Y. 530, 22 N. E. 1091; Colwell v. Tinker, 169 N. Y. 535, 58 L.R.A. 765, 98 Am. St. Rep. 587, 62 N. E. 668; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 203-213, 15 L. ed. 73-77; Reed v. McCord, 160 N. Y. 330, 54 N. E. 737; Hutton v. Smith, 175 N. Y. 378, 67 N. E. 633; Cronin v. Lord, 161 N. Y. 90, 55 N. E. 397.

Chase, J., delivered the opinion of the court:

This action is brought by a widow to recover damages for loss of the services of her son, which she alleges was caused by the defendants as herein stated. The defendants at the times herein mentioned were druggists of experience, engaged in conducting retail drug stores, one of which was in the city of Amsterdam. The plaintiff at the times

herein mentioned lived in the city of Schenectady. She had a son who at eighteen years of age was of good physique and fair ability. He lived with his mother, and was employed by others at remunerative wages. The mother, except for the aid of the son, was dependent upon her labor to maintain her household. The son was kind, helpful, and obedient to his mother, and brought to her all or a substantial part of his earnings. About that time, and within four or five weeks before January 1, 1912, he was given fifteen or twenty tablets, each containing from  $\frac{1}{16}$  to  $\frac{1}{8}$  of a grain of heroin, by a boy friend. During that time he used these tablets, and he testified: "I felt like I wanted it. I liked it."

Heroin is a derivative of morphine. It is a poison within the provisions of the Public Health Law (Consol. Laws, chap. 45) as it existed at the times herein mentioned (Public Health Law, § 236, as it existed prior to the amendment by <sup>Poison—</sup>heroin as. chapter 502 of the Laws of 1915). The statute referred to provided: "It shall be unlawful for any person to sell at retail or furnish any of the poisons named in the schedules hereinafter set forth, without affixing or causing to be affixed, to the bottle, box, vessel or package, a label containing the name of the article and the word 'poison' distinctly shown, with the name and place of business of the seller, all printed in red ink, together with the name of such poisons printed or written thereupon in plain, legible characters."

It also provided: "Every person who shall dispose of or sell at retail or furnish any poisons included under schedule A [thereinabove included] shall, before delivering the same, make or cause to be made an entry in a book kept for that purpose, stating the date of sale, the name and address of the purchaser, the name and the quantity of the poison, the purpose for which it is represented by the purchaser to be required. . . . He shall not deliv-



er any of said poisons without satisfying himself that the purchaser is aware of its poisonous character and that the said poison is to be used for a legitimate purpose."

Any person who violates any of the provisions of the Public Health Law mentioned is guilty of a misdemeanor. Penal Law (Consol. Laws, chap. 40) § 1743.

The defendants at all the times mentioned knew of the existence of the statutes relating to the sale of poisons. The jury could have found from the evidence that about January 1, 1912, plaintiff's son went to Amsterdam from Schenectady and endeavored to purchase heroin of the defendants, but was asked if he had purchased it of them before, and, when he answered in the negative, was told that they could not sell it to him. Soon thereafter he went again to Amsterdam, and to the defendant's store. His boy friend was with him, and his friend said to one of the defendants that he (plaintiff's son) "was all right if he wanted to buy any heroin." Thereafter, and on the same day, plaintiff's son went alone to the defendants and purchased from them 200 tablets. From that time until he became twenty-one years of age, a period of between two and three years, he purchased of the defendants, except during the times when he was in a hospital or confined under criminal process, more than 300 tablets per week. One week he purchased of them 1,000 tablets. Each of the tablets so purchased contained either  $\frac{1}{2}$  or  $\frac{1}{3}$  of a grain of heroin. During a part of the time plaintiff's son personally pulverized and inhaled 75 to 100 tablets per day. He became a physical wreck. He not only abandoned his work, but he pawned his clothing and also carpets, rugs, and furnishings from his mother's home to obtain money to buy the drug. At the time of the trial he was brought as a witness from the county jail, where he was serving a term for petit larceny.

The defendants wholly failed to obey the statutes quoted, knowing

that heroin, except as a medicine used in very small quantities and under the direction of a physician, is a poison dangerous to human life.

The jury could have found that one of the defendants stated to the plaintiff's son that he should be careful not to let anyone know that he was getting heroin at the defendants' store, as it might make trouble for them. They could also have found that the change in the habits and physical condition of plaintiff's son, and his consequent conduct and general incapacity, were the results of the use of heroin purchased of the defendants; that in selling it to him as stated they knew that he was making an improper use of it, and that its use was injuriously affecting his health, and that their conduct in the repeated sales to him, in the manner and to the extent as shown, was reckless and equivalent in law to wilful injury. Upon the facts necessarily found in this case, the sales were entirely different from those ordinarily made by a druggist at the request of a customer.

The jury found for the plaintiff, and an appeal was taken from the judgment entered upon their verdict to the appellate division, where the judgment was unanimously affirmed (171 App. Div. 98, 34 N. Y. Crim. Rep. 196, 156 N. Y. Supp. 885), the court expressly stating in its opinion that the verdict was not against the weight of evidence, and that "the proof does abundantly establish . . . that the defendants were wholly reckless of the rights of others." The judgment of the trial court entered upon the verdict of the jury having been unanimously affirmed by the appellate division, it is on this appeal incontrovertibly established that the facts presented at the trial sustain the verdict. Const. art. 6, § 9; Code Civ. Proc. § 191. The judgment must be sustained by this court unless error was committed in the rulings upon the admission or rejection of evidence, or in the charge by the court to the jury.

Appeal—extent  
of review.

Numerous questions are presented to us by the appellants arising from rulings of the court upon objections to the receipt of evidence during the trial. The appellants claim that the court erred in receiving evidence to show that the plaintiff's son had taken carpets and rugs from the floor of her home and pawned them, and also to show his other efforts to obtain money to purchase heroin. We do not think that the court erred in the rulings mentioned. It was a part of the history of the son during the time mentioned, and tended to show the dominating influence that

Evidence—

pawning of articles from house.

heroin had over his time and his thought as it affected his time, and the consequent loss of his services to his mother.

There were no exceptions taken to the main charge of the court except those relating to punitive or vindictive damages. The only exceptions taken by the defendants to their request to charge made at the close of the main charge, other than those relating to punitive or vindictive damages hereinafter referred to, were taken in connection with other statements and charges by the court, all of which we quote as follows:

Mr. Heffernan: I ask your Honor to charge that the defendants had a legal right to sell and offer for sale heroin between the 1st day of January, 1912, and the 1st day of July, 1914, without the direction or prescription of a physician on complying with the terms of the statute as to registering it and labeling it.

The Court: I will charge the jury that at the time of the sales in question, if there were such sales, there was no statute of the state which prohibited the sale by these defendants of the drug known as heroin without a doctor's prescription, and I also charge the jury that cases can arise where the sales are so excessive and made with such purpose that a civil action will lie for damages resulting from such sales, in which case the sales could not be termed rightful.

Mr. Heffernan: The defendants except to your Honor's modification. I ask your Honor to charge the jury that in order to find a verdict for the plaintiff the jury must be satisfied from the evidence that the defendants sold heroin to Rooney, knowing that Rooney was making an improper use of it, and that its use was injuriously affecting his health.

The Court: I so charge.

Mr. Heffernan: I ask your Honor to charge the jury that there is no evidence in this case upon which the jury can find that the defendant knew, or had reason to know, that Rooney's health was being injuriously affected by heroin.

The Court: I decline to charge that on the ground that the defendant was a pharmacist, and from his position as a pharmacist the jury might infer that he had knowledge of the drug heroin and of its consequences, and also from the size of the doses claimed to have been sold.

Mr. Heffernan: We except to your Honor's modification. I ask your Honor to charge that if the defendants, between January 1, 1912, and June, 1914, sold heroin in the ordinary course of business to Rooney or to others on their application, the defendants are not liable for the improper use of it made by the purchasers.

The Court: For improper use made by the purchasers?

Mr. Heffernan: Yes.

The Court: Refused.

Mr. Heffernan: I except to that. I ask your Honor to charge that there is no evidence in this case that the defendants knew or had reason to know that Rooney was not using heroin in a proper or lawful manner.

The Court: I will refuse to charge that on the ground that there is proof in this case to the effect that the use of 500 tablets of heroin a week is not known for medical purposes.

Mr. Heffernan: I except to your Honor's statement. I ask your Honor to charge that there is no evidence in this case that the defend-

ants wrongfully, unlawfully, or by acts or words requested, solicited, or induced the plaintiff's son to enter their store or to purchase or use heroin.

The Court: I charge that there is no evidence of active inducement of the son of the plaintiff to enter the store of the defendants and acquire the drug habit.

Mr. Heffernan: Now I ask your honor to charge that there can be no recovery by the plaintiff here unless the defendants, or either of them, requested, solicited, or induced Rooney to enter their store, for the purpose of selling or giving to him heroin.

The Court: Refused.

Mr. Heffernan: Except. I ask your Honor to charge that if the jury find that Rooney had become addicted to the use of heroin before he claims he made his first purchase from the defendants, then the jury's verdict must be no cause of action.

The Court: I so charge.

It will be seen from the above quotation that the defendants took but five exceptions. The first exception followed a charge by the court in accordance with the defendant's request, in which the jury were told "that at the time of the sales in question, if there were such sales, there was no statute of the state which prohibited the sale by these defendants of the drug known as heroin without a doctor's prescription," but the court added: "Cases can arise where the sales are so excessive and made with such purpose that civil action will lie for damages resulting from such sales, in which case the sales could not be termed rightful."

It was not error to leave the jury to consider the purpose and extent of the sales. The purpose and extent of the sales were questions of fact. Heroin being a poison, the purpose and extent of the sales were proper subjects of consideration in the action.

The second exception was after the court had charged, at the de-

fendants' request, that the jury *must be satisfied that the defendants sold heroin to plaintiff's son, knowing that he was making an improper use of it, and that the use was injuriously affecting his health*, and the defendants had made a further request that the court charge the jury "that there is no evidence in this case upon which the jury can find that the defendant knew or had reason to know that Rooney's health was being injuriously affected by heroin."

The modification by the court to which the exception was taken is in words as follows: "The defendant was a pharmacist, and from his position as a pharmacist the jury might infer that he had knowledge of the drug heroin and of its consequences, and also from the size of the doses claimed to have been sold."

The defendants' knowledge of the drug heroin was ~~knowledge of~~ established. The ~~druggist.~~ modification was not error.

The third exception was to the refusal of the court to charge "that if the defendants, between January 1, 1912, and June, 1914, sold heroin in the ordinary course of business to Rooney or to others on their application, the defendants are not liable for the improper use of it by the purchasers."

The charge so far as it relates to sales to others than Rooney was immaterial, and the sale to Rooney could not be disassociated from the facts and circumstances affecting such sales. The court had charged ~~refusal to~~ charge as to ~~improper use.~~ that in order to find

a verdict the jury must be satisfied that defendants sold the heroin to Rooney, knowing that he was making an improper use of it, and that its use was injuriously affecting his health.

The fourth exception was to the refusal of the court to charge the jury "that there is no evidence in this case that the defendants knew or had reason to know that Rooney was not using heroin in a proper or lawful manner." The court did charge in connection with such re-

**Trial-jury-**  
**extent of sales**  
**of heroin.**

fusal that his refusal was "on the ground that there is proof in this case to the effect that the use of 500 tablets of heroin a week is not known for medical purposes." This exception does not present a question of law.

The fifth exception was to the refusal to charge that "there can be no recovery by the plaintiff here unless the defendants, or either of them, requested, solicited, or induced Rooney to enter their store for the purpose of selling or giving to him heroin."

The court refused to charge as requested after saying: "I charge that there is no evidence of active inducement of the son of the plaintiff to enter the store of the defendant and acquire the drug habit."

The questions raised by exceptions, as we have shown, are few. In considering them they must be read with all that was said by the court in connection therewith, and with the facts necessarily found by the jury. As so read, no question of controlling importance is presented.

The right of a parent to recover for loss of services of a child has long been recognized at common law. *Maxson v. Delaware, L. & W. R. Co.*

112 N. Y. 559, 20 N. E. 544; *Lawyer v. Fritcher*, 130 N. Y. 239, 14 L.R.A. 700, 27 Am. St. Rep. 521, 29 N. E. 267; *King v. Viscoloid Co.* 219 Mass. 420, 106 N. E. 988, 7 N. C. C. A. 254, Ann. Cas. 1916D, 1170; *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633.

Such an action is sustained when the loss of services has been caused by an assault and battery (*Cowden v. Wright*, supra), indecent assault (*Whitney v. Hitchcock*, 4 Denio, 461), negligence (*Maxson v. Delaware, L. & W. R. Co.* supra; *Cum- ing v. Brooklyn City R. Co.* 109 N. Y. 95, 16 N. E. 65), abduction (*Lawyer v. Fritcher*, supra), or other tort by which the parent's right to the services of the child is taken away

in whole or in part. When the child's father is dead the mother can maintain the action. *Gray v. Durland*, 51 N. Y. 424.

It is an established general rule of law that where a parent sues for loss of services arising from an injury <sup>—negligence of child—effect.</sup> received by his in-

fant child, damages will not be permitted if the evidence shows that the child's negligence was the efficient cause of the injury. *Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249; *Honegsberger v. Second Ave. R. Co.* 2 Abb. App. Dec. 378; *Dennis v. Clark*, 2 Cush. 347, 354, 48 Am. Dec. 671; *Kerr v. Forgue*, 54 Ill. 482, 5 Am. Rep. 146; *Chicago & G. E. R. Co. v. Harney*, 28 Ind. 28, 92 Am. Dec. 282; *Moore v. Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106; *Chicago, B. & Q. R. Co. v. Honey*, 26 L.R.A. 42, 12 C. C. A. 190, 27 U. S. App. 196, 63 Fed. 39; *Ainley v. Manhattan R. Co.* 47 Hun, 206, 9 Am. Neg. Cas. 599.

It is an equally well-established rule of law that if the conduct of the defendant in such a case was so deliber- <sup>—wilful injury—effect.</sup> ate, persistent, and

intentional as to be equivalent in law to positive and wilful injury, the contributory negligence of the child is not a defense. *Chapman v. Trial—jury—rule applicable.* New Haven R. Co.

19 N. Y. 341, 75 Am. Dec. 344. Unless the evidence is without conflict it is always for the jury to determine whether the facts in a given case bring it within one rule or the other.

The question distinctly arises in this case whether the plaintiff is entitled to recover punitive or vindictive damages against the defendants. The court charged the jury that if they found the defendants "with evil heart desiring to ruin this boy, or not caring at all whether they ruined him or not, knowing that surely he was acquiring this habit, that his life would be more or less affected thereby, and that he would eventually become a useless

Appeal—con- sidering refusal of instructions.

Parent and child—recovery for loss of services—habit-forming drug.

citizen," and permitted "the sale of this poison to make money out of the miseries of this boy, and did it from a reckless disregard of any duty towards any human being and out of desire to injure, in such case and no other can you consider the question of so-called punitive or vindictive damages."

The defendants excepted to the charge, and the court directed the jury that in case they found a verdict for the plaintiff they should find separately as to the compensatory damages and as to the punitive damages. At the close of the charge the defendants asked the court to charge "that there is no evidence in this case upon which they may predicate or make an award of punitive damages."

The court declined to make this charge, and the defendants took an exception.

The common-law action which a master or parent has for loss of the services of a servant or minor child

Master and  
servant—action  
for injury to  
servant—prop-  
erty rights.

is based upon an injury to a property right. Compensation is allowed for loss of services to

which the master or parent is entitled and for the expenses incurred by reason of such injury. Much has been written by the courts and by text-writers upon the question whether punitive, vindictive, exemplary, aggravated, or retributory damages should be allowed in any case without reaching a generally accepted conclusion. In some states of this country such damages are allowed by statute, and in others they are by statute prohibited. In most of the states, including this state, such damages are allowed to the person directly injured in cases of wrong committed with malice or reckless disregard of the rights of

others. Such damages are allowed in this state in an action by a parent against a person who seduces his daughter. It was said in *Cowden v. Wright*, supra: "It is true that in the action for the seduction of a daughter, the jury in fixing upon the damages may regard the wounded feelings of the family; but that case has always been considered *sui generis*, and inconsistent with the fundamental principle of the action." 24 Wend. 430, 35 Am. Dec. 633.

We are of the opinion that such damages do not in this case come within the reason on which the common-law action in favor of a third person is sustained. The weight of reason and authority is in favor of confining the damages to be recovered in an action by a third party to compensation for the pecuniary injury actually sustained. *Cowden v. Wright*; *Whitney v. Hitchcock*, and *Cuming v. Brooklyn City R. Co.* supra; *Barnes v. Keene*, 132 N. Y. 13, 29 N. E. 1090. See also *Covert v. Gray*, 34 How. Pr. 450, and 20 R. C. L. pp. 614, 615, §§ 24, 25, and cases cited.

The jury found a verdict in favor of the plaintiff, and fixed the compensatory damages at \$2,000, and the punitive damages at \$1,000. Judgment was entered for \$3,000 and costs.

The judgment should be modified by reducing the amount of the recovery to \$2,000, being the amount found for compensatory damages, and, as thus modified, affirmed, without costs to either party in this court or in the Appellate Division.

*Hiscock, Ch. J., and Collin, Cuddeback, Hogan, and McLaughlin, JJ., concur.*

*Crane, J., absent.*

## ANNOTATION.

### Right of action against one selling habit-forming drug to child or spouse.

It is generally held that a parent may maintain an action against one selling a habit-forming drug to a

child, or a spouse for a like sale to the other spouse, where it appears that the person selling the drug knew or

had good reason to know that it was not to be used for a medical purpose, but, on the contrary, was intended to satisfy the craving created by the habitual use thereof. *Hoard v. Peck* (1867) 56 Barb. (N. Y.) 202; *Holleman v. Harward* (1896) 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972; *Flandermeyer v. Cooper* (1912) 85 Ohio St. 327, 40 L.R.A. (N.S.) 360, 98 N. E. 102, Ann. Cas. 1913A, 983; *Moberg v. Scott* (1917) 38 S. D. 422, L.R.A. 1917D, 732, 161 N. W. 998. And see the reported case (*TIDD v. SKINNER*, ante, 1145).

In *Hoard v. Peck* (N. Y.) supra, it was held that a druggist was liable to a husband for selling laudanum to his wife to be used by her as a beverage, the sales extending over several months. As a result the wife became sick and emaciated, and her mind was affected so that she was unable to perform her duties as a wife. The court held that although the sale of laudanum was not prohibited by law, it did not, therefore, follow that every sale of it was lawful, saying that "its lawfulness or unlawfulness depends upon the circumstances of the sale, and the uses and purposes to which it is applied."

In *Holleman v. Harward* (1896) 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972, it was held that the defendant, a druggist, was liable to a husband for selling his wife laudanum, knowing that it was to be used as a beverage and not for medical purposes, and despite the warnings and protests of the husband against the sale, as a result of which the wife became a mental, moral, and physical wreck, causing the husband to lose her services and society. The court said: "Notwithstanding the claim of the defendants, we think this action rests upon a principle, a principle not new, but one sound and consistent. The principle is this: 'Whoever does an injury to another is liable in damages to the extent of

3 A.L.R.—73.

that injury. It matters not whether the injury is to the property, or the rights, or the reputation of another.' . . . The defendants owed the plaintiff the legal duty not to sell to his wife opium in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying mind and body, and thereby causing loss to the husband."

In *Flandermeyer v. Cooper* (1912) 85 Ohio St. 327, 40 L.R.A. (N.S.) 360, 98 N. E. 102, Ann. Cas. 1913A, 983, it was held that a wife could recover for the loss of her husband's consortium, caused by the sale to him of morphine by the defendant, a druggist. It appeared that the plaintiff's husband had previously been a morphine fiend, but had been cured, and the plaintiff, knowing the danger of a recurrence of the habit, had warned the defendant repeatedly not to sell her husband the drug, but that he nevertheless persisted in so doing.

In *Moberg v. Scott* (S. D.) supra, it was held that a wife might maintain an action against one who sold her husband opium. As a result of the continued use of the drug the husband became an opium fiend, and the wife was thereby deprived of his aid, support, and consortium. It appeared that the wife repeatedly warned the defendant against selling the drug to her husband, so that he had actual knowledge that the drug was not being used for medical purposes.

In the reported case (*TIDD v. SKINNER*, ante, 1145), wherein it was held that a mother could recover damages against a druggist for the sale of heroin tablets to her son, by reason of which he gave up his position, his health was ruined, and he became a criminal, the court held that the defendant had notice of the improper use for which the drug was intended, by reason of the fact that larger amounts were sold at one time than were used for medical purposes.

B. F. D.

J. LANGDON WARD et al., Trustees, etc., of Mary Mason Jones, Deceased,  
Appts.,  
v.

UNION TRUST COMPANY OF NEW YORK, Respt.

*New York Court of Appeals — June 11, 1918.*

(224 N. Y. 73, 120 N. E. 81.)

**Landlord and tenant — covenant to pay taxes — construction — change in time of payment.**

A tenant whose lease expires at noon on a specified date, and who has covenanted to pay and discharge all taxes as shall be imposed on the premises during the term as soon as they become due and payable, is liable for taxes which, by change of the due date, become payable on the day the lease expires.

[See note on this question beginning on page 1159.]

APPEAL by plaintiffs from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County, dismissing the complaint in an action on a covenant to pay taxes contained in a lease. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. K. Post and Henry W. Hayden, for appellants:

Annual taxes are imposed when the assessment rolls are delivered by the president of the board of aldermen to the receiver of taxes, with the warrant for their collection.

Ogden v. Getty, 100 App. Div. 430, 91 N. Y. Supp. 664; Re Sherwoods, 127 C. C. A. 304, 210 Fed. 754, Ann. Cas. 1916A, 940; Wilkinson v. Libbey, 1 Allen, 375; Amory v. Melvin, 112 Mass. 83; Richardson v. Gordon, 188 Mass. 279, 74 N. E. 344; Craig v. Summers, 47 Minn. 189, 15 L.R.A. 236, 49 N. W. 742; Blythe v. Gately, 51 Cal. 236; McManus v. Fair Shoe & Clothing Co. 60 Mo. App. 216.

Under the covenant in the lease to pay all taxes imposed upon the demised premises during the term, the defendant is obligated to pay all the taxes for 1914.

Ogden v. Getty, supra; New York v. Cashman, 10 Johns. 96; Bleecker v. Ballou, 3 Wend. 263; Post v. Kearney, 2 N. Y. 394, 51 Am. Dec. 303; Walker v. Whittemore, 112 Mass. 187.

The lessee, by its acts, has itself construed the covenant as covering taxes imposed in accordance with the amendment of 1911.

Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594.

Messrs. Wolcott G. Lane and John B. B. Fiske, with Messrs. Miller, King, Lane, & Trafford, for respondent:

Leases are construed most strongly against the landlord; and a burden which is imposed by law upon the landlord can be shifted to the tenant only by the very clearest language.

24 Cyc. 915; Woodruff v. Oswego Starch Factory, 177 N. Y. 23, 68 N. E. 994; Herald Square Realty Co. v. Saks & Co. 215 N. Y. 427, 109 N. E. 545; Ayer v. Bonwit, 161 App. Div. 122, 146 N. Y. Supp. 301.

The language used in a lease (and especially words which relate to the shifting of a burden to the tenant) should not receive a narrow technical construction, but should be construed upon broad common-sense lines, so as to carry out the intention of the parties.

Gillet v. Bank of America, 160 N. Y. 549, 55 N. E. 292; Maloney v. Iroquois Brewing Co. 173 N. Y. 303, 66 N. E. 19; Williams v. Barkley, 165 N. Y. 48, 58 N. E. 765; Nellis v. Western L. Indemnity Co. 207 N. Y. 320, 100 N. E. 1119.

In construing leases as well as all other contracts the court should avoid, if possible, any construction which is unreasonable or inequitable; and in order to determine the real intention

of the parties it will construe the language used in the light of all the surrounding circumstances, including contemporaneous regulations, customs, and long-established laws.

9 Cyc. 587; *Simon v. Etgen*, 213 N. Y. 589, 107 N. E. 1066; *Russell v. Allerton*, 108 N. Y. 288, 15 N. E. 391; *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292; *Schoellkopf v. Coatsworth*, 166 N. Y. 77, 59 N. E. 710; *Heyn v. New York L. Ins. Co.* 192 N. Y. 1, 84 N. E. 725; *Herald Square Realty Co. v. Saks & Co.* 215 N. Y. 427, 109 N. E. 545; *Morris v. Henry*, 221 N. Y. 96, 116 N. E. 797; *Muhlker v. New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; *Bradley v. Lightcap*, 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. Rep. 748; *Reynolds v. Hall*, 2 Ill. 35.

The words, "annual taxes," stipulated in this lease to be paid by the tenant, should be construed to mean five years' taxes—not six years' taxes—for the five years' term.

*Morris v. Suerken*, 88 Misc. 262, 151 N. Y. Supp. 817; *Ogden v. Getty*, 100 App. Div. 430, 91 N. Y. Supp. 664; *Simon v. Etgen*, 213 N. Y. 589, 107 N. E. 1066.

Even construing the words used in this lease in the narrowest possible sense, they must be held to mean a complete fixation of the taxes, including the establishment of a lien, so that the most that can be claimed is that the respondent became liable for the first half of the 1914 taxes.

*Gray v. Board of School Inspection*, 231 Ill. 63, 83 N. E. 95; *Doan v. Fallon*, 3 Mo. App. 596.

*Chase, J.*, delivered the opinion of the court:

This is an action upon an express covenant contained in a lease. The facts are admitted. So far as now material they are that the trustees under the will of Mary Mason Jones, deceased, executed, as lessors, to the Plaza Bank, as lessee, a written lease of premises on Fifth avenue, New York city, for a term of five years, commencing on the 1st day of May, 1909, at noon, and ending on the 1st day of May, 1914, at noon, at a rent to be paid as therein provided. The lease contained a covenant as follows: "Provided always and the lessee hereby covenants to pay said rent punctually, and to pay

and discharge all annual taxes as shall during said term be imposed on said premises hereby demised, as soon as they become due and payable, and to pay the Croton and all other water charges as soon as the same shall become due, and to keep said demised premises free, clear, discharged and unencumbered from all such taxes and Croton and other water charges during said term, and to put and keep the said premises in good order and repair, and in all respects promptly comply with and execute all the laws, orders, and regulations of the state and municipal authorities applicable to said premises; except as hereinafter provided with respect to the widening of Fifth avenue."

The Plaza Bank occupied the premises described in the lease for sixteen years prior to the commencement of the term as therein provided, pursuant to two similar leases, one for ten years, commencing May 1, 1893, and the other for six years, commencing May 1, 1903, and it had paid the rent and taxes as provided during said terms. The bank continued in possession under the lease in controversy until December 22, 1911, when it merged under the State Banking Law with the Union Trust Company of New York, the defendant in this action. The bank paid the taxes for the years 1909, 1910, and 1911, pursuant to said covenant. The defendant trust company continued in possession of said lease from December 22, 1911, until May 1, 1914, at noon, and paid the taxes pursuant to said covenant for the years 1912 and 1913. It refused to pay any part of the taxes for the year 1914, and the plaintiff, subsequent to such refusal, and on June 3, 1914, paid the first half of the taxes on the demised premises for that year, amounting to \$5,117.50, and on November 25, 1914, the second half thereof, amounting to \$5,117.50. This action is brought to recover the taxes so paid by the plaintiffs for the year 1914. At the time the lease in controversy was executed and for many years prior



thereto, the assessment rolls of the city of New York had, pursuant to the charter of said city, been delivered to the receiver of taxes of the city, with the warrant for the collection of taxes therein specified on or before the 15th day of September, and they were payable on the first Monday of October in each year.

By chapter 455 of the Laws of 1911, which became effective January 1, 1912, it was provided that the board of taxes and assessments should cause the assessment rolls to be prepared (§ 907), and that the board of aldermen should properly estimate and compute the "taxes annually imposed," and cause the same to be properly set down or extended in the several assessment rolls (§ 909), and that on or before the 28th day of March the board of aldermen should deliver the assessment roll of each borough, with the proper warrant annexed, to the receiver of taxes, to collect the same from the several persons named therein (§ 911). The charter as so amended provided that "all taxes upon personal property and one half of all taxes upon real estate shall be due and payable on the 1st day of May and the remaining and final one half of taxes on real estate shall be due and payable on the 1st day of November. All taxes shall be and become liens on the real estate affected thereby on the respective days when they become due and payable as hereinbefore provided and shall remain such liens until paid." Section 914.

The taxes became liens accordingly for the years 1912, 1913, and 1914. The assessment rolls for the year 1914 were delivered to the receiver of taxes, together with the warrants for the collection thereof, on March 27, 1914, and contained a tax of \$10,235 on the demised premises. One half of the amount of such tax for the year 1914 became due and payable on the day on which the term of the defendant's lease expired.

It is probably true that a change

in the charter of the city of New York was not particularly considered by either of the parties to the lease prior to its execution. It is to be assumed that the parties thereto intended that the landlords would deliver the possession of the property to the tenant free from all general taxes that were due and unpaid, and that the tenant, pursuant to its covenant, would return them to the landlords at the end of the term, free from general taxes then due and unpaid. If that was not the intention of the contract and the obligation of the parties, then the landlords will receive their property burdened with an unpaid tax that cannot be charged to a new and subsequent tenant as current general taxes to become due and payable after the beginning of the new term. It becomes a question, therefore, whether the lessors or lessee must bear the burden of the general taxes which became a lien upon the demised premises at or prior to the expiration of the lease in controversy.

The question involved is not one of equity in view of subsequent events or otherwise, but of simple contract between the parties, interpreted in view of the circumstances and surroundings existing at the time the lease was executed, and in view of the possibility of changes in the time and manner of paying the general taxes of the city of New York. The fiscal year of the city of New York is coextensive with the calendar year. The term of the lease in controversy commenced within one fiscal year and ended in the sixth fiscal year thereafter, counting both the fiscal year in which the lease commenced and ended. The promise of the lessee was "to pay and discharge all annual taxes as shall during said term be imposed on said premises hereby demised, as soon as they become due and payable," and "keep said demised premises free, clear, discharged, and unencumbered from all such taxes . . . during said term." The words, "annual taxes,"

are used to describe the general taxes in the city of New York as distinguished from special assessments. It is descriptive of the kind of taxes to be paid by the tenant, and includes the aggregate or total of taxes for general purposes. Reading the covenant as a whole, the promise of the tenant includes the general taxes imposed and becoming due and payable within the term. The demised premises became encumbered with one half of the tax of 1914 on May 1, 1914. The lessee could not leave the demised premises free, clear, discharged, and unencumbered from taxes during said term if the taxes so actually due and payable on the date of the expiration of the lease were left unpaid. The payment of the tax comes precisely within the terms of the contract made by the lessee, and we can only consider and enforce it. By the

Landlord and  
tenant—cove-  
nant to pay  
taxes—construc-  
tion—change in  
time of payment.

lease the lessors and  
the lessee assumed  
the risk of changes  
in the charter of the  
city that might af-

fect the interests of either. Not only is the meaning of the covenant reasonably clear, but the conclusion reached by us is sustained in principle by the authorities.

In *Walker v. Whittemore*, 112 Mass. 187, a lease included a covenant by the lessee to pay "all and singular the taxes, rates, charges, and assessments which shall or may from time to time, and at any time during said term, be levied, assessed, or made on the demised premises, or in respect of the same, for or on account of any matter or cause whatever." The court held that "these words are sufficient to cover, and must have been intended to cover, all possible forms of taxation."

The court further says: "They import that the lessors were to receive the stipulated rent absolutely, and subject to no deduction. *Bleecker v. Ballou*, 3 Wend. 263. It is a charge upon the owner by reason of his ownership, against which he

undertook to guard himself by the terms of his lease."

In *Bleecker v. Ballou*, 3 Wend. 263, 266, referred to in the *Walker Case*, the tenant covenanted to pay "all taxes, charges, and impositions which should be taxed, charged, imposed, or assessed upon the demised premises." During the term the premises were subjected to an assessment for paving a street under an act incorporating the village and authorizing such assessment, which was passed subsequent to the date of the lease. The court says: "Had there been no decisions of courts upon similar covenants, I should think it clear that the parties intended precisely what the language of their contract imports; that the lessee ran the risk of all taxes, charges, and impositions. . . . They import that the landlord was to receive his rent, and, during the term, was to be subject to no expense on account of the demised premises."

In *Post v. Kearney*, 2 N. Y. 394, 396, 51 Am. Dec. 303, the lessee covenanted to pay "all assessments for which the premises shall be liable." It was held that an assessment subsequently imposed for opening a street, although it was not authorized by law existing at the time the lease was executed, should be paid by the lessees. Judge Gardiner, speaking for the court, said: "It is insisted that the assessment in question is . . . not within the contemplation of the parties, or the law, as a part of the rent reserved; that no assessments but those authorized by the law existing at the execution of the lease are within its terms."

He further said: "The covenant is, we think, perfectly plain; and, unless there is some law that prohibited parties from making their own contracts, the defendant must abide by the one he has voluntarily assumed."

In *Norfolk v. J. W. Perry*, 108 Va. 28, 35 L.R.A.(N.S.) 167, 128 Am. St. Rep. 940, 61 S. E. 867, affirmed in 220 U. S. 472, 55 L. ed. 548, 31 Sup. Ct. Rep. 465. It was

held that the covenant of a perpetual leaseholder with his municipal lessor to pay public taxes which shall become due on the land embraces municipal taxes whenever they can thereafter be lawfully assessed on the land, or the improvement which was part of the land, although when the lease was made the municipality had no power of taxation. A municipal corporation may lay taxes upon land which it has let at an annual rental for a term of ninety-nine years, renewable forever, to one who covenants to pay in addition to the rent the public taxes levied on the property.

In *New York v. Cashman*, 10 Johns. 96, the covenant under consideration extended to all taxes, assessments, impositions, and payments payable out of and for the demised premises, and the charge under consideration (opening the street) was such an assessment. The court held that it could not enter into any equitable consideration when the covenant speaks for itself.

A covenant that the lessees shall pay all rates, taxes, and assessments for which the premises shall be liable includes not only such charges as may be imposed by laws then in force, but also such as may be authorized by laws afterward enacted. 16 R. C. L. § 310.

When the lease was executed the possibility of changes in the city charter affecting the amount and the time and manner of payment of the annual taxes was not so remote that it could be ignored. If the lessee desired to restrict its obligation to the payment of taxes for the five fiscal years ending January 1, 1914, it should have so stipulated in the lease. Its term extended into the sixth fiscal year, as we have seen, and the lease, as written, required the lessee to pay annual taxes becoming due and payable in that term.

In *Welch v. Phillips*, 224 Mass. 267, 112 N. E. 651, a lease was made for a term of twenty years from May 1, 1893. The lessee covenanted to pay "all taxes and water taxes

and assessments whatsoever, except betterments, whether in the nature of taxes now in being or not, which may be assessed upon or payable for or in respect of the said premises or any part thereof during the said term." The lessee paid the taxes assessed as of May 1, 1893, and the taxes assessed for each succeeding year until the last year of the term which ended April 30, 1913, but refused to pay the tax assessed as of April 1, 1913, asserting that he already had paid the taxes for twenty years, and that Stat. 1909, chap. 440, which changed the day of assessment from May 1st to April 1st was not contemplated by the parties when the lease was made. Held, that the lessee must comply with the terms of the express covenant he had made, although the result was that he had to pay the taxes for twenty-one years under a twenty-year lease, it not being open to this court to modify the lease in accordance with the conjecture as to what agreement the parties would have made had they foreseen the likelihood of a change in the Tax Law.

The cases cited by the respondent do not aid it. In *Ayer v. Bonwit*, 161 App. Div. 122, 146 N. Y. Supp. 301, the suit was brought to recover for one third of the taxes for the year 1912. The lease under consideration expired May 1, 1912, and the suit presumably was for that part of the assessed taxes represented by the first four months of the year in which the lease expired. It appeared that the landlord had rented the property from May 1, 1912, and the new tenant had agreed to pay taxes falling due May 1, 1912, and on November 1, 1912. Upon such evidence the plaintiff's claim was dismissed.

In *Morris v. Suerken*, 88 Misc. 262, 151 N. Y. Supp. 817, the court held that the taxes did not become due and payable during the term. It also appeared in that case that the new tenant whose lease commenced May 1, 1914, had agreed to pay the annual tax for the year 1914.

In the *Saks Case* (Herald Square

Realty Co. v. Saks & Co. 215 N. Y. 427, 432, 109 N. E. 545, 546) the alterations required by the municipal authorities were radical and structural, and the court held not within the intention of the parties. This court took occasion in that case to say that "taxes and assessments are not in the same category with the cost of making substantial changes in a commercial building."

The judgment of the Appellate Division and of the Special Term should be reversed, and judgment should be ordered for the plaintiffs for \$5,117.50, with interest from June 8, 1914, with costs in all courts.

Hiscock, Ch. J., and Hogan, Cardozo, Pound, and Andrews, JJ., concur.

McLaughlin, J., not sitting.

### ANNOTATION.

#### Change in time for assessment or payment of taxes as affecting provision for payment of taxes during term of lease.

There seems to be but one other case in which the exact question here raised was squarely before the court (Welch v. Phillips (1916) 224 Mass. 267, 112 N. E. 651, *infra*), and the conclusion reached supports the holding in the reported case. (WARD v. UNION TRUST Co. *ante*, 1154) that a tenant who has covenanted to pay and discharge all taxes that shall be imposed on the premises during the term is liable for annual taxes which are so imposed, solely by reason of a change by the legislature in date of imposition, after the making of the lease, although he has paid an annual tax corresponding to each year of the term. As to the peculiar wording of the covenant and the possible effect thereof, see same case discussed *infra*.

The rule that a covenant, obligating the tenant to pay all rates, taxes, and assessments for which the leased premises may be liable, includes not only such charges as may be imposed by laws then in force, but also such as may be authorized by laws afterwards enacted, should be, according to some early English decisions and a few American cases, cited *infra*, somewhat qualified or limited in its application. That a case in which the legislature has merely changed the date of assessment or for payment of taxes so as to technically bring an assessment which came later at the date of the lease, within the term covered by the covenant, should be governed

by this rule, is a doubtful proposition.

The court in *Love v. Howard* (1859) 6 R. L. 116, after a discussion of *Davenant v. Bishop of Sarum* (1672) 2 Lev. 68, 83 Eng. Reprint, 453; *Hopwood v. Barefoot* (1709) 11 Mod. 237, 88 Eng. Reprint, 1013; *Brewster v. Kidgill* (1698) 12 Mod. 166, 88 Eng. Reprint, 1239; *Giles v. Hooper* (1690) Carth. 135, 90 Eng. Reprint, 683; *Bradbury v. Wright* (1781) 2 Dougl. (K. B.) 624, 99 Eng. Reprint, 395; *Brewster v. Kitchin* (1698) 1 Ld. Raym. 317, 91 Eng. Reprint, 1108; said: "The rule recognized and adopted in these cases is that, if the tax or assessment be made under a law existing at the time of the covenant, it is within it; or, if there be no law existing at the time authorizing or requiring it, but it is afterwards enacted, still, if the assessment or tax be of the same kind with taxes or assessments made under former acts, it is presumed to have been in the contemplation of the parties, as a tax *in viris*, though not *in esse*. But if such tax or assessment be different in kind from such as have been theretofore in *esse*, it is not to be presumed that the parties contemplated any unusual exercise of power in the legislature, such as it had never before exercised. The land tax seems not to have been a continuing act; but these taxes were levied by act of Parliament, as the public exigencies from time to time required; but they had been used, in the lan-

guage of Lord Holt; they were not of a foreign nature, but known to the law, and had always a virtual, though not an actual, existence; and, speaking of the covenant, he says: 'It does not provide against an unusual accident, but against a thing well known to our law as part of the Constitution.'"

The rule is not within the scope of the note and is not exhaustively annotated, but a number of cases are cited for the purpose of showing that it is not an absolute one, applicable under all circumstances.

The court, in the case of *Bleecker v. Ballou* (1829) 3 Wend. (N. Y.) 263, cited by the court in the reported case (*WARD v. UNION TRUST Co.* ante, 1154), recognized this limitation of the rule, but held that the "charges and impositions" mentioned in the covenant "may refer to such charges and impositions as are known to be made upon other property similarly situated." The court also said: "The premises in question were leased as a village lot, and, therefore, the parties may have anticipated that, within the term granted, some improvements might become necessary and proper, which would require charges and impositions."

In *Post v. Kearney* (1849) 2 N. Y. 394, 51 Am. Dec. 303, cited with quotation by the court in the reported case (*WARD v. UNION TRUST Co.*), the facts were such that there was no need to mention the exception to the rule. The court also said: "What the precise character or amount of the subsequent assessments would be could not be known, although the parties must have anticipated an increase during a term of forty years, and in a city rapidly growing in importance." The same may be said of the circumstance involved in *Garner v. Hannah* (1857) 6 Duer (N. Y.) 262, which case was decided upon the authority of *Post v. Kearney*.

And it is very clear that *J. W. Perry Co. v. Norfolk* (1911) 220 U. S. 472, 55 L. ed. 548, 31 Sup. Ct. Rep. 465, affirming (1908) 108 Va. 28, 35 L.R.A.(N.S.) 167, 128 Am. St. Rep. 940, 61 S. E. 867, could not fall with-

in the exception. In that case the grant was made by the city for a term of ninety-nine years, renewable forever, at a very low annual rental, with a covenant that the "public taxes" be paid by the grantee and his successors in title. Although the courts held this to be a lease in the technical sense, they also held that "the value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being." And since the city was the grantor, it was held that the grantee would be liable for city taxes,—city taxes were the disputed taxes,—even if there had been no covenant, since nonliability of the grantee would amount to an exemption of taxes on the property. On these facts, both courts affirm the rule as already stated, without mentioning any exceptions.

As already stated *Welch v. Phillips* (1916) 224 Mass. 267, 112 N. E. 651, supports the holding in the reported case (*WARD v. UNION TRUST Co.* ante, 1154). However, it will be observed that the wording of the covenant, "whether in the nature of taxes now in being or not," would seem to indicate that the parties had in mind taxes that might be held to fall within the exception already discussed, and that they meant to provide that the rule as to taxes imposed by later legislation should be enforced without exception. As the court said, "Presumably the change in the Tax Law which makes them liable for the 1913 tax was not contemplated by them;" yet, if they deliberately stipulated that the effect of future legislation should be borne by the party upon whom the burden falls, there might be reason for the enforcement of the covenant literally. This was not, however, the ground for the decision.

For the purposes of discussion, the grounds of the exception are the important matter, rather than the exception itself. The court in *Love v. Howard*, quoted *supra*, states the grounds thus: "It is not to be presumed that the parties contemplated any unusual exercise of the power of

the legislature," etc. So, the grounds for this exception seem to correspond with the reasoning by which Page, J., sought to support the decision in the appellate division (172 App. Div. 569, 159 N. Y. Supp. 54), now reversed by the reported case (*WARD v. UNION TRUST Co.* 1154), where he said: "There can be no question as to the intention of the parties at the time the lease was executed, and that was that the annual tax for each year of the term was to be paid by the tenant. This tax had been assessed and was payable in the fall of each year. Under the first two leases, during the sixteen years of their terms, sixteen annual taxes had been paid by the tenant, and it was the expectation of both parties that during the five years of the lease, in the instant case, five annual taxes would be assessed in September and paid in October of each year. Neither party to the lease had any reason to anticipate that the

law in regard to the time of assessment and payment of taxes in New York city, which had been fixed for more than fifty years, would be changed within the terms of the lease. When parties enter into a contract they are presumed to have in mind all the existing laws relating thereto, or to the subject-matter thereof."

In the class of cases within the scope of this note, it may be observed, the lessor would be in no worse position if he paid the tax than he would have been in had the new law not have been passed. This is not true of any other class of cases. The effect of the legislation, under the holding of the two cases within the scope of the note, is merely to relieve one party of taxes that he must have expected to pay, and place the burden upon the other party, who did not expect to pay them. This is not the effect in any other case in which the rule has been applied. J. W. M.

RICHARD DONEHY et al., Appts.,  
v.  
COMMONWEALTH OF KENTUCKY.

*Kentucky Court of Appeals—May 31, 1916.*

(170 Ky. 474, 186 S. W. 161.)

**Arrest — overcoming resistance — use of force.**

1. A police officer attempting to arrest one for a misdemeanor may use such force as seems necessary in the exercise of sound judgment to effect his purpose if the offender is armed and offers resistance or threatens the officer, and, in connection with such threat, assumes a menacing attitude towards the officer.

[See note on this question beginning on page 1170.]

**Criminal law — statement of plea — sufficiency.**

2. A statutory provision requiring the clerk or district attorney to read to the jury the indictment in a criminal case and state the defendant's plea is sufficiently complied with if, after the reading of the indictment by the clerk, the defendant himself pleads not guilty in the presence of the jury.

**— instructions — murder.**

3. An instruction on murder is justified in a case where one known to be a police officer by accused, who was

attempting to steal a ride on a train, advanced towards accused, whom he directed to take his hand out of his pocket, where it rested upon a pistol, a portion of which was in sight, and was shortly afterwards found dead with bullet holes in his body, while accused fled and stated to others that he had had a difficulty with a railroad detective.

[See 14 R. C. L. 786.]

**Homicide — murder — slaying policeman.**

4. Where a police officer is killed

while attempting to make an arrest by one who knew him to be an officer, it is not necessary, to constitute the crime murder, that the slayer should have had a particular malice.

[See 13 R. C. L. 866.]

**Arrest — right to kill.**

5. A police officer has no right wantonly to shoot and kill one only charged with a misdemeanor if the offender is merely trying to escape such arrest by flight.

[See 2 R. C. L. 473.]

**Appeal — instruction — right to kill in effecting arrest.**

6. Failure of the court to bring out the distinction between killing one accused of misdemeanor, who is merely attempting to escape, and one who, be-

ing armed, assumes a menacing attitude towards the officer, is not prejudicial if the evidence presents only the latter situation.

[See 13 R. C. L. 932.]

**— refusal of requested instruction.**

7. Failure to give a requested instruction is not reversible error if the subject-matter was adequately covered by the instructions given.

[See 14 R. C. L. 751.]

**Criminal law — right to handcuff prisoner.**

8. It is within the sound discretion of the sheriff, as the custodian of a prisoner on trial for murder, to take him between the jail and the court room handcuffed.

[See 8 R. C. L. 69.]

**APPEAL** by defendants from a judgment of the Criminal, Common Law, and Equity Division of the Circuit Court for Kenton County, convicting them of murder. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. O. M. Rogers and R. S. Holmes for appellants.

Messrs. M. M. Logan, Attorney General, and D. O. Myatt, Assistant Attorney General, for the Commonwealth.

Turner, J., delivered the opinion of the court:

In August, 1915, Elmer C. Matthews was a railroad policeman in the employ of the C., N. O. & T. P. Ry. Co. He had been appointed and commissioned under the provisions of § 779a, Kentucky Statutes, and as such officer was clothed with the power and authority of a sheriff upon the trains of the company or about its depots.

On the 18th day of August, early in the afternoon, there was made up in Cincinnati by the C., N. O. & T. P. Ry. Co. a freight train which proceeded across the river on its south-bound journey; at Ludlow, immediately across the river from Cincinnati, this train was boarded by Matthews, the railroad policeman, and when the train got a short distance south of Ludlow he discovered in one of the gondola cars of the freight train, which was loaded with gas pipe, two negro men, afterwards identified as the appellants, Donehy and Prather.

The train at the time was going up a steep grade and running at the rate of only from 4 to 10 miles an hour; Fleming, the brakeman, was then on the same car that Donehy and Prather were riding in, and Matthews boarded the car at the northeast corner. As he did so, Donehy jumped up, whereupon Matthews asked where they were going, when one of them said they were going "down the road," and they were then informed by Matthews that they could not ride on that train; Donehy, as he got up, had his hand in his right coat pocket, on his pistol; Matthews asked him to take his hand out of his pocket and he refused, and Prather, at about that time, said: "Wait a minute, he is not going to put you off." Matthews then advanced toward Donehy with his pistol presented at him and demanded that he take his hand out of his pocket, and Donehy still refused, and when Matthews got up to where Donehy was, he grabbed hold of the hand which he had in his pocket on the pistol, and struck him with his pistol on the left side of the head, and Donehy, with his left hand, grabbed Matthews's right hand; Fleming started to go to the

assistance of Matthews when Prather fired twice at him, whereupon Fleming, being unarmed, jumped off the car; just after he jumped off the car he heard seven, eight, or ten shots, ran along the side of the train and got on a car further forward, when he looked back and saw the two negroes leaving the train, going in a westerly direction. The body of Matthews was found in the car with four bullet holes in his back and two in his right side, having been instantly killed. Several months later the two appellants were arrested and indicted, charged with the murder of Matthews, and upon their joint trial were each found guilty and sentenced to confinement in the penitentiary for life, from which judgment they prosecute this appeal.

Their defense in the lower court was an alibi, they each claiming that they were not present in the car at the time, and that they were not the men who engaged in the difficulty with Matthews. It is sufficient to say on this subject that the plea was a complete failure; they were identified positively by Fleming, the brakeman; by a farmer, who saw them a short distance from the train, just after they had left it, and whom they told they had been fired upon by a detective; they were identified by the man who set them across the Ohio river that afternoon; and in addition to all of this there was the evidence of three or four witnesses showing certain admissions by one or both of them.

The appellants, however, are relying upon five grounds for reversal: First, because the attorney for the commonwealth, in his statement to the jury, failed to state what was the plea of the defendants; second, that there was no evidence authorizing an instruction on murder; third, that the instruction of self-defense was erroneous; fourth, because of the failure of the court to give the whole law of the case; and, fifth, because the sheriff and his deputies, during the trial, brought appellants into and took them from

the court room handcuffed, in the presence of the jury.

1. On the first proposition the record shows that the defendants were arraigned by the clerk reading to them the indictment, after which they were each asked for their plea, and they each entered a plea of not guilty, whereupon the attorney for the commonwealth read the indictment to the jury, but failed to state to the jury that the defendants pleaded not guilty.

Section 219 of the Criminal Code of Practice requires the clerk or the attorney for the commonwealth to read to the jury the indictment and state the defendant's plea, and while this provision has been held to be mandatory, a substantial compliance with its provisions only is necessary. It is true that literally neither the clerk nor the attorney for the commonwealth stated the plea of the defendants to the jury, but they themselves, after the reading of the indictment by the clerk and before the statement of the commonwealth's attorney, entered in the presence of the jury their plea of not guilty.

The purpose of this Code provision is to inform the jury at the very inception of the trial the nature of the charge and the plea of the defendants, and when this has been done in the manner indicated, the Code provision, while not literally followed, has been sufficiently complied with. *Criminal law—statement of plea—sufficiency.* Combs v. Com. 31 Ky. L. Rep. 822, 104 S. W. 270; Meece v. Com. 78 Ky. 586; Howard v. Com. 24 Ky. L. Rep. 91, 67 S. W. 1003.

2. The second contention of appellants, that there was no evidence justifying the giving of an instruction on murder, is without merit. Matthews was an *—instructions—murder.* officer, and that appellants knew him to be such is apparent; he had on his badge, and they, immediately after the shooting, referred to him in their talk with the farmer whom they met as *the detective*, and in all the conver-



sations showing admissions by them, detailed by several witnesses in the record, they referred to him as *the detective* or as *the railroad detective*. Knowing him to be a detective, when he notified them that they could not ride on that train, Donehy immediately assumed towards the officer a menacing attitude by placing his hand in his pocket on his pistol, the handle of which was showing, and declined more than once to take his hand out of his pocket. Prather, after the demand by the officer that Donehy should take his hand off of his pistol, said to Donehy in the presence of the officer: "He will not put you off," and drew his pistol and fired two shots at the brakeman who undertook to go to the relief of the officer. Thus it is seen that they each committed an offense in the presence of the officer; one the offense of carrying a concealed weapon which he had started to draw on the officer, and the other defying the authority of an officer by saying to him in substance that he could not put them off the train, and drawing his weapon to enforce that threat and to prevent another from aiding the officer.

It is true that there was no eyewitness to the actual killing, and the brakeman only saw the first two shots which were fired at him; but within a very few minutes the two men were seen to leave the car and run off through the fields, and immediately thereafter the dead body of Matthews was found in the car with four bullet holes in his back and two in his right side.

Even if there had been no other evidence except that of the brakeman and the finding of the body with six bullet holes in it, and their location, there would have been ample justification in submitting to the jury an instruction on murder; but, in addition to this evidence, there is that of some two or three other witnesses who testified to admissions made by the defendants at different times, showing that they shot the decedent with his own pistol after having taken it from him,

and that he begged them not to kill him.

It is true there is no evidence that Matthews notified the defendants that he was an officer, or that he in terms said to them he intended to arrest them; but, as already stated, the evidence shows that they knew he was an officer, and the facts stated by Fleming unmistakably showed Matthews's intention to arrest them, and that they knew of such intention.

It has long been the rule in this state that where an officer is killed while attempting to make an arrest, by one knowing him to be an officer, it is not necessary, <sup>Homicide—murder—slaying policeman.</sup> to constitute the crime of murder, that the slayer should have had any particular malice. *Dilger v. Com.* 88 Ky. 550, 11 S. W. 651.

3. The first objection to the instruction on self-defense is that it tells the jury it was the duty of the appellants to submit to an arrest at the hands of Matthews if they knew he was an officer and was attempting to arrest them. It is argued that this was unauthorized because there was no evidence that they knew he was an officer, or that they knew he was undertaking to arrest them; but we have already seen from a statement of the facts that there was evidence that they knew he was an officer, and that the facts showed that he was attempting to arrest them.

Objection is also to the concluding paragraph of that instruction, which said to the jury in substance that the officer, in attempting to make the arrest, had the right to use such force as appeared to him to be reasonably necessary to accomplish such purpose, and that if the defendants, knowing he was an officer and attempting to arrest them, resisted arrest, and in doing so shot and killed him, or aided or abetted in such shooting and killing, then they could not be acquitted on the ground of self-defense.

The distinction has been frequently pointed out by this court between

the rights, power, and authority of an officer attempting to make an arrest for a misdemeanor in cases where there is forcible resistance by the offender and in cases where there is only an effort to escape by fleeing. Manifestly an officer has no right to wantonly shoot or kill one only charged with a misdemeanor if the offender is merely trying to es-

Arrest—  
right to kill. cape such arrest by flight; but if the offender be armed and offers forcible resistance or threatens the officer, and, in connection with such threat, assumes a menacing attitude towards the officer, the officer then may use such force in the exercise of a sound judgment as is necessary to effect the arrest, not only for the

—overcoming  
resistance—  
use of force. purpose of bringing the offender to justice, but to protect himself from threatened danger. Com. v. Marcum, 135 Ky. 12, 24 L.R.A.(N.S.) 1194, 122 S. W. 215; Stevens v. Com. 124 Ky. 32, 98 S. W. 284; Reed v. Com. 125 Ky. 126, 100 S. W. 856.

While the instruction in this case did not point out the distinction which has been taken in the cases referred to, it could not have been prejudicial in this case for the reason that all the evidence showed

Appeal—instruction—right to kill in effecting arrest. that both of the appellants, at the time of the attempted arrest, were armed, that they resisted arrest, and in such resistance drew their pistols and in effect defied the officer.

4. It is complained by appellants that the court did not give the whole law of the case because of its failure to instruct the jury that the appellants had the right to resist the attempted arrest by Matthews if the jury believed from the evidence the arrest was undertaken in an illegal way.

—refusal of requested instruction. It is unnecessary to consider this contention at length, for whether such an instruction was authorized by the evidence or not, the idea contended for was embraced in one of

the instructions given wherein the jury was told, in substance, that if they believed from the evidence that the defendants did know that Matthews was an officer and was attempting to arrest them, and did not forcibly resist such arrest, and that Matthews assaulted them or either of them with a pistol, and that they had reasonable grounds for believing from his conduct that they or either of them were in danger of death or great bodily harm, and that it was necessary or appeared to them, in the exercise of a reasonable judgment, to be necessary, in order to avert such danger, to shoot Matthews, then they would find such defendants not guilty on the ground of self-defense.

But, in any event, the statement of the evidence above given shows that there was no basis in the evidence for any such instruction.

5. Finally it is contended that because the sheriff and his deputies, during the progress of the trial, brought the two appellants into the court room and took them therefrom handcuffed, the judgment should be reversed, because such conduct strongly tended to prejudice the jury against them.

The sheriff, while conducting prisoners to and from court, was their proper custodian, and was responsible for their delivery to the court and back to the jail. Such officers have all kinds of criminals to deal with; they have not only the most dangerous and desperate criminals, charged with such crimes as would give them an incentive to take any desperate chance to escape, but they are also the custodians of the most harmless and inoffensive offenders, whose nature and disposition is such, or the charge against whom is such, that little inducement is offered them to undertake to escape or to do harm to others. Under such circumstances it would be most unreasonable to say that a public official charged with the responsibility of delivering prisoners to the court and returning them to jail should not be given the right to exercise some

discretion in handling his prisoners. It would be unfair to the officer to say that he must treat a desperate and dangerous criminal in the same way and give him the same opportunity to escape or to do injury to others as he would an inoffensive prisoner charged with a less serious offense.

As said in *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266, 38 N. W. 885, "some discretion must be reposed in an officer in making an arrest for felony as to the means taken to apprehend and safely keep the prisoner. In order to justify handcuffing a person arrested for felony it is not necessary that he should be unruly or attempt to escape, or do anything indicating a necessity for such restraint, nor, in the absence of these indications, that he should be of notoriously bad character." Also *Edger v. Burke*, 96 Md. 726, 54 Atl. 986.

We entertain no doubt that it is within the sound discretion of an officer in custody of criminals, taking into account the nature of the offense charged and the character and disposition of the offender, to place handcuffs on him when he is taken to the court from the jail for trial.

**Criminal law—  
right to handcuff prisoner.**

Judgment affirmed.

#### NOTE.

The question as to the degree of force which may lawfully be employed in arresting one charged with a misdemeanor, which the court, in the reported case (*DONEHY v. COM.* ante, 1161), considered because of its bearing on the defendant's right of self-defense, is the subject of a note beginning at page 1170, post.

### STATE OF NORTH CAROLINA

v.

I. W. DUNNING, Appt.

*North Carolina Supreme Court — March 12, 1919.*

(— N. C. —, 98 S. E. 530.)

#### Arrest — use of necessary force — misdemeanor.

1. An officer having a right to arrest an offender may use such force as is necessary to effect his purpose, even to the extent of taking life.

[See note on this question beginning on page 1170.]

#### Assault — deadly weapon — effecting arrest.

2. A police officer cannot be convicted of assault with a deadly weapon for using a pistol to effect an arrest under warrant of one charged with a misdemeanor.

[See 2 R. C. L. 470, 471, 539, 540.]

#### — liability of officer.

3. A police officer is liable for the use of force in effecting an arrest only when excessive force is used maliciously, or to such a degree as amounts to wanton abuse of authority.

[See 2 R. C. L. 470.]

#### — justification of shooting.

4. A police officer having a warrant to arrest a man who for several hours has been drunk, committing breaches

of the peace, and terrorizing the community, is justified in shooting him if, when advancing upon him to arrest him, after having notified him of his purpose, the person whose arrest is sought defies the officer, and attempts to cut him with an open knife, although the officer might have avoided injury by retreating.

[See 2 R. C. L. 473.]

#### Assault — duty of police officer to retreat.

5. An officer charged with the arrest of one committing a breach of the peace is not bound to retreat or retire to avoid injury, but must stand his ground and use such force as is necessary to effect the arrest.

[See 2 R. C. L. 473.]

**APPEAL** by defendant from a judgment of the Superior Court for Bertie County, convicting him of assault with a deadly weapon. *New trial.*

**Statement by Hoke, J.:**

This is an indictment for an unlawful assault with a deadly weapon on one C. T. White, while defendant, as constable and chief of police of the town of Aulander, was endeavoring to arrest the said prosecutor C. T. White for disorderly conduct in breach of the criminal law.

On the trial the defendant testified in his own behalf, and at the close of all the evidence the court charged the jury as follows: "Gentlemen of the jury, if you believe the evidence of the defendant, I. W. Dunning, himself, I charge you that he is guilty, and, if you so believe it, you will say guilty for your verdict."

Verdict of guilty. Judgment, and defendant excepted and appealed.

Messrs. Winston & Matthews and Alex Lassiter for appellant.

Messrs. James M. Manning, Attorney General, Frank Nash, and Winborne & Winborne for the State.

Hoke, J., delivered the opinion of the court:

There was evidence on the part of the state tending to convict the defendant, but the same does not accompany the record, as no exception is made concerning it.

For the defense I. W. Dunning, a witness in his own behalf, testified as follows: "I am the defendant. I have lived near and in Aulander, Bertie county, all my life. I am now twenty-four years old. Some three years ago I moved to Aulander, to be near a physician for treatment. I went to Norfolk and underwent an operation and came back to Aulander. I have not been strong since then. The commissioners of the town of Aulander elected me constable and chief of police of the town. There was no other constable of the town nor any other policeman. I was the only one. I have known C. T. White all my life. He was then living in Aulander, and had been living there a number of years. His reputation was that when under

the influence of liquor he was a desperate and violent man. I know that of my own knowledge, because I had frequently seen him in that condition. He had been indicted for repeated assaults and for cutting people, and had been convicted. At the May election of this year in Aulander I was re-elected constable by the people of the town. On the day in question, about 4 o'clock in the afternoon, complaint was made to me that C. T. White was drunk on the street, violently noisy, and profane in the presence of the public and of ladies passing on the street. I went up the street and found him at the Main street crossing of the town, within a few yards of the postoffice, in the heart of the business section of the town and of the bank, and in the very center of the business part of the town. I went up to him. He had an open knife in his hand and was noisy and cursing. I ordered him to cease cursing and advised him to go home. I did not want to have to put him in the lockup, and thought I could get him quiet. He did quiet down for a few moments, and came up to me and said he wanted me to give him his liquor. He claimed that he had been to Kelford and brought back 2 quarts of liquor, and said I had taken it. I told him I had not done so. He demanded that I let him search me, and to satisfy him I did so. He felt in all my pockets until he came to the one in which I had my pistol, as I was then on duty. I told him he could not go in that pocket. Then he began to curse and abuse me, and called me a most foul and loathsome name (too foul for this record). I backed back from him. He had me by the hand and was attempting to cut me. I was trying to arrest him. This kept up for several minutes. Finally, the mayor came up and quieted him down. Later he went in the barber shop and commenced raising a row and cursing Mr. Early, who was in the barber shop. Early finally got him down on the floor.

I went to arrest him, and Early and his relatives said if I would let him alone they could get him to go home. He was quiet for but a moment, and came out in the street and commenced cursing Early and myself and threatened to kill us both. He had his open knife in his hand. I dodged about the town to keep out of his way. He completely terrorized the town. All the above occurred about three to four hours before I shot him. People came to me and complained, and finally about 10 o'clock Mr. A. T. Castellow, the mayor of the town, brought me a warrant charging disorderly conduct or a misdemeanor, for the arrest of C. T. White, and told me to go at once and arrest him and bring him before him. During the early part of the evening, and again after I got the warrant, I called on several persons to go with me to assist in making the arrest. They all declined because they said they knew his desperate and dangerous character when under the influence of liquor, and they did not propose to get cut. I finally got a man to go with me. Then White was passing down the street with one Cox, and going in the direction of the Cox place of business—his restaurant and poolroom. I heard him cursing and threatening to kill me and Early. He was violent; cursing and noisy. He went in the Cox place of business and took a seat by the stove. It was a store some 70 feet deep. In the back was a poolroom. Some young boys were there playing pool. The stove was in the middle of the house, between the counters, and about 20 feet from the door. I went in with my warrant in my hand. I then had my pistol in my pocket, and had not taken it out during the day or night. I had my hand on my pistol, which was in my hip pocket. I walked within 10 or 12 feet of White, and said: 'I have a warrant for you; consider yourself under arrest.' He got up with his open knife in his hand, and I said: 'Put up your knife and consider yourself under

arrest.' He said: 'Damn you and your warrant, too; take your hand off your gun.' I again told him I had the warrant and to consider himself under arrest. He again replied: 'Damn you and your warrant both; take your hand off your gun.' He then advanced towards me about one step with his knife open in his hand, and drawn back in the attitude of striking. He did not get in striking distance of me; an open door opening on the street was behind me, and there was nothing to keep me from going out of it. If I had stepped out of this door he could not have hurt me, but I did not go out of the door because I did not want to run. The warrant I had for his arrest charged disorderly conduct, or a misdemeanor."

And on this evidence we are of opinion that there was error in holding the defendant guilty as a conclusion of law.

**Assault—deadly weapon—effecting arrest.**

It is a principle very generally accepted that an officer, having the right to arrest an offender, may use such force as is necessary to effect his purpose, and to

**Arrest—use of necessary force—misdemeanor.**

a great extent he is made the judge of the degree of force that may be properly exerted. Called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace, his conduct in such circumstances is not to be harshly judged, and, if he is withstood, his authority and purpose being made known, he may use the force necessary to overcome resistance, and to the extent of taking life, if that is required for the proper and efficient performance of his duty. It is when excessive force has been used maliciously, or to such a degree as

**—liability of officer.**

amounts to a wanton abuse of authority, that criminal liability will be imputed. The same rule prevails when an officer has a prisoner under lawful arrest, and the latter makes forcible effort to free himself; and, in this juris-

diction, the position holds whether the offense charged be a felony or a misdemeanor, the governing principle being based on the unwarranted resistance to lawful authority, and not dependent, therefore, on the grade of the offense.

These views are in accord with numerous decisions of our court in which the questions presented were directly considered, as in *State v. Sigman*, 106 N. C. 728, 11 S. E. 520; *State v. McMahan*, 103 N. C. 379, 9 S. E. 489; *State v. Pugh*, 101 N. C. 737, 9 Am. St. Rep. 44, 7 S. E. 757; *State v. McNinch*, 90 N. C. 695; *State v. Garrett*, 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359; *State v. Stalcup*, 24 N. C. (2 Ired. L.) 50. In *State v. Sigman* the principle is stated and approved as follows: "If an officer is resisted in making an arrest, he may use that degree of force which is necessary to the proper performance of his duty; and, after an accused person is arrested, the officer is justified in the use of such force as may be necessary, even to taking life, to prevent his escape, whether the offense charged is a felony or a misdemeanor."

In *State v. McNinch*: "A police officer, in arresting one for violating a city ordinance, was indicted for an assault. The prosecutor alleged that the force used was excessive, and the judge charged the jury if such was the case the defendant was guilty, but failed to call their attention to the good faith in which the officer claims to have acted. Held, error. The amount of force necessary to make the arrest is left to the judgment of the officer when acting within the scope of his general powers and actuated by no ill will or malice."

In *State v. Garrett* it was held, among other things, "that where a defendant, in a state's warrant charging a misdemeanor, put himself in armed resistance to the officer having such warrant, and the officer, in an attempt to take defendant, slew him, without resorting to

unnecessary violence, it was held that he was justified."

In *Sigman's Case* the officer was convicted of an assault, but that was because, the offense being only a misdemeanor, the defendant was fleeing from the officer to avoid arrest, the distinction and principle applicable being stated as follows: "But where a person charged only with a misdemeanor flies from the officer to avoid arrest, the latter is not authorized to take life or shed blood in order to make the arrest. Under such circumstances, if he kills, he will at least be guilty of manslaughter, and he will be guilty of an assault if no actual injury is inflicted, if he uses such force as would have amounted to manslaughter had death ensued."

And a similar ruling was approved in *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757, and in *State v. Bryant*, 65 N. C. 327. In none of these was the question of resistance presented.

Considering the facts in evidence as testified to by defendant, it appears that the prosecutor, C. T. White, shown to be a violent and dangerous man when drinking, had been drunk and disorderly in the town of Aulander for several hours, intimidating its citizens, committing various violations of the town ordinances, including several breaches of the peace; that when defendant, the constable and chief of police, approached the prosecutor to arrest him, having a warrant for the purpose duly issued, and of which the prosecutor was fully aware, the latter, in resistance, assaulted the officer with a drawn knife, making it necessary to shoot the offender in order to subdue him and execute the process and in view of the principles prevailing here, as stated, if this version of the occurrence is accepted by the jury, the action of the officer is fully justified. True, defendant testifies that he could have retired from the room and have avoided the difficulty, "but that he did not want to run." While this,

at times, may be the rule as between individuals, under the circumstances presented he was not required to "withdraw or to run." Charged, in a special sense, with conserving the peace and quiet of the town, having, as stated, a warrant commanding him to arrest the prosecutor, it was both his legal right and official duty to proceed according to the exigency of his writ, and to exercise the force required to its efficient execution.

A proper concept of the officer's duty in the premises is very well stated in one of the defendant's prayers for instructions, as follows:

"The law does not require an officer with a warrant for an arrest for an offense to retreat or retire, but he must stand his ground and perform his duty; and it was not the duty of the defendant with the warrant for the arrest of the prosecutor, when the prosecutor advanced on him with the knife, if he did so, to back or retire, but it was his duty to stand and perform his duty and disarm the prosecutor, if it appeared to be necessary to do so, to effect the arrest."

On the record there was error to defendant's prejudice, and there must be a new trial of the cause.

—justification  
of shooting.

Assault—duty  
of police officer  
to retreat.

## ANNOTATION.

### Degree of force that may be employed in arresting one charged with a misdemeanor.

- I. Scope, 1170.
- II. General rule, 1170.
- III. Judging the amount of force, 1172.
- IV. Checking flight, 1173.

#### I. Scope.

This note does not discuss the force used on third persons, or in suppressing affrays, etc. Unlawful arrests and arrests of fugitive slaves are also excluded.

#### II. General rule.

An officer having the right to arrest a misdemeanant may use such force as is necessary to effect his purpose.

**United States.** — United States ex rel. Roberts v. Jailer (1867) 2 Abb. (U. S.) 268, Fed. Cas. No. 15,463; North Carolina v. Gosnell (1896) 74 Fed. 734; Re Laing (1903) 127 Fed. 213.

**Alabama.** — Patterson v. State (1890) 91 Ala. 58, 8 So. 756; Birt v. State (1908) 156 Ala. 29, 46 So. 858; Tarwater v. State (1817) — Ala. App. —, 75 So. 816.

**Georgia.** — Ramsey v. State (1893) 92 Ga. 53, 17 S. E. 613.

**Iowa.** — State v. Phillips (1903) 119 Iowa, 652, 67 L.R.A. 292, 94 N. W. 229, 13 Am. Crim. Rep. 325.

#### V. Meeting physical resistance:

- a. Need not retreat, 1175.
- b. Shooting or killing:
  - (1) General rule, 1175.
  - (2) Contrary doctrine, 1177.

**Kansas.** — State v. Appleton (1904) 70 Kan. 217, 78 Pac. 445.

**Kentucky.** — Fleetwood v. Com. (1882) 80 Ky. 1, 4 Am. Crim. Rep. 36; Cockrill v. Com. (1893) 95 Ky. 22, 23 S. W. 659; Bowman v. Com. (1894) 96 Ky. 8, 27 S. W. 870; Com. v. Marcum (1909) 135 Ky. 1, 24 L.R.A. (N.S.) 1194, 122 S. W. 215.

**Missouri.** — State v. Fuller (1888) 96 Mo. 165, 9 S. W. 583; State v. Dierberger (1888) 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; State v. Rose (1897) 142 Mo. 418, 44 S. W. 329.

**North Carolina.** — State v. Garrett (1863) 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359; STATE v. DUNNING (reported herewith) ante, 1166.

**Ohio.** — State v. Pate (1897) 7 Ohio N. P. 543.

**Pennsylvania.** — Com. v. Max (1870) 8 Phila. 422.

**Virginia.** — Mesmer v. Com. (1875) 26 Gratt. 976.

**England.** — Leigh v. Cole (1853) 6 Cox, C. C. 329.

But the officer must not use excessive force.

**California.** — *Towle v. Matheus* (1900) 130 Cal. 574, 62 Pac. 1064.

**Delaware.** — *Petit v. Colmery* (1903) 4 Penn. 266, 55 Atl. 344.

**Georgia.** — *Burns v. State* (1888) 80 Ga. 544, 7 S. E. 88; *Moody v. State* (1904) 120 Ga. 868, 48 S. E. 340; *Dixon v. State* (1912) 12 Ga. App. 17, 76 S. E. 794.

**Illinois.** — *Cash v. People* (1889) 32 Ill. App. 250.

**Indiana.** — *Plummer v. State* (1893) 135 Ind. 308, 34 N. E. 968; *Gross v. State* (1917) — Ind. —, 1 A.L.R. 1151, 117 N. E. 562.

**Mississippi.** — *Wallace v. State* (1897) — Miss. —, 21 So. 662.

**Missouri.** — *State v. Lane* (1900) 158 Mo. 572, 59 S. W. 965.

**South Carolina.** — *Golden v. State* (1869) 1 S. C. 292.

**England.** — *Rex v. Smith* (1804) 3 Russell, Crimes, 6th ed. 132.

See also, as stating the same, *State v. Mills* (1908) 6 Penn. (Del.) 497, 69 Atl. 841; *State v. Wyatt* (1913) 4 Boyce (Del.) 473, 89 Atl. 217. In some cases the statute provides as much. See *Petrie v. Cartwright* (1902) 114 Ky. 103, 59 L.R.A. 720, 102 Am. St. Rep. 274, 70 S. W. 297, 13 Am. Crim. Rep. 72; *Skidmore v. State* (1875) 43 Tex. 93; *Harper v. State* (1918) — Tex. Crim. Rep. —, 207 S. W. 96.

Where there are persons in sight whose aid can be procured, it is aggravated assault and battery for an officer to strike with a pistol a drunken man who refuses to go with him. *Skidmore v. State* (1875) 43 Tex. 93; *Skidmore v. State* (1877) 2 Tex. App. 20.

The officer cannot chastise the prisoner for insolence. *Moody v. State* (1904) 120 Ga. 868, 48 S. E. 340; *Dixon v. State* (1912) 12 Ga. App. 17, 76 S. E. 794. He may not unnecessarily brutally assault and beat him. *Cash v. People* (1889) 32 Ill. App. 250. He cannot strike and beat an unresisting prisoner after they have reached the guardhouse. *Moody v. State* (Ga.) supra.

In *State v. Lane* (Mo.) supra, where the prisoner died from a blow with a pistol, the court said: "Considering the inequality in the size of the officer and the prisoner, that the officer was

sober and the prisoner drunk, that the officer had an assistant, that he was already in a room adjoining the calaboose, and had made no effort to escape when coming from the saloon to the prison, that the officer at no time requested Bohlack, his assistant, to aid him in putting the prisoner in the calaboose, but resorted to his pistol and knocked him down, we do not think we can, as a matter of law, say that he did not use excessive and unnecessary means to compel obedience to his authority."

It is murder gratuitously to shoot and kill a misdemeanor immediately on meeting him. *Rex v. Smith* (Eng.) supra.

The officer is also liable for criminal carelessness. *York v. Com.* (1884) 82 Ky. 360.

An officer who does not inform the accused that he has come to arrest him, and who carelessly and recklessly shoots into the room where the accused is, killing him, although there was no attempt to evade the arrest, cannot escape punishment. *State v. Rollins* (1909) 226 Mo. 524, 126 S. W. 478.

#### Clubs.

The officer may use his club if necessary. *Patterson v. State* (1890) 91 Ala. 58, 8 So. 756; *Gillespie v. State* (1901) 69 Ark. 573, 64 S. W. 947, 13 Am. Crim. Rep. 123; *State v. Pugh* (1888) 101 N. C. 737, 9 Am. St. Rep. 44, 7 S. E. 757; *Mesmer v. Com.* (1875) 26 Gratt. (Va.) 976 (billy).

In a case where the officer used his club, the court said: "The jury ought not to weigh the conduct of the officer as against him in gold scales; the presumption is he acted in good faith." *State v. Pugh* (1888) 101 N. C. 737, 9 Am. St. Rep. 44, 7 S. E. 757.

An officer cannot be convicted of murder for killing a person whom he is attempting to arrest for misdemeanor by striking him on the head with a billy, if he uses no more force than is necessary in case of an ordinary person, although it proved fatal in the particular case because of the thinness of the prisoner's skull, of which the officer had no knowledge. *State v. Phillips* (1903) 119 Iowa, 652,



67 L.R.A. 292, 94 N. W. 229, 13 Am. Crim. Rep. 325, reversing on rehearing (1902) — Iowa, —, 89 N. W. 1092.

But the use of a club may be excessive. *Golden v. State* (1869) 1 S. C. 292.

Where there was little danger of escape, the court sustained a verdict of guilty against a policeman for assault and battery, where he struck the prisoner twice with his club, one of the blows knocking him down. *Burns v. State* (1888) 80 Ga. 544, 7 S. E. 88.

Unnecessary violence by an officer in clubbing an unresisting misdemeanor and in striking him with a pistol is assault and battery. *Wallace v. State* (1897) — Miss. —, 21 So. 662.

#### **Handcuffs.**

In British countries, there is a decided feeling against the gratuitous use of handcuffs.

Taking a misdemeanor through the streets handcuffed is not permissible where there is no resistance or indication thereof. *Hamilton v. Massie* (1889) 18 Ont. Rep. 585.

And in *Leigh v. Cole* (1853) 6 Cox, C. C. (Eng.) 329 (where, however, the jury exonerated the officer), it was said that there is no general rule justifying the handcuffing of a misdemeanor in taking him from the police station to the magistrate.

The use of handcuffs was sustained in *Dehm v. Hinman* (1888) 56 Conn. 320, 1 L.R.A. 374, 15 Atl. 741; *McCullough v. Greenfield* (1903) 133 Mich. 463, 62 L.R.A. 906, 95 N. W. 532, 1 Ann. Cas. 924; *State v. Sigman* (1890) 106 N. C. 728, 11 S. E. 520.

"An officer is not liable in damages for using handcuffs on a prisoner who is unknown to him, where he has a considerable distance to go after dark, and has another person under his charge, there being nothing to show wantonness or malice in his conduct." *McCullough v. Greenfield* (1903) 133 Mich. 463, 62 L.R.A. 906, 95 N. W. 532, 1 Ann. Cas. 924, supra.

"In the precautionary measure of securing a prisoner (who had shown himself so swift and slippery) by the use of handcuffs, he did not so abuse his power, according to the evidence,

as to subject himself to indictment for an assault." *State v. Sigman* (N. C.) supra.

But the sheriff may be liable for the act of his deputy in putting irons and handcuffs upon a prisoner charged with criminal libel, in conducting him through a city's streets from a jail to a railway station. *Shields v. Pfanz* (1897) 101 Ky. 407, 41 S. W. 267.

#### *III. Judging the amount of force.*

It is, of course, the general rule that the jury is the arbiter of the amount of force.

It is enough if the force used appears necessary to the officer, if he has reasonable grounds for his belief. *Gillespie v. State* (1901) 69 Ark. 573, 64 S. W. 947, 13 Am. Crim. Rep. 123; *Cockrill v. Com.* (1893) 95 Ky. 22, 23 S. W. 659; *Doolin v. Com.* (1893) 95 Ky. 29, 23 S. W. 663. Or if the force used reasonably appears necessary to the officer. *State v. Rose* (1897) 142 Mo. 418, 44 S. W. 329. It seems somewhat doubtful whether the court meant to follow this rule, or not, when it stated in a case where an officer, in arresting and disarming a drunken man who had a pistol in his hand and was threatening violence to one or more persons, struck him with his club, that if "it reasonably appeared to be necessary to inflict the blow to overcome Stephens, disarm him, and thus place it out of his power to injure or kill some other person, then the law, which only voices reason, authorized the officer to employ such force as was necessary to accomplish the end, even if in doing so he struck the defendant. In other words, if to a reasonable mind it appeared necessary to use violence in order to accomplish the object with safety to the arresting officer, then the officer violated no law in using the baton. On the other hand, if to a reasonable mind it did not appear necessary to the officer's discharge of this public duty with safety to himself, or some other person who might be aiding him, that he should strike Stephens, then the blow he struck was unauthorized, and he was guilty of an assault and battery. Whether, under these rules,

the officer was justified in striking Stephens was a question for the jury." *Patterson v. State* (1890) 91 Ala. 58, 8 So. 756.

It has been held to be error to refuse to allow the officer to say that at the time he shot he believed he was in danger at the hands of the deceased. *Williams v. Com.* (1890) 90 Ky. 596, 14 S. W. 595.

On a trial of an officer for killing a misdemeanant it was held that, as it did not clearly appear that the deceased was shot while in flight, it was error to exclude his threats that he would not be arrested, and that he would kill any two men who came to arrest him. *Harris v. State* (1894) 72 Miss. 99, 16 So. 360.

Much is necessarily left to the discretion of the officer.

In *People v. O'Brien* (1900) 48 App. Div. 66, 62 N. Y. Supp. 571, the court reversed a judgment convicting of assault a police officer in Union Square, who came up behind a peddler who had escaped from arrest, while he was running away pushing his cart, and struck him with his fist, knocking him down, on the ground that they could not say the peddler would not have escaped otherwise. (An appeal to the court of appeals was dismissed on the ground that it did not appear that the reversal was ordered for error of law only (1900) 164 N. Y. 57, 58 N. E. 117.)

It has been held, in North Carolina, that "the amount of force and the employment of the usual means in making the arrest and detention, when within the compass of the means ordinarily resorted to for securing one found committing a criminal act, must be left to the discretion and judgment of the officer, when, actuated by no ill will or malevolent impulse, he is engaged in discharging a public and official duty." *State v. McNinch* (1884) 90 N. C. 695, where the prisoner complained that the officer struck him with his fist.

In *State v. Stalcup* (1841) 24 N. C. (2 Ired. L.) 50, where the nature of the prosecuted offense did not appear, the defendant was indicted for assault and battery in tying the prosecutor in

taking him before a magistrate. It was held that the officer was the judge of the necessity, and that the jury could not supervise his judgment, and that they should be instructed that there was an abuse of authority, if the facts testified to convinced the jury that the officer did not act honestly in the performance of his duty, according to his sense of right, but, under the pretext of duty, was gratifying his malice, but if they were not so convinced, he did not abuse his authority.

It may be noted that it was held in *State v. Rollins* (1893) 113 N. C. 722, 18 S. E. 394, that the officer was entitled to an instruction to the effect that in an attempted rescue he, "in resisting such attempt, would be protected in the use of such force as a jury would ordinarily consider excessive, if" he "was acting in good faith and was free from malice."

#### IV. *Checking flight.*

An officer in attempting to arrest a person charged with a misdemeanor is not justified in shooting or killing him to stop his flight.

*United States.* — *North Carolina v. Gosnell* (1896) 74 Fed. 734.

*Alabama.* — *Handley v. State* (1892) 96 Ala. 48, 38 Am. St. Rep. 81, 11 So. 322; *Suell v. Derricott* (1909) 161 Ala. 259, 23 L.R.A. (N.S.) 996, 49 So. 895, 18 Ann. Cas. 676.

*California.* — *People v. Kilvington* (1894) 4 Cal. Unrep. 512, 36 Pac. 13.

*Georgia.* — *McAllister v. State* (1910) 7 Ga. App. 541, 67 S. E. 221.

*Mississippi.* — *State use of Johnson v. Cunningham* (1914) 107 Miss. 140, 51 L.R.A. (N.S.) 1179, 65 So. 115.

*North Carolina.* — *Sossamon v. Cruse* (1903) 133 N. C. 477, 45 S. E. 757.

*Oklahoma.* — *Roberson v. United States* (1910) 4 Okla. Crim. Rep. 336, 111 Pac. 984; *Sharp v. United States* (1911) 6 Okla. Crim. Rep. 350, 118 Pac. 675.

*Pennsylvania.* — *Com. v. Max* (1870) 8 Phila. 422; *Com. v. Greer* (1898) 20 Pa. Co. Ct. 535; *Com. v. Rhoads* (1903) 23 Pa. Super. Ct. 512.

*England.* — *Reg. v. Dadson* (1850) 14 Jur. 1051, 2 Den. C. C. 35, Temple

Cas. N. S. 57, 4 Cox, C. C. 360.

The rule is also stated in *Railway Mail Asso. v. Moseley* (1914) 127 C. C. A. 427, 211 Fed. 1; *Williams v. State* (1870) 44 Ala. 41; *Croom v. State* (1890) 85 Ga. 718, 21 Am. St. Rep. 179, 11 S. E. 1035; *Head v. Martin* (1887) 85 Ky. 480, 3 S. W. 622 (bastardy); 2 Hale, P. C. 117; 1 East, P. C. 302.

"An officer charged with the duty of arresting a misdemeanor has no more authority to shoot him down to prevent an escape, than he would have the right to kill any indifferent person who was casually walking or running away from the place where the officer happened to be." *Handley v. State* (Ala.) supra.

"The officer is in no personal danger and the offender may be arrested another time." *North Carolina v. Gosnell* (Fed.) supra.

An officer "must not intentionally shoot a misdemeanor who is a fugitive, nor must he discharge a firearm while in pursuit in such a manner as to cause such fugitive injury." *State use of Johnson v. Cunningham* (Miss.) supra.

But it has been held that if he shoots to intimidate, and does not hit, it is not an assault. *Mesmer v. Com.* (1875) 26 Gratt. (Va.) 976.

It has been held that an officer may not kill to stop flight on suspicion of felony where only a misdemeanor has been committed. *Petrie v. Cartwright* (1902) 114 Ky. 103, 59 L.R.A. 720, 102 Am. St. Rep. 274, 70 S. W. 297, 13 Am. Crim. Rep. 72.

It has also been held in one case that the officer may not shoot to stop flight, although a felony has been committed, when he has no reason to suspect more than a misdemeanor. Thus, where a constable, employed to guard a copse from which wood had been stolen, saw the prosecutor come out of the copse carrying wood, which he was stealing, and called to him to stop, the prosecutor ran away, and the constable fired and wounded him in the leg. Although the stealing of the wood amounted to a felony, the constable was found guil-

ous bodily harm, as he did not know that a felony had been committed. *Reg. v. Dadson* (Eng.) supra.

Sometimes the above rule is prescribed by statute. See *Caldwell v. State* (1874) 41 Tex. 86; *Tiner v. State* (1875) 44 Tex. 128.

But if the officer kills, having good grounds for thinking his life in peril from the fleeing prisoner, he will be justified. *Doolin v. Com.* (1893) 95 Ky. 29, 23 S. W. 663.

And if a misdemeanor shoots at a posse advancing to arrest him, this is felony, and, if necessary to check his flight, they may shoot him. *Reed v. Com.* (1907) 125 Ky. 126, 100 S. W. 856 (cited in *DONEHY v. COM.* (reported herewith) ante, 1161).

#### **Flight after arrest.**

After the arrest has been made, if the misdemeanor breaks away and flees, the rule is the same as in case of flight before the arrest, that the officer may not shoot or kill to stop the flight.

**Arkansas.** — *Thomas v. Kinkead* (1892) 55 Ark. 502, 15 L.R.A. 558, 29 Am. St. Rep. 68, 18 S. W. 854.

**Delaware.** — *State v. O'Niel* (1875) *Houst. Crim. Rep.* 468.

**Iowa.** — *State v. Smith* (1904) 127 Iowa, 534, 70 L.R.A. 248, 109 Am. St. Rep. 402, 4 Ann. Cas. 758.

**Kentucky.** — *Head v. Martin* (1887) 85 Ky. 480, 3 S. W. 622 (bastardy); *Lewis v. Com.* (1910) 140 Ky. 652, 131 S. W. 517.

**Mississippi.** — *Brown v. Weaver* (1898) 76 Miss. 7, 42 L.R.A. 423, 71 Am. St. Rep. 512, 23 So. 388.

**New York.** — *Conrady v. People* (1862) 5 Park. Crim. Rep. 234.

**North Carolina.** — *State v. Sigman* (1890) 106 N. C. 728, 11 S. E. 525.

**Ohio.** — *Rischer v. Meehan* (1896) 11 Ohio C. C. 403, 5 Ohio C. D. 416 (concedes).

**Pennsylvania.** — *Com. v. Loughhead* (1907) 218 Pa. 429, 120 Am. St. Rep. 896, 67 Atl. 747.

**Tennessee.** — *Reneau v. State* (1879) 2 Lea, 720, 31 Am. Rep. 626 (escaping after conviction); 2 Hale, P. C. 117.

*V. Meeting physical resistance.**a. Need not retreat.*

It is admitted by all the authorities that the officer need not retreat.

"But if A, either upon the attempt to arrest, or after the arrest, assault the minister that hath the warrant to arrest him, to the intent to make his escape from him, and the minister standing upon his guard kills him, this is no felony, for being by law authorized to arrest him, he is not bound to go back to the wall, as in common cases of se defendendo, for the law is his protection." 2 Hale, P. C. 117.

*b. Shooting or killing.**(1) General rule.*

If a misdemeanor resists arrest the officer may use such force as is necessary to effect it, even to injuring or killing the offender. *United States v. Jailer* (1867) 2 Abb. (U. S.) 268, Fed. Cas. No. 15,463; *North Carolina v. Gosnell* (1896) 74 Fed. 734; *Re Laing* (1908) 127 Fed. 213; *Birt v. State* (1908) 156 Ala. 29, 46 So. 858; *Holland v. State* (1909) 162 Ala. 5, 50 So. 215; *Tarwater v. State* (1917) — Ala. App. —, 75 So. 816; *Bowman v. Com.* (1894) 96 Ky. 8, 27 S. W. 870; *Com. v. Marcum* (1909) 135 Ky. 1, 24 L.R.A. (N.S.) 1194, 122 S. W. 215 (cited in *DONEHY v. Com.* (reported herewith) ante, 1161; *State v. Fuller* (1888) 96 Mo. 165, 9 S. W. 583; *State v. Dierberger* (1888) 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; *State v. Rose* (1897) 142 Mo. 418, 44 S. W. 329; *State v. Garrett* (1863) 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359. The reported case (*STATE v. DUNNING*, ante, 1166); *Com. v. Max* (1870) 8 Phila. (Pa.) 422. For *Robertson v. Territory* (1910) 13 Ariz. 10, 108 Pac. 217, see *infra*, V. b (2).

It would seem clear that any other doctrine permits defiance, not only of the officer, but of the law.

In *Foster's Crown Law*, 270, it is said: "In the case of resistance in either case" (civil or criminal) "the person having authority to arrest or imprison may repel force by force, and if death ensueth in the struggle he will be justified. This is founded in reason and publick utility; for few men would

quietly submit to an arrest, if in every case of resistance the party empowered to arrest was obliged to desist and leave the business undone."

"The defendant was entitled to a plain instruction to the effect that he had a right, in endeavoring to make the arrest, to use all the force that was necessary to overcome all resistance, even to the taking of life, and if he used no more force than was reasonably necessary to then and there accomplish the arrest, then he should be acquitted." *State v. Dierberger* (1888) 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168, *supra*.

"In making such arrest, such peace officer has the right to use such force as is reasonably necessary therefor, if the arrest be forcibly resisted, even to the taking of the life of the offender; but he has not the right to use unnecessary force or violence, nor to shoot or otherwise injure the offender unless such offender forcibly resists the arrest, and the arrest cannot be otherwise made, or it appears to the officer, in the exercise of a reasonable judgment, that it cannot be otherwise made." *Com. v. Marcum* (1909) 135 Ky. 1, 24 L.R.A. (N.S.) 1194, 122 S. W. 215, *supra*.

"If one charged with a misdemeanor resists arrest, the officer may use sufficient force to overcome resistance, and if the resistance is with a deadly or dangerous weapon the officer may resort to extreme measures to avoid serious injury and accomplish the arrest," even to shooting. "He is never required, under such circumstances, to afford the resisting offender the opportunities of a fair and equal struggle, but may avail himself of any advantages that arise in the conflict." *North Carolina v. Gosnell* (1896) 74 Fed. 734, *supra*.

"It is the right and duty of an officer who is resisted in attempting to make a lawful arrest, to use such force as may be necessary to compel submission and accomplish the arrest; and where a person taken in a criminal assault upon another defies the authority of the officer, and by threats of violence seeks to intimidate him, the officer is not bound to wait until he is

actually assaulted before himself resorting to force." Ramsey v. State (1893) 92 Ga. 53, 17 S. E. 613.

In State v. Weston (1896) 98 Iowa, 125, 67 N. W. 84, it was held that "to excuse the taking of life in making an arrest, it must be shown that the killing was necessary to effect the object." But in State v. Phillips (1903) 119 Iowa, 652, 67 L.R.A. 292, 94 N. W. 229, 13 Am. Crim. Rep. 325, it was held that proof of absolute necessity is not necessary to justify an officer in killing a person whom he is attempting to arrest for misdemeanor, where the statute requires him to employ no more force in effecting the arrest than to him, acting as an ordinarily prudent person, would, under the circumstances, seem reasonably and apparently necessary to effect the result.

The general rule applies where, after the arrest, the prisoner attempts to release himself. Thus, an officer, having arrested a misdemeanant, may use such force as is reasonably necessary to prevent an attempted escape, even to shooting and killing the pursuer. Stevens v. Com. (1906) 124 Ky. 32, 98 S. W. 284, where the court said: "Though he may not have had any reason to fear death or bodily harm at the hands of deceased, if the latter was attempting to release himself from arrest by forcibly overpowering appellant, the latter had the right to use such force as was reasonably necessary to overcome that being used by deceased to effect his release, even to the extent of shooting and killing the latter, if it reasonably appeared to appellant that that was the only way to prevent his release from his [appellant's] custody, though he would have had no right to shoot deceased if he had gotten away from him and was fleeing to escape." Quoted and followed in Ayers v. Com. (1908) 32 Ky. L. Rep. 1234, 108 S. W. 320. The Stevens Case was also cited in DONEHY v. COM. (reported herewith) ante, 1161.

Holland v. State (1909) 162 Ala. 5, 50 So. 215, supra, while deciding in accord with the general rule, has a contrary intimation in one part of the opinion. Murkison v. State (1914) 11

Ala. App. 105, 65 So. 684, while reversing the conviction of an officer, also lays down the contrary rule, citing as authority Handley v. State (1892) 96 Ala. 50, 38 Am. St. Rep. 81, 11 So. 322, which is misread. The early Alabama cases were not entirely clear as to how far they meant to go when they adopted the rule that "in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means, are resisted in so doing, they may repel force with force, and need not give back; and if the party making the resistance is unavoidably killed in the struggle, this homicide is justifiable." Clements v. State (1874) 50 Ala. 117; Hammond v. State (1906) 147 Ala. 79, 41 So. 761. But in Birt v. State (1908) 156 Ala. 29, 46 So. 858, it was said that "the doctrine of self-defense has no application in such cases, because it is the duty of the officer to effect the arrest or imprisonment of the offender, without the use of unnecessary or improper violence."

In Clements v. State (Ala.) supra, where "the evidence tended to prove, at most, that the deceased had cocked a pistol, and half drawn it," the court, while reversing the case on other grounds, approved a charge to the effect that a mere attitude of defiance or preparation to resist did not justify a killing by the officer; but in Hammond v. State (Ala.) supra, the court said: "If the defendant was in good faith attempting to arrest the deceased, and if deceased was armed with a pistol and, at the time of the attempted arrest, he manifested an intention to resist the arrest, and committed an overt act which manifested an intent to immediately use the pistol, under such circumstances as were sufficient to create in the mind of a reasonable man, and if they did create in the mind of the defendant, an honest belief that the deceased was going to draw the weapon and immediately fire on him in resistance of arrest, then the defendant was justified in firing first."

See also, in this connection, Ramsey v. State (1893) 92 Ga. 53, 17 S. E. 613, supra.

In some of the cases the right to kill is limited to self-defense. Forster's Case (1825) 1 Lewin, C. C. 187; Murkison v. State (1914) 11 Ala. App. 105, 65 So. 684; Smith v. State (1894) 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; Com. v. Greer (1898) 20 Pa. Co. Ct. 535 (obiter); Com. v. Rhoads (1903) 23 Pa. Super. Ct. 512 (obiter); Meldrum v. State (1914) 23 Wyo. 12, 146 Pac. 596.

Robertson v. Territory (1910) 13 Ariz. 10, 108 Pac. 217, is not definite. In that case, where the conviction of an officer for homicide was affirmed, portions of the charge to the jury, as stated in the report, are confused and contradictory as to the officer's duty, and the affirmation of the case,—(1911) 110 C. C. A. 489, 188 Fed. 783,—while not referring to the most confused portions of the charge, still leaves the matter in confusion.

In Meldrum v. State (Wyo.) supra, it was said: "It is the general rule that a peace officer is not permitted to kill or maim one who is resisting or who does not peaceably submit to the arrest. The degree of force used by the officer is not permitted to go to that extent unless the culprit assaults the officer, when the right of self-defense accrues to the officer."

In Smith v. State (1894) 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712, supra, which seems a pure case of self-defense, the court, in reversing the conviction, said: "In making the arrest, or in preventing an escape after the arrest, the officer or person assisting him in obedience to a summons, when resisted by the offender, is not bound to retreat, but may use such physical force as is apparently 'necessary, on the one hand, to effect the arrest by overcoming the resistance he encounters, or, on the other, to subdue the efforts of the prisoner to escape; but he cannot in either case take the life of the accused, or even inflict upon him a great bodily harm, except to

save his own life or to prevent a like harm to himself." Thomas v. Kinkade (1892) 55 Ark. 502, 15 L.R.A. 558, 29 Am. St. Rep. 68, 18 S. W. 854."

The same has been provided by statute. Thus, the Texas court said: "The law says that an officer or other person executing an order of arrest is required to use such force as is necessary in overcoming resistance to the execution of such order, 'but he shall not take the life of the person resisting arrest unless he has just grounds to fear that his own life will be taken, or that he will suffer great bodily injury in the execution of the order.'" Plasters v. State (1877) 1 Tex. App. 673. Applied, Giebel v. State (1889) 28 Tex. App. 151, 12 S. W. 591.

Probably we are to understand that the court was referring to the actual circumstances in State v. McClure (1914) 166 N. C. 321, 81 S. E. 458, where the officer was killed while pursuing the misdemeanor, and where it was said that "it is generally held that an officer cannot kill to effect an arrest or to prevent the escape of one charged with a misdemeanor."

It may be noted that it was held in State v. Towne (1916) 180 Iowa, 339, 160 N. W. 10, that a private citizen attempting to arrest a person for a present misdemeanor is not justified in using a deadly weapon in a deadly manner, although there is an attempt to flee or resistance to the arrest, unless acting in necessary self-defense.

Anything in the following cases that may limit the officer's right to cases of self-defense is no longer important, in view of the definite stand to the contrary later taken by the respective courts. Dilger v. Com. (1889) 88 Ky. 550, 11 S. W. 651; Stephens v. Com. (1898) 20 Ky. L. Rep. 544, 47 S. W. 229; State v. McNally (1889) 87 Mo. 644.

For Alabama cases, see supra, V. b (1). B. B. B.

WILLIAM C. SCRIBNER.

FRAMINGHAM ICE COMPANY.

TRAVELERS' INSURANCE COMPANY, Appt.

*Massachusetts Supreme Judicial Court — May 25, 1918.*

(231 Mass. 132, 120 N. E. 350.)

**Workmen's compensation — which employer makes compensation.**

1. A driver who, with his team, is let by an ice to a coal company for the delivery of coal, and who receives his orders from the coal company, must, in case of injury while in the yards of the coal company, look to it for compensation under the Workmen's Compensation Act, although he remains in the general employ of the ice company, which relies on him to look after its team.

[See note on this question beginning on page 1181.]

— lent servant — who is master.

2. The rule that an employee lent to a special employer, and who assents to the change of employment, becomes

the servant of the employer to whom he is lent, applies to cases arising under the Workmen's Compensation Act.

[See 18 R. C. L. 493.]

APPEAL by the insurer from a decree of the Superior Court for Suffolk County affirming an award to claimant, by the Industrial Accident Board, in a proceeding by him under the Workmen's Compensation Act to recover compensation for injuries sustained while working for a coal company to which he is loaned by his employer. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Walter I. Badger and Louis C. Doyle, for appellant:

At the time of his injury, Scribner was an employee of the Coal Company rather than of the Ice Company.

Cain v. Hugh Nawn Contracting Co. 202 Mass. 238, 88 N. E. 842; Hasty v. Sears, 157 Mass. 123, 34 Am. St. Rep. 267, 31 N. E. 759; Clancy's Case, 228 Mass. 318, 117 N. E. 347; Bowie v. Coffin Valve Co. 200 Mass. 578, 86 N. E. 914.

Mr. Edward L. McManus for appellee.

Carroll, J., delivered the opinion of the court:

The employee, who was in the general employment of the Framingham Ice Company (hereinafter called the Ice Company) was injured while at work in the yard of the Framingham Coal Company (hereinafter called the Coal Company). Both companies were insured under the Workmen's Compensation Act. The Industrial Accident Board awarded compensation against the insurer of

the Ice Company. The only question before us on this appeal is whether Scribner, at the time of his injury, was an employee of the Ice Company within the meaning of the Workmen's Compensation Act.

The Ice Company let to the Coal Company a pair of horses, wagon, and driver. This happened frequently; and on one occasion, under this arrangement, Scribner worked for the Coal Company two or three months. He received his wages from the Ice Company. The proprietor of the Ice Company testified that he "looked to Scribner to take care of the horse and team which he owned," but "exercised no supervision with respect to his delivering coal. Scribner worked there the same as their man did [and] took his orders from the office of the Coal Company." The employee testified that Mr. Twitchell (one of the clerks employed by the Coal Company) told him where to deliver the ma-

terial; that he took his directions from Twitchell; that he helped to load coal, brick, wood, lime, or cement; and that sometimes he had a helper when making deliveries.

"In determining whether, in a particular act, he is the servant of his original master or of the person to whom he has been furnished, the general test is whether the act is done in business of which the person is in control as a proprietor, so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result." *Shepard v. Jacobs*, 204 Mass. 110, 112, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 398. "The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired." *Coughlan v. Cambridge*, 166 Mass. 268, 277, 44 N. E. 219. Applying these tests, it is clear that Scribner at the time of the injury was an employee of the Coal Company; he was in that company's yard, engaged in its business and doing its work; and he was under its direction and subject to its orders. Whatever may have been the relation of Scribner to the Ice Company in the care and management of the horses, at the time of his injury he was engaged in work over which that company had no control. The business was that of the Coal Company and under its direction. The transaction between the two companies amounted only to a loan of the Ice Company's servant to the Coal Company, the servant became the employee of the latter for the time being, and on the evidence he must be found to have assented to this, although remaining in the general employment of the Ice Company. *Ibid.*; *Hasty v. Sears*, 157 Mass. 123, 84 Am. St. Rep. 267, 31 N. E. 759; *Samuelian v. American Tool & Mach. Co.* 168 Mass. 12, 46

N. E. 98, 1 Am. Neg. Rep. 447, and cases cited.

*Pigeon's Case*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516, relied on by the employee, is distinguishable. In that case the driver was on his way to water the horse which was owned by Shaw, the general employer, who retained the general direction of the employee except so far as his control was surrendered to the city of Springfield. This relation of control included the care of the horses, to the extent, at least, of seeing that they were watered. When injured the employee was under the control of the original master and occupied in his work, and not engaged in the business of the city of Springfield, nor under its direction. See, in this connection, *W. S. Quinby Co. v. Estey*, 221 Mass. 56, 108 N. E. 908; *Shepard v. Jacobs*, *supra*; *Delory v. Blodgett*, 185 Mass. 126, 64 L.R.A. 114, 102 Am. St. Rep. 328, 69 N. E. 1078, 15 Am. Neg. Rep. 581.

In *Clancy's Case*, 228 Mass. 316, 117 N. E. 347, the deceased was not in the service of the defendant city nor under its direction when injured; he was the servant of his employer, McGillicuddy, and engaged in his business.

The record shows that the Coal Company was a subscriber. The employee's remedy under the Workmen's Compensation Act was against the insurer of this company, by whom he was employed, and not against the insurer of the Ice Company.

Workmen's compensation—  
which employer makes compensation.

This well-established principle of the common law which holds that an employee who is lent to a special employer as distinguished from his general employer, and who assents to the change of employment, becomes the servant of the employer to whom he is lent, applies as well to cases arising under the Workmen's Compensation Act as to those at common law. The

—lent servant—who is master.



English Workmen's Compensation Act, 6 Edw. VII. (1906) chap. 58, § 13, in defining the word "employer," enacts: "Where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service, . . . the latter shall, for the purposes of this act, be deemed to continue to be the employer of the workman whilst he is working for that other person."

This statute was considered by the commission on compensation for industrial accidents, and in the "Report of the Massachusetts Commission on Compensation for Industrial Accidents," in its "Commentary on the Massachusetts Law" (pages 46-48, 52, 53), reference is made to the English act and to the English decisions, showing that these were called to the attention of the legislature; and see McNicol's Case, 215 Mass. 497, 499, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522. We must assume from the refusal of the legislature to adopt this particular section of the English statute that it intended the common-law principle should prevail when the services of an employee were transferred from the employment of his general employer to that of a special employer.

To decide, as we are now urged to do, that this rule has no application to proceedings under the Workmen's Compensation Act, would in many cases deprive the injured employee of the benefits which the act was intended to give him, and which can be enforced only by reliance on the common-law rule.

In the first section of the Workmen's Compensation Act it is provided that, if the employer is not a subscriber, the injured employee can recover in an action at law by establishing the negligence of the employer. If such an employee, who is lent to an employer and is injured by reason of this employer's negligence, remains the employee of the general employer, it would be difficult if not impossible for him to

avail himself of the right given him under this section; for, if injured while engaged in the business of the special employer, under ordinary circumstances, it could not be said that the negligence of the general employer caused his injury. His remedy under this section is against the person who is in fact his employer. To abandon the common-law rule would make this important section ineffective in many, if not all, of the cases where the employee is injured while temporarily in the employ of a special employer.

Under § 3, pt. II. of the Workmen's Compensation Act, if an employee is injured by the serious and wilful misconduct of a subscriber, or of any person regularly intrusted with and exercising the powers of superintendence, he can recover double compensation. The employee's rights under this section are based on the relation of master and servant, and he can recover only from his employer. If we should decide that an employee working for a special employer,—notwithstanding his consent to the change,—and injured while so employed, remained the servant of the general employer, then the employee could not recover the additional compensation provided for in this section unless it could be said that he was injured by the serious and wilful misconduct of the general employer.

In the case at bar, if Scribner was an employee of the Ice Company and was injured by the serious and wilful misconduct of the Coal Company, he could not claim the double compensation against the Ice Company if he was not injured by reason of that company's misconduct. And, if it were held he was not an employee of the Coal Company, but was in the employ of the Ice Company, he could have no relief against the Coal Company under this particular section, although injured by its serious and wilful misconduct. If the Ice Company was not a subscriber under the act, and the Coal Company was such a subscriber and he was injured by its serious and

wilful misconduct, to recover the additional compensation under this section it would have to be decided that he was an employee of the Coal Company. Many other difficulties might be suggested where injustice would be done the employee if the common-law principle were abolished.

There might also be obstacles in the way of enforcing the penalty (pt. III. § 18) where the employer is required to report all injuries received by employees in the course of their employment, if it were held that an employee working for a special employer and engaged in his business, was not employed by him, but remained the employee of his general employer. In order to safeguard fully the rights of all parties, the well-recognized common-law rule should prevail in the application of the Workmen's Compensation Act. The one who is in fact the employer should be held for the consequences of his own neglect.

In *Arnett v. Hayes Wheel Co.* 201 Mich. 67, 166 N. W. 957, the facts were these: The Hayes Company, a manufacturer, and the Grand Rapids Blowpipe & Dust Arrester Company, a contractor, entered into an agreement whereby the latter was to install a dust-collecting system at the plant of the former, furnishing the skilled mechanics therefor, while the Hayes Company was to furnish labor to help. A laborer

so furnished, working as a helper to a mechanic and under the direction of the contractor, but paid by the Hayes Company as his general employer, was injured; it was held that the general employer, the Hayes Company, was not liable under the Workmen's Compensation Act, but that the special employer, the Grand Rapids Company, was liable.

In *Pigeon's Case* and *Clancy's Case*, supra, the common-law rule appears to have been assumed. And see *King's Case*, 220 Mass. 290, 107 N. E. 959; *Comerford's Case*, 224 Mass. 571, 113 N. E. 460, s. c. 229 Mass. 573, 118 N. E. 900, where this rule was recognized. And in this connection see *Humphrey's Case*, 227 Mass. 166, 167, L.R.A.1918F, 193, 116 N. E. 412. The cases of *Rongo v. R. Waddington & Sons*, 87 N. J. L. 395, 94 Atl. 408, 9 N. C. C. A. 402, *Dale v. Saunders Bros.* 218 N. Y. 59, 112 N. E. 571, Ann. Cas. 1918B, 703, *De Noyer v. Cavanaugh*, 221 N. Y. 273, 116 N. E. 992, and *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721, were decided under statutes which differ in material respects from the Workmen's Compensation Act of this commonwealth, and we do not consider them applicable.

It follows that the decree must be reversed, and a decree entered in favor of the insurer.

So ordered.

## ANNOTATION.

### Workmen's compensation: liability of general or special employer for compensation to injured employee.

- I. Introductory, 1181.
- II. Teamster loaned to another, 1182.
- III. Employee working for another in emergency, 1184.
- IV. Employee engaged in loading or unloading vessel, 1184.
- V. Employee engaged for another without disclosure of principal, 1185.
- VI. Miscellaneous cases, 1185.
- VII. Function of court on appeal, 1186.

#### I. Introductory.

Under the Compensation Statutes,

as at common law and under the Employers' Liability Act, the question frequently arises, Which of two employers is liable for injuries to one who is admittedly an employee of one or the other of the employers? Many of these decisions are controlled by the principles applicable in common-law cases, but the courts, generally, are more liberal in their construction of the Compensation Statutes than they are in construing the common-

law principles, and there is apparently a tendency to permit the injured employee to recover compensation in any case in which that result may be obtained without working injustice to the other parties interested.

The cases passing upon this question arise on such varying states of facts that it is practically impossible to lay down any general rule which will control all cases of this character.

#### *II. Teamster loaned to another.*

This question most frequently arises where an employee of a company or person doing a general teaming business is loaned with his team to another person.

The rule adopted by the Massachusetts court is that the employee must look for compensation to the employer under whose direction, and subject to whose orders, he was at the time of the injury.

Thus, a driver who, with his team, is let by an ice company to a coal company for the delivery of coal, and who receives his orders from the coal company, must, in case of injury while in the yard of the coal company, look to it for compensation under the Massachusetts act, although he remains in the general employment of the ice company, which relies on him to look after its team. *SCRIBNER'S CASE* (reported herewith) ante, 1178.

But a teamster whose contract of employment was exclusively with the general employer, who alone was responsible for his wages, cannot recover compensation from the city, where the latter hired from the general employer, horses, cart, and driver to carry material from one place to another, as its officers might direct, the driver being left to deal with the horses in his own way. *Clancy's Case* (1917) 228 Mass. 316, 117 N. E. 347.

And a driver of a team hired out by the owner, his general employer, to perform work for another, remains in the employ of his general employer so far as concerns the management and care of his horses, and cannot look to the special employer for compensation for injuries received in the

management of the horses. *Centrello's Case* (1919) — Mass. —, 122 N. E. 560.

So, too, where the owner of a horse and cart loaned them, together with a driver, to a city for use in cleaning sweepings from the streets, but retained control of the horse so far as feeding, watering, and care of it were concerned, the driver, while taking the horse to water during the noon hour, was in the employment of the owner of the horse, and not of the city. *Pigeon's Case* (1913) 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516.

Under the California statute, it has been held that one engaged in the business of contract teaming and hauling, who furnishes a driver and team to a third person, may be found to be the employer of such driver, who is injured while working for the third person.

Thus, in *Kirkpatrick v. Industrial Acci. Commission* (1916) 31 Cal. App. 668, 161 Pac. 274, the court said: "The Workmen's Compensation, Insurance, and Safety Act, in §§ 13 and 14 thereof, furnishes its own definition of the terms, 'employer' and 'employee.' The term 'employer' includes every person who has any person in service under any contract of hire, express or implied. The term 'employee' includes every person thus in the service of such employer. The decisions in negligence cases such as those above mentioned are not necessarily controlling in cases like the present; for the liability of the employer in this case arises not from any wrong done by him, but from the statute, which imposes such liability upon persons bearing toward each other the relation of employer and employee as defined in the statute."

So, a workman is not an employee of the foreman of the general employer, merely because, at the time that he was injured, he was driving a team which belonged to the foreman personally, where he received the same pay that he would have received had he been working without the team, and the foreman made no profit out of the workman's wages, and the work-

man was controlled and directed by the foreman precisely as were the other workmen, who were admittedly employees of the general employer. *Yolo Water & Power Co. v. Industrial Acci. Commission* (1917) 35 Cal. App. 14, 168 Pac. 1146.

Under the New York statute, however, either the general employer, or the special employer to whom the employee's services had been contracted by the general employer, may be held liable for compensation for injuries received by the employee while working for the special employer.

Thus, where one is in the general employ of another, and is injured while he is working under the direction of a special employer, he may look, so far as the provisions of the Compensation Law are applicable, to the general employer, or to the special employer, or to both, for compensation for injuries due to occupational hazards. *De Noyer v. Cavanaugh* (1917) 221 N. Y. 273, 116 N. E. 992.

So, an employee who is loaned by his employer, together with a team and wagon, to the owner of a sand bank to draw sand, is, while engaged in the latter work, still in the employ of his original employer, who may be held responsible for any injuries received by the employee while so engaged. *Dale v. Saunders Bros.* (1916) 218 N. Y. 59, 112 N. E. 571, Ann. Cas. 1918B, 703, affirming (1916) 171 App. Div. 528, 157 N. Y. Supp. 1062. In the appellate division the court said: "The law of negligence, the rules relating to master and servant, the rule as to the inability to serve two masters, are of but little value here. The statute itself has removed these questions to quite an extent from our consideration. It names the hazardous employments; it defines an employee as a person engaged in such employment in the service of the employer, and defines the employer as a person employing workmen in such employment. When the statute defines the employer as one employing men in a hazardous employment, it does not necessarily mean that he is hiring a servant by a personal contract with

him; but it means that he is using or engaging the man in a hazardous work. It is not a question of hiring, or of master and servant, but of using and putting the man in the hazardous employment, which the act has in view. The name of the act, 'Workmen's Compensation Law,' indicates that it is not to be limited to cases where the actual relation of master and servant exists, but to workmen and those employing or using them in the manner stated. When it appears that a person is carrying on such hazardous employment for profit, and that a person in his service, or whom he is employing or using therein, receives an injury, compensation follows."

And in *Gimber v. T. P. Kane Co.* (1916) — App. Div. —, 155 N. Y. Supp. 1109, and in *Dale v. Hual Constr. Co.* (1916) 175 App. Div. 284, 161 N. Y. Supp. 540, awards against the special employer were sustained.

So, an employee of one engaged in the general teaming business, who is injured while doing teaming for a third person, has a remedy, under the Workmen's Compensation Act, against such third person, so that an action for damages cannot be maintained, although there may be some doubt whether the injured employee was the servant of the said third person. *Lee v. Cranford Co.* (1918) 182 App. Div. 191, 169 N. Y. Supp. 370.

In *Nolan v. Cranford Co.* (1915) 171 App. Div. 959, 155 N. Y. Supp. 1128, affirmed in (1916) 219 N. Y. 581, 114 N. E. 1074, an award was upheld against a special employer, where the general employer had but one employee, and was himself an employee of the special employer, and was not carrying on the business of teaming, except in the sense that he furnished the truck and team of horses, with the driver, to the special employer.

Under the New Jersey statute, the employer who is liable for compensation is the person who makes the contract with the employee, whereby the latter engages to work for the former, and he, on his part, engages to pay the servant for such work.

Thus, a person who makes a contract with contracting teamsters for the supply of a team consisting of

horses, wagon, and a driver, for which, as a team, he pays the teamsters, is not the "employer" of the driver within the meaning of the New Jersey act, where he had no direct dealings with the driver, and had nothing to say on the question of how much wages the driver should be paid. *Rongo v. R. Waddington & Sons* (1915) 87 N. J. L. 395, 94 Atl. 408, 9 N. C. C. A. 402.

### III. *Employee working for another in emergency.*

In a few cases in which an employee of one employer went in an emergency to help another, and was injured while so engaged, it has been held that the employee could not hold his regular employer liable in compensation for such injury.

Thus, a section hand who was sent by his foreman to assist a farmer in extinguishing a fire which was spreading over his property is not, while he is so engaged, an employee of the railroad so as to make the latter liable for compensation for injuries received by the section hand while so engaged. *London & L. Guarantee & Acci. Co. v. Industrial Acci. Commission* (1916) 173 Cal. 642, 161 Pac. 2.

So, an employee of a lumber company who, while engaged with fellow laborers in constructing a railroad, was ordered by the fire warden to go with him and assist in extinguishing a forest fire, and, while so engaged, was struck by a falling tree and injured, cannot claim compensation for such injury from the lumber company, since, at the time of the injury, he was not engaged in its employment. *Kennelly v. Stearns Salt & Lumber Co.* (1916) 190 Mich. 628, 157 N. W. 378. The court further said that it was immaterial that he was paid his regular salary by his employer for the time spent in fighting fire.

A citizen who responds to a call of the village marshal to aid in suppressing a disturbance, as it is his duty to do under the laws of the state, is, while so engaged, an employee of the village, and if he is killed his dependents are entitled to compensation from the village. *West Salem v. Industrial Commission* (1916) 162 Wis. 57, L.R.A.1918C, 1077, 155 N. W. 929.

### IV. *Employee engaged in loading or unloading vessel.*

In a number of cases arising under the English act, in which an employee engaged in loading a vessel was injured, it has been held that he may look to the owners of the vessel for compensation, although he had been hired to do the work by someone else.

Thus, shipowners may be found to be the employers of a workman employed to assist in mooring ships, although he was engaged and paid by a stevedore, where it appears that the owners gave the money to the stevedore instead of to the workman, as a matter of convenience. *Pollard v. Goole & H. Steam Towing Co.* (1910) 3 B. W. C. C. (Eng.) 360.

So, a coal trimmer, although employed by an agent of the harbor commissioners, is in the employment of a firm of shipping agents who act as managers of a vessel being loaded with coal for third persons, where the trimmers are directly under the control of the agents, and are paid from the freight, the balance of which, less charges, is sent by the agents to the owners of the vessel. *Gorman v. Gibson & Co.* [1910] S. C. 317, 47 Scot. L. R. 394.

And the mate of a vessel may be found to be in the employment of the owners, where, by the contract between them and the captain, the latter made all contracts for freight, and engaged the crew, and took the vessel where he wished, and the owners paid the wages of the crew if the freight was not sufficient therefor, and tonnage and pilotage expenses were deducted from the gross freights, and the captain took two thirds of the residue, paying thereout all other expenses. *The Victoria v. Barlow* [1912] 45 Ir. L. T. 260, 5 B. W. C. C. 570.

Where an agreement between the owners of a vessel and the skipper provided that the skipper was to work the vessel on the best-paying trade, receiving for his services two thirds of all the freight earned, out of which he was to pay all the wages for the crew, and all other expenses connected with the working of the vessel, re-

mitting to the owner the remaining one third, and it further provided that, if he had cause to give up command of the vessel, he was to advise the owner, and, if requested, to bring the vessel to certain ports free of all charges to the owner, and further provided for his leaving the vessel at a loading port, a mate employed by the skipper, who would get his full wages whether the vessel earned any freight or not, may be found to be under a contract of service with the owners. *Kelly v. The Miss Evans* [1913] 2 Ir. R. 385, 47 Ir. L. T. 155, [1913] W. C. & Ins. Rep. 418, 6 B. W. C. C. 916.

A member of the gang engaged in unloading sulphur from a barge is not an employee of the owner of the sulphur, where he engaged one of the gang to supply the labor necessary, and that one engaged the others and supplied necessary tools, and the money received was divided equally among the gang, except that the leader received two pennies from each of the others, the owner merely directing where the sulphur should be placed. *Bobbey v. W. M. Crosbie & Co.* [1915] 84 L. J. K. B. N. S. (Eng.) 856, 112 L. T. N. S. 900, 8 B. W. C. C. 236.

*V. Employee engaged for another without disclosure of principal.*

In case a person engages an employee in behalf of another, but fails to disclose the principal, he may be held liable for compensation, in case the employee is injured.

Thus, a general contractor for the erection of a building, who, to enable a subcontractor to carry on his work, employs the workman in his own name without disclosing for whom the contract was made, may, if the workman elects, be treated as his employer, and subject to liability for compensation for injuries received by the workman. *Scott v. O. A. Hankinson & Co.* (1919) 205 Mich. 353, 171 N. W. 489.

So, where a mandatory hires workmen in his own name, without disclosing his principal, and pays them with his own money or check, he is liable for any compensation to which they may be entitled because of injuries received while in such employment:

3 A.L.R.—75.

*Demers v. McCrae* (1911) Rap. Jud. Quebec 40 C. S. 123.

*VI. Miscellaneous cases.*

A number of decisions passing upon the question as to which of two employers shall be held liable for compensation will be found below, but, as is suggested above, they do not yield themselves to any logical classification, because the facts presented are different in each case.

The owners of a threshing machine are the employers of a man engaged by them as a road man to go along the road ahead of the thresher, but who, when the machine is at work, acts as trusser, and is paid by the farmer, and was so at work when injured. *Reed v. Smith* [1910] 3 B. W. C. C. (Eng.) 223.

A motorman must be held to be continuously in the employ of an interurban railway, although, for a portion of his time each day, he operates his car upon the lines of a street railway company, and the latter company pays his wages for such time, where he has made but one contract of employment, and the wages are paid by the street railway company by virtue of a contract between the two companies, to which the motorman is in no wise a party. *Chicago & Interurban Traction Co. v. Industrial Bd.* (1918) 282 Ill. 230, 118 N. E. 464.

A man furnished to a street car company by a detective bureau, as a strikebreaker, who was injured while riding in the car as a guard, is an employee of the railway company rather than of the detective bureau, and, if injured, cannot maintain an action for damages, since his remedy is under the Compensation Act. *Murray v. Union R. Co.* (1918) 183 App. Div. 209, 170 N. Y. Supp. 601.

An employee engaged to operate a locomotive, by a firm engaged in grading a railroad, is entitled to compensation from the firm for injuries received while assisting the railroad in the work of laying rails, where the railroad was performing the work at the request of the contracting firm, the track being necessary for it to carry on the work which it had con-

tracted to do. *Georgia Casualty Co. v. Industrial Acci. Commission* (1918) — Cal. —, 170 Pac. 625.

A contractor engaged in installing a dust-arrester system in the plant of a manufacturing company, to whom an employee of the company was loaned for such work of installation, and who had full control of such laborer while so employed, is liable for compensation for injuries resulting in the laborer's death, where the company's sole connection with the laborer was its liability to pay him his wages. *Arnett v. Hayes Wheel Co.* (1918) — Mich. —, 166 N. W. 957. The court said that the fact that a person employed and paid a servant does not conclusively show that the latter was a servant of such person, where it is further shown that the employee was actually under the control of another person during the progress of the work.

But a machinist sent by a machine shop to repair machinery at the plant of a third party is not an employee of such third party. *Texas Ref. Co. v. Alexander* (1918) — Tex. Civ. App. —, 202 S. W. 131.

In a case in which a partnership furnished a company with employees, but retained the power to hire and discharge, and paid employees with money furnished by the company, and the latter directed the men in their work, it may be found that both the general and special employers exert some measure of control over the employees, so that they both should be held liable in compensation for injuries received by an employee. *Employers' Liability Assur. Corp. v. Industrial Acci. Commission* (1918) — Cal. —, 177 Pac. 273.

The mere fact that a night watchman employed by defendant also acted as watchman for various other persons does not prevent him from being the employee of the defendant, so as to be entitled to compensation, within the California statute. Thus, several corporations, for each of which a workman acts as a night watchman, cannot be brought within any fair meaning of the term, "voluntary association," as used in the California

statute, where each acts independently and without concert with the others. *Western Metal Supply Co. v. Pillsbury* (1915) 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390.

So, a watchman at a crossing, who acts for both of two railway companies whose tracks are parallel at that point, is a servant of each of them within the meaning of the Compensation Act. *San Francisco-Oakland Terminal R. Co. v. Industrial Acci. Commission* (1919) — Cal. —, 179 Pac. 386.

A club, which, for the convenience of its members, provides caddies, who are hired and supervised by its own employee, is the employer of a caddy injured while in the performance of his duties, within the operation of the Workmen's Compensation Act, although the club member utilizing the services of a caddy directs his activities while so doing, and furnishes the compensation therefor. *Claremont Country Club v. Industrial Acci. Commission* (1917) 174 Cal. 395, L.R.A. 1918F, 177, 163 Pac. 209.

A workman employed by the Public Service Commission in the work of constructing a subway for the city of New York is entitled to compensation from the city for injuries received in the course of his employment, since the city was, under the statute, engaged in the hazardous employment of subway construction; and the mere fact that the employee was engaged by state officials does not prevent the recovery of compensation, where such state officials were, by statute, made the agents of the city in regard to the work in question. *Sexton v. Public Service Commission* (1917) 180 App. Div. 111, 167 N. Y. Supp. 493.

#### VII. *Function of court on appeal.*

The court will not disturb a finding of the commission as to who was the employer of the injured employee, when there was some evidence to sustain the finding. *Sullivan v. Preston* (1917) 177 App. Div. 110, 163 N. Y. Supp. 692.

The court will not interfere with the decision of the county court judge





at another pier several miles distant from the one chosen by Midland Company, and to that pier libellants under protest transported the cake, incurring therefor an expense of \$1,287. These charges were for lighters and tugs, and arose necessarily before any cake went aboard The Saturnus, or came into the possession, custody, or control of any agent of the vessel.

No charter party of The Saturnus, either in the Baltimore form or otherwise, was ever made to libellant; that form relates solely to "heavy grain" cargoes, and is in many respects wholly unsuited to the present venture. It does contain provisions as to loading, and expressly provides for demurrage for delay in loading, but neither expressly nor by implication of words requires steamer to go to such safe pier at the loading port as might be chosen by shipper or charterer. The plain inference from the exhibits attached to the libel is that The Saturnus was under the complete control of the Dutch government, and, whether formally chartered or not, looked for remuneration to that sovereign. The bills of lading specifically called only for freight "according to agreement" between that government and owners of ship.

Peremptory exception was filed to a libel in rem, by claimant, a private corporation owning the steamship, as follows: "The breach of contract alleged does not give a maritime or other lien against The Saturnus"—which exception was sustained and libel dismissed. Libellants appeal.

Argued before Rogers and Hough, Circuit Judges, and Learned Hand, District Judge.

Mr. Herman S. Hertwig, for appellant:

Upon delivery of cargo to a vessel under a contract of affreightment, the vessel and cargo become mutually answerable for any violation of the agreement relating to the vessel and to the cargo delivered, whether such violation occurred before or after the delivery of cargo.

The Pacific, 1 Blatchf. 586, Fed. Cas. No. 10,643; The Flash, Abb. Adm. 67, Fed. Cas. No. 4,857; Oakes v. Richardson, 2 Low. Dec. 173, Fed. Cas. No. 10,390; The Phebe, Ware, 265, Fed. Cas. No. 11,064; The Hyperion, 2 Low. Dec. 93, Fed. Cas. No. 6,987; Donaldson v. McDowell, Holmes, 290, Fed. Cas. No. 3,985; Hawgood v. 1310 Tons of Coal, 21 Fed. 681; The Colombia, 197 Fed. 662; Watt v. Cargo of Lumber, 88 C. C. A. 268, 161 Fed. 104; Davis v. Smokeless Fuel Co. 116 C. C. A. 381, 196 Fed. 755; Carleton v. 367 Tons of Coal, 206 Fed. 345; Hoadley v. The Lizzie, 39 Fed. 44; The Alvah, 59 Fed. 630; The J. C. Stevenson, 17 Fed. 540; The Priscilla, 52 C. C. A. 470, 114 Fed. 836; The Eli Whitney, 1 Blatchf. 360, Fed. Cas. No. 4,345.

Messrs. Everett, Clarke, & Benedict also for appellant.

Messrs. Burlingham, Veeder, Masten, & Fearey and Chauncey I. Clark for appellee.

Hough, Circuit Judge, delivered the opinion of the court:

This is not an action for breach of charter, nor to enforce a maritime lien arising upon such breach, for these libellants never chartered. Benevolently reading the libel and exhibits, the most favorable statement of libellant's legal position is that The Saturnus was offered in fulfillment of a nonmaritime contract for the sale of oil cake, of which her owners presumptively had knowledge. By that contract Midland Company had agreed to furnish a cargo for a ship which turned out to be The Saturnus, and to furnish a cargo within the time limited in a well-known printed charter form, or pay demurrage after the there stipulated lay days, which would begin on tender of vessel for loading. Therefore, both ship and consignor had agreed to manage the lading according to the custom of the port unless varied by the charter form. That form contains no special provisions as to loading pier, but, by the custom, a ship at New York must go where ordered by shipper, if the place is safe. Libellant-shipper named such a place, shipmaster or agent refused



v. Buckingham, 18 How. at 188, 15 L. ed. 343). We must now assume that the freight lien of American admiralty is less than a privilege, because lost by unqualified delivery of possession, yet more than the possessory lien of common law, because creative of *jus in re* rather than *jus ad rem*. Why this is so has long been no more than a curiosity of legal literature.<sup>3</sup>

The affreightment contract before us presents more simply than would many modern charter parties, with their numerous incidental and ancillary provisions, this question: Is a maritime lien upon hull or cargo, as the case may be, the normal and lawful result of every legal claim of damage, due to any violation of the terms, express or implied, of a contract for carriage under which a carriage is ever actually begun? The inquiry must go this far, because no reason can be given for upholding the presently asserted lien that will not also support a multitude of other demands quite as close to the act of transport as is the one at bar, and all of them breaches of the maritime contract of affreightment.

It appears to us that: (1) The lien asserted is without historical basis in general maritime law; (2) it has been in substance rejected in America by a preponderance of authority; (3) is not in its nature beneficial to commerce, nor deserving of even statutory adoption—the only way it can obtain.

1. English law may be disregarded;

<sup>3</sup> For a summary (by Putnam, Circuit Judge) of ruling cases on nature of water carriers' liens, and its reciprocal nature, see *Wellman v. Morse*, 22 C. C. A. 318, 33 U. S. App. 610, 76 Fed. at 577.

<sup>4</sup> Its present state as to the freight lien is well summarized in *Scrutton on Charter Parties*, §§ 101 and 105, while damages for detention or demurrage are by contract only. See a review of the cases in *Crossman v. Burrill*, 179 U. S. at 107, 45 L. ed. 110, 21 Sup. Ct. Rep. 38, and cf., *Dunlop v. Balfour*, 7 Asp. Mar. L. Cas. 181, [1892] 1 Q. B. 507, 61 L. J. Q. B. N. S. 354, 66 L. T. N. S. 455, 40 Week. Rep. 371.

ed;<sup>5</sup> if it had been followed a century ago, no question such as this could have arisen, as is abundantly shown by the opinions of Justice Story and sufficiently recognized in the Supreme Court decisions above named.

Having gone beyond the common-law lien of England, but not accepted the privilege of Continental Europe (as we assert), yet derived what we have rather from Europe than Britain, it may safely be said that, if no privilege arose from a given state of facts, no lien (in our sense) based on such facts can be asserted to have historical foundation.

Before the codifications of the Empire, Pothier<sup>4</sup> set forth the accepted doctrine of privilege for freight, i. e., that cargo might be delivered and the privilege live for a fortnight unless during that time sale was made to a purchaser without notice. This passed into the Code de Commerce (§§ 191 et seq.) with the mutual privileges of carrier and shipper defined, i. e., the ship was privileged for freight and average (i. e., general), and the shipper for average and safe delivery, above all creditors,<sup>5</sup> and this allotment of privileges was and is restrictive.<sup>6</sup> But this limitation of rights in *rem* was not a creature of the legislature, for § 191 "a complété les dispositions de l'ordonnance de 1681 en adoptant le Commentaire de Valin, et les solutions données par la jurisprudence,"<sup>7</sup> and that the Ordonnance de la Marine

<sup>4</sup> On the Maritime Contract, translation by Caleb Cushing, Boston, 1821.

<sup>5</sup> Hennebicq, *ubi supra*.

<sup>6</sup> A l'égard de l'affrètement le privilège sur le navire est restreint aux dommages intérêts qui lui sont dus pour les deux cas exprimés dans l'article 191; et à l'égard du capitaine le privilège n'existe sur les marchandises chargées, que pour le fret seulement." Caumont Dictionnaire de Droit Maritime, Paris 1867.

<sup>7</sup> Alauzet, Commentaire du Code de Commerce, Paris, 1879, vol. 5, p. 52. An see Valin to the effect that no privilege existed in a shipper who for any reason

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United States [1885 ed.] p. 172), and it was so assumed in *The Ripon City*, supra.

One who agrees to load a full cargo and neglects to do it commits an especially plain breach of the affreightment contract, yet the carrier has no lien on what is laden, in respect of what is not. That a common-law or possessory lien could hardly exist on that which was not in possession is easily admitted,<sup>11</sup> but that no seaman or shipowner has (we believe) ever asserted such a maritime lien unsupported by charter party is the strongest evidence of the historic meaning of Cleirac's "clever phrase," i. e., that the mutual obligations of the personified ship and personified cargo begin when they are in charge of the same master, i. e., the captain, and cover only what occurs during that period of union. In the United States this union, in contemplation of law, begins when the ship is ready to receive cargo, and ends when a reasonable time has elapsed for putting it overside. And delay by the ship in discharging merely extends the charterer's or consignee's time wherein to receive; they have no cause of action (much less lien) against ship or owner for such delay (*Milburn v. Federal Sugar Ref. Co.* 88 C. C. A. 577, 161 Fed. 717; *Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* 35 L.R.A. 623, 23 C. C. A. 564, 40 U. S. App. 157, 77 Fed. 920), in the absence of special agreements to that effect. To hold that freight money or some substitute for it began a reasonable time after ship ready to receive cargo is now, whatever its original justification or lack of it, law; but the only reason ever given for the holding is no reason for granting a lien on a ship for refusing to go to a particular loading place.

We therefore think that the history of maritime jurisprudence af-

fords no evidence that anywhere has the lien contended for been admitted.

2. Reported American decisions thought applicable are of two classes: (1) Those leaning for support on the maxim of *The Freeman*, supra, that the mutual rights (i. e., liens) of shipper and carrier do not arise until contract made and cargo shipped; and (2) those looking rather to the nature of the mutuality arising upon union of goods and ship, and deducing rights and liabilities therefrom. Cases of the first kind are germane to the contention that any breach of affreightment contract will support a proceeding in rem if and as soon as goods are laden; while the second class applies when libellant asserts his lien as the logical result of mutuality of remedy.

To make lien depend on its relation to a point of time, i. e., the date of delivery to ship, is perhaps fictional or mechanical rather than thoughtful; yet for lack of a better line of demarcation has long been well known in matters of statutory liens of mechanics and others.

In *The Ask* (D. C.) 196 Fed. 165, ship's alleged wrongful delay caused waiting cargo to spoil, and, after lading, a lien was asserted for antecedent damages. The delay was adjudged excusable, but *McPherson, J.*, pointed out that any lien came into existence "at the time injury was done," the necessary inference being that, as nothing was laden at date of injury, there was nothing to which the lien could then attach, and there certainly cannot be a lien in nubibus waiting to descend.

In *Guffey v. Alaska & P. S. S. Co.* 64 C. C. A. 517, 130 Fed. 271, a shipper delivered his goods to a carrier and got a bill of lading for a particular vessel then at sea. That vessel never took the goods, but the delivery did not produce a lien. And

the captain might retain the cargo until his claim for empty spaces was satisfied. This is a very different thing from the privileges preserved from older law by the Code de Commerce.

<sup>11</sup> *Phillips v. Rodie*, 15 East, 547, 104 Eng. Reprint, 950, 13 Revised Rep. 528; *Birley v. Gladstone*, 3 Maule & S. 205, 105 Eng. Reprint, 587, 15 Revised Rep. 465.

to the same effect, under different facts, *The Garonne*, 87 C. C. A. 651, 160 Fed. 847.

In *The Priscilla*, 52 C. C. A. 470, 114 Fed. 836, libellant took passage on a steamer, and some hours before embarking delivered his baggage to the shipowner but not on ship-board. Some baggage was lost, but before it came aboard, and the passenger was duly carried as per agreement with the rest of his luggage; but he was by this court denied a lien for what had been lost.

*The Hiram* (D. C.) 101 Fed. 139, is considered authority against the lien here asserted, and *The Habil* (D. C.) 100 Fed. 120, expresses the same view. *Hoadley v. The Lizzie* (C. C.) 39 Fed. 45, presented facts appropriate for opinion, and lien was awarded; apparently the point was conceded.

In the second class of decisions are two of Judge Morris of the Maryland district, which undoubtedly hold with libellant,—one a case of keeping cargo for a wrongfully delayed and chartered vessel, and the other of shutting out cargo. Decision goes on the nature of contract, as we read the opinion. *The J. C. Stevenson* (D. C.) 17 Fed. 540; *The Alvah* (D. C.) 59 Fed. 630, reversed on another point in 23 C. C. A. 181, 45 U. S. App. 210, 77 Fed. 315.

On the other hand, in *The Eli Whitney*, 1 Blatchf. 360, Fed. Cas. No. 4,345, Justice Nelson, affirming Judge Betts, summarily denied a lien asserted by a shipper against a ship whose capacity had been falsely misrepresented, to his injury as shipper. The point was necessarily involved, and, while the judgment is not reasoned, as authority there was nothing superior to the judges concerned at the date of decision.

*The General Sheridan*, 2 Ben. 294, Fed. Cas. No. 5,319, expresses on suggestive facts the opinion of Justice Blatchford that "any duty that may be violated by the owner or master before the cargo is put aboard is not a duty of the vessel,

and therefore the vessel cannot be in default."

In the *S. L. Watson*, 55 C. C. A. 439, 118 Fed. at 952, there was considered a contract by a transportation line to carry full cargoes by several boats, and all cargoes by some boat of the line, which contract was partially executed, but any lien against any or all boats of the line was refused in respect of cargoes shut out, the court remarking that no lien arose "except in connection with some visible occurrence relating to vessel or cargo."

The reasons of Addison Brown, J., for finding a lien for damages by delay to the return cargo on a chartered round voyage, in *The Giulio* (D. C.) 34 Fed. at 911, are instructive, as is the discussion in *The Ripon City*, 42 C. C. A. 247, 102 Fed. 182, though in neither case was the present point involved. But in both decisions, had the contention of the libellant here been accepted, or even thought of, it would certainly have been considered.

The weight of whatever authority exists is against libellant; and, indeed, considering <sup>Shipping-lien for refusal to load.</sup> how often similar disagreements have occurred, the novelty of the present claim is a potent argument against it.

3. This litigation exemplifies a common tendency to regard any floating property used in the performance of contract, as in some sort a pledge or surety for satisfactory performance; such security to be enforced by asserted maritime lien. No such principle is known to the admiralty. The ancient and customary lien of the sea is not maintained, nor was it created (so far as history reveals its origin) for the convenience or assurance of parties, but for the encouragement of commerce and shipping as a presumed benefit to the public, in respect of an occupation hazardous and uncertain beyond most land ventures.

In respect of carriage of goods in particular, every public benefit has

for centuries been deemed obtained when goods were liable for freight, and ship for safe and sound delivery of goods, the mutuality of relation thus growing out of the act of transport, not the making of a contract for transportation. Anything more than this<sup>12</sup> multiplies secret liens and hampers instead of advances ease and freedom of commerce. Merchant and mariner alike subject their property to the municipal law of every country into which their venture comes, but a maritime lien is as near an approach to jus

gentium as can be found in private jurisprudence, and any extension thereof, not internationally well founded, is to be opposed as jealously as is a denial of its accepted extent.

The foregoing considerations lead to affirmance with costs of the decree below.

Petition for a writ of certiorari denied by the Supreme Court of the United States, June 10, 1918, 247 U. S. 521, 62 L. ed. 1247, 38 Sup. Ct. Rep. 583.

## ANNOTATION.

### Maritime lien for breach of executory contract of affreightment.

- I. Scope, 1194.
- II. In general, 1194.
- III. When contract ceases to be executory, 1198.
- IV. Effect of performance after breach, 1199.

#### I. Scope.

This note does not embrace the question whether there has been any breach of the contract or any fault of any kind on the part of the ship or its owner, but merely the question whether, assuming such breach, there is any lien on, or right of action in rem against, the ship.

#### II. In general.

Under the Maritime Law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of the contract of affreightment. *The Freeman v. Buckingham* (1856) 18 How. (U. S.) 188, 15 L. ed. 343; *Vandewater v. Mills* (1857) 19 How. (U. S.) 82, 15 L. ed. 554 (see also *Rose's Notes* to these cases); 36 Cyc. 277.

It is now settled, however, that the lien does not arise for the breach of a contract of affreightment which has

never advanced beyond the wholly executory stage.

*United States*. — *The Freeman v. Buckingham*, *supra*; *Vandewater v. Mills* (1857) 19 How. 82, 15 L. ed. 554; *The Lady Franklin* (1869) 8 Wall. 325, 19 L. ed. 455; *The Keokuk* (1870) 9 Wall. 517, 19 L. ed. 744 (see also *Rose's Notes* to these cases); *Scott v. The Ira Chaffee* (1880) 2 Fed. 401; *The Asa Eldridge* (1881) 8 Fed. 720; *The Prince Leopold* (1881) 9 Fed. 333; *The Monte A* (1882) 12 Fed. 331; *The Alice* (1882) 12 Fed. 496; *The City of Baton Rouge* (1883) 19 Fed. 461; *The J. F. Warner* (1883) 22 Fed. 342; *The Missouri* (1887) 30 Fed. 384; *The Guiding Star* (1893) 53 Fed. 936, affirmed in (1894) 10 C. C. A. 454, 22 U. S. App. 344, 62 Fed. 407; *The Vigilancia* (1893) 58 Fed. 698; *The Eugene* (1898) 31 C. C. A. 345, 59 U. S. App. 513, 87 Fed. 1001; *The Bella* (1899) 91 Fed. 540; *The Habil* (1900) 100 Fed. 120; *The Hiram* (1900) 101 Fed. 138; *The Ripon City* (1900) 42 C. C. A. 247, 102 Fed. 176; *The Universe* (1901) 108 Fed. 968; *The Thomas P. Sheldon* (1902) 113 Fed. 779, affirmed in (1902)

<sup>12</sup> It is worth noting that in America we have also based the lien for general average on possession only, thereby following England rather than modern Continental Europe. *Lowndes Gen. Av'ge*, 5th ed., p. 384; *Coe Gen. Av'ge* in U. S., p. 74. For French treatment, see *Valin*, *infra*, vol. 2, p. 535.

NOTE.—*Valin* ed. 1828, by *Becane*, 2 vols., may be referred to for text of the *Ordonnance*. For correspondence with *Code de Commerce*, see vol. 1, p. 397, and for the commentator's view of the origin of *Cleirac's* saying and limitations of privilege, vol. 2, p. 24.

55 C. C. A. 439, 118 Fed. 945; *The Priscilla* (1902) 52 C. C. A. 470, 114 Fed. 836; *The Energia* (1903) 124 Fed. 842; *Guffey v. Alaska & P. S. S. Co.* (1904) 64 C. C. A. 517, 130 Fed. 271; *The Margaretha* (1909) 93 C. C. A. 184, 167 Fed. 794; *The Ask* (1912) 196 Fed. 165; *Corsica Transit Co. v. W. S. Moore Grain Co.* (1918) — C. C. A. —, 253 Fed. 689; *The Panama* (1846) Olcott, 343, Fed. Cas. No. 10,703; *Dill v. The Bertram* (1857) Fed. Cas. No. 3,910; *Hannah v. The Carrington* (1860) Fed. Cas. No. 6,029; *The R. G. Winslow* (1860) 4 Biss. 13, Fed. Cas. No. 11,736; *The Pauline* (1863) 1 Biss. 390, Fed. Cas. No. 10,848; *Rynauid v. The Richard Cobden* (1863) Fed. Cas. No. 12,191; *Salzobel v. The Rolling Wave* (1863) Fed. Cas. No. 12,274; *The General Sheridan* (1868) 2 Ben. 294, Fed. Cas. No. 5,319; *The William Fletcher* (1876) 8 Ben. 537, Fed. Cas. No. 17,692.

See also *Barr v. The Pocahontas* (1858) 3 Ohio Dec. Reprint, 337.

The opposite view of this question was, however, taken in *The Flash* (1847) Abb. Adm. 67, Fed. Cas. No. 4,857; *The Pacific* (1850) 1 Blatchf. 569, Fed. Cas. No. 10,643; *Oakes v. Richardson* (1872) 2 Low. Dec. 173, Fed. Cas. No. 10,390; *The Williams* (1873) 1 Brown, Adm. 208, Fed. Cas. No. 17,710; *Miners' Co-op. Asso. v. The Monarch* (1905) 2 Alaska, 383.

In the Alaska case just cited, a contract was made with the master to transport a proposed shipment of goods. When the goods reached the shipping point the ship did not meet them, and it was necessary to forward them by another steamer. Judgment was rendered against the vessel for the damages from the breach of the contract, consisting of the difference in the freight charges. The court, after referring to the general rule that a maritime contract for transportation operates reciprocally as a pledge to the shipper for the conveyance and delivery of the goods, and of the goods to the ship, to secure the payment of the freight earned, said that the lien likewise arose in favor of the shipper for damages upon the refusal of the vessel to fulfil its contract. The only au-

thority cited by the court for this last statement was *The Flash* (Fed.) supra. This case seems clearly in conflict with other late cases.

The conflict in the earlier cases, which continued even after the Supreme Court decisions cited, was doubtless due to the fact that the remarks of that court on this question were dicta. Thus, in *The Freeman v. Buckingham* (1856) 18 How. (U. S.) 188, 15 L. ed. 943, the question actually involved was whether the master could create liens on the vessel by issuing fictitious bills of lading for goods never delivered to the vessel. *Vandewater v. Mills* (1857) 19 How. (U. S.) 82, 15 L. ed. 554, involved a breach of an agreement to run between certain ports, carrying passengers and freight, so as to connect with the libellant's vessel. *The Lady Franklin* (1869) 8 Wall. (U. S.) 325, 19 L. ed. 455, involved the question whether there was any lien for nondelivery of goods described in a bill of lading given by mistake. In *The Keokuk* (1870) 9 Wall. (U. S.) 517, 19 L. ed. 744, the libellant, without notice to anyone connected with a steamer, took possession of a barge belonging to the steamer's owners and loaded it with wheat, and, before any contract had been made with the steamer to transport the wheat, the barge sunk at the dock.

But, as said in *Scott v. The Ira Chaffee* (1880) 2 Fed. 401, though the Supreme Court's remarks on this point were dicta, it showed no disposition to recede from the doctrine so announced, and such doctrine has been applied or recognized in all of the later cases in which the contract was wholly executory, with the exception of the Alaska case above cited.

Thus, it has been uniformly held that there is no lien for breach of an executory charter party by failing or refusing to proceed to the port of shipment, or to receive and transport the goods.

**United States.**—*The Asa Eldridge* (1881) 8 Fed. 720; *The Monte A* (1882) 12 Fed. 331; *The J. F. Warner* (1883) 22 Fed. 342; *The Missouri* (1887) 30 Fed. 384; *The Universe*



(1901) 108 Fed. 968; *The Thomas P. Sheldon* (1902) 113 Fed. 779, affirmed in (1902) 55 C. C. A. 439, 118 Fed. 945; *The Margaretha* (1909) 93 C. C. A. 184, 167 Fed. 794; *Corsica Transit Co. v. W. S. Moore Grain Co.* (1918) — C. C. A. —, 253 Fed. 689; *The Panama* (1846) Fed. Cas. No. 10,703; *Hannah v. The Carrington* (1860) Fed. Cas. No. 6,029; *The Pauline* (1863) 1 Biss. 390, Fed. Cas. No. 10,848; *Salzobel v. The Rolling Wave* (1863) Fed. Cas. No. 12,274; *The General Sheridan* (1868) 2 Ben. 294, Fed. Cas. No. 5,319; *The William Fletcher* (1876) 8 Ben. 537, Fed. Cas. No. 17,692.

In *The General Sheridan* (1868) 2 Ben. 294, Fed. Cas. No. 5,319, it was held that there was no lien for such a breach, though the charter party provided that the parties bound the vessel and the cargo, each to the other, for the performance of the covenants and agreements therein. The court said that, under the covenant, the duty of the vessel, to the performance of which the hypothecation bound her, was to deliver the cargo that might be put on board, at the time and place stipulated for such delivery; that any duty that might be violated by the owner or master before the cargo was put on board was not a duty of the vessel, or one for which a lien on the vessel was created or could be enforced; and that, under the covenant, if the cargo was not laden on board, it was not bound to the vessel, and therefore the vessel could not be in default, though the master or owner might be for the nondelivery of the cargo. But in *The Asa Eldridge* (1881) 8 Fed. 720, the court, in holding that there was no lien, apparently attached some weight to the fact that the charter contained no direct pledge of the vessel, but simply bound the parties themselves, each to the other.

In *The Pauline* (1863) 1 Biss. 390, Fed. Cas. No. 10,848, *supra*, the court said: "A maritime contract depends on its subject-matter, and the courts have jurisdiction of contracts which relate to the service or employment of a vessel. And contracts of affreight-

ment entered into by the master or agent of the vessel in good faith, and within the scope of his apparent authority, bind the vessel to the merchandise. Under the Maritime Law of the United States, the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until the cargo is shipped under it."

Nor does the fact that a ship has partly performed its contract, by transporting one of the cargoes covered by a charter party, give any lien for failure to transport the rest of the cargoes contracted for. *The Thomas P. Sheldon* (1902) 113 Fed. 779, affirmed in (1902) 55 C. C. A. 439, 118 Fed. 945.

So, there is no lien upon a vessel for a cargo for which bills of lading have been issued, but which is destroyed by fire while in the possession of the owner of the landing, before being placed on board or given into the control of the master, and before the arrival of the steamer at such landing (*The Guiding Star* (1893) 53 Fed. 936, affirmed in (1894) 10 C. C. A. 454, 22 U. S. App. 344, 62 Fed. 407); for breach of a contract to transport passengers between certain ports, with a specified amount of freight, where the steamer never received such passengers, or their baggage or freight, on board, or entered on the performance of the undertaking (*The Eugene* (1898) 31 C. C. A. 345, 59 U. S. App. 513, 87 Fed. 1001); for nonperformance of a contract of transportation made by the agent of the company operating the ship while the ship was on the high seas, though the goods were delivered on the company's docks, and a bill of lading issued (*Guffey v. Alaska & P. S. S. Co.* (1904) 64 C. C. A. 517, 130 Fed. 271); for refusing to receive and transport goods as previously agreed by the vessel's agent (*Rynaude v. The Richard Cobden* (1863) Fed. Cas. No. 12,191); for delay in delivery of a boiler which was never delivered to the vessel libeled, whose master contracted to transport it, but

which was received by the master on behalf of another vessel, which attempted to transport it (*Scott v. The Ira Chaffee* (1880) 2 Fed. 401); for such part of the goods represented by a bill of lading as was never shipped (*The Alice* (1882) 12 Fed. 496); for failure to call for and receive goods for transportation as agreed (*The City of Baton Rouge* (1883) 19 Fed. 461); or for breach of a contract of shipment, under which the cargo has not been actually shipped (*The Ask* (1912) 196 Fed. 165).

And there is no lien in favor of the holder of a bill of lading issued fraudulently or by mistake, where the goods therein described were not in fact shipped. *The Freeman v. Buckingham* (1856) 18 How. (U. S.) 188, 15 L. ed. 343; *The Lady Franklin* (1869) 8 Wall. (U. S.) 325, 19 L. ed. 455 (see also *Rose's Notes* to these cases); *Montell v. The William H. Rutan* (1865) Fed. Cas. No. 9,724.

A master's misrepresentation or concealment of the facts as to the tonnage or capacity of his vessel, whereby the libellants were induced to enter into a charter party, gives them no lien for the refusal to receive a part of the cargo. *The Eli Whitney* (1848) 1 Blatchf. 360, Fed. Cas. No. 4,345.

But though there is no lien for the breach of an executory contract of affreightment, or an executory charter party, such a contract is maritime, and a state law may annex to it a lien upon the vessel for its breach; and where the state has done so the court of admiralty will enforce such lien. *The J. F. Warner* (1883) 22 Fed. 342; *The Energia* (1903) 124 Fed. 842. In the last-cited case it was held that the statute gave a lien for the breach of an executory contract for the transportation of a cargo from a point in the state, though the vessel was not a domestic, but a foreign, vessel, but the holding to this effect is expressly disapproved by the circuit court of appeals for the eighth circuit, in *Corsica Transit Co. v. W. S. Moore Grain Co.* (1918) — C. C. A. —, 253 Fed. 689, in which it is held that a state has no power to grant a maritime lien against foreign vessels navigating wa-

ters not wholly within the state, for causes of action which have never been recognized as maritime, and that a state statute, giving a lien on a vessel for breach of an executory contract to transport property, is, therefore, not applicable to foreign vessels.

In *Turner v. Lewis* (1852) 2 Mich. 350, it was held that the statutes of that state, giving a lien on vessels for the nonperformance of any contract of affreightment, applied only to contracts made within the state, and not to contracts made in another state for the transportation of property to a point within the state.

In *Guffey v. Alaska & P. S. S. Co.* (Fed.) supra, it was held that a state law, giving a lien for nonperformance of a contract of transportation made by the owner, master, agent, or consignee, did not give a lien for nonperformance of a contract made by an agent of the charterer while the ship was on the high seas.

In *Hendrik Hudson* (1855) Fed. Cas. No. 6,358, where the master of a vessel agreed with a railroad company, from whom he received goods for transportation, to collect its freight charges and return them to such company, and it was shown that a custom existed to collect such charges for connecting carriers, it was held that the railroad company had a right to hold the ship liable for the nonperformance of the contract.

In England, no maritime lien in favor of a shipper is apparently recognized, but a statutory lien attaches when a ship is arrested in an action in rem for certain causes, including actions for damage to cargo imported into England or Wales, when the owner is not domiciled in those countries. 26 Laws of England (Halsbury) pp. 618, 621. The questions discussed in this note do not seem to have arisen, if they could arise, under this state of the law; but in *The Maggie Hammond* (1870) 9 Wall. (U. S.) 449, 19 L. ed. 777, where a ship on a voyage between foreign ports, after being damaged in a storm, unloaded its cargo at an English port, the Supreme Court expressed the opinion that there was a lien under the English law; but held

right to sue the ship, the damages could be recovered in this country by a suit in rem.

### *III. When contract ceases to be executory.*

While it is settled that there is no lien while the contract remains wholly executory, some difficulty has been encountered in determining when the contract ceases to be wholly executory. In *The Freeman v. Buckingham* (1856) 18 How. (U. S.) 188, 15 L. ed. 343, it was said that there was no lien until some lawful contract of affreightment was made, "and the cargo shipped under it." And in *Vandewater v. Mills* (1857) 19 How. (U. S.) 82, 15 L. ed. 554, the court said that if the cargo was not placed on board it was not bound to the vessel, and the vessel could not be in default for nondelivery in good order of goods never received, and that, consequently, if the master or owner refused to perform the contract, or for any other reason the ship did not receive the cargo and depart on her voyage according to contract, the charterer had no privilege or maritime lien on the ship. But in *Bulkley v. Naumkeag Steam Cotton Co.* (1860) 24 How. (U. S.) 386, 16 L. ed. 599, affirming (1859) 1 Cliff. 322, Fed. Cas. No. 4,301, which affirmed (1859) 1 Sprague, 477, Fed. Cas. No. 4,300, which involved the loss of goods while on a lighter from which they were to be loaded on the ship, it was held that a physical connection between the cargo and the ship was not essential to the lien. In *The Lady Franklin* (1869) 8 Wall. (U. S.) 325, 19 L. ed. 455, it was said that the lien does not attach until the cargo is on board or in the custody of the master. And in *The Keokuk* (1870) 9 Wall. (U. S.) 517, 19 L. ed. 744, the lien was said not to arise until the cargo was delivered to the custody of the master, or someone authorized to receive it.

In *The R. G. Winslow* (1860) 4 Biss. 13, Fed. Cas. No. 11,736, a vessel was held liable for wheat lost while being loaded on the vessel from a warehouse by means of a pipe. The court pointed out that the duty of the master, as

transportation, and said that the delivery was complete when the wheat was discharged into the pipe, and that the case was different from a contract merely executory, where there had been no delivery of the goods to the master, nor change of possession, nor offer to deliver.

And where the agent of an ocean steamer employed a river boat to take freight and passengers down the river and transfer them to the steamer, it was held that a delivery of freight to the purser of the river boat was such a delivery to the ocean steamer as bound it, and that, even if this was not a sufficient delivery, the steamer was bound, where, upon meeting, both steamers proceeded to a wharf, where the river boat unloaded its cargo for transfer to the ocean steamer. *The Oregon* (1866) Deady, 179, Fed. Cas. No. 10,553.

And where goods were received by a carrier too late for shipment on a particular voyage, and were stored in its warehouse, where they were damaged by a flood, it was held that the owner had a lien on the vessel for the damages. *Pearce v. The Thomas Newton* (1889) 41 Fed. 106. The court said that the lien depended upon the receipt of the goods for shipment, though they had not been placed on board the vessel.

In *The Gutenfels* (1908) 166 Fed. 989, affirmed in (1909) 91 C. C. A. 97, 170 Fed. 937, a maritime lien for damages from delay was upheld by the district court, where the owner of the vessel receipted for merchandise lying ready to be loaded aboard the vessel, but a part of the merchandise was not taken for lack of room; but was forwarded by another ship of the same owner. The district court said that the contract could not be regarded as an executory one, but as one duly executed as far as delivery of possession was concerned. The circuit court of appeals affirmed the judgment, without passing on the question of lien.

In *Bulkley v. Naumkeag Steam Cotton Co.* (1860) 24 How. (U. S.) 386, 16 L. ed. 599, affirming (1859) 1 Cliff. 322, Fed. Cas. No. 4,301, which affirmed

(1859) 1 Sprague, 477, Fed. Cas. No. 4,300, it was held that where delivery of cotton was to be made at the wharf, and the ship employed a lighter whose boiler exploded, throwing part of the goods into the water, the shipper had a lien for their loss. The court said that the cargo was delivered in pursuance of the contract, and the goods were in the custody of the master and subject to his lien for freight as effectually as if they had been upon the deck of the ship, and that, unless the shipper was entitled to his lien upon the vessel, he was deprived of one of the privileges of the contract, when, at the same time, the owner was in the full enjoyment of all the privileges belonging to his side of it (see also *Rose's Notes* to this case).

Liens have also been upheld where the goods were lost while in a lighter, preparatory to being loaded on the vessel, in *The Coldillera* (1867) 5 Blatchf. 518, Fed. Cas. No. 3,229a; *Campbell v. The Sunlight* (1877) 2 Hughes, 9, Fed. Cas. No. 2,368; *The City of Alexandria* (1886) 28 Fed. 202; *Petersburg, N. & N. S. B. Line v. Norfolk-Virginia Peanut Co.* (1909) 24 L.R.A.(N.S.) 569, 96 C. C. A. 383, 172 Fed. 321, affirming (1908) 161 Fed. 383.

Where cargo, after being loaded, was unloaded by direction of the owners of the vessel in order that they might attach it for a debt alleged to be due from the charterers, a lien against a vessel for the damages from the breach was enforced, in *The Tribune* (1837) 3 Sumn. 144, Fed. Cas. No. 14,171.

In *Dill v. The Bertram* (1857) Fed. Cas. No. 3,910, it was apparently held that a delivery of goods on the wharf, where they were taken in charge by the vessel's officers, and a part taken on board, was not a sufficient delivery of the part not loaded to give a lien on the ship for its loss by fire.

In *The Bella* (1899) 91 Fed. 540, the charterer contracted with the libellant to carry a party of passengers with a quantity of freight by a vessel not named, and then chartered the vessel libeled to carry out the contract. The members of the party delivered the freight at a warehouse, and selected

their sleeping berths. Thereafter the vessel was seized under process in another suit, and, while in the custody of the marshal, the purser and freight clerk had the freight moved from the warehouse to a place on the dock, ready to be taken aboard; but it was not loaded. The charterer abandoned the voyage. It was held that the libellant had no lien on the vessel. This holding, though based in part on the ground that the charterer, under the circumstances, had no authority to create a lien, was also based on the ground that no lien could be asserted on the freight and baggage by the handling of the goods by the purser and freight clerk while the vessel was in the hands of the marshal, and that, as the lien is reciprocal, a lien on the ship for safe carriage and delivery of the freight did not attach until the lien for freight had attached to the cargo.

In *The Phebe* (1834) 1 Ware, 265, Fed. Cas. No. 11,064, the right to a lien was upheld where the ship became leaky, and the goods were transhipped by another boat, and not delivered; and in *The Maggie Hammond* (1870) 9 Wall. (U. S.) 499, 19 L. ed. 777, a lien was enforced where the ship, after being damaged in a storm, unloaded the cargo, and subsequently refused to transport it.

#### IV. *Effect of performance after breach.*

It will be noted that none of the questions so far discussed quite cover the point involved in the reported case (*MIDLAND LINSEED PRODUCTS CO. v. THE SATURNUS*, ante, 1187). In that case it was not claimed that there was any lien for the breach of contract while the contract remained wholly executory, nor was it claimed that the contract in question had advanced beyond the wholly executory stage at the time of the breach. The contention apparently was that, while there was no lien for the breach at the time it occurred, yet, when the ship subsequently entered upon the performance of the contract, the lien which then arose in favor of the shipper reached back and covered the prior breach. This contention, which the court rejected, was apparently supported by

the only other case which has been found (aside from the decision of the district court, under review in the reported case), in which the opinion contains evidence that the court had directly in mind the question whether the subsequent performance of the contract would entitle the shipper to a lien (*The J. C. Stevenson* (1888) 17 Fed. 540); but there are a number of other cases decided in the district courts in which this question would seem to have been necessarily involved.

In *The J. C. Stevenson* (Fed.) supra, decided by the district court for the district of Maryland, a vessel which had contracted to carry cattle and to sail about a certain date was about a month late in sailing. It was held that the shipper was entitled to a lien for the cost of keeping the cattle during the delay, and the increase in insurance premium by reason of the lateness of the shipment. The court said that the question was not free from doubt; but that as the cattle were actually loaded on board under the contract, and reference was specially made to the contract in the bill of lading, and the ship obtained the benefit of the contract, it seemed to be within the spirit of the decisions to hold her liable for the delay.

In *The Giulio* (1888) 34 Fed. 909, a ship was held liable in rem for storage and other expenses during a delay on her part in proceeding to the port to which she was ordered by the charterer, for the purpose of taking a cargo, and also for the amount of a fall in the market price of the cargo during the period the cargo was thus delayed in reaching its destination. This case is apparently distinguished in the reported case (*MIDLAND LINSEED PRODUCTS CO. v. THE SATURNUS*, ante, 1187) on the ground that the delay was in taking a return cargo on a chartered round voyage. The delay, however, apparently occurred when the ship had no cargo on board, or in the possession, or under the control, of the ship's officers.

In *The Alvah* (1894) 59 Fed. 680, reversed on another point in (1896) 23 C. C. A. 181, 45 U. S. App. 210, 77 Fed.

315, the suit was in rem for breach of a contract to transport a certain number of cattle, the alleged breach consisting in failure to provide ventilation so that the ship could carry the agreed number. It was contended that the contract was not a maritime contract, but a contract preliminary to a maritime contract, which did not bind the ship, and that it was made without authority. After disposing of the contention as to the agent's authority, the court said: "After the performance of the contract had begun, the ship became bound to its performance, and the libellant can recover in admiralty against the ship for a violation thereof." The ship had received and transported all the cattle the shipper was willing to ship with the ventilation provided, and the decision was reversed on the ground that it did not appear that there had been any breach of contract.

In *The Habil* (1900) 100 Fed. 120, the libel was by a charterer for damages to a shipment of bananas from delay in reaching the shipping point, and in loading and transporting the bananas. The libellant was a commission merchant, and it was held that he had suffered no damage. The court, though not conceding that he could sue as consignee or agent of the shipper, apparently proceeded to consider what the ship's liability would be if he could so sue, and said: "Damages for any loss or injury to the bananas after they had been placed on board the vessel, and on the voyage to Mobile would be recoverable by the banana company, if such loss or injury was occasioned by a breach of its contract of shipment, or by any neglect of duty to the cargo on the part of the vessel. Such is not the case made by the pleadings and proof here. This suit is based on a breach of the covenants of the charter party, and the principal damage complained of is that which occurred to the bananas before they were taken on board the vessel, and which were sustained, as is alleged, by reason of the delay of the vessel in reaching the loading berth at Bocas del Toro, and her delay in

loading after reaching there." The libel was dismissed (and, so far as it is implied that there could be no recovery against the vessel for the damages accruing before loading, the case is in harmony with the reported case (*MIDLAND LINSEED PRODUCTS Co. v. THE SATURNUS*)).

The *Hiram* (1900) 101 Fed. 138, was a suit in rem against a ship for damages due to delay in taking the cargo on board, and in proceeding on the voyage after it was laden. The court held that the ship could not be held

liable for any delay accruing prior to the delivery of the cargo to the vessel, though it would be liable for any unreasonable delay thereafter. The contract of affreightment was made between the libellant and a charterer, and the court appears to attach some weight to this fact, but also holds that no duty that may be violated by the owner or master before the cargo is put on board the vessel is a duty of the vessel, or one for the breach of which a lien on the vessel is created or can be enforced. A. McT.

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STANLEY PRIESTLY, Appt.,

v.

STATE OF ARIZONA.

*Arizona Supreme Court—March 5, 1918.*

(19 Ariz. 371, 171 Pac. 137.)

**Criminal law — impartial jury — sitting in similar case.**

1. One charged with unlawfully selling intoxicating liquor is not afforded a fair trial where he is compelled to submit to the presence on the jury of men who found a verdict of guilty in another case, depending on the evidence of the same witnesses, who were hired detectives, whose testimony was attacked as incredible.

[See note on this question beginning on page 1206.]

**Jury — impartial — discretion.**

2. Whether or not the state of mind of a juror is such as will prevent his acting with entire impartiality is ordinarily a matter that must be left largely to the discretion of the trial court.

[See 16 R. C. L. 261, 262.]

**Appeal — impartiality of juror — interference.**

3. The appellate court must inter-

fere when the exercise of discretion by the trial judge as to the impartiality of a juror is clearly erroneous.

[See 2 R. C. L. 211 et seq., 217.]

**Jury — duty of judge.**

4. The trial judge must see that an unbiased, unprejudiced, and impartial jury is provided in every case.

[See 16 R. C. L. 262.]

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**APPEAL** by defendant from a judgment of the Superior Court for Yavapai County (Smith, J.) convicting him of unlawfully selling intoxicating liquor. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Robert E. Morrison and Allen Hill, for appellant:

Defendant was denied his constitutional right to trial by an impartial jury as the jurors were incompetent.

24 Cyc. 278; 17 Am. & Eng. Enc. Law, 2d ed. 1155; *State v. Hammon*, 84 Kan. 137, 113 Pac. 418; *Boutcher* 3 A.L.R.—76.

*v. State*, 4 Okla. Crim. Rep. 576, 111 Pac. 1006, 112 Pac. 762; *Wickard v. State*, 109 Ala. 45, 19 So. 491; *Roberts v. State*, 4 Ga. App. 378, 61 S. E. 497; *Brown v. State*, 104 Ga. 736, 30 S. E. 951; *Garthwaite v. Tatum*, 21 Ark. 336, 76 Am. Dec. 402; *United States v. Smith*, Fed. Cas. No. 16,342b; *People*

v. Troy, 96 Mich. 530, 56 N. W. 102; People v. Mol, 68 L.R.A. 871, and note, 137 Mich. 692, 100 N. W. 913, 4 Ann. Cas. 960.

Messrs. Wiley E. Jones, Attorney General, R. William Kramer and George W. Harben, Assistant Attorneys General, for the State:

It was not error to allow the five jurors who sat in the Duff Case to sit in the case against defendant.

Leigh v. Territory, 10 Ariz. 129, 85 Pac. 948; People v. Mol, 137 Mich. 692, 68 L.R.A. 871, 100 N. W. 913, 4 Ann. Cas. 960; State v. Leicht, 17 Iowa, 28; State v. Sheeley, 15 Iowa, 404; Chariton Plow Co. v. Deusch, 16 Neb. 384, 20 N. W. 268; Gruesendorf v. State, — Tex. Crim. Rep. —, 56 S. W. 624; Stephens v. People, 38 Mich. 739; Smith v. Eames, 4 Ill. 76, 36 Am. Dec. 515.

Franklin, Ch. J., delivered the opinion of the court:

Stanley Priestly was adjudged guilty of a misdemeanor, and appeals. He was charged with selling intoxicating liquor to one C. J. Cooper, and asks a reversal of the judgment of conviction mainly upon the ground that he was not accorded a fair and impartial trial in the superior court.

The panel from which a jury was to be selected to try his case contained five men who, a day or two previously, had sat as jurors and rendered a verdict of guilty against the defendant in the case of State v. Duff, in which case the defendant was charged with selling intoxicating liquor to one R. H. Bryant. These men, Cooper and Bryant, are detectives, and, together with one S. E. Terry, were employed by Yavapai county to obtain evidence against those suspected of violating the Liquor Law. In this business Cooper, Bryant, and Terry were working together. It was on the testimony of these three detectives that the state relied for a conviction in each case. In the case of State v. Duff, the testimony of the prosecuting witness Bryant was corroborated by the testimony of Cooper and Terry, and, in the case of State v. Priestly, the testimony of the prosecuting witness Cooper

was corroborated by the testimony of Bryant and Terry. The main, if not the sole, defensive matter in both of these cases was the incredibility of the testimony of these three detectives, Bryant, Cooper, and Terry, and the credibility of the impeaching witnesses for the defendant. Except the names of the defendant, the evidence in each case was substantially the same and from the mouths of practically the same witnesses. According to the testimony, both Duff and Priestly were working as bartenders for Bob Birch in his place of business on Montezuma street in the city of Prescott. The character of Birch's establishment became an important issue in each case, and was the subject of a mass of testimony pro and con. The testimony for the prosecution discloses that each of the defendants sold intoxicating liquor disguised in ginger ale; that it was the plan or scheme of Birch and these defendants, concocted by them to evade the law, to dispose of intoxicating liquor in this kind of a disguise. The character of the place in which these defendants were thus employed, the kind of persons who frequented there and patronized it, and the conduct of the employees and such persons thereabouts, all this was gone into by the prosecution with much detail of circumstance. In each case, to throw light upon the particular charge being tried, and to corroborate the testimony given to prove the specific sale for which a conviction was asked at the hands of the jury, other sales of a similar nature were testified to by the three detectives. So connected and mingled were these offenses and the circumstances related by the witnesses that the trial of the case of Duff was practically a trial of the case of Priestly. Substantially the only difference in the two cases was the application of practically the same testimony by practically the same witnesses to different defendants. The conflict in the testimony for the state and that for the de-

fendant in each case was sharp. The defensive matter in both cases was almost wholly upon the weight and credibility to be given by the jury to the testimony of the respective witnesses. Timely exception was made to the disqualification of these five jurors to be upon the panel, and they were each challenged for cause. Counsel for defendant put upon the record before the trial court with clearness and in detail the similarity of the case of State v. Duff, which these jurors had tried, with the case of State v. Priestly, the trial of which they were entering upon. These jurors, however, notwithstanding the similarity of the cases and their conviction in the Duff Case upon practically the same evidence from the mouths of the same witnesses, were each emphatically of the opinion, in answer to questions put to them, that their knowledge of the Duff Case, together with their verdict under oath, would not influence them against Priestly, but that each could give Priestly a fair and impartial trial relieved from any conviction they may have entertained in the Duff Case. The challenges for cause were each overruled, and, after exhausting his peremptory challenges, appellant Priestly was forced to accept on the panel for the trial of his case a portion of the jury who had theretofore sat upon the previous case against Duff.

The Declaration of Rights in the Constitution of Arizona, art. 2, § 24, provides: "In criminal prosecutions, the accused shall have the right . . . to have a speedy trial by an impartial jury."

This constitutional guaranty to persons accused of crime, that they shall have a fair trial by an impartial jury, inures to the benefit of every accused, irrespective of his guilt or condition in life. Whether the existence of a state of mind on the part of the juror is such as will prevent him from acting with entire impartiality is ordinarily a matter that must

be left largely to the wise discretion of the trial court. But when the exercise of such discretion in a given cause appears to be clearly erroneous under well-settled principles of law, the appellate court is bound to interfere.

Appeal—Impartiality of Juror—Interference.

The first admonition found in our Constitution, art. 2, § 1, is that "a frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

The benign policy of the law that causes shall be submitted to tribunals indifferent as between the parties must not be frittered away in exposition, nor the operation of so just and fundamental a principle be nullified in the practical administration of justice, however happy the breach in its observance may appear to those in any particular instance wherein a conviction would appear justifiable to such, though this fundamental right had been invaded. The right of trial by jury is justly dear to the American people. Our fathers brought the right to this country. They knew that men accused of crimes had been broken upon the wheel after being tortured into a confession at the rack. They and their forbears had experienced the practices of the Star Chamber and verdicts of guilty at the "bloody assizes" by a packed jury, with the brutal and odious Jeffreys upon the bench to serve, not justice, but a monarch ambitious for autocratic power. With these horrors fresh in mind, or not in a remote historical sequence, it is not to be wondered at that the basic principle sounded in the Great Charter as the "bulwark of English liberties" has become the very warp and woof of our institutions. That as a people we have watched with jealousy and deep concern any tendency to encroach upon or impair any of the essential elements of the trial by jury, viz., number, impartiality, unanimity. We know the blood and treasure it has cost to get and keep this birthright of

Jury—Impartial—discretion.



Of the suffering and ignominy that has been endured for the want of it; of the evils tyranny and the lust of power have visited upon the weak and helpless who were without its protecting ægis. Upon occasion, as individuals, we may feel some of that indifference to the sacredness of this institution which a long-continued possession and use are not unlikely to beget, and in such a mood speak half mockingly of the endearing words, "bulwark," "palladium," etc., with which this great humane right has been enshrined in our language, to look upon such as mere ebullitions fitted for a Fourth of July oration. But, after all, each realizes the great importance of the trial by jury, and the necessity for preserving it in its purity and dignity with none of its substantive attributes impaired.

I shall advert to the case of *State v. Holt*, 90 N. C. 749, 751, 47 Am. Rep. 546, for some observations of eminent men upon the subject. Said Merrimon, J.:

"Judge Story, in his *Commentaries on the Constitution*, thus points out its great purpose and the ends it subserves: § 1780. 'The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former. The sympathies of all mankind are enlisted against the revenge and fury of a single despot, and every attempt will be made to screen his victims. But how difficult is it to escape from the vengeance of an indignant people, roused to hatred by unfounded calumnies, or stimulated to cruelty by bitter political enmities, or unmeasured jealousies! The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do

dence and a sense of duty. In such a course there is a double security against the prejudices of judges who may partake of the wishes and opinions of the government, and against the passions of the multitude who may demand this victim with their clamorous precipitancy. So long, indeed, as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fail. But to give it real efficiency, it must be preserved in its purity and dignity, and not, with a view to slight inconveniences or imaginary burthens, be put into the hands of those who are incapable of estimating its worth, or are too inert, or too ignorant, or too imbecile to wield its potent arm.'

"It is scarcely to be supposed that in this country any serious danger could arise to the citizen or to the country generally from an open or flagrant violation of the fundamental right in question. Occasional instances have occurred in times of public danger and trouble wherein the citizen was deprived of his right to a trial by jury, and his life was unlawfully sacrificed, but such cases have been few, and have met with very general condemnation. A greater danger arises from practices and precedents that insidiously gain a foothold and power in courts of justice, by inadvertence and lack of due consideration. The great importance of trial by jury is sometimes lost sight of, even in courts of justice, in the disposition of petty misdemeanors, cases of no great moment, and what are called 'plain cases.' In the economy of time, the hurry of business, lack of attention, hasty consideration, irregular and unwarranted methods of trial are adopted, allowed, tolerated, and thus vicious practices spring up, creating sources of danger to constitutional right. It is the province and the duty of the courts to keep strict watch over and protect fundamental rights, in all matters that come before them. Those who administer the law

should never forget that decided cases make precedents, precedents oftentimes of little moment in themselves, but which, in their accumulated power, may, in some emergency, overturn principle and subvert the rights of many people.

"Mr. Justice Blackstone, in commenting upon the great excellence of trial by jury, thus points out the evil to which we advert: 'So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolable, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it by introducing new arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet, let it be again remembered that delays and little inconveniences in the form of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution, and that, though begun in trifles, the precedents may gradually increase and spread, to the utter disuse of juries, in questions of the most momentous concern.'"

The tendency of legislation is to increase the dignity of the jury and lessen the power of the courts to influence or control their verdicts. It is indispensable, therefore, to the due administration of the law that this important right be carefully guarded. No higher duty rests upon the trial judge than to see that an unbiased, unprejudiced, and impartial jury should in every case be provided. If jurors objectionable in the particulars here stated are permitted to serve, this case must become a precedent for others sure to follow, and thus the

impairment of the right will insidiously gain such a foothold that the right itself would in time become the mere echo of a voice, a shadow, not substance, and as "idle as a painted ship upon a painted ocean." These objectionable jurors are no doubt good men and representative citizens, perfectly conscientious in the belief they expressed of an ability to be indifferent between the state and the defendant, notwithstanding the knowledge they had obtained of the facts and witnesses in a court of justice where they had sat as jurors and given their verdict. So, too, the action of the learned trial judge, we are persuaded, was dictated by a proper sense of propriety and decorum. But the weakness and error in the ruling lay in the trial judge having that confidence in the ability of the jurors to be entirely impartial under the circumstances, which confidence the jurors had expressed, each in himself. Having passed upon the credibility of witnesses in a similar case, upon substantially the same testimony, and having theretofore rendered a verdict on their oaths, it is not to be believed that they could sit upon this case with such an opinion previously formed without it influencing their action.

Criminal law—  
impartial jury—  
sitting in  
similar case.

"Answers by these jurors to categorical questions, though doubtless intended to be truthful, are less convincing than the known nature and tendency of the human mind." State v. Hammon, 84 Kan. 137, 140, 113 Pac. 419.

We quote from the syllabus to the case of Edgar v. State, 59 Tex. Crim. Rep. 488, 129 S. W. 140: "In a prosecution for the unlawful sale of intoxicating liquors, where the principal matter of defense was an attack on the credibility of the prosecuting witness, it was error to compel defendant to select a jury from a panel including six jurors who had previously sat in a similar case, in which almost the sole defen-

Jury—  
duty of judge.

sive matter was the credibility of the same prosecuting witness."

Other authorities may be consulted: *Green v. State*, 54 Tex. Crim. Rep. 3, 111 S. W. 933; *Hardgraves v. State*, 61 Tex. Crim. Rep. 422, 135 S. W. 144; *People v. Mol*, 137 Mich. 692, 68 L.R.A. 871, 100 N. W. 913, 4 Ann. Cas. 960; *Boutcher v. State*, 4 Okla. Crim. Rep. 576, 111 Pac. 1006, 112 Pac. 762; *Wickard v. State*, 109 Ala. 45, 19 So. 491; *Roberts v. State*, 4 Ga. App. 378, 61 S. E. 497; 24 Cyc. 278, 279.

Other questions are raised which

have been determined in the cases of *Duff v. State*, 19 Ariz. 361, 171 Pac. 133, and *Birch v. State*, 19 Ariz. 366, 171 Pac. 135, just decided, and therefore require no particular discussion.

Appellant Priestly was not accorded his right to a trial by an impartial jury within the constitutional provision. The case must be reversed, with direction to grant a new trial. It is so ordered.

Ross and Cunningham, JJ., concur.

### ANNOTATION.

#### Service on jury in prosecution for selling intoxicating liquor as disqualification as juror in similar case.

- I. Prosecution based on same sale, 1206.
- II. Prosecution based on different sale:

- a. Generally, 1206.
- b. Prosecution depending on testimony of same witness, 1207.

##### *I. Prosecution based on same sale.*

A person who had served as a juror on a trial for selling intoxicating liquor is not qualified to sit as a juror in another prosecution based on the same sale. *Smith v. State* (1915) 16 Ga. App. 299, 85 S. E. 207; *Gilmore v. State* (1897) 37 Tex. Crim. Rep. 81, 38 S. W. 787.

In *Smith v. State* (Ga.) *supra*, it was said in an official syllabus: "Upon a showing, made on a principal challenge for cause, that certain named jurors had served at the same term of the court on other juries, which had convicted other defendants of the same offense, in cases involving the same transaction, and where it appeared from the testimony of state's counsel that the intoxicating quality of the liquor alleged to have been sold by the accused would be established by the expert witness upon whose credibility the jurors challenged had already passed, it was error to overrule the challenge. And this is true although the challenged jurors qualified by their answers to the usual questions propounded."

In *Gilmore v. State* (Tex.) *supra*, a prosecution for the illegal sale of

liquor, it appeared that on the trial of another person a witness testified that the appellant sold liquor to him. A juror who sat in that case testified that from that testimony he believed that the sale was made. It was held that he was incompetent, the prosecution being based on the sale in question. The court said: "An inspection of this record will show that but one issue was before the jury; that is, whether appellant sold the whisky to Beard or not. The minds of the jury were fixed upon this fact. They stated that they heard Beard swear in the first trial that he had sold whisky to him, and that they believed what he said to be true, and at that time believed it. This was not rumor or newspaper account; but the source of information was from the sworn testimony of a witness to the main fact in the case."

##### *II. Prosecution based on different sale.*

###### *a. Generally.*

Service as a juror in a prosecution for the unlawful sale of intoxicating liquor does not ordinarily disqualify a person from sitting as a juror on the trial of the same person for a similar offense, if the transaction on which the prosecution was based was different and distinct. *Com. v. Hill* (1862) 4 Allen (Mass.) 591; *Dew v. McDivitt* (1876) 31 Ohio St. 139;

*West v. State* (1895) 35 Tex. Crim. Rep. 48, 30 S. W. 1069; *Arnold v. State* (1897) 38 Tex. Crim. Rep. 1, 40 S. W. 734; *Ross v. State* (1908) 56 Tex. Crim. Rep. 275, 118 S. W. 1034; *Edgar v. State* (1910) 59 Tex. Crim. Rep. 252, 127 S. W. 1053; *Engman v. State* (1915) 78 Tex. Crim. Rep. 94, 180 S. W. 235.

In *Arnold v. State* (1897) 38 Tex. Crim. Rep. 1, 40 S. W. 734, it was held that a juror was not disqualified by the fact that he had served as a juror on a previous prosecution of the accused for another violation of the Local Option Law, the court saying: "The fact that the defendant may have been guilty of violating the Local Option Law on the 28th of March, 1895, if tried by the same jury, would be no cause for challenge in a case where he is charged with violating the same law on the 6th of June, 1895. These are different transactions, and in no way related to each other."

In *Com. v. Hill* (1862) 4 Allen (Mass.) 591, it was held that a person who served as juror on a trial for maintaining a building as a liquor nuisance between certain dates was competent on a trial of the same person for so maintaining the same building between two later dates. The court said: "The offenses charged in the two indictments against the defendant, although of the same nature, were entirely separate and distinct. They had no connection with each other. Nor would the same evidence be competent in support of the second indictment, which had been offered at the previous trial to sustain the first indictment. It was only on proof of a new state of facts, or series of facts, covering the time alleged in the present indictment, and having no relation to or connection with those on which the previous conviction was founded, that the government could maintain the charge on which the jury were to pass in the trial of the present case. It cannot, therefore, be assumed that the jurors who had served during the first trial of the defendant, had in any degree prejudged the present case, or were under any bias or want of impartiality which

would prevent them from giving hearing to the new case which were called on to try and deter

In *West v. State* (1895) 35 Tex. Crim. Rep. 48, 30 S. W. 1069, a prosecution of a physician for giving lawfully a prescription for intoxicating liquors, it was held that a person who had served as jurors on previous prosecutions of the same defendant based on prescriptions given to persons, were not thereby disqualified.

In *Ross v. State* (1909) 56 Tex. Crim. Rep. 275, 118 S. W. 1034, it was held that jurors who had previously convicted the accused of an offense were not disqualified. See to the same effect *Edgar v. State* (1910) 59 Tex. Crim. Rep. 252, 127 S. W. 1053; *Engman v. State* (1915) 78 Tex. Crim. Rep. 94, 180 S. W. 235.

In *Dew v. McDivitt* (1876) 3 St. 139, it was held that persons who had sat as jurors on the trial of an accused by a wife under the Civil Damage Act were competent on the trial of the same accused by her against other liquorers.

In *Quinlan v. State* (1913) App. 669, 79 S. E. 768, it was held that the question whether jurors who had served on previous prosecutions could be raised by challenge to the pool was not by challenge to the array.

*b. Prosecution depending on testimony of same witness.*

A juror who has served on the trial of a prosecution for unlawfully selling intoxicating liquors is disqualified to serve on a subsequent prosecution for a similar offense, though the offenses are distinct, if the testimony of the same witness is relied on to sustain the prosecution in each case. *Roberts v. State* (1908) 4 Ga. 378, 61 S. E. 497; *Drye v. State* (1908) 40 Tex. Crim. Rep. 125, 49 S. W. 1069; *Holmes v. State* (1908) 52 Tex. Crim. Rep. 353, 106 S. W. 1160; *Griffin v. State* (1908) 54 Tex. Crim. Rep. 252, 127 S. W. 933; *Edgar v. State* (1910) 59 Tex. Crim. Rep. 252, 127 S. W. 1053; *Engman v. State* (1915) 78 Tex. Crim. Rep. 94, 180 S. W. 235; *Hardgraves v. State* (1911) 61 Tex. Crim. Rep. 422, 135 S. W. 144. See the reported case (*PRIEST v. STATE*, ante, 1201). Compare *F*

State (1909) 56 Tex. Crim. Rep. 275, 118 S. W. 1034; *Ausbrook v. State* (1913) 70 Tex. Crim. Rep. 289, 156 S. W. 1177; *Fletcher v. Com.* (1907) 106 Va. 840, 56 S. E. 149.

In *Roberts v. State* (Ga.) *supra*, it appeared that a person was engaged in procuring evidence of violations of the Local Option Act. In a prosecution based on a sale to him, it appeared that convictions had been had in two similar cases, against third persons, based on his testimony. It was held that the accused should have been allowed to interrogate jurymen as to whether they had served on either of the previous trials, the court saying: "Whether this sole witness to the criminal act charged against the defendant was worthy of credit was vital to the defense of the accused. If the jurors believed this witness, they would convict the accused; if they did not believe him, they would acquit. If they had believed him notwithstanding the attack made upon his credit in the two former cases, it is certainly reasonable to presume that they would also believe him when a similar attack was made upon his credit by the defendant in the present case. At least, the jury who had tried the other two cases would come to the consideration of the present case, entertaining an opinion that the sole witness against the defendant was worthy of credit. The defendant would, therefore, have the burden of combating a preconceived judgment or opinion formed by the jurors as to a most material fact in the case. It is, therefore, clear to our minds that the court should have allowed this showing to be made, and, if the facts were proved as established, should have sustained the defendant's challenge to the polls, and should have given to him a panel of jurors entirely free from any preconceived opinion as to the credibility of the witness against him."

In *Drye v. State* (1898) 40 Tex. Crim. Rep. 125, 49 S. W. 83, the court stated the facts and its conclusion as follows: "The facts further show that the witness Medford was employed by the sheriff of Grayson coun-

ty to work up violations of the Local Option Law at Van Alstyne and elsewhere, and he seems to have been a very effective detective, and the main witness in these prosecutions. It is further shown by the bill that on his testimony convictions were obtained. In the Hunter Case he had testified positively to the fact that he had purchased whisky from appellant. Now, if appellant had been on trial instead of Hunter, there would have been no question of the fact that the jurors who heard him testify would have been disqualified, because they would have been jurors in appellant's case, and heard the very testimony upon which the state was seeking the conviction; and this record discloses that it was upon the testimony of this witness Medford that this conviction was obtained. Now, we are unable to see any real practical difference in the effect it would produce upon the juror's mind, whether the witness swore in appellant's own case as to his guilt, or to the same facts in another case; the jurors having heard the testimony of said witness. Where the conclusion of defendant's guilt is arrived at in the juror's mind from newspaper accounts, hearsay, rumors, or other sources of that character, the juror may reach a conclusion which, upon being acquainted with the real facts, might be removed. It is true, there is a possibility that a conviction established in the mind of the juror might be overcome, even where he had heard the testimony in the particular case, but that is rather a speculative possibility."

In *Holmes v. State* (1908) 52 Tex. Crim. Rep. 353, 106 S. W. 1160, jurors who had found the accused guilty in a previous prosecution for violation of the Local Option Law, on the testimony of the same witness who was the principal support of the instant prosecution, were held to be incompetent, the court saying: "We cannot believe that this jury could sit and listen to the trial of a local option case against appellant, with practically the same testimony in another case, and not have an opinion previously formed, which opinion would influence

they believed appellant guilty in the first instance, there is no rational basis for concluding that they would not believe him guilty in the second instance. If the witness swore appellant sold him whisky once, and they believed that fact, we know of no process of reasoning by which they could discard the fact and disbelieve the statement when the witness swore appellant sold him (witness) whisky the second time. It follows, therefore, that the court erred in not setting the jurors aside, and awarding appellant another jury." The foregoing decision was followed, on similar facts, in *Green v. State* (1908) 54 Tex. Crim. Rep. 3, 111 S. W. 933, *Edgar v. State* (1910) 59 Tex. Crim. Rep. 488, 129 S. W. 140, and *Hardgraves v. State* (1911) 61 Tex. Crim. Rep. 422, 135 S. W. 144.

But in *Ross v. State* (1909) 56 Tex. Crim. Rep. 275, 118 S. W. 1034, the jurors who had previously convicted the accused of illegal sales of liquor to other persons were held to be competent, though in those cases the accused testified that he did not make the sales in question, and his testimony was discredited by the jury.

In *Ausbrook v. State* (1913) 70 Tex. Crim. Rep. 289, 156 S. W. 1177, so much of the opinion as bears on the

point under consideration reads as follows: "The appellant made a motion to discharge the regular jury of the week at the time on the ground that this jury had already tried two other defendants and convicted them on the same character of offense, and on the testimony of two certain witnesses, who would be the only witnesses against appellant in this case. The court properly overruled this motion, qualifying appellant's bill presenting it by stating: 'There was an additional witness, Jim Peck, in this case. The defendant, Jess Howell, and Jacob Bush' (the parties against whom two verdicts of guilty had already been rendered) 'were convicted of running entirely different places. They did not have anything to do with each other and were in different parts of the city of Dallas, Texas.' Besides, neither the bill nor the record shows that either of the jurors who tried the defendants in other cases mentioned were on the jury that tried this case."

In *Fletcher v. Com.* (1907) 106 Va. 840, 56 S. E. 149, it was held that where there is nothing to show that the jury was not impartial, the fact that members of the panel "had, at the same term of court, tried similar cases, proved by the same witness," is not error. J. C. L.

## COMMONWEALTH OF MASSACHUSETTS

v.

THOMAS P. COYNE et al.

*Massachusetts Supreme Judicial Court — October 20, 1917.*

(228 Mass. 269, 117 N. E. 337.)

**Evidence — burglary — possession of unidentified valuables.**

1. Failure to identify valuables found on one arrested for burglary, as part of the property stolen, does not render inadmissible, upon his trial for that offense, evidence of the fact that such property was in his possession at the time of arrest.

[See note on this question beginning on page 1213.]

**Appeal — conduct of trial — review.**

2. The conduct of the trial and the order of the introduction of the evi-

dence are largely within the discretion of the trial judge.

[See 2 R. C. L. 215.]

**Evidence — lapse of time — remoteness.**

3. The lapse of two months between a burglary and an arrest does not ren-

der too remote evidence that at the time of arrest accused had in his possession jewelry of large value.

[See 4 R. C. L. 440.]

**EXCEPTIONS** by defendants to rulings of the Superior Court for Worcester County made during the trial of an indictment charging them with breaking and entering a dwelling house. *Overruled.*

The facts are stated in the opinion of the court.

Messrs. Daniel J. McNerney, M. Fred O'Connell, and James W. Hoy, for defendants:

Defendants were not called upon to explain where they got the money, mileage books, and jewelry, under the penalty of having an inference drawn against them that they stole the Wallace jewelry and disposed of it, receiving money with which they bought mileage books and jewelry.

Williams v. United States, 168 U. S. 382, 42 L. ed. 509, 18 Sup. Ct. Rep. 92; Com. v. Jeffries, 7 Allen, 548, 83 Am. Dec. 712; Com. v. Tucker, 189 Mass. 457, 7 L.R.A.(N.S.) 1056, 76 N. E. 127; Com. v. O'Neil, 169 Mass. 394, 48 N. E. 134; Com. v. Williams, 171 Mass. 461, 50 N. E. 1035; State v. Carter, 72 N. C. 99, 1 Am. Crim. Rep. 444; Turner v. State, 124 Ala. 59, 27 So. 272.

Defendants suffered prejudicial error by the instructions of the court, submitting to the jury for its determination the issue whether the money and jewelry found upon the defendants when arrested were the proceeds or part of the proceeds of the Wallace jewelry.

Mark v. Stuart-Howland Co. 226 Mass. 35, 2 A.L.R. 678, 115 N. E. 42; Wylie v. Blake & K. Steam Pump Works, 221 Mass. 489, 109 N. E. 396; Kerr v. Shurtleff, 218 Mass. 167, 105 N. E. 871.

Evidence of other and independent crimes committed by the defendants is not admissible to show that they were bad characters.

Jordan v. Osgood, 109 Mass. 457, 12 Am. Rep. 731; Com. v. Jackson, 132 Mass. 16.

If the jury had been told to disregard the evidence entirely the defendants still were prejudiced.

Selkirk v. Cobb, 13 Gray, 313; Allen v. Boston Elev. R. Co. 212 Mass. 191, 98 N. E. 618; Farnum v. Farnum, 13 Gray, 508; Com. v. Edgerly, 10 Allen, 184.

Messrs. Edward T. Esty and George R. Stobbs, for the Commonwealth:

The testimony of inspector Flaherty was rightly admitted.

Com. v. Montgomery, 11 Met. 534, 45 Am. Dec. 227; Com. v. Devaney, 182 Mass. 33, 64 N. E. 402; Com. v. Tucker, 189 Mass. 457, 7 L.R.A.(N.S.) 1056, 76 N. E. 127; Perrin v. State, 81 Wis. 135, 50 N. W. 516; Leonard v. State, 115 Ala. 80, 22 So. 564; State v. Burns, 19 Wash. 52, 52 Pac. 316; Com. v. Mulrey, 170 Mass. 103, 49 N. E. 91; State v. Thompson, 87 Iowa, 670, 54 N. W. 1077.

Rugg, Ch. J., delivered the opinion of the court:

The defendants were indicted jointly for breaking and entering the dwelling house of one Wallace in the nighttime with the intent to commit larceny, and for the larceny therein of divers articles of jewelry and precious stones, of an aggregate value of about \$5,000. There was evidence tending to show that the defendants committed the crime.

After the defendants had introduced some evidence the presiding judge, at the request of the district attorney, permitted him to reopen the case and introduce further evidence in support of the charge in the indictment. The conduct of the trial and the order of the introduction of evidence, ordinarily, are within the discretion of the trial judge. There is nothing to indicate an abuse of such discretion.

The evidence thus introduced out of order was to the effect that, when arrested, the defendant Coyne had in his possession \$350 in money; "one New York, New Haven, & Hartford Railroad Company 500-mile ticket, containing 156 miles, stamped, 'Bridgeport, Conn., Oct. 20, 1916,' one platinum ring set

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with three diamonds, stated by the defendant to be worth \$1,000, but he declined to tell where he got it; one diamond stick pin set in platinum, stated by the defendant to be worth \$500; one gold-handled knife attached to a 14" gold and platinum link chain, stated by him to be worth, together, \$45; one gold stud button set with a diamond, stated by him to be worth \$20; one gold collar button, stated by him to be worth \$10; one small gold stick pin set with a diamond, stated by him to be worth \$20; one gold locket set with a diamond, attached to a gold chain, both stated by him to be worth \$20; one pearl-handled knife, stated by him to be worth \$4; one open-faced gold Elgin watch with the monogram 'T. P. C.' on the case, stated by him to be worth \$40; one pair gold cuff links, stated by him to be worth \$20; one black leather traveling bag containing various articles of clothing; . . . that Farrell had in his possession money amounting to about \$117; one New York, New Haven, & Hartford Railroad Company 500-mile ticket, containing 3 miles, stamped, 'Stamford, Conn., Oct. 9, 1916; one Elgin gold watch, stated by the defendant Farrell to be worth \$28; one gold ring set with a diamond, stated by him to be worth \$425; one platinum watch chain, 14" long, stated by him to be worth \$50; one crown stick pin set with diamonds and sapphire, stated by him to be worth \$65; one pair pearl cuff links with diamond, stated by him to be worth \$15; one gold stud with diamond, stated by him to be worth \$20; one gold-handled knife set with two small diamonds, with the initials 'M. F.' engraved on handle, stated by him to be worth \$10; and one black leather traveling bag containing a pair of shoes, clothing, and other articles. It was admitted by the Commonwealth that none of the specific articles taken from the Wallace residence were found in the possession of the defendants, or of anyone else connected with the defendants."

The defendants objected to this

evidence unless it could be shown that these articles "had some connection with, or relation to, the breaking and entering of and larceny in the Wallace residence, or could be identified as property stolen from the Wallace residence."

No other ground of objection appears then to have been suggested. It is manifest that this ground of objection is not sound. The possession of property of considerable value, whether jewels or money, although not identified as a part of the property stolen, is nevertheless a circumstance proper for the consideration of the jury as

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tending to show property in the hands of the defendants subsequent to the alleged larceny. Such evidence is competent in the case at bar. Its weight may be trivial or cogent according to other conditions shown. It might be slight against a person of affluence and of extravagant habits. It might be of importance against one of small estate or of no visible means of support. There was evidence tending to show that neither of the defendants had worked for a year, and that, when arrested, they declined to tell where they were on the date of the crime alleged. As to Coyne, it appeared that when arrested he said in substance that once he had been an inmate of Concord reformatory, and was an engraver by occupation; that a witness called by him testified that he had known Coyne for many years, that he did not know what his business was, and that he knew he had worked in a rope factory about eight years before, and had been employed in a bakery three or four years before for a few weeks. As to Farrell, it appeared that his sister testified that he had made his home with her for some years, that she saw him at her house every two or three weeks, that she never inquired as to his business and did not know what it was or whether he had any, that she understood he was a traveling sales-



man, and that she knew he had traveled for a varnish house. This state of evidence does not indicate commonly such a state of financial resourcefulness as accompanies the ownership of the kind and amount of jewelry and diamonds found in the possession of these defendants. The ordinary law-abiding man, whether artisan or of other occupation, who has not worked for a year and whose friends or family do not know his business, does not commonly carry about with him for personal use and adornment diamonds and other jewelry of \$1,600 value, as did one of these defendants, or even of \$600 value, as did the other defendant. Of course, this evidence, standing alone, does not prove criminal conduct. But there were strong accompanying circumstances of guilt of an independent character. As was said by Mr. Justice Holmes in *Com. v. Mulrey*, 170 Mass. 103, at pages 110, 111, 49 N. E. 94: "It is not necessary that every piece of evidence admitted should be sufficient by itself to prove the crime. Evidence which may be colorless if it stood alone may get a new complexion from other facts which are proved, and in turn may corroborate the conclusion which would be drawn from the other facts. . . . It is possible that" these defendants "may have had an independent fortune from which" these jewels were purchased, "but that was open to" them to prove if they "saw fit, and was not the probability with regard" to persons in their general situation.

Upon the authority of that decision and of *Com. v. Montgomery*, 11 Met. 534, 45 Am. Dec. 227, this evidence was admissible. If there is anything inconsistent with this conclusion in *Williams v. United States*, 168 U. S. 382, 396, 42 L. ed. 509, 514,

18 Sup. Ct. Rep. 92, it is equally inconsistent with our law as declared in the authorities just cited. Indeed, the soundness of the Federal decision has been doubted. See 1 Wigmore, Ev. § 154, p. 213.

The evidence was not too remote in time. It can hardly be said as matter of law that an interval of about two months had broken the reasonable probability of connection between the amount of booty secured by the burglary charged in the indictment and the possession of the jewels found upon the defendants at the time of their arrest.

—lapse of time—  
remoteness.

It was not equivalent to the admission of evidence of another crime. That was not the ground on which it was received. The jury were not permitted to consider it in that connection. But the jury were instructed carefully to disregard this evidence upon the question of breaking and entering, and to consider it only if the breaking and entering were found to be proved by independent evidence, and even then only if it was found that the defendants "had no other source of income to account for the possession of the property found in their possession; and if they also found that the money and jewelry were the proceeds, or a part of the proceeds, of the property stolen from the Wallace residence, they might consider this evidence in so far as this property accounts for the defendants not having the specific articles stolen in their possession when arrested; that otherwise they were to disregard the evidence entirely."

No exception was taken to the charge. But the defendants have no just ground for complaint in the particulars which have been argued.

Exceptions overruled.

## ANNOTATION.

**Admissibility of evidence that one charged with burglary, larceny, or robbery was in possession of property not identified as part of that stolen.**

- I. In general, 1213.
- II. To identify defendant, 1215.
- III. Where the other property is found in close connection with the property involved in the crime charged, 1219.
- IV. To show intent or system, 1220.

*I. In general.*

This note is confined to cases involving, as did the reported case (*COM. v. COYNE*, ante, 1209), evidence of the possession by defendant of specific chattels or items of personal property not identified as part of the property stolen, as distinguished from evidence which merely tends to show defendant's pecuniary condition before and after the crime charged, or the possession of money not earmarked or otherwise identified.

It may be observed at this point that in most of the cases involving possession of specific chattels the question of the admissibility of evidence has turned upon the admissibility of the general rule which excludes evidence of other crimes, or of the various exceptions to that rule. In the reported case (*COM. v. COYNE*, ante, 1209), however, the admission of the evidence is sustained, not upon the ground that it came within any of those exceptions, but apparently upon the principle which admits evidence of the financial or pecuniary condition of the defendant. Considering the number and variety of the articles of jewelry enumerated in the statement of facts, it would seem that the inference from their possession by defendant that they were acquired by other burglaries or larcenies would be at least as natural as that they were acquired with the proceeds of the property stolen at the time of the offense under prosecution. If so, there was danger, from a practical point of view at least, of prejudice.

Where evidence of possession by defendant of property other than that involved in the crime with which he is charged has no proper tendency

to connect him with the crime charged, its only effect being to discredit defendant by showing or tending to show that he had been guilty of other crimes, such evidence should not be admitted.

**Alabama.**—*Tinney v. State* (1895) 111 Ala. 74, 20 So. 597.

**California.**—*People v. Vertrees* (1866) 169 Cal. 404, 146 Pac. 890.

**Iowa.**—*State v. Brundige* (1902) 118 Iowa, 92, 91 N. W. 920, 14 Am. Crim. Rep. 164.

**Indian Territory.**—*Parker v. United States* (1898) 1 Ind. Terr. 592, 43 S. W. 858.

**New York.**—*People v. Friedman* (1912) 149 App. Div. 873, 134 N. Y. Supp. 153; *Hall v. People* (1868) 6 Park. Crim. Rep. 671.

**Texas.**—*Ivey v. State* (1875) 43 Tex. 425; *Webb v. State* (1880) 8 Tex. App. 115; *Neeley v. State* (1889) 27 Tex. App. 315, 11 S. W. 376; *Nixon v. State* (1892) 31 Tex. Crim. Rep. 205, 20 S. W. 364; *Marshall v. State* (1893) — Tex. Crim. Rep. —, 22 S. W. 878; *Wilson v. State* (1899) 41 Tex. Crim. Rep. 115, 51 S. W. 916; *Denton v. State* (1901) 42 Tex. Crim. Rep. 427, 60 S. W. 670; *Hunt v. State* (1901) — Tex. Crim. Rep. —, 60 S. W. 965; *McAnally v. State* (1903) — Tex. Crim. Rep. —, 73 S. W. 404; *Caddell v. State* (1905) 49 Tex. Crim. Rep. 133, 122 Am. St. Rep. 806, 90 S. W. 1013; *Johnson v. State* (1906) 50 Tex. Crim. Rep. 116, 96 S. W. 45; *Herndon v. State* (1907) 50 Tex. Crim. Rep. 552, 99 S. W. 558; *Gonzales v. State* (1907) — Tex. Crim. Rep. —, 105 S. W. 196; *Alford v. State* (1908) 52 Tex. Crim. Rep. 621, 108 S. W. 364; *Pitts v. State* (1910) 60 Tex. Crim. Rep. 524, 132 S. W. 801.

**Utah.**—*State v. Bowen* (1913) 43 Utah, 111, 134 Pac. 623.

**Washington.**—*State v. Humason* (1893) 5 Wash. 499, 32 Pac. 111.

Conversely, evidence of the possession of other property may be admitted where the circumstances are such

that such evidence tends to prove the crime with which defendant was charged. *Oxier v. United States* (1896) 1 Ind. Terr. 85, 38 S. W. 331; *State v. Castor* (1887) 93 Mo. 242, 5 S. W. 906; *State v. Prunty* (1918) — Mo. —, 208 S. W. 91; *Watters v. State* (1906) — Tex. Crim. Rep. —, 94 S. W. 1038; *State v. Norris* (1902) 27 Wash. 453, 67 Pac. 983, 14 Am. Crim. Rep. 197.

In *Parker v. United States* (1898) 1 Ind. Terr. 592, 43 S. W. 858, the court discusses the admission of testimony of the possession of property by a defendant other than that charged to have been stolen, and says that such testimony is admissible for either of four purposes: "(1) To prove felonious intent; (2) to prove that the alleged theft was a part of a continuous transaction or scheme of larceny; (3) to identify the defendant; (4) to identify the stolen property. In all of these cases, however, it must not only be shown that the defendant was found in possession of the property, and that it was stolen, but in addition thereto it must appear from the proof that there was some connection between it and the property charged in the indictment to have been stolen. If nothing be shown but that it was in the defendant's possession, then it is inadmissible in every case, because it tends to prove nothing but another and a separate and independent larceny. If, in addition to the fact that the stolen property was found in the possession of the defendant recently after the alleged larceny, it be shown that it had been stolen at or about the same time and place as that charged to have been stolen, then it is admissible in all of the cases, because, under the circumstances of each case, it tends to prove the matter in controversy. Cases arising under the first proposition are usually those where the taking by the accused of the alleged stolen property is admitted or clearly established, and the defense is interposed that it was taken under some claim of right or color of title, or through some mistake or misapprehension. In such case, for the purpose of proving the intent, the pros-

ecution, in rebuttal, may show that at the time the defendant was found with the property in question he was in possession of other property stolen about the same time and place. Under the second proposition, it may be shown that the alleged stolen property was found in the possession of the defendant, together with a number of other stolen articles taken at different times and places not too remote from the time and place of the alleged larceny, not for the purpose of showing that the defendant is a common thief or of proving an independent crime against him, but as tending to show that the alleged taking was a part of a continuous transaction or scheme of larceny, and thus shedding light on the transaction in controversy. Cases arising under the third proposition are generally those where the larceny is admitted or established, and the defendant has been seen with the alleged stolen property, but under such circumstances as that he was not recognized by the witness; as, if he were a stranger to him, or was in disguise, or seen in the nighttime; or it may occur in cases where no one has seen the defendant in possession of the property alleged to have been stolen, but the circumstances point to his guilt without clearly identifying him. In such case, proof of other stolen property having been found in his possession shortly after the theft, taken about the same time and place, is admissible for the purpose of identifying him. . . . Cases arising under the fourth proposition usually occur when the alleged stolen property found in the possession of the defendant is similar to others of that class, but without marks of identification whereby it may be distinguished, or the brands and marks may have been destroyed, or the property so mutilated as to leave it without means of identification. In such cases proof that the defendant, recently after the larceny, was in possession of other stolen property taken about the same time and place, is admissible for the purpose of identifying that which is in controversy and found in his possession. If the property named in the

indictment be shown to have been stolen, but the identity of that found in the possession of the defendant, claimed to be the stolen property, is in doubt, then the fact that he is found with other stolen property which had been taken from or about the same place and at the same time would so connect the two articles as that the identification of one would tend to identify the others; but if not taken from or about the same place, although it may have been taken at the same time, and found in the possession of the defendant, it would have no such tendency, and therefore for that purpose the proof of it would be inadmissible."

The applications of the exceptions above outlined will be shown in subsequent subdivisions of the note. In the meantime illustrations are given of the applications of the general rule itself.

## *II. To identify defendant.*

In *Tinney v. State* (1895) 111 Ala. 74, 20 So. 597, it was held that, in a trial for the larceny of two hogs, it was error to show that the defendant had in his possession, along with the two hogs alleged to have been stolen, six others, some of which were without earmarks and others of which had marks differing from those involved in the case, as such evidence had no legitimate tendency to prove that defendant feloniously took and carried away the two hogs in question.

In *State v. Brundige* (1902) 118 Iowa, 92, 91 N. W. 920, 14 Am. Crim. Rep. 164, a prosecution for the larceny of tobacco from a railroad car, it was held error to admit evidence that, when the sheriff searched defendant's house and found the tobacco, there were found in a private drawer belonging to defendant, two boxes, one of patent medicine and the other of candy, such articles not being with the tobacco. The court said: "It is true there was no evidence that the goods referred to were stolen, but it is perfectly clear that the testimony was offered for the purpose of having the jury infer that such was their character, and thereby strengthen the unfavorable inference arising from

the presence of the tobacco in defendant's house. The incompetency, not to say unfairness, of such testimony is too manifest for argument."

In *Hall v. People* (1868) 6 Park. Crim. Rep. (N. Y.) 671, a prosecution for burglary, it was held erroneous to admit evidence that with the property taken at the burglary charged, which was found in defendant's possession, was found other property which had been stolen from other parties two or three weeks prior to the burglary in question, the court saying: "This proof had no direct tendency to show that the prisoner stole the property referred to in this indictment. It did not prove that the one who had stolen that had necessarily stolen this property. It showed, or tended to show, that the prisoner was a thief, and therefore more likely to have stolen this property than if he had been honest. If that proof were proper then the prosecution might, in the first instance, prove the bad character of a prisoner and thus show him more likely to have committed the crime charged. This, however, would not be contended for; yet the one kind of evidence is just as admissible as the other."

In *People v. Friedman* (1912) 149 App. Div. 873, 134 N. Y. Supp. 153, a prosecution for burglary and larceny of horses and harness, it was held to be error to admit evidence that several days after the crime charged an officer found upon defendant's farm a gray mare, not one charged in the indictment to have been stolen, and that he took possession of it and notified the chief of police, and as the result of a telegram a certain man came and took the horse away with him, it not appearing that there was the slightest relation between this incident and the crime charged in the indictment, which would bring it within any exception to the rule against the testimony of other crimes.

In *Nixon v. State* (1892) 31 Tex. Crim. Rep. 205, 20 S. W. 364, a prosecution for the theft of a horse, it was held error to permit the state to prove that defendant was in the possession of and had sold other stolen

horses about three weeks prior to the date of the theft charged in the indictment, the court saying: "This testimony did not tend to identify any fact or circumstance which could aid in developing the *res gestæ*, nor did it tend to prove system between the offense on trial and that introduced, nor did it develop a criminative fact or circumstance against defendant in relation to the case then on trial, nor did it explain a relative or competent fact or circumstance pertaining to the theft of the horses charged in the indictment."

In *Marshall v. State* (1893) — Tex. Crim. Rep. —, 22 S. W. 878, a prosecution for burglary, it was held error to permit the state to prove that one week before the burglary charged another burglary had been committed, and various articles taken, and that subsequent to defendant's arrest and incarceration the property taken in the other burglary was found in a trunk in his house, as such evidence in no way tended to connect defendant with the burglary charged.

In *Wilson v. State* (1899) 41 Tex. Crim. Rep. 115, 51 S. W. 916, a prosecution for the theft of cattle, it was held to be error to permit a witness to testify that he had been employed by defendant to butcher a cow, and was requested by defendant to put the hide in some high weeds near the butcher-pen fence, where there was no evidence that the cow whose hide was hid by the witness was the one charged in the indictment to have been stolen, the court saying: "The fact that appellant may have stolen another cow, or any circumstance indicating that he had done so, unless it was contemporaneous with the taking of this one, on the question of intent, certainly would not be admissible on the trial of appellant in this case."

In *McAnally v. State* (1903) — Tex. Crim. Rep. —, 73 S. W. 404, a prosecution for burglary, evidence that when defendant was arrested certain articles were found in his possession which had been taken at a burglary on the preceding night, of a store in another town, was inadmissible, as such evidence tended to show an extraneous crime, and did not show in-

tent or serve to identify the defendant with the crime on trial.

In *Caddell v. State* (1905) 49 Tex. Crim. Rep. 133, 122 Am. St. Rep. 806, 90 S. W. 1013, a prosecution for the burglary of a store from which certain brands of tobacco were taken, it was held error to admit testimony that some ten days after the alleged burglary, several pounds of tobacco were found in defendant's bed between the mattresses, there being nothing in the testimony to show that the tobacco found in the bed belonged to any of the brands taken from the burglarized store, and nothing which in any way tended to connect this tobacco with that which was stolen.

In *Gonzales v. State* (1907) — Tex. Crim. Rep. —, 105 S. W. 196, it was held, in a prosecution for the burglarizing of a store and stealing of coffee, that it was error to permit an officer to specify that, when he searched the house where defendant resided, he failed to find any evidence of the stolen coffee, but that he found some shoes and other items, where there was no connection shown between the shoes and the property taken from the store in question, and such testimony did not tend to throw any light upon the transaction alleged in the indictment.

In *Alford v. State* (1908) 52 Tex. Crim. Rep. 621, 108 S. W. 364, a prosecution for theft, where it was not claimed or contended that the articles stolen had been taken from a box car, it was error to admit evidence that when defendants were arrested they were trying to open a box car, and that, upon searching the premises, property was found which had apparently been taken from railroad cars.

In *Pitts v. State* (1910) 60 Tex. Crim. Rep. 524, 132 S. W. 801, a prosecution for burglary, it was held that evidence showing a commission of a burglary some few days before the one charged, and that articles taken in the prior burglary were traced to the possession of a codefendant, had no relation to the pending case, and was inadmissible.

In *State v. Bowen* (1913) 43 Utah, 111, 134 Pac. 623, where the hide of a

cow which defendant was accused of stealing was found in his possession and put in evidence, the putting in evidence of the hides of other cattle found in defendant's possession was erroneous, as having no relevancy to the crime charged, where defendant was a ranchman and cattleman, and the finding of hides on his premises was in itself not an unusual or suspicious circumstance, and the hide of the cow charged to have been stolen could have been put in evidence and all the circumstances of its possession by defendant shown, without showing a possession of or putting in evidence the other hide; and no evidence was adduced and no claim made that such other hides, or the animals from which they had been taken, had been stolen, or that defendant had wrongfully obtained possession of them, or that his taking or receiving them had anything to do or was in any wise connected with, or was a part of, the transaction charged.

And in *State v. Humason* (1893) 5 Wash. 499, 32 Pac. 111, where defendant was charged with participating in a larceny of certain cattle which he had slaughtered and entirely disposed of, it was error to permit the sheriff to show that a sack containing the marked ears of other cattle was in defendant's slaughterhouse, and that, upon its being discovered, defendant attempted to dispose of it, where such other cattle and carcasses of cattle had not been commingled with the cattle charged in the indictment to have been stolen, and there was no testimony that they were stolen cattle.

And in order to make admissible the testimony that defendant had in his possession property taken in the commission of a crime other than the one charged, the two offenses should be closely connected in time and place. *Parker v. United States* (1898) 1 Ind. Terr. 592, 43 S. W. 858; *Webb v. State* (1880) 8 Tex. App. 115; *Denton v. State* (1901) 42 Tex. Crim. Rep. 427, 50 S. W. 670; *Ivey v. State* (1875) 43 Tex. 425.

So in *Parker v. United States* (1898) 1 Ind. Terr. 592, 43 S. W. 858, it appeared that two cattle other than

those charged to have been stolen had been taken from other parties at about the same time as those of the prosecuting witness, and were found in the possession of the defendant with the cattle charged to have been stolen, but the court held that the evidence as to such other cattle was inadmissible, because there was no evidence that they were taken from or about the same place.

In *Webb v. State* (1880) 8 Tex. App. 115, it was held error to admit testimony that defendant had in his possession stolen animals other than the one taken at the larceny for which he was being prosecuted, where the two transactions were entirely separate.

In *Denton v. State* (1901) 42 Tex. Crim. Rep. 427, 50 S. W. 670, a prosecution for burglary, where the court permitted introduction of testimony that two and one half months after the prosecuting witness had missed articles from the house charged to have been burglarized, other articles were taken from his butcher's shed, and that on the day the defendant was arrested witness saw articles which he believed to be the ones taken at that time, the court said: "This testimony was clearly inadmissible, since it is never permissible to introduce independent extraneous crimes against defendant unless independent extraneous crimes are contemporaneous with the commission of the theft for which he is then being tried; and even then, before they are admissible, it must be shown with a reasonable degree of certainty that defendant was guilty of the independent crimes."

And in *Ivey v. State* (1875) 43 Tex. 425, it was held that, in a prosecution for the theft of a steer, it was error to permit the state to prove that other stolen stock taken from the same neighborhood was found in the possession of defendants, as, to make such evidence admissible, it must be shown that the stolen stock and the steer in question were taken at the same time, and formed but one transaction.

See also *People v. Sobczak* (1918) 286 Ill. 157, 121 N. E. 592, a prosecu-

tion for the robbery of a bank messenger, in which the court said that evidence that certain articles consisting of rings and a clock, which apparently had been stolen and were found in the room of one of the defendants, should not have been introduced, but it was held that, under the circumstances, their admission was not reversible error, where the testimony was apparently volunteered by a police officer who was testifying, and was admitted without objection.

And in *Bright v. State* (1903) — *Tex. Crim. Rep.* —, 74 S. W. 912, it was held that evidence that while one burglary was being investigated, property found in defendant's possession and taken at that burglary was found commingled with property taken at another burglary, and which defendant claimed to own, was properly admitted because, although ordinarily evidence of extraneous crimes is not admissible, it may be admitted when it tends to develop the *res gestæ*, show the intent of the party, or connect or tend to connect him with the crime under investigation.

In harmony with the exception which takes out of the general rule excluding evidence of other crimes, evidence which tends to aid in identifying the accused as the person who committed the particular crime under investigation, it is held that evidence of the possession by defendant of property other than that involved in the particular crime with which he is charged may be admitted, although it tends to show the commission of an independent crime, when the circumstances are such that its admission will tend to identify defendant with the crime charged. *Yarborough v. State* (1868) 41 Ala. 405; *Reed v. State* (1891) 54 Ark. 621, 16 S. W. 819; *State v. Harris* (1912) 153 Iowa, 592, 133 N. W. 1078; *State v. Williams* (1916) — Mo. —, 183 S. W. 308.

Thus, in *Yarborough v. State* (1868) 41 Ala. 405, a prosecution for the larceny of a horse and buggy, it was held proper to admit evidence that a mule which had been stolen from other parties on the same night was found in the possession of defendant, along

with the property charged in the indictment, for the purpose of showing the identity of defendant, the court saying: "The evidence objected to by the prisoner was clearly admissible for the purpose we have stated; and we cannot place the court in error by making the intendment that it was admitted for any other than the legal purpose."

And in a prosecution for the larceny of a saddle it was held proper, for the purpose of identifying defendant as the party who stole the saddle, to admit evidence tending to show that other articles found attached to the saddle were stolen at another time, the court saying: "If these articles had been received by appellant lawfully, and found, as they were afterwards found, attached to the saddle in the possession of the appellant, these facts would have been circumstances tending to show that appellant was the person who took the saddle. If the evidence was competent for this purpose, it would not have been incompetent because it might have tended to show that appellant stole the saddle, pockets, stirrups, and girth." *Reed v. State* (1891) 54 Ark. 621, 16 S. W. 819.

In *State v. Williams* (1916) — Mo. —, 183 S. W. 308, a prosecution for robbery, it was held that testimony of a witness that the clothing worn by defendant when arrested belonged to him, and had been stolen from him the night of the robbery, was admissible because, when considered with other facts and circumstances in the case, it constituted evidence to show the presence of the defendant at or near the scene of the robbery a short time before its commission, and thus tended to establish the identity of the robber.

And in *State v. Harris* (1912) 153 Iowa, 592, 133 N. W. 1078, a prosecution for burglary, where an article stolen during such burglary was found under defendant's control, with other articles taken during burglaries both prior and subsequent to the one charged, it was held proper to admit testimony of one of the other parties who had been burglarized that defendant was the party who commit-

ted that burglary, such evidence being admissible for the purpose of indentifying accused as the person who committed the burglary charged in the indictment. It will be noted, however, that the objection here was to the admission of the direct evidence of the other burglary, rather than to the possession of the property stolen at that time.

And in *State v. Norris* (1902) 27 Wash. 453, 67 Pac. 983, 14 Am. Crim. Rep. 197, a prosecution for burglary, where the state relied upon circumstantial evidence, and property taken from the place alleged to have been burglarized was found in the railroad car where defendants were found when arrested, and two of the defendants had already entered a plea of guilty, and the state sought to show that all the defendants had participated in the burglary, and therefore sought to trace the whereabouts of the men from the time of the burglary until the time of their arrest, it was competent for the state to show that the men were in the immediate vicinity of the crime charged, as bearing upon the possibility that they could have engaged in it; and therefore it was proper to admit evidence of other parties, whose house had been burglarized on the same night, that several men participated in the other burglary, and that property taken at that time was found in the car with the property taken at the burglary charged in the indictment.

*III. Where the other property is found in close connection with the property involved in the crime charged.*

Evidence of the possession of other property by defendant may be admissible because it is found in such close connection with the property involved in the crime charged that evidence regarding it is inseparable from evidence of possession of the property charged in the indictment; or because the fact appears incidentally and naturally in showing the whole transaction concerning the property involved in the prosecution. *Ray v. State* (1899) 126 Ala. 9, 28 So. 634; *People v. Nicolosi* (1893) 4 Cal. Unrep. 341, 34 Pac. 824; *State v. Schaffer* (1886)

70 Iowa, 371, 30 N. W. 639; *State v. Robinson* (1892) 35 S. C. 340, 14 S. E. 766; *Hamilton v. State* (1893) — Tex. Crim. Rep. —, 24 S. W. 32; *Willingham v. State* (1894) — Tex. Crim. Rep. —, 26 S. W. 834; *Thornton v. State* (1916) 80 Tex. Crim. Rep. 64, 188 S. W. 749.

Thus, in *Ray v. State* (1899) 126 Ala. 9, 28 So. 634, a trial for burglary in which a witness was produced by the state who had purchased the harness from defendant, which was alleged to have been taken at the time of the burglary, it was held that the witness was properly allowed to testify that defendant had two sets of harness, both of which he took out of a closet in a back room of his house and offered to sell either of them, the witness buying the one involved in the prosecution; as the conduct of defendant in dealing with the other harness was so inseparably connected with and interwoven into the transaction involving the negotiation, sale, and delivery of the said purchase that a reference to it and the set sold could hardly be avoided,—in fact, could not be avoided unless the witness only testified to a part of the transaction, and not to the whole of it.

In *People v. Nicolosi* (1893) 4 Cal. Unrep. 341, 34 Pac. 824, a prosecution for the larceny of a trunk which was found in defendant's possession, it was held that evidence of another trunk found with the one said to have been stolen was properly admitted, as against an objection that the evidence was irrelevant, immaterial, and incompetent and had a tendency to prove a commission of another crime, there being no evidence tending to prove that the other trunk had been stolen, it being merely described as one of the things discovered in close proximity to the stolen trunk, as were articles of clothing with which the trunks were covered.

In *State v. Schaffer* (1886) 70 Iowa, 371, 30 N. W. 639, a prosecution for larceny of a set of harness, it was held proper to admit evidence that some wire had been stolen from another person, and that the officers were searching defendant's premises for it



under a search warrant when they discovered the harness and the wire hidden together, where the state, in making out a case, made no attempt to prove that the wire found in the building was the identical wire which had been stolen, but the evidence was offered as merely explanatory of the action of the officers in going upon the premises and making the search which resulted in finding the harness, such facts being incidental merely to the main facts which the state was seeking to establish, namely, the possession by the defendant of the stolen property described in the indictment.

In *State v. Robinson* (1892) 35 S. C. 340, 14 S. E. 766, a prosecution against several defendants for burglary, it was proper to admit as evidence goods proved to have been taken during another burglary, where such goods were found secreted in the same box with the goods taken at the burglary in question, as such property was inseparably connected with the transaction in question.

In *Hamilton v. State* (1893) — Tex. Crim. Rep. —, 24 S. W. 32, a prosecution for burglary, where it appeared that defendant and another went one night on a general stealing expedition among their neighbors, it was held proper to admit testimony that property other than that taken during the burglary charged was found in his possession and in the possession of his partner in crime.

In *Willingham v. State* (1894) — Tex. Crim. Rep. —, 26 S. W. 834, a prosecution for the theft of a horse, it was held proper to admit testimony tending to show that appellant was in the possession of about twenty other stolen horses, where the court properly charged the law applicable to the possession of the other stolen horses and limited the effect of the evidence by instructions.

In *Thornton v. State* (1916) 80 Tex. Crim. Rep. 64, 188 S. W. 749, a prosecution for burglary, it was held proper to admit evidence that, with the property taken at the time of the burglary as charged, other property was found belonging to other persons, which had been stolen, some on the

same night and some on the night before the burglary charged.

In *Watters v. State* (1906) — Tex. Crim. Rep. —, 94 S. W. 1038, in answer to an objection against the admission of testimony showing the possession by defendant of other hides than those of the cattle charged to have been stolen, the court said: "This is a case depending on circumstantial evidence, and it was a circumstance against appellant to show that other hides than those of the animals alleged to have been stolen were found buried or concealed in appellant's little field of 18 or 20 acres. The more hides so found buried and concealed, the more cogent would the circumstances be against him in that respect."

In *State v. Prunty* (1918) — Mo. —, 208 S. W. 91, a prosecution for burglary, it was held to be proper to show that an automobile used in committing the burglary had been stolen, such evidence being competent to prove preparation beforehand by means of which the contemplated crime was committed and escape made, though such evidence tended to prove the commission of another independent crime, and, further, the possession by defendant of the stolen automobile together with the possession of the money stolen at the time of the burglary charged, and the carrying it away in the automobile so connected the two crimes and so related them that proof of one tended to prove the commission of the other by the same parties.

#### IV. To show intent or system.

Evidence of the possession of other property than that involved in the prosecution is frequently admitted for the purpose of showing the intent of defendant in doing the particular act charged against him as a crime, or as tending to show that such crime was part of a system of criminal acts. *Myers v. People* (1918) — Colo. —, 177 Pac. 145; *Martin v. State* (1912) 10 Ga. App. 795, 74 S. E. 304; *People v. Clement* (1918) 285 Ill. 614, 121 N. E. 213; *State v. Balch* (1896) 136 Mo. 103, 37 S. W. 808; *State v. Franke*

(1900) 159 Mo. 535, 60 S. W. 1053; Territory v. Caldwell (1908) 14 N. M. 535, 98 Pac. 167; Howard v. State (1913) 9 Okla. Crim. Rep. 337, 131 Pac. 1100; State v. Morris (1908) — Or. —, 175 Pac. 668; Cannon v. State (1919) — Tex. Crim. Rep. —, 208 S. W. 339.

In Oxier v. United States (1896) 1 Ind. Terr. 85, 38 S. W. 331, the court said: "It is true that the possession of other stolen property by a defendant is competent in evidence against him upon a trial for larceny, when it connects him with the transaction of which he stands accused, not as tending to prove another offense, but that one; but before such testimony is admissible it must be shown that the property in his possession was stolen property."

So in Myers v. People (1918) — Colo. —, 177 Pac. 145, a prosecution for the larceny of a bicycle frame, it was held proper to admit testimony that other bicycle frames were found with the one charged to have been stolen, which were identified by various witnesses as frames which had been stolen in the same city at about the same time as the one charged in the information, notwithstanding the fact that the testimony tended to prove other offenses, it being admissible for the purpose of showing system, or motive, or intent to commit the crime charged in the indictment.

In Martin v. State (1912) 10 Ga. App. 795, 74 S. E. 304, a prosecution for the larceny of a harness in which reliance for conviction of the larceny was placed upon the fact of the harness stolen being found in defendant's possession, and accused claimed to be a bona fide purchaser thereof, it was held proper to admit evidence that twenty-two other sets of harness, many of which were also stolen at about the same time as those involved in the indictment, were found in the possession of defendant, as such evidence not only illustrated but illuminated the transaction at issue.

In People v. Clement (1918) 285 Ill. 614, 121 N. E. 213, a prosecution for larceny from the person, it was proper to admit in evidence the fact that

defendant, upon being arrested, attempted to dispose of another pocketbook besides the one said to have been stolen, as it was a fair inference that the other pocketbook had also been stolen, and that defendant was engaged in picking pockets.

In State v. Balch (1896) 136 Mo. 103, 37 S. W. 808, a prosecution for robbery, it was held proper to admit evidence that when arrested defendant had in his possession property taken at the time of another robbery, this circumstance being corroborative of the inference of guilty possession of the particular property which he was charged with taking at the robbery for which he was under indictment.

In State v. Castor (1887) 93 Mo. 242, 5 S. W. 906, the court, in discussing the evidence against the defendant who was charged with larceny of articles which were found in his trunk, said: "Relative to other articles found in the possession of the defendant, if it had been established that they had been stolen, this fact would doubtless have greatly helped the case of the state . . . but no such proof was offered." And see State v. Flynn (1894) 124 Mo. 480, 27 S. W. 1105.

In State v. Franke (1900) 159 Mo. 535, 60 S. W. 1053, a prosecution for burglary and larceny, it was held proper to admit evidence that a gun which had been stolen from a house not far from that of defendant was found secreted in defendant's house such evidence being admissible as showing the guilty intent of defendant.

In Territory v. Caldwell (1908) 14 N. M. 535, 98 Pac. 167, a prosecution for the larceny of a calf, it was held proper to admit upon the question of intent, evidence that on the day the calf in question was found, and the day defendants were arrested, and the day following, the officers rounded up near the home of defendants about a dozen other calves, branded with defendants' brand, some of which were recognized as belonging to other people.

In Howard v. State (1913) 9 Okla.

Crim. Rep. 337, 131 Pac. 1100, where defendant was charged with a larceny in which he was associated with another, the stolen property being found in the possession of the two, it was held proper also to prove that other stolen property was found in their possession, as such evidence strongly tended to show that a partnership in crime, of which the larceny of the property in question was a part, existed between the two.

In *State v. Morris* (1918) — Or. —, 175 Pac. 668, a prosecution for the larceny of horses in which the evidence tended to show that defendant rebranded the animals in such a manner as to alter the original brand, it was proper to show that other animals owned by other parties were also found in his possession or claimed by him, which exhibited evidence of having upon them worked-over brands similar to that used upon the animal in question, such evidence tending to show the commission of a system of crimes by unusual methods, as a single instance of rebranding might be attributed to a mistake as to the ownership, or to accident, or carelessness in branding in the first instance.

Likewise, in *Cannon v. State* (1919) —Tex. Crim. Rep. —, 208 S. W. 339, where defendant was charged with stealing a cow upon which it appeared that the brand had been changed, where the defense was that he took the cow and changed the brand under the belief of ownership, evidence of possession by him of another animal with the brand changed was held by a majority of the court to be admissible.

Such testimony is particularly appropriate where the defendant has testified and the testimony is offered in rebuttal. *Perry v. People* (1906) 38 Colo. 23, 87 Pac. 796; *State v. Ditton* (1878) 48 Iowa, 677; *Davis v. State* (1912) 7 Okla. Crim. Rep. 322, 123 Pac. 560.

Thus, in *Perry v. People* (1906) 38 Colo. 23, 87 Pac. 796, where it appeared that a gun was found in the possession of defendant, along with articles charged in the indictment to have been stolen, and defendant tes-

tified that he had owned the gun for four years, it was proper to permit a witness to testify that his store was burglarized a few weeks previously and the gun was taken from the store at that time, such testimony being competent and relevant in rebuttal although it did tend to prove another larceny.

In *State v. Ditton* (1878) 48 Iowa, 677, where defendant was charged with the larceny of a horse and buggy, and claimed that he had found them and was in pursuit of the thief when arrested, evidence that other articles which had been taken the same night from a store a short distance from the barn from which the horse and buggy had been taken were found in the buggy when it was discovered, and that a box of cigars taken from the same store was found in the sleeve of a coat, which defendant admitted to be his, and which he had left at another place, as such testimony would establish the untruthfulness of a statement touching the pursuit of the thief, and connect him with the larceny.

And in a prosecution for the larceny of certain cattle where defendant's evidence tended to explain his possession of the cattle by purchase from others than the owner, it was competent in rebuttal to show his contemporaneous possession of other stolen cattle. *Davis v. State* (1912) 7 Okla. Crim. Rep. 322, 123 Pac. 560.

But in *People v. Vertrees* (1866) 169 Cal. 404, 146 Pac. 890, a prosecution for burglary for the purpose of stealing papers which were to be used before a grand jury, it was held to be error to show that defendant had in his possession a forged check, the prosecution claiming that the testimony tended to exhibit the motive of defendant for the commission of the alleged burglary, as, there being no showing that there was any connection between the check and the crime for which defendant was on trial, and no showing that the check was given for any particular purpose, and as the alleged existence of the check was attributed to a time long after the disappearance of the papers involved in

the burglary, such testimony had no relevancy as showing motive or for any other purpose.

And where, in a prosecution for the larceny of a horse, hearsay evidence of the theft of a saddle at about the same time and place that the theft of the horse occurred was admitted, but excluded upon motion of defendant, and thereafter evidence was admitted identifying, as belonging to another party, a saddle found in the possession of defendant at the same time that he was found in possession of the alleged stolen horse, it was error for the court to instruct the jury that such evidence should not be considered unless it tended to show the identity of the transaction of the theft of the horse or explain the intent of defendant, as such evidence was liable to prejudice defendant, especially when the attention of the jury was directed to it by the charge of the court. *Neeley v. State* (1889) 27 Tex. App. 315, 11 S. W. 376.

In *Hunt v. State* (1901) — Tex. Crim. Rep. —, 60 S. W. 965, a prosecution for burglary, it was held error to permit a witness to testify that he missed some property which he found in the house of defendant's mother where defendant and his two brothers lived, as such evidence tended to show the theft of other articles of property from other and different sources, and at no specific time, and was not admissible for the purpose of showing intent or for the purpose of showing a system of crimes, or as a part of the *res gestæ*, the court saying: "The fact that a crime was committed on the same evening that the schoolhouse was burglarized would not of itself authorize the admission of this testimony. There must be some evidence showing it illustrates the intent with which appellant acted in the commission of the offense on trial. A party may commit two separate and distinct offenses the same day, both of which would be thefts or burglary, yet if they were separate, distinct, and independent crimes, in no way connected with or illustrative of the intent of appellant, the mere fact of their being contemporaneous

would not of itself make them admissible. In other words, if appellant introduced any evidence showing a lack of criminal intent in the case on trial, then, if contemporaneous thefts were committed that would demonstrate the intent with which appellant acted in the case on trial, then the contemporaneous theft would be admissible. But clearly, if it has no connection, dependence upon, or does not illustrate the offense on trial, it would not be admissible."

In *Johnson v. State* (1906) 50 Tex. Crim. Rep. 116, 96 S. W. 45, a prosecution for burglary, it was held error to permit evidence that when defendant was arrested he had in his possession other articles taken at other times, inasmuch as they had no bearing on the case then being tried, either as a part of the *res gestæ* or to show intent or system.

And where the intent with which a burglary was committed was not disputed by the evidence, it was held error to admit evidence of the possession by some of the defendants of property taken at the burglary of another house. It would be otherwise, if there had been any evidence in the case that the parties entered the house they were charged with burglarizing accidentally or inadvertently, for then the fact that they had, contemporaneously with the entry of said house, feloniously burglarized another house, would be admissible on a question of intent. *Herndon v. State* (1907) 50 Tex. Crim. Rep. 552, 99 S. W. 558.

The number and nature of the articles found in the possession of the defendant in the reported case (*COM. v. COYNE*, ante, 1209) were such that it would seem that the inference that they were the fruits of other burglaries would be as natural and reasonable as that they were the fruits of the burglaries in question, and, if so, the admission of the evidence would involve some danger of prejudice to the defendant which would not have obtained if the evidence had merely tended to show the defendant's financial condition or the possession

of considerable sums of money by him after the offense charged. The trial court, however, apparently guarded as far as possible against the use of the evidence as a basis of an inference of the commission of other crimes by the defendant, strengthening the probability of his guilt of the

offense charged, by instructing the jury in effect that they were not to consider the evidence in that connection, but only as the basis of an inference that the articles were acquired by the fruits of the property taken at the time of the offense charged.

R. L. S.

**DENVER & RIO GRANDE RAILROAD COMPANY, Resp't.,**  
v.

**GRAND COUNTY, Appt.**

*Utah Supreme Court — December 21, 1917.*

(— Utah, —, 170 Pac. 74.)

**Tax — mothers' pensions — public purpose.**

1. The court cannot declare that a tax levied for the purpose of pensioning mothers, that they may surround their young children with home influences, is not for a public purpose.

[See note on this question beginning on page 1233.]

**Constitutional law — duty of courts.**

2. It is the duty of courts, in determining the constitutionality of an act, to resolve every doubt in favor of its constitutionality.

[See 6 R. C. L. 78.]

**Tax — amount — limitation.**

3. A legislature which has limited a county's taxing power to the levy of 5 mills on the dollar of valuation, for general county purposes, and 1 mill additional for poor relief, authorizes

an additional levy by enacting a statute permitting a tax for mothers' pensions.

**Courts — power over legislative discretion.**

4. The wisdom or desirability of providing pensions for dependent mothers is peculiarly within the power of the legislature, with which the courts are not at liberty to interfere.

[See 7 R. C. L. 1049.]

**APPEAL** by defendant from a judgment of the District Court for Grand County (Christensen, J.) in favor of plaintiff in an action brought to recover an amount alleged to have been unlawfully collected by defendant, under an act known as the Dependent Mothers' Act. *Reversed.*

The facts are stated in the opinion of the court.

**Mr. Knox Patterson**, for appellant:

The county commissioners under the statute had authority to make the levy, which was for a public purpose.

*People ex rel. O'Meara v. Salt Lake City*, 23 Utah, 13, 64 Pac. 460; *Cooley*, Taxn. 275; *Fisher v. People*, 84 Ill. 491; *United States v. New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Peoria, D. & E. R. Co. v. People*, 116 Ill. 401, 6 N. E. 497; *Ralls County Ct. v. United States*, 105 U. S. 733, 26 L. ed. 1220.

**Messrs. Van Cott, Allison & Riter, B. R. Howell, and W. Q. Van Cott**, for respondent:

Levying a tax pursuant to the De-

pendent Mothers' Act is a taking of private property for other than a public purpose.

*Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *People ex rel. Detroit & H. R. Co. v. Salem*, 20 Mich. 452, 4 Am. Rep. 400; *Lucas County v. State* (Davies v. State) 75 Ohio St. 114, 7 L.R.A. (N.S.) 1196, 78 N. E. 955; *Hooper v. Emery*, 14 Me. 375; *State ex rel. Griffith v. Osawkee Twp.* 14 Kan. 418, 19 Am. Rep. 99; *Patty v. Colgan*, 97 Cal. 251, 18 L.R.A. 774, 31 Pac. 1133; *Lowell*



about the 16th day of November, 1914, respondent paid the dependent mothers' tax under written protest to the county treasurer of Grand county, together with \$100.64 accrued interest on the same, and \$2.75 costs of advertisement, sale, and redemption certificate.

Conclusions of law were made from the foregoing agreed facts that Grand county was without authority to levy such dependent mothers' tax, and that the tax was illegal and void; that the officers of the county, charged with the duty to enter tax levies and collect the same, were without power or authority to enter such levy on the assessment rolls, or to assess respondent's property with such tax, or to collect taxes from respondent based on such levy. Judgment was entered in favor of respondent for the amount paid, together with the accumulated interest and costs of the action. From that judgment Grand county appeals to this court.

The sections of the statute in question (Laws 1913, chap. 90) so far as material here, are as follows:

"Section 1. It shall be the duty of the county commissioners of each county in this state, and they are hereby authorized and empowered to provide funds in an amount sufficient to meet the purposes of this law, but not exceeding in any one year the sum of ten thousand dollars, such funds to be expended for the partial support of mothers who are dependent upon their own efforts for the maintenance of their children.

"Sec. 2. The allowance to each of such mothers shall not exceed ten dollars a month when she has but one child under the age of fifteen years, and if she has more than one child under the age of fifteen years it shall not exceed the sum of ten dollars a month for the first child and five dollars a month for each of the other children under the age of fifteen years.

"Sec. 3. Such allowance shall be made by the county commissioners, except in counties having a pop-

ulation of one hundred and twenty-five thousand or more. The authority, power, and duty of determining upon allowance to be made under the provisions of this act shall devolve upon and be exercised by the juvenile judge of the district in and for such counties. Such allowance shall be made only upon the following conditions: (1) The child or children for whose benefit the allowance is made must be living with the mother of such child or children. (2) The allowance shall be made only when in the absence of such allowance a mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children. (3) The mother must, in the judgment [judgment] of the county commissioners or juvenile court, be a proper person morally, physically and mentally, for the bringing up of her children. (4) Such allowance shall, in the judgment [judgment] of the county commissioners or juvenile court, be necessary to save the child or children from neglect. (5) No persons [person] shall receive the benefit of this act who shall not have been a resident of the county in which such application is made for at least two years next before the making of such application of such allowance.

"Sec. 4. Whenever any child shall reach the age of fifteen years, any allowance made the mother of such child for the benefit of such child shall cease. The county commissioners or juvenile court may, in their discretion, at any time before such child reaches the age of fifteen years, discontinue or modify the allowance to any mother and for any child.

"Sec. 5. Should the fund herein authorized be sufficient to permit an allowance to only a part of the persons coming within the provisions of this law, the county commissioners of juvenile court shall select those cases in most urgent need of such allowance."

Respondent contends that such

statute, authorizing the assessment, levy, and collection of a dependent mothers' tax, is unconstitutional and void for the reason that it takes private property for other than a public purpose; that the act is discriminatory and favors a class, and is, therefore, in violation of article 14, § 1, of the Federal Constitution, and of article 1, § 7, of the Utah Constitution. Respondent also contends that the tax is illegal and without authority, as being in excess of the taxing limit fixed by Comp. Laws 1907, § 2593.

We shall consider these contentions in the order named.

By article 6, § 1, of the Constitution, the legislative power of the state is vested in the legislature thereof. It is provided by article 13, § 3, of the Constitution, that the legislature shall provide by law a uniform and equal rate of assessment, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property, etc. Section 5 of the same article gives to counties, cities, towns, and other municipal corporations the power to assess and collect taxes for all purposes of such corporations, and is in the following language: "The legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may by law vest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation."

It is conceded that the phrase, "for all purposes of such corporation," includes every object or purpose for which a tax may be legally levied. In other words, the expression is synonymous with the phrase generally used by text-writers and courts,—*"public purposes."* We have, then, to determine in this case whether the object for which the tax in question was levied, as set out in the act, can be upheld as for a *"public purpose."*

The determination of that question is not without difficulty. The authorities on such or like questions

are not in harmony. What may or may not be termed a *"public purpose"* is not easily defined and no definition has as yet been framed that will fit all conditions or provisions of legislation. That the objects of the act now under consideration were beneficent, and, in the judgment of the lawmakers, to the best interests of the state, will not be questioned; and yet the determination of the legality or constitutionality of the act must be based upon some recognized rule of construction that would authorize the legislature to appropriate the public funds for the purposes mentioned in the act. We are not prepared to hold that the legislature might not provide for the appropriation of public funds for the purposes stated. To do so would be to hold that the legislature has exceeded its authority, as that authority is limited by the common acceptance of the meaning of the phrase, *"public purpose."* It will be conceded, we take it, that the proper rearing and bringing up of children, their education, their moral welfare, can all be subserved better by giving to such children the companionship, control, and management of their mothers than by any other system devised by human ingenuity. The object of the act is to provide means whereby mothers who are otherwise unable may be enabled to give such attention and care to their children of tender years as their health, education, and comfort require. The act further provides that no such money shall be appropriated or given unless the mother is a fit person, morally and physically, to be intrusted with the rearing of young children, and that only during the years when the children are unable to determine right from wrong, or to earn a livelihood. The act having for its object the better care and training, mental and physical, of children who are to become the citizens of the state, would at least, leave the constitutionality of such act doubtful, and it is the duty of courts, in determining the constitu-



tionality of any act, to resolve every doubt in favor of its constitutionality.

**Constitutional law — duty of courts.**

We are not prepared to hold that the act, in effect, does not define and declare a policy of the state, nor that it is not within the province of the legislature to so define and declare a state policy. Having in mind the public welfare by assisting in surrounding children of tender years with home associations, with the care and nurture of their natural protector, the mother, the legislature, by this act, has determined that to be a policy of the state. Such being

**Tax—mothers' pensions — public purpose.**

the object of the act this court would not be justified in declaring the act invalid, and that the funds so used are not used for a public purpose.

The principle or rule that should guide the court in determining the constitutionality of any legislative act is lucidly and well stated by the supreme court of Missouri in *Ex parte Loving*, 178 Mo. at page 203, 77 S. W. at page 509, quoting from other decisions of that court in the following language: "It is the duty of the courts to uphold a legislative act unless it plainly and clearly violates the Constitution, and, if its language is susceptible of a meaning that will remove the objections to its validity, such interpretation should be adopted. 'A legislative intent to violate the Constitution is never to be assumed, if the language of the statute can be satisfied by a contrary construction.' Endlich, *Interpretation of Statutes*, § 178. It is our duty to uphold the act unless it plainly and clearly violates the fundamental law of the state, and, if its language is susceptible of a meaning that will remove the objections to its validity, such interpretation should be adopted."

In *Booth v. Woodbury*, 32 Conn. 118, it is said: "In the first place, if it be conceded that it is not competent for the legislative power to make a gift of the common property, or of a sum of money to be raised by taxation, where no possible bene-

fit, direct or indirect, can be derived therefrom, such exercise of the legislative power must be of an extraordinary character to justify the interference of the judiciary; and this is not that case. Second, if there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the legislature is conclusive. And such is this case. Such gifts to unfortunate classes of society, as the indigent blind, . . . colleges or schools, or grants of pensions, swords, or other mementoes for past services, involving the general good indirectly and in slight degree, are frequently made and never questioned."

In *Broadhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711, the supreme court of that state said: "To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable,—so clear and palpable as to be perceptible by every mind at the first blush."

To the same effect is the decision of this court in the recent case of *Rio Grande Lumber Co. v. Drake*, — Utah, —, L.R.A.1918A, 1193, 167 Pac. 241, wherein Mr. Justice Thurman, speaking for the court, says: "It is a fundamental rule in construing a statute, when its validity is challenged on constitutional grounds, that the courts will not consider mere questions of policy or expediency. These are matters of legislation, and belong to the legislative department of government. . . . For the judiciary to dictate in matters of policy and expediency, and seek to nullify acts of the law-making body because it conceives that such acts are impolitic or unnecessary, would be just as flagrant a violation of the Constitution as would be an act of the legislature which would deprive a person of life, liberty, or property without due process of law."

the power to levy taxes for the purposes mentioned in this act is removing practically every limitation upon the taxing power of the legislature. That does not necessarily follow: but should the time ever come when the electors, through ignorance or want of sufficient interest in their public officers, fail to check any extravagance or waste of the public funds through acts of their chosen representatives in the legislature, then any limitation that the court might attempt to throw around the right of the taxing power would prove abortive and be easily evaded. The chief safeguard against extravagance or marked delinquency of any system must be found in the knowledge and rectitude of the people, and in the honesty and intelligence of their representatives.

We must, therefore, while admitting the question is not free from doubt, resolve that doubt in favor of the power of the legislature to authorize the expenditure as provided in the act in question.

What has been said above answers the second objection urged by respondent against the validity of the tax in question.

The further contention that the tax is excessive, as being in excess of the maximum allowed by Comp. Laws 1907, § 2593, cannot be sustained. That section, which has been in force in this state practically since statehood, reads: "The board of county commissioners of each county must, between the first Monday in July and the second Monday in August in each year, fix the rate of county taxes, and designate the number of mills on each dollar of valuation of property for each fund, and must levy taxes upon the taxable property of the county not exceeding five mills on the dollar for general county purposes, and may levy a tax not exceeding one mill on the dollar additional for the care, maintenance, and relief of the indigent sick and otherwise dependent poor, and not exceeding four

purposes.

It is a matter of common knowledge, and one that the legislature must have known and had in mind when it enacted the law complained of, in 1913, that every county in the state needed and had been levying taxes for the purposes mentioned in § 2593, supra, up to the full limit permitted thereby. Therefore, it must have been the intention of the legislature, when it enacted the law directing the county commissioners of each county to provide funds, etc., that such commissioners should provide such funds by

the only legal means — <sup>amount</sup> limitation.

within their power, namely, levying an additional tax on the property in such county. If any other view be taken, then we must assume that the legislature intended the act in question to be stillborn, and of no effect. That we may not do. The only way, therefore, it may be given effect is to treat it as the last expression of the legislature upon the subject treated in § 2593, supra. Instead of expressing the limitation in mills, or in fractions thereof, the amount that can be raised by taxation for the purposes mentioned in the act is specifically limited. There is, therefore, a limitation beyond which the county commissioners may not go, precisely as contemplated in § 2593, supra.

We are not to be understood as holding that any act of the legislature, authorizing the expenditure of public funds for every purpose, could or should be permitted by the courts. We are simply determining in this case that the question is so close, and not free from difficulty of determination, that we are resolving that doubt in favor of the policy established by the legislature, and we are not expressing any opinion as to the wisdom or desirability of such policy. That is peculiarly within <sup>Courts — power</sup> the province of the <sup>over legislative</sup> legislature, and any error of law that leads to extravagance, or fraud, or imposition upon the public can

be easily corrected by the people themselves through their representatives.

We are not unmindful that many courts of the highest authority, and whose judgments are entitled to great weight and respect, have stated rules or elucidated principles which might, by analogy, seem to hold contrary to the views herein expressed; but considering the purposes of the act, and the safeguards thrown around the appropriation of the funds, we do not feel justified in holding it beyond the power of the legislature.

It follows from the foregoing that the case should be reversed and remanded to the District Court, with directions to make conclusions of law in accordance with this opinion, and enter judgment dismissing the complaint. Such is the order. Appellant to recover costs.

Frick, Ch. J., and McCarty, Corfman, and Thurman, JJ., concur.

#### NOTE.

The decision in the reported case (*DENVER & R. G. R. Co. v. GRAND COUNTY*, ante, 1224), is of especial interest in connection with the annotation following *RE SNYDER*, post, 1233, in that it points out in apt terms the object of Mothers' Pension Acts, and declares that such an act outlines the policy of the state. For other cases which discuss the principles upon which such acts are based, see I. a, in the annotation referred to.

*DENVER & R. G. R. Co. v. GRAND COUNTY* is also of interest for its holding that a provision in a Mothers' Pension Act for the levying of a tax is not violative of a general Tax Limit Act, although it increases the total tax to an amount in excess of the limit fixed thereby. This question is also treated in I. e, of the annotation beginning post, 1233.

### RE PETITION OF MRS. ROSE SNYDER, Appt.

*Washington Supreme Court (Dept. No. 1.)—September 26, 1916.*

(93 Wash. 59, 160 Pac. 12.)

#### Constitutional law — validity of mothers' pensions — inequality.

1. Granting pensions to widowed mothers and those whose husbands are confined in institutions, or unable because of total disability to support their families, and withholding them from mothers who have been abandoned by their husbands, does not unconstitutionally grant any unequal privileges and immunities or deny the equal protection of the laws.

[See note on this question beginning on page 1233.]

#### Pension — vested right.

2. A mother has no vested right in a pension granted her by the state which

will prevent its withdrawal at the pleasure of the public authorities.

[See 21 R. C. L. 242, 243.]

**APPEAL** by petitioner from an order of the Superior Court for King County denying her a mother's pension. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. G. Wright Arnold for appellant.  
Messrs. Alfred H. Lundin, Frank P. Helsell, W. F. Meier, and Joseph A. Barto, amici curiæ:

No person has a vested legal right to a pension, which is merely a bounty

which the government may give, withhold, distribute, or recall at its direction.

*United States v. Teller*, 107 U. S. 64, 27 L. ed. 352, 2 Sup. Ct. Rep. 39; *Gibbs v. Minneapolis Fire Dept.* Re-

lief Asso. 125 Minn. 174, 145 N. W. 1075, Ann. Cas. 1915C, 749.

The classification afforded by the Act of 1915 is reasonable, and does not offend either the state Constitution or the 14th Amendment to the Federal Constitution.

State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; Thomas v. Spartanburg R. Gas & E. Co. 100 S. C. 478, 85 S. E. 50; Lasher v. People, 183 Ill. 226, 47 L.R.A. 802, 75 Am. St. Rep. 103, 55 N. E. 663, 15 Am. Crim. Rep. 108; State v. Barrett, 172 Ind. 169, 87 N. E. 7; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 33 L.R.A. (N.S.) 494, 130 N. W. 545, Ann. Cas. 1912B, 1030; Minegar v. Minneapolis Fire Dept. Relief Asso. 126 Minn. 332, 148 N. W. 279; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, L.R.A. 1917D, 15, 154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886; 6 R. C. L. § 384, p. 391; Debrot v. Marion County, 164 Iowa, 208, 145 N. W. 467; Gibbs v. Minneapolis Fire Dept. Relief Asso. supra.

Fullerton, J., delivered the opinion of the court:

The Act of March 24, 1913 (Laws 1913, p. 644), commonly known as the Mothers' Pension Act, provided for an allowance out of the county treasury to certain destitute mothers whose husbands were dead, or were inmates of penal institutions, or who had been abandoned by their husbands and such abandonment had continued for a period of more than one year. In 1915 (Laws 1915, p. 364) the act was repealed and a new act passed, which provided for allowances only in cases where the husband is dead, or confined in a penal institution or insane hospital, or whose husband through total disability is unable to support his family, making no provision for a case of abandonment.

While the Act of 1913 was in force the petitioner, Rose Snyder, made application to the proper authorities of King county for an allowance, basing her claim upon the fact that she had been abandoned by her husband, which abandonment had continued for more than one year. Her claim was allowed, and she was paid a fixed allowance

until the repeal of the statute by the going into effect of the Act of 1915. After that time she applied by petition to the juvenile court for a renewal of the allowance, again basing her claim upon the ground that she had been abandoned by her husband. The petition was disallowed, and a judgment rendered dismissing the application. This appeal is prosecuted therefrom.

The appellant attacks the law of 1915 on the ground of constitutionality. She argues that it contravenes § 12 of article 1 of the state Constitution, which provides that no law shall be passed granting to any citizen or class of citizens, or corporations other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens or corporations, and also that part of the 14th Amendment to the Constitution of the United States which provides that no state shall make or enforce laws which shall abridge the privileges or immunities of the citizens of the United States or deny to any person within its jurisdiction the equal protection of the laws. The specific objection is that the law makes an arbitrary selection of its beneficiaries, since it includes indigent mothers whose husbands are dead, or incarcerated in penal or insane institutions, or whose husbands are unable because of total disability to support their families, but excludes mothers whose husbands have abandoned them.

In support of the objections her attorney presents an able brief on the principles to be applied by the courts in determining whether or not an act of the legislature falls under the constitutional ban of class legislation. But while we agree with his presentation in the abstract we cannot think the principles contended

Constitutional law—validity of mothers' pensions—inequality.

for have application here. In the first place the Act of 1913 did not provide pensions for all classes of indigent mothers, and is, in consequence, as susceptible to the consti-

tutional objection of class legislation as is the Act of 1915. Any rule of law, therefore, which would destroy the Act of 1915 on this ground would destroy all previous legislation on the subject, thus leaving the applicant utterly without remedy in any event.

In the second place, the state may care for its indigent and poor in any manner it pleases. What scheme will be adopted is wholly within the discretion of the legislature. That body may provide, without violating any provision of the Constitution, that certain classes shall be cared for by regular allowances from the county treasury, while others may receive intermittent allowances, or be cared for at almshouses or poor farms maintained for the purpose. No individual or class of individuals can acquire a vested right to be cared for in any particular manner. Indeed, the state is under no legal obligation to care for its poor at all. While it undoubtedly has a moral obligation to do so, there is no such obligation as can be enforced in law. Such relief as it does provide is legally in the nature of a largess or bounty, which may be discontinued at the legislative will.

**Pension—  
vested right.**

In the case before us the legislature probably discontinued pensions to indigent mothers whose husbands had abandoned them because it concluded that to grant such pensions was not in accord with sound public policy. But whatever may have been its motive, there is no question as to its right and power to discontinue such pensions, and no former beneficiary can legally complain.

The judgment is affirmed.

Morris, Ch. J., and Mount and Ellis, JJ., concur.

Chadwick, J., concurring:

The suggestion that the act of the legislature amending the Mothers' Pension Bill violates article 1, § 12, of the state Constitution, and the 14th Amendment to the Constitu-

tion of the United States, will not bear discussion. Those sections of our Constitution apply only to rights sounding in contract, or which become vested rights under some rule of the common law or a statute which partakes of the nature of a contract.

" . . . Vested rights never grow out of gratuitous favor. Only those who can ground their claims in some contract, express or implied, or upon some right guaranteed by the common law, are heard to assert such rights. Neither element exists in this case." *Whitaker v. Clausen*, 57 Wash. 268-271, 106 Pac. 745.

"No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion." *United States v. Teller*, 107 U. S. 64-68, 27 L. ed. 352-354, 2 Sup. Ct. Rep. 39.

"The right of recovery being dependent upon the statute, it is within the power of the legislature to limit the amount of the recovery to any sum it sees fit." *Longfellow v. Seattle*, 76 Wash. 509-514, 136 Pac. 855.

And we may add, to any person it sees fit, for, as said in *Frisbie v. United States*, 157 U. S. 160-166, 39 L. ed. 657-659, 15 Sup. Ct. Rep. 586: "Congress, being at liberty to give or withhold a pension, may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension. . . . The whole control of that matter is within the domain of congressional power. *United States v. Hall*, 98 U. S. 343, 25 L. ed. 180."

The supreme court of Illinois refused to give a similar statute the character of a remedial statute in the absence of clear and apt language, notwithstanding the contention that in construing an act that may have been intended to be retrospective in its application, the courts will resolve the doubt in favor of the individual, resorting to contem-

as though it were a matter of contract or vested right, while, in fact, it is a mere matter of largess or bounty. A pension is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension

and the pension cease." *Eddy v. Morgan*, 216 Ill. 437-449, 75 N. E. 174.

Affirmed by the Supreme Court of the United States, December 9, 1918, in (U. S. Adv. Ops. 1918-19, p. 171) 248 U. S. 539, 63 L. ed. —, 39 Sup. Ct. Rep. 67.

## ANNOTATION.

### "Mothers' " Pension Acts.

#### I. Constitutionality:

- a. In general, 1233.
- b. Sufficiency of title, 1233.
- c. Class legislation, 1234.
- d. Limitation of jurisdiction, 1234.
- e. Tax provisions, 1235.
- f. Relation to Poor Laws, 1235.

##### *I. Constitutionality.*

##### *a. In general.*

In *Cass County v. Nixon* (1917) 35 N. D. 601, L.R.A.1917C, 897, 161 N. W. 204, in discussing the general question of proof and constitutionality of Mothers' Pension Acts, the court said that such laws are "founded upon sound, most progressive, and scientific principles of public policy," that they are "in the deepest interests of the public good and welfare," and the "protection and perpetuity of the state itself," and that the "public policy" of such laws is "the protection of the public health and the elimination of an environment which has a tendency to weaken the moral fiber of those of tender years."

And again in *DENVER & R. G. R. Co. v. GRAND COUNTY* (reported herewith) ante, 1224, it was held that the Utah Dependent Mothers' Act (Laws 1913, chap. 90), since it had for its object the better care and training, mentally and physically, of the dependent children of indigent mothers, in effect declared the policy of the state as regards the public welfare of such children.

Of course, such statutes should be confined to indigent persons. Thus, an Old Age and Mothers' Pension Act 3 A.L.R.—78.

#### II. Construction and application:

- a. In general, 1235.
- b. Persons entitled to benefits, 1236.
- c. Period and amount of relief, 1237.

which provides for the payment of pensions to certain mothers of dependent children, regardless of their financial condition, has been held invalid on the ground that it violates the theory upon which pension systems of the character under consideration must be sustained, namely, that the state owes a duty to take care of its unfortunates who are unable to care for themselves, and that the taxpayers are not required to help pay pensions to those fully capable of maintaining themselves, but who happen to be mothers with dependent children. *State v. Buckstegge* (1916) 18 Ariz. 277, 158 Pac. 837.

##### *b. Sufficiency of title.*

An act entitled, "An Act Providing for an Old Age and Mothers' Pension and Making Appropriation Therefor," and which provided for the establishment, both of an old age and mothers' pension and for the abolishment of the system of almshouses and poor farms, has been held to violate a constitutional provision requiring that the subject of an act shall be expressed in its title, it being maintained that the title was not as broad as the legislation in that it did not disclose the important subject of abolishment of the system of caring for the poor

and substitution therefor of a system which would include, because of its limitation as to persons included in its benefits, only a small part of the persons dependent upon the counties for assistance. *State v. Buckstegge* (1916) 18 Ariz. 277, 158 Pac. 837.

In *Re Rumsey* (1918) — Neb. —, 167 N. W. 66, however, the objections that the provisions of the Constitution that no bill shall contain more than one subject and that the same shall be entirely expressed in its title were violated, because the title provided for pensions for "mothers and guardians," whereas, it was contended, the body of the act provided a pension for the parent of any child or children; because the title provided a pension for dependent *and* neglected children, whereas the act itself provided a pension for dependent *or* neglected children; and because the act provided a pension for those who are liable to become dependent or neglected, and not those who are already dependent or neglected,—were held not to be well taken. The court said that the provisions of the act referred to in these objections are found in the first section, which only regulates the substance of the petition that must be filed in order to obtain the action of the court; and that it is the second section that provides for the relief, and the provision there is that if the court finds "that the petitioner is poor and unable to properly care for such child or children, but otherwise is a proper guardian, and that it is for the welfare of the child or children to remain at home under the guardianship of their mother or guardian, the court may make an order finding such facts and fixing the amount of money necessary to enable the petitioner to properly care for such child or children." The court further observed that as the application was made by the mother it was unnecessary to determine under what circumstances the father of the children might be entitled to a pension; and that if he is "the proper guardian" he comes within the provisions of § 2.

### *c. Class legislation.*

In *RE SNYDER* (reported herewith) ante, 1230, it was held that Washington Laws 1915, p. 364, which amended Laws 1913, p. 644, by withholding pensions from abandoned mothers, did not thereby grant any unequal privileges and immunities or deny the equal protection of the law, the court maintaining that the relief granted under such laws is in the nature of a largess or bounty, which may be discontinued at the pleasure of the legislature.

### *d. Limitation of jurisdiction.*

In *Cass County v. Nixon* (1917) 35 N. D. 601, L.R.A.1917C, 897, 161 N. W. 204, it was contended that the North Carolina Mothers' Pension Act, which confers jurisdiction upon the county court, is unconstitutional because it attempts to confer upon that court powers not granted by § 111 of the Constitution, which declares that "the county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors and administrators and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdictions as may be conferred by law." The court, however, held that the contention was not well founded, and observed in this connection that the persons to be protected and benefited by the act are minors of tender years, whose natural guardians are unable to furnish them the absolute necessities of life; and that such minors and their estates are proper subjects of guardianship. It was also held that the act does not violate the constitutional provision relating to the separation of judicial and administrative functions, since the powers so conferred, while they partake in no small degree of the nature of administrative duties, are in fact judicial in their nature. The Chief Justice, in a concurring opinion, said that in his opinion the word "probate," as used in the clause, "such other probate jurisdiction as may be conferred by law," does not merely

apply to proof of wills, but is much more comprehensive in its terms, and is intended to include such powers as are usually exercised by probate and county courts. Christianson, J., who concurred specially, was not entirely satisfied that the duties imposed upon the county court by the act fall within the "probate jurisdiction" conferred upon those courts by § 111; and it seemed to him that the duties imposed are neither wholly administrative nor wholly judicial, but rather that they are of such a nature as to permit the legislature to choose such instrumentality as it deems best to carry out its will.

#### *c. Tax provisions.*

It has been held that a Mothers' and Guardians' Pension Law does not violate a constitutional provision which limits the aggregate amount of taxes which county authorities may assess, where there is nothing in the Pension Law which warrants the assumption that the allowance of pensions thereunder will necessarily cause the tax assessors to exceed the constitutional limit. *Re Rumsey* (1918) — Neb. —, 167 N. W. 66.

And in *DENVER & R. G. R. Co. v. GRAND COUNTY* (reported herewith) ante, 1224, it was held that the Utah Dependent Mothers' Act of 1913 was not illegal as violative of a statutory provision fixing a tax limit on counties, even though it must be assumed that the legislature, in enacting the same, knew that the levying of the tax provided therein would increase the total taxes to an amount in excess of the limit fixed by the General Tax Limit Act.

So, it has been held that the levying of taxes for pensions for indigent mothers having dependent children of tender years is for a public purpose, within the meaning of a constitutional provision prohibiting the taking of private property for other than a public purpose. *DENVER & R. G. R. Co. v. GRAND COUNTY*.

And that a tax for a mothers' pension fund is a tax for ordinary county purposes, and, while not subject to reduction, is one which must be con-

sidered when taxes for other county purposes are being scaled to come within the legal limit, or certified for extension of such limit, see *People ex rel. Stuckart v. Chicago*, L. S. & E. R. Co. (1915) 270 Ill. 477, 110 N. E. 720; *People ex rel. Stuckart v. New Jersey Sandberg Co.* (1918) 282 Ill. 245, 118 N. E. 469; and *People ex rel. Stuckart v. Klee* (1918) 282 Ill. 440, 118 N. E. 754.

#### *f. Relation to Poor Laws.*

The objection that the Nebraska Mothers' and Guardians' Pension Law is in conflict with the constitutional requirement that when statutes are amended the section amended shall be repealed, which was predicated upon the idea that the act is an amendment of the Nebraska Poor Law, was answered by the court in *Re Rumsey* (1918) — Neb. —, 167 N. W. 66, by the statement that the Poor Laws neither cover nor attempt to cover the idea of assisting a worthy and competent mother to properly care for herself and children, and that the subject of the act is entirely distinct from the subjects of the various statutes for supporting the poor.

Nor does the general statutory system of Minnesota, which provides for the poor, itself either curtail the legislature in enacting, or prevent the enforcement of, a law providing for the granting of pensions to mothers. *State ex rel. Stearns County v. Klasen* (1913) 123 Minn. 382, 49 L.R.A. (N.S.) 597, 143 N. W. 984.

But an Old Age and Mothers' Pension Act which abolishes almshouses and substitutes a pension system, if it includes state institutions, is violative of a constitutional provision providing for the establishment and support by the state of institutions for the benefit of the insane, etc., "and such other public institutions as the public good may require." *State v. Buckstegge* (1916) 18 Ariz. 277, 158 Pac. 837.

#### *II. Construction and application.*

##### *a. In general.*

Where a Mothers' Pension Act affords relief to dependent children of a



mother to whom the act is applicable, it has been held that there is no error or impropriety in entertaining a joint application for relief in behalf of such children. *State ex rel. Stearns County v. Klasen* (1913) 123 Minn. 382, 49 L.R.A.(N.S.) 597, 143 N. W. 984.

And it has been held that the relief provided by the Minnesota Mothers' Pension Law of 1913 is not a matter of purely local municipal concern, but applies to all counties, towns, and cities, including counties wherein the town system of caring for the poor prevails, as well as cities which maintain their own pauper systems. *Ibid.*

*b. Persons entitled to benefits.*

A child dependent upon the public for support is a dependent child within the meaning of the Minnesota Mothers' Pension Law of 1913, though the sole reason for such dependency is the financial inability of its parents to support it, and though there is neither delinquency upon the part of the child nor other unfitness upon the part of the parent. *State ex rel. Stearns County v. Klasen* (1913) 123 Minn. 382, 49 L.R.A.(N.S.) 597, 142 N. W. 984. In this case it was said that the state as *parens patriæ* has the power to assume or provide for the custody and control of a child upon the sole ground of the financial inability of the parent to support it, whenever the breach of parental trust thus involved constitutes a menace to the fundamental welfare of the child, and consequently that delinquency or unfitness upon the part of the child itself is not essential.

But where a Mothers' Pension Act provides that it shall not apply to a child having property of its own sufficient for its support, and the statutes provide for the sale of a minor's real estate when necessary for his or her support, and real estate has been left to children subject to the widow's dower interest, she can claim no pension under the act until such land is disposed of according to law and the proceeds exhausted in caring for such children. *Buster v. Marion County* (1917) 84 Or. 624, 165 Pac. 1168.

And a mother is not entitled to an allowance for the support of herself and children under an act entitling every widow who has children under the age of sixteen years to such an allowance where they are dependent wholly upon her labor for support, if her application shows that the husband left an estate consisting partly of life insurance, and it does not appear that either of the children were necessarily dependent upon her labor for support. *Badura v. Multnomah County* (1918) 87 Or. 446, 170 Pac. 938.

A divorced woman, the mother of dependent children, whose father is living, has been held not to be a "widow" within the meaning of an Iowa Pension Act, providing that if the mother of dependent children is a widow and unable to properly care for them, certain financial allowances should be made to her, especially where the statute provides that certain classes of women whose husbands are living shall be regarded as widows, but does not mention divorced women. *Debrot v. Marion County* (1914) 164 Iowa, 208, 145 N. W. 467.

And a Mothers' Pension Act which makes provision for indigent women having children under sixteen years of age, and "whose husbands are dead," has been held to apply only to women whose husbands are "actually dead, and not merely presumably so" because of seven years' unexplained absence. *Com. ex rel. Mothers' Assistance Fund v. Powell* (1917) 256 Pa. 470, L.R.A.1917E, 1150, 100 Atl. 964.

But under Oregon Laws 1913, p. 75, § 1, providing for a mother's pension for the support of herself and children, and § 2, providing that it is the intent of the act to keep the children together under the control of their mother, who shall make a home for them, a mother does not forfeit her right to a pension by working away from the family residence at some hours of the day, where such labor is necessary to contribute to their subsistence. *Finley v. Marion County* (1916) 81 Or. 294, 159 Pac. 557; *Wolfe v. Marion County* (1916) 81 Or. 297, 159 Pac. 558.

*c. Period and amount of relief.*

A supervising power to whom authority is granted by a Mothers' Pension Act can grant no other relief than that provided for in the act. *Finley v. Marion County* (1916) 81 Or. 294, 159 Pac. 557; *Wolfe v. Marion County* (1916) 81 Or. 297, 159 Pac. 558.

Under the Oregon Mothers' Pension Act of 1913 an applicant's right to pension accrues from the date of a proper application. *Finley v. Marion County* and *Wolfe v. Marion County* (Or.) *supra*.

And where an application is made under one act, the amount of recovery is governed thereby, although such act is subsequently amended, if none of the provisions of the first act regarding amount of recovery are repealed, and notwithstanding action was not taken on the application until after such amendatory act went into effect. *Ibid*.

But where a Mothers' Pension Act is so amended as to disqualify a mother entitled to a pension under the original act, the pension cannot be continued after the amendatory act goes into effect, since such acts confer no vested rights. *Ibid*.; *RE SNYDER* (reported herewith) ante, 1230.

Where a Mothers' Pension Act provides for a pension in a certain amount where all of the children are "wholly" dependent on the mother's labor for support, and that if they are but "partly" dependent upon her labor she shall receive such a sum as, added to her other income other than that derived from her labor, shall be equal to the amount specified in case of children dependent "wholly" upon her labor, a declaration of partial dependency with deductions from the full amount is proper, it appearing that she has a home and a small area of land to cultivate. *Re Sharp* (1918) 88 Or. 594, 171 Pac. 586. G. J. C.

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P. D. MORRIS, Admr., etc., of C. G. Westerman, Deceased, et al.,  
v.

ANITA WESTERMAN et al.

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D. V. LEMON, Trustee, etc.,  
v.

FIRST NATIONAL BANK OF MARTINSVILLE et al.

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W. P. SIMMONS, Surviving Partner,  
v.

P. D. MORRIS, Admr., etc., of C. G. Westerman, Deceased, et al.,  
and  
C. S. FARMER, Admr., etc., of Beulah Westerman, Deceased, and W. S. Wiley, Deceased, Appt.

*West Virginia Supreme Court of Appeals—May 8, 1917.*

(79 W. Va. 502, 92 S. E. 567.)

**Executor and administrator — failure to account — unadministrated asset.**

1. If, where a man was executor of an estate in which his wife was interested as a donee of money, the wife preceded the husband in death and he qualified as her administrator, and, as such, failed to reimburse her estate, and his administration was terminated by his death, the amount due from him as executor of the first estate is an unadminis-

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Headnotes 1-9 by POFFENBARGER, J.

trated asset of the wife's estate, and may be recovered by her administrator de bonis non. But, as to the estate to which the fund originally belonged, it is an administered asset, and cannot be recovered by the administrator de bonis non, with the will annexed, of the first estate.

[See note on this question beginning on page 1252.]

**Husband and wife — gift by wife — inference.**

2. A gift or relinquishment by a married woman to her husband, of a general or residuary money legacy, given to her from an estate by the will of a deceased person, and held by her husband as executor of the will, cannot be inferred from her mere forbearance to demand and enforce payment thereof from her husband acting as executor, and her silence and failure so to do, with knowledge of his appropriation to his own use of the assets of the estate, including her legacy.

[See 12 R. C. L. 928; 13 R. C. L. 1387.]

**Executor and administrator — obligation to beneficiary — husband and wife.**

3. The duty imposed by law upon a husband acting as the executor of an estate in which the wife is interested as the donee of money vests in her a right of even higher dignity and character than the obligation imposed upon him by his mere promise or agreement to repay money borrowed from her separate estate; and he cannot relieve himself of the sacred and solemn duty so imposed by his own misconduct, silently submitted to by the wife.

**— enforcement of trust — rights of creditors.**

4. In such case, the wife is not precluded, in the interest of the husband's general creditors, from assertion against his estate, after his death, of her claim for an accounting and settlement as to what was due her from the estate upon which he administered, by the doctrine of estoppel.

[See 10 R. C. L. 742.]

**— preference of claim.**

5. By virtue of § 25 of chap. 85 of the Code, such a debt is entitled to preference over the general debts of the deceased personal representative, in the distribution of the proceeds of such estate of his as is not required for the discharge of liens acquired in the modes prescribed by law, and of his interest in any partnership property after the payment of the social debts.

**— delay in enforcing claim — effect.**

6. The inaction or forbearance of the wife to assert her right against her husband acting as executor of the estate in which she is so interested, with knowledge of his conversion of the executorial estate to his own use, does not deprive her estate of the benefit of the preference so given.

[See 11 R. C. L. 176.]

**Corporation — transfer of shares — wife to husband — gift.**

7. Shares of the capital stock of a bank, belonging to an estate of which the husband is executor, transferred on the books of the bank to the wife and then assigned by her to her husband, and transferred to him on the books of the bank, and subsequently treated as his own, with her knowledge, are deemed, in the absence of clear proof to the contrary, to have been a gift from her to him.

[See 12 R. C. L. 942-943.]

**— indebtedness of stockholder — refusal of transfer of stock.**

8. A bank organized under a law which impliedly sanctions loans by it on shares of its own capital stock as collateral security, by providing that such loans shall not exceed 50 per cent of such capital stock, can make and enforce a by-law providing that no stockholder will be permitted to sell, transfer, or assign his or her stock while indebted to the bank, and loans made by it to one of its stockholders holding certificates of stock reciting such by-law are valid liens on the shares held by him.

[See 3 R. C. L. 391.]

**Bank — forbidding loan on shares — retroactive effect.**

9. A statute subsequently passed, prohibiting banks from making loans on shares of their capital stock as collateral security, does not invalidate a lien on shares, so previously acquired.

[See 3 R. C. L. 435.]

**Husband and wife — title to property — possession by husband.**

10. Under statutes rendering property coming to a married woman by will immune from the control of her husband, she acquires a good, sound, and substantial title which is not af-

fectured by the fact that the property is reduced to possession by her husband as executor of the will under which she acquires it.

**Evidence — presumption of gift.**

11. If a married woman places property which is in her hands and subject to her absolute control in the hands of her husband, and permits him to take charge of and use it as his own, a presumption of gift arises in favor of creditors, which can only be overcome by proof of a relation of debtor and creditor between her and her husband.

[See 12 R. C. L. 928-929.]

**— gift to husband.**

12. If the relation of debtor and creditor is established between husband and wife, her acquiescence in his use of her money or property as his own cannot be regarded as a transfer of her right by gift.

**— separate estate — disposal.**

13. Statutory separate estates may be disposed of by a married woman as readily as equitable separate estates.

**Estoppel — married woman.**

14. As to her personal property, a married woman is subject to the operation of the doctrine of estoppel in pais.

[See 10 R. C. L. 742-743; 13 R. C. L. 1165.]

**APPEAL** by defendant Farmer, administrator, from a decree of the Circuit Court for Wetzel County in favor of complainant Morris, in a suit, consolidated with others, brought to subject real estate of complainant's decedent to the payment of his debts, and to settle up his estate. *Reversed in part.*

The facts are stated in the opinion of the court.

Messrs. A. C. Chapman and McCam-ing the whole indebtedness of C. G. ic & Clarke, for appellant:

The claims asserted by Farmer in his representative capacity are debts "due as personal representative."

Craddock v. Turner, 6 Leigh, 116; Lomax, Exrs. & Admsrs. 886; Black v. Scott, 2 Brock. 327, Fed. Cas. No. 1,464; Turnstall v. Pollard, 11 Leigh, 35; Shearman v. Christian, 6 Rand. (Va.) 49; Bridgman v. Bridgman, 138 Mass. 58; Williams v. S. M. Smith Ins. Agency, 75 W. Va. 494, 84 S. E. 237, Ann. Cas. 1917A, 813.

The Wetzel County Bank had no legal right as against the appellant to pass a by-law. "No stockholder will be permitted to sell, transfer, or assign his or her stock while indebted to this bank,"—and it was error for the circuit court to overrule the commissioner's report in this respect.

Savage v. People's Bldg. Loan & Sav. Asso. 45 W. Va. 275, 31 S. E. 991; Brent v. Bank of Washington, 10 Pet. 596, 9 L. ed. 547; Mechanics Bank v. Merchants Bank, 45 Mo. 513, 100 Am. Dec. 388; Bohmer v. City Bank, 77 Va. 445; 5 Cyc. 439.

Messrs. Hall & Hall, for appellee First National Bank:

A person claiming under one bound by an estoppel is himself bound by the same estoppel.

Summerfield v. White, 54 W. Va. 311, 46 S. E. 154.

Mr. Edwin O. Keifer, for appellee Wetzel County Bank:

The court below was right in decree-

ing the whole indebtedness of C. G. Westerman to the Wetzel County Bank as a lien first in order of priority against the twenty-one shares of the capital stock of said bank owned by him.

Savage v. People's Bldg. Loan & Sav. Asso. 45 W. Va. 275, 31 S. E. 991; Mechanics' Bank v. Seton, 1 Pet. 299, 7 L. ed. 152; Stafford v. Produce Exch. Bkg. Co. 61 Ohio St. 160, 76 Am. St. Rep. 371, 55 N. E. 162; Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 334; Jennings v. Bank of California, 79 Cal. 323, 5 L.R.A. 233, 12 Am. St. Rep. 145, 21 Pac. 852; Mechanics Bank v. Merchants Bank, 45 Mo. 513, 100 Am. Dec. 388; 1 Thomp. Corp. §§ 1031, 1032; Brent v. Bank of Washington, 10 Pet. 596, 9 L. ed. 547; Victor G. Bloede Co. v. Bloede, 57 Am. St. Rep. 381, and note, 84 Md. 129, 33 L.R.A. 107, 34 Atl. 1127; Reese v. Bank of Commerce, 14 Md. 271, 74 Am. Dec. 538; Morgan v. Bank of North America, 8 Serg. & R. 73, 11 Am. Dec. 575.

The amount allowed the bank as a first lien against the proceeds derived from the sale of the Ruttencutter leasehold in the hands of M. H. Willis, special receiver, is the balance due said bank on the last renewal of the note secured by deed of trust.

McCandlish v. Keen, 13 Gratt. 615.

The specific liens acquired by the bank are prior and superior to the claim asserted by appellant.

Alderson v. Henderson, 5 W. Va. 182; Wood v. Wood, 50 W. Va. 570, 40 S. E. 416; Laidley v. Kline, 8 W. Va. 218.

C. G. Westerman and W. P. Simmons are liable as partners to their creditors, whether they were partners as between themselves or not.

Farmers' Bank v. Smith, 26 W. Va. 542; Conaway v. Stealey, 44 W. Va. 163, 28 S. E. 793; Kenneweg v. Schilansky, 45 W. Va. 521, 31 S. E. 949; Hart v. Hart, 31 W. Va. 688, 8 S. E. 562; McCoy v. Jack, 47 W. Va. 201, 34 S. E. 991.

The estate of deceased was not indebted to appellant.

Coleman v. M'Murdo, 5 Rand. (Va.) 51; Hinton v. Bland, 81 Va. 588.

Mr. M. H. Willis, for appellee Morris:

From 1903 to her death in 1910, Beulah Westerman consented to the use of her money by her husband and did not require him to render any accounting to her for the same; hence a gift to him.

Crumrine v. Crumrine, 50 W. Va. 226, 88 Am. St. Rep. 859, 40 S. E. 341; Steadman v. Wilbur, 7 R. I. 481; Kana-wha Valley Bank v. Atkinson, 32 W. Va. 203, 25 Am. St. Rep. 806, 9 S. E. 175; Thornton, Gifts & Advancements, § 55, and note.

Messrs. M. R. Morris and H. H. Rose, for appellee Supply Company et al.:

If a sum of money or property held by one person for another is, with the authority, or with the full knowledge and consent, or with the ratification, of the person entitled thereto, used or otherwise disposed of by the person so holding the same, the claim of the beneficiary is validly discharged, and his personal representative is barred from recovering the same.

Crumrine v. Crumrine, 50 W. Va. 226, 88 Am. St. Rep. 859, 40 S. E. 341; Robertson v. Harmon, 47 W. Va. 500, 35 S. E. 832; Cox v. National Coal & Oil Invest. Co. 61 W. Va. 291, 56 S. E. 494.

A valid claim, although not legally discharged, may be unenforceable as against creditors of the debtor, by reason of the acts, or the failure to act, of the claimant, which amount to an estoppel.

Roberts v. Tavenner, 48 W. Va. 632, 37 S. E. 576; McConnell v. Rowland, 48 W. Va. 276, 37 S. E. 586; Mann v. Peck, 45 W. Va. 18, 30 S. E. 206; 16 Cyc. 773-777.

As against creditors of a stockholder, a corporation cannot, by secret by-laws, create a lien in its favor against the stock represented by a certificate issued by it.

Bank of Atchison County v. Durfee. 118 Mo. 481, 40 Am. St. Rep. 396, 24 S. W. 133.

Poffenbarger, J., delivered the opinion of the court:

The principal complaint against the decree appealed from is its denial of the claim of title to the major portion of the subject-matter of the main suit, *Morris, Admr. v. Westerman et al.*, set up by Farmer, the administrator de bonis non of Beulah Westerman, the deceased wife of plaintiff's decedent, on the ground that it was a residuary legacy belonging to her, in the hands of said decedent at the time of his death, as the executor of her father's will. Farmer asserted this claim in a second capacity also, viz., administrator de bonis non, with the will annexed, of W. S. Wiley, deceased, the father of the deceased wife. The suit was brought against the heirs and creditors of Westerman, to subject his real estate to the payment of his debts, the personal property being insufficient to pay them, and to settle up his estate. Farmer, administrator, was admitted on his petition, as a defendant claiming the property to be unadministered assets of the Wiley estate and of the estate of Westerman's deceased wife. For hearing and determination, three other suits involving property and relations in which Westerman had been interested were consolidated with the suit brought by Morris, administrator, the evidence taken once for all of them and one final decree entered. Two of the other suits were brought to settle the business of a partnership between Westerman and W. P. Simmons, and the third to obtain advice and instructions from the court as to the distribution of a trust fund in which Westerman had held an interest.

There is no controversy of any consequence, as to the facts. On January 22, 1903, C. G. Westerman

qualified as the executor of the will of W. S. Wiley, without bond, agreeably to a provision of the will, naming him as the executor. Wiley had left a considerable estate, all of which, except some specific devises and legacies, went to his daughter, Beulah Wiley, who was then the wife of C. G. Westerman or soon afterward became his wife. He made no inventory of the estate, caused no appraisement to be made, never made any settlement thereof, and never delivered or set over to his wife the property and bonds now in controversy. He resided in the home of Wiley, at the time of the death of the latter, and continued to reside there until the time of his death. Of that property, he made no disposition. He caused to be transferred to his wife a portion of the bank stock her father owned. She died intestate, late in 1909, or early in 1910, and her husband qualified as her administrator, but he did not charge himself with any of the property in controversy, as such. Property of hers, including the bank stock transferred to her, was appraised at \$16,452.50, the bank stock being the principal item. He died intestate February 8, 1912, leaving five children ranging in age from two to twelve years, and property was appraised, as belonging to his estate, at the sum of \$49,085.94.

At the time of the death of Wiley, Westerman had no property. It has been shown, on a reference to a commissioner, that he received from the estate of Wiley, at various times, in addition to the bank stock he transferred to Mrs. Westerman, amounts aggregating \$51,383.65, and disbursed for repairs on the residence, satisfaction of small bequests made by the will, debts due from the estate, funeral expenses, taxes, insurance, and medical and hospital bills of the widow sums amounting to \$9,128.33, leaving \$42,255.32. For a time he kept two bank accounts, one executorial and the other individual, but in making his deposits he did not regard the sources from which the money had been derived. In numerous in-

stances, he divided funds of the estate between the two accounts and made deposits in both, and drew checks on them indiscriminately. He engaged extensively in oil and gas production, trading and speculation and other business, using for such purposes the estate that had come into his hands, as executor of Wiley's will, for the benefit of his wife as residuary legatee. He created large indebtedness in these enterprises, occasioning the execution to banks and individuals of many notes, some of which the wife indorsed. She must have known he had not fully accounted to her for her interest in the estate, and that he was making use of the same as if it were his own, for he had commenced these operations without means of his own.

The commissioner to whom the cause was referred reported indebtedness of the estate of C. G. Westerman to the estate of Beulah Westerman, in the sum of \$28,433.40, two thirds of the amount traced into his hands and undisbursed, the other third being deducted as having vested in him as a distributee of his wife's estate. Sustaining numerous exceptions to this finding, filed by creditors and Morris, administrator, the court held there was no such liability, and decreed that the property in question belongs to the estate of C. G. Westerman and is liable for his debts. Farmer, administrator, also excepted to the allowance of a distributive share to the husband's estate, on the ground that the wife never became legally possessed of the property in her lifetime. Though this exception became unimportant, for the purposes of the decree, in consequence of the disposition of the others, the court overruled it.

But for the statute making the legacy of Mrs. Westerman her sole and separate property and rendering it immune from the control of her husband and liability for his debts, Code, chap. 66 (§§ 3669-3683), his acts and conduct respecting the same, after it came into his hands as executor, might have been

sufficient to make it his own, by reduction thereof into possession, on common-law principles. *Linn v. Patton*, 10 W. Va. 187; *Clarke v. King*, 34 W. Va. 631, 12 S. E. 775; *Harcum v. Hudnall*, 14 Gratt. 369; *Yerby v. Lynch*, 3 Gratt. 460; *Blakey v. Newby*, 6 Munf. 64; *Wallace v. Taliaferro*, 2 Call (Va.) 447. That statute, however, has cut up this old common-law doctrine by the roots. It makes all real and personal property of any female, which she shall own at the time of her marriage, and all property she may, after marriage, acquire by inheritance, gift, grant, devise, or bequest, from any person other than her husband, as thoroughly immune and secure from her husband's control and from liability for his debts as an equitable separate estate, if not more so. Under it, her property cannot become the property of her husband, otherwise than by her voluntary sale, barter, or gift thereof to him. The equitable separate estate of a married woman, the creation and possession of which were permissible, before the passage of this statute, was a thing of substance, not of mere form. As to it, a married woman was regarded as a feme sole, and had right to dispose of all her separate personal estate, and the rents, issues, and profits of her real estate, in the same manner as if she had been a feme sole, unless the power of alienation was restrained by the instrument creating such estate. *Radford v. Carwile*, 13 W. Va. 572. One of the effects of the statute was enlargement of the rights and powers of married women so as to enable them to take separate legal estates in real and personal property. *Ibid.*; *Patton v. Merchant's Bank*, 12 W. Va. 587. The policy of this statute passed in 1868 has been greatly enlarged and extended by later acts conferring upon the married woman, among other things, right to maintain in her own name all suits and proceedings necessary for the protection and vindication of her property rights. Her powers respecting her statutory

separate estate are therefore much more extensive than were those pertaining to her separate equitable estate. Hence the property bequeathed to Mrs.

Westerman by her father became hers by a good, sound, and substantial title. Her relation to the executor did not limit or qualify it in the slightest degree.

Husband and wife—title to property—possession by husband.

During the period of six or seven years intervening between the death of W. S. Wiley and the death of Mrs. Westerman, the latter merely acquiesced in the acts and conduct of her husband, the executor, and did no positive act indicating intention to part with her title or relinquish her right. If she was cognizant of his use of the property belonging to her for his own purposes and in his own business, the most that can be claimed is that she remained passive, made no protest, and did not endeavor to bring him to a settlement and payment of what was due her. There is no evidence of any affirmative act of gift. Her property was in her husband's hands as executor. It came to him in due course of law, not by any act of hers. Though, with her knowledge, he used it in a manner not in conformity with law and in violation of her legal right, there is no evidence that by any act of hers the status or character of the property was ever changed. If it had once been in her hands and subject

Evidence—presumption of gift.

to her absolute control, and she had then placed it in the hands of her husband or permitted him to take charge of it and use it as his own, there would be a presumption of a gift on her part, in favor of his creditors, which it would be necessary for her to overcome with proof of the relation of debtor and creditor between herself and her husband, in order to prevail over them. *Crumrine v. Crumrine*, 50 W. Va. 226, 88 Am. St. Rep. 859, 40 S. E. 341; *Kanawha Valley Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175. But, inasmuch as her prop-

erty and funds went into his hands, in his capacity as executor, and did not come from her hands at all or by any act of hers, this presumption cannot consistently be indulged. She never delivered or relinquished her property to him, for it was never in her possession. It came to him in the character of executor, and he, instead of performing his duty as such and delivering it over to her, converted it to his own use. Of course, she could have demanded an accounting from him, but her failure to do so does not necessarily signify intention willingly to acquiesce in such use or to relinquish her right. If she had not been his wife, such acquiescence would not have the slightest tendency to prove a relinquishment or abandonment of right. The delicate relation subsisting between the parties may have constituted the reason for an unwilling acquiescence, unaccompanied by even the slightest intention to make a gift of the property. If she had had the property in her possession or the title in her name and within her control and delivered or conveyed it to him, or permitted him to take possession of it, without any understanding or agreement for return thereof, there would have been a presumption of a gift. *McGinnis v. Curry*, 13 W. Va. 29, 64, 65. But if, under such circumstances, he had contemporaneously given her his note or other obligation for the money or the value of the property, or even verbally promised to pay or return it, no such presumption would have arisen. The transaction would have created the relation of debtor and creditor. In most instances, however, if not all of them, the verbal agreement is rejected, for want of sufficient proof, or inconsistency with conduct. *McGinnis v. Curry*; *Crumrine v. Crumrine*; and *Kanawha Valley Bank v. Atkinson*, cited, *supra*. But, if the relation of debtor and creditor is established, the wife's acquiescence in the husband's use of the money or property as his own cannot con-

sistently be regarded, deemed, or treated as a transfer of her right by gift. She cannot be both donor and creditor at the same time. The two relations are logically and legally incompatible. If the wife's separate estate or the profits thereof go into her husband's hands, upon such an assurance or promise, it is a debt against his estate. *Roper v. Wren*, 6 Leigh, 38; *McGinnis v. Curry*, 13 W. Va. 29, 68; *Grabill v. Moyer*, 45 Pa. 530; *Kaufman v. Whitney*, 50 Miss. 103. A conveyance made to a wife by the husband, in the absence of fraud and for a valuable consideration, such as money of her separate estate or her inchoate right of dower in land, is everywhere upheld against creditors as well as between themselves, though such a conveyance in consideration of antecedent indebtedness would obviously be voidable under the statute, at the suit of creditors, to the extent of the preference created in her favor. Though the wife's mere acquiescence in the husband's possession and use of her pin money and profits arising from her equitable separate estate, or her mere failure to demand payment thereof, when entitled to them, precluded right of recovery thereof from his estate (*Moore v. Ferguson*, 2 Munf. 421; *Ridout v. Lewis*, 1 Atk. 269, 26 Eng. Reprint, 171; *Warwick v. Edwards*, 1 Eq. Cas. Abr. 140, 21 Eng. Reprint, 942; *Peacock v. Monk*, 2 Ves. Sr. 190, 28 Eng. Reprint, 123; *Townsend v. Windham*, 2 Ves. Sr. 1, 7, 28 Eng. Reprint, 1; *Parker v. Brooke*, 9 Ves. Jr. 583, 32 Eng. Reprint, 729), such conduct seems not to have precluded assertion of her right to the principal sum constituting her separate estate. This distinction is perfectly clear, if the separate estate is regarded as having been intended as a mere provision for her comfort and support, which she was deemed to have demanded as she needed it, and not to have demanded at all, if her requirements were satisfied by her



husband or from some other source, although her strict right to demand them as such in full could not be denied. In *Parker v. Brooke*, cited, *supra*, a purchaser of a wife's separate estate from the husband, with notice of her title, was required to account for it in full, the court declining to apply the rule applicable to arrears of pin money or profits arising from the separate estate. In a similar manner, the distinction was made in *Powell v. Hankey*, 2 P. Wms. 82, 24 Eng. Reprint, 649, and in *Towers v. Hagner*, 3 Whart. 48.

These illustrations afforded by the decisions reveal the substantial character of the wife's separate estate and the intricacy of questions arising out of transactions between her and her husband concerning it. The statutory separate estate and the equitable separate estate differ principally in respect of the nature of the title, the mode of creation, and the remedies incident thereto. Hence statutory separate estate may be disposed of by gift as readily as

equitable separate  
—separate estate  
—disposal.

estate, and any circumstance sufficient to rebut the presumption of a gift in the one instance suffices in the other. As mere acquiescence in the husband's possession and use of equitable separate estate was not deemed a gift thereof, though it might be so regarded as to the profits arising from its use, it cannot consistently be so regarded in the case of statutory separate estate. Since a promise or agreement to repay money of the equitable estate, borrowed, creates the relation of debtor and creditor, and precludes the possibility of a gift, it must do so in the case of a loan of money belonging to a statutory separate estate. In view of the ease with which the presumption of gift may be rebutted or avoided, it cannot be

deemed to have  
Husband and  
wife—gift by  
wife—inference.  
husband has obtained possession as executor or administrator. The duty to account

for and pay over the estate to the wife is manifestly as high in dignity as his promise to reimburse her for money or property obtained from her on such promise. Indeed, it is higher. He is a fiduciary

Executor and  
administrator  
—obligation to  
beneficiary—  
husband and  
wife.

held by law to a strict and drastic accounting. As to his liability to her on his receipt of assets, there can be no question. It arises independently of any agreement or understanding between them. He neither receives nor holds it in his individual capacity. Even at common law, it remained hers, until he reduced it into possession, by exercise of dominion over it in his individual capacity. Now, he cannot elect so to hold it. By withholding it or making a wrongful disposition of it, he can only violate his duty. Her silence, with knowledge of such wrong, is not a decisive nor a clear index to her intention. By no affirmative act does it pass to him either the title or the possession. She merely acquiesces in a wrongful use, for some reason not expressed. The same thing might occur in the case of a fully proved loan. The money might be long past due and she fully armed with remedies for its recovery. Would she be denied her right merely because credit has been extended to him by others in ignorance of the debt? Our decisions and uniform authority in other jurisdictions impliedly answer in the negative. They go to the inception of the transaction, and at that point determine its character, and, if it is shown then to have been a loan, the wife's right is admitted, notwithstanding her indulgence of her husband as her debtor, and her subsequent conduct is ignored, however prejudicial it may have been to other creditors, by reason of the secrecy of the loan. Mere indulgence of a debtor has never been deemed a gift, although actual delivery of money or property is not essential to a gift. *Miller v. Neff* (*Miller v. McMechen*) 33 W. Va. 197, 6 L.R.A.

515, 10 S. E. 378. In that case, it was held that, if the subject of the gift is in the possession of the donee as agent of the donor, proof of a declaration of the gift by the donor and subsequent dominion and use of the subject were sufficient to pass the title. But the property in question here was not held by the agent of the wife, nor is there any evidence of a declaration of gift. No doubt a gift may be inferred from the conduct of the parties (*M'Donald v. Crockett*, 7 S. C. Eq. (2 M'Cord) 130; 20 Cyc. 1194), but the circumstances must be such as to put the question of intention beyond reasonable doubt. In *New York*, it has been held that, in the case of a gift from a wife to her husband, the burden of proof is on the latter to show it by clear evidence. *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197. In *Pennsylvania*, the husband's mere possession of the wife's property is not evidence of a gift. He is presumed to hold it as her debtor or trustee. *Grabill v. Moyer*, 45 Pa. 530; *Wormley's Estate*, 137 Pa. 101, 20 Atl. 621. Upon these principles and conclusions, we are of the opinion that a gift of Mrs. Westerman's estate to her husband has not been established, and the inquiry next in order is whether she is estopped by her conduct from assertion of her right.

As to her personal property, a married woman is subject to the operation of the doctrine of estoppel in pais. Williamson v.

**Estoppel—  
married woman.**

*Jones*, 43 W. Va. 562, 578, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 411, 19 Mor. Min. Rep. 19; *Smilie's Estate*, 22 Pa. 134. In the numerous cases in which the courts assert, generally, that by permitting her husband to use and manage her separate property and thus conferring on him indicia of ownership, inducing third persons to extend credit to him on the faith of his ownership, a married woman may be estopped to claim the property as her separate estate, against the hus-

band's creditors (13 R. C. L. p. 1165); but the facts and circumstances disclosed here do not bring this case within the classes to which the doctrine has been applied. Most of them are similar in

**Executor and  
administrator  
—enforcement of  
trust—rights of  
creditors.**

their facts to *McGinnis v. Curry* and *Crumrine v. Crumrine*, to which reference has been made. Others involved false representations of the wife, acted upon by third persons, to their prejudice, not mere acquiescence. Here, there is no effort to resist the claims of creditors against any specific tangible property, real or personal, formerly owned by the husband and fraudulently conveyed to the wife. The cross-bill answer asserts a debt due in a fiduciary capacity. Mrs. Westerman never had legal title to the property of the estate of her father, not accounted for or paid to her. The will gave her fifty shares of the stock of the Wetzel County Bank and some of the testator's personal effects. Some of the real estate was given to two nephews. Six additional shares of bank stock were specially disposed of. The executor was required to sell all of the other property and distribute the proceeds to designated legatees. Hence, strictly speaking, the wife never placed any of her property in the executor's hands, nor permitted him to use it, in such manner or under such circumstances as would induce any person to believe it was his. Technically, the property belonged to Wiley's estate, not to the wife, but there was a liability upon the executor in her favor respecting it which she never released, and there is no proof of a representation to any creditor or anyone else that she had released it.

The statute (Code, chap. 85, § 25 [§ 4013]) gives this debt preference over the general indebtedness of the deceased executor, and thus works serious disadvantages to general creditors. If the residuary legatee had been a

**—preference of  
claim.**

stranger to the executor and had forborne suit to compel a settlement and enforce payment, the result would have been the same.

Had the executor contracted, in his individual capacity, enormous simple debts, and so burdened his estate that it would pay only a few cents on the dollar, his creditors would have been hurt in a similar manner. In that case, their complaint that the debts were secret and unknown to them would have availed nothing. To inflict upon a

—delay in  
enforcing claim  
—effect.

wife loss of money due her from a personal representative, for her failure to sue for it, on the ground that her husband has used it to the detriment of creditors, would subject her to a rule of law not applied to other persons. To estop her because undue credit has been extended to her husband, in ignorance of the debt due her, would be a plain and flagrant discrimination against her, founded upon nothing except her marital relation, since the secrecy of debts due other people has no such effect. Moreover, if the laws requiring recordation of deeds, liens, etc., are intended for the benefit of traders and dealers on mere personal credit, as some courts seem to hold, the county records disclosed enough to put any prudent man upon inquiry, and hence this debt was not a secret one. They disclosed the will, the appointment, and the lack of an inventory, appraisal, and settlement, and hence an undischarged liability of high character. Such records are not constructive notice to general creditors (*Gilbert v. Peppers*, 65 W. Va. 355, 364, 36 L.R.A.(N.S.) 1181, 64 S. E. 361), binding upon them as matter of law, but they are available sources of information. As to this debt, persons dealing with the executor and extending individual credit to him were under the duty and assumed the risk that attend their dealings with other persons, on mere personal credit. In all such cases, they are aware of the danger, and know the

law has made no provision for their protection. They may, under some circumstances, avail themselves of the doctrine of estoppel when they have extended credit, relying upon the debtor's known possession of property as evidence of title, but almost daily experience tells them it is unsafe to deal with a man on the assumption that he owes no debts. There is no legal presumption that he owes none. No law requires him or his creditors to record them.

This asset of the wife's estate belongs to the administrator de bonis non. Its status remains wholly unaltered. His predecessor never collected it, nor disturbed its condition in any respect. It never came into his hands as administrator. He owed it

—failure to  
account—unad-  
ministrated  
asset.

to her estate as executor of Wiley, at the time of his qualification as her administrator, and, not having collected it nor altered its status, he left it an unadministered asset of her estate. As an asset of the estate of Wiley, it was administered. The executor improperly disposed of the property, and was liable directly to the legatee for a devastavit. For this reason, the administrator of Wiley de bonis non, with the will annexed, is not entitled to sue for it. *Brown v. Brown*, 72 W. Va. 648, 47 L.R.A.(N.S.) 995, 78 S. E. 1040. As administrator of his wife, Westerman should have collected the wife's claim against himself. It was a debt he owed, not property in his hands, and he neither paid it nor in any way discharged it. Hence it is necessarily an unadministered asset of her estate.

Though the action of the court in sustaining the commissioner's allowance to the husband's estate, of his distributive share of the amount recoverable from his estate, on the ground of his liability as executor of the will of Wiley, is made the ground of an assignment of error, nothing is said in the brief in support of the assignment, wherefore it may well be deemed to have been waived. However, it may be said, with

safety, that he became entitled to one third of that claim on the death of his wife, for the statute gives to the husband, without exception, one third of the wife's personal property, in case of her death leaving children. Code, chap. 78, § 9, (§ 3909).

In this decree, the court rightly proceeded upon the theory that the preference given by the statute does not extend to or override liens acquired on the property of the decedent, in his lifetime, by mortgage, deed of trust, judgment, execution, and the like. Being general in its terms, it must be read in connection with, and in subordination to, the laws permitting acquisition of such liens. *Reeves v. Ross*, 62 W. Va. 7, 57 S. E. 284. No preference under it over such liens is claimed. Nor is there any claim that the preference extends to the debts of a partnership of which the decedent was a member. The assets of the copartnership would necessarily be first liable for the debts of the firm, on the principle above stated. But it is insisted that a certain piece of property, known as the Ruttencutter lease, was not partnership property, and that the court erred in treating it as such, by making the proceeds thereof liable for partnership debts. The existence of the partnership for limited purposes, namely, ownership and operation of oil and gas properties, is admitted, but it is insisted that there is no lien on the Ruttencutter lease. However, Westerman executed or joined in a deed of trust on that particular lease, to secure a partnership debt which was not recorded until after his death, and it is said that by reason of his death before the recordation of the deed of trust, the liability of the estate, on the executorial account, became a lien upon the lease. In this conclusion we are unable to concur. The statute gives no lien upon the property of the decedent. It simply determines the rights of creditors as to portions of the estate on which no liens exist.

Under a by-law of the Wetzel

County Bank, a creditor of Westerman's estate, in large amount, inhibiting the sale, transfer, or assignment of any of its stock by a stockholder, while indebted to the bank, the trial court accorded it a lien on twenty-one shares of such stock, standing on its books in the name of Westerman, at the time of his death. This stock had belonged to Wiley. Westerman had transferred it to his wife, and she had then transferred it back to him. The certificate for sixteen shares thereof bears date August 17, 1903, and the certificate for the other five shares is dated October 10, 1904. The part of the decree allowing this lien is challenged on the ground of alleged invalidity of the by-law, and this contention is founded largely, if not altogether, on a provision of the statute, inhibiting state banks from making loans on the security of shares of their own capital stock. Code 1913, chap. 54, § 79 (§ 3040). At the time of the adoption of the by-law, issuance of the certificates and incurrence of the indebtedness, this provision of the statute was not in force. It was enacted in 1913. Prior to the date of its effectiveness, ninety days from February 18, 1913, such banks were impliedly, if not expressly, authorized to make loans on the shares of their capital stock as security, and to say this by-law is invalid as to transactions perfected under it, before the passage of the act, would give the statute retroactive effect. In those instances in which the legislature has acknowledged power to make laws operate retrospectively, the intention to make them do so will not be inferred. To give a statute such an effect, it must contain terms clearly importing the intention. *Harrison v. Harman*, 76 W. Va. 412, 85 S. E. 646. As to whether the subject-matter of the by-law may be so dealt with by the legislature, there is no occasion to inquire. The act is

Corporation—  
transfer of  
shares—wife to  
husband—gift.

Bank—for-  
bidding loan on  
shares—retro-  
active effect.

clearly prospective in effect. Before the statute was amended, it

**Corporation—  
indebtedness of  
stockholder—  
refusal of trans-  
fer of stock.**

impliedly authorized banks to make loans on the security of shares of their capital stock,

if statutory authority is necessary. Code 1906, chap. 54, § 79.

Two notes for \$3,000 each, executed by the Anita Oil Company, secured by a deed of trust and assigned by Westerman and Simmons to the First National Bank of New Martinsville, as collateral security for a note held by it, constituting the subject-matter of certain provisions of the decree, are rather elaborately discussed in the briefs filed for Morris, administrator, and the First National Bank of New Martinsville; but the attitudes of these parties to said provisions are not very definitely stated. It seems that, pending the suit, the bank sold the notes, under a power of sale conferred by the assignment thereof, and bought them itself, at the price of \$1,800. They are perfectly good for \$6,000, since a trustee holds the proceeds of the property upon which they were secured, and they are the only notes assigned out of several secured by the deed of trust, wherefore they constitute the first lien on that fund. Counsel for the bank seem to contend that the bank's title by purchase is valid, and this claim is resisted by counsel for the administrator. Neither brief, however, seems to complain of the decree, which obviously treats these two notes as having been held by the bank as collateral. It recites that they are so held, and then directs the trustee to pay to the bank the sum of \$6,000, with interest from November 16, 1911, in discharge of the two notes, and directs such payment to be "credited pro rata upon the liabilities joint and sole of C. G. Westerman" to the bank. Regarding the argument in the briefs as being directed not at the decree, nor made in support of any complaint against it, but as pertaining to a matter shown by the

record, but not embodied in the decree, our inference is that the parties are satisfied with what the court has actually done respecting the matter, wherefore we enter upon no inquiry as to the propriety of the court's action.

Certain items have been classed as partnership assets by the decree, which the evidence tends very strongly to prove are individual assets. These are included in an aggregate sum of \$3,118.71, described as a fund in the hands of M. H. Willis, special receiver. As to this fund, the decree will be reversed, to the end that the status of the several items thereof may be reconsidered.

In so far as the decree sustains exceptions to that part of the commissioner's report which finds indebtedness against the estate of Westerman in favor of C. S. Farmer, administrator de bonis non of the estate of Beulah Westerman, deceased, and makes it a debt first in order of payment against the whole of Westerman's estate, except funds in the hands of Lemon, trustee, and the proceeds of the Ruttencutter lease in the hands of Morris, administrator, and disallows that claim and the preference accorded it by law, and makes "all debts of C. G. Westerman liens of equal dignity and first in priority against the general fund in the hands of M. H. Willis, special receiver, and against all other assets of the personal estate of C. G. Westerman, save the Wetzel County Bank stock," and holds the sum of \$3,118.71 in the hands of M. H. Willis, special receiver, to be a partnership asset, it will be reversed, set aside, and annulled; and it will be here adjudged, ordered, and decreed that the estate of C. G. Westerman, deceased, is indebted to C. S. Farmer, administrator de bonis non of Beulah Westerman, deceased, in the sum of \$28,433.40, exclusive of interest, and that said administrator de bonis non is entitled to have said sum, with interest thereon according to law, paid out of the estate of the

said C. G. Westerman, in so far as the same is not subject to liens, debts due to the United States, and taxes and levies assessed against the said Westerman, prior to his death, to the exclusion of, so far as is necessary, and in preference to, the unsecured general debts due from the estate of the said Westerman. In all other respects, the decree will be affirmed, and the cause will be remanded to the Circuit Court of Wetzel county for ascertainment in conformity with law, of the entire amount due and owing said Farmer, administrator de bonis non, from the estate of said Westerman, including interest, and for a decree for the full amount thereof, when so ascertained. Costs in this court will be decreed to C. S. Farmer, administrator as aforesaid,

against the creditors of the estate of C. G. Westerman, deceased, named in the decree complained of.

Reversed in part. Affirmed in part. Remanded.

**NOTE.**

It will be seen that in the reported case (MORRIS v. WESTERMAN, ante, 1237) it is held that an administrator de bonis non cannot recover of his predecessor the proceeds of converted assets, but that the right to recovery therefor is in the person interested in the estate. For a discussion of the right of an administrator de bonis non to recover proceeds of personal property of the estate converted by his predecessor, see annotation beginning on page 1252.

**FARMERS' BANK & TRUST COMPANY, Admr., etc., of W. L. Yancy,**  
Deceased, Appt.,

v.

**FIDELITY & DEPOSIT COMPANY OF MARYLAND, Impleaded, etc.**

*Kentucky Court of Appeals — March 7, 1919.*

(Yancy's Admr. v. Yancy, 183 Ky. 512, 209 S. W. 858.)

**Executor and administrator — rights of administrator de bonis non — converted assets.**

1. An administrator de bonis non can recover from his predecessor or his personal representative only such estate of deceased as remains in specie, and cannot recover the proceeds of such as have been converted into money unless such proceeds were kept separate, and are susceptible of identification.

[See note on this question beginning on page 1252.]

— de bonis non — who is.

2. The appointment of one to administer the estate of a deceased person upon removal of a former appointee renders him an administrator de bonis non, whether the words de bonis non are used in the order of their appointment or not.

[See 11 R. C. L. 417.]

**Parties — action to recover assets wasted by administrator.**

3. The right of action for assets wasted by an administrator is not in the administrator de bonis non, but in

3 A.L.R.—79.

the distributees, heirs, or creditors of decedent.

[See 11 R. C. L. 426-428.]

**Pleading — petition to recover assets from administrator.**

4. A petition by an administrator de bonis non to recover of his predecessor and the surety on his bond must allege that the predecessor had in his possession unadministered assets in kind, or the proceeds of such as had been converted into money and kept separate and unmixed with those of his own.

[See 11 R. C. L. 420.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Henderson County sustaining a demurrer to and dismissing a petition filed for the settlement of the accounts of defendants as former administrators of the estate of W. L. Yancy, deceased. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Vance & Heilbronner, for appellant:

The appraisement and inventory returned to and approved by the court is prima facie evidence of the amount of estate which came to the hand of said administrators.

Carrol v. Connet, 2 J. J. Marsh. 195; 18 Cyc. 202.

An administrator "de bonis non" has usually the right to compel an accounting by his predecessor, where the latter has resigned or been removed.

18 Cyc. 1109; Warfield v. Brand, 13 Bush, 87; Enlow v. Bethel College, 24 Ky. L. Rep. 31, 67 S. W. 989.

Messrs. Yeaman & Yeaman, for appellee:

An administrator de bonis non cannot maintain an action for the recovery of the proceeds or the value of such of the estate of the deceased as had been sold or wasted by the preceding administrator of the deceased. He can only maintain an action for such of the property as remains in specie.

Warfield v. Brand, 13 Bush, 77; Karn v. Seaton, 23 Ky. L. Rep. 101, 62 S. W. 737; Boyd v. Immegart, 29 Ky. L. Rep. 20, 91 S. W. 1182.

Clay, C., filed the following opinion:

This suit was brought by the Farmers' Bank & Trust Company, as administrator de bonis non of W. L. Yancy, deceased, against Y. L. Yancy and J. W. Yancy, former administrators of W. L. Yancy, deceased, and their surety, the Fidelity & Deposit Company of Maryland, to require Y. L. Yancy and J. W. Yancy to answer and say what money and other property of the estate of W. L. Yancy came to their hands as such administrators, and to account for and pay over same to plaintiff, and for judgment against all of the defendants for the sum of \$980.37, with interest and costs. The petition was twice amended, and the demurrer of the Fidelity & Deposit Company was sustained to the peti-

tion as amended, and the petition dismissed. Plaintiff appeals.

The original petition alleged the following facts: W. L. Yancy died intestate and a resident of Henderson county, in the month of February, 1915. The defendants Y. L. Yancy and J. W. Yancy were duly appointed and qualified as administrators of his estate, and executed bond as required by statute, with the Fidelity & Deposit Company of Maryland as surety. As shown by the inventory and appraisement filed by the defendants as administrators aforesaid, there came into their hands personal property of the value of \$980.37. The defendants Y. L. Yancy and J. W. Yancy, as administrators, sold and disposed of the entire property which came into their hands and received the proceeds thereof, and refused to account for, or to pay out, the money which came into their hands, to persons entitled thereto, or to make a settlement of their accounts. On September 25, 1917, a rule was issued by the Henderson county court against the defendants Y. L. Yancy and J. W. Yancy, administrators, to show cause why they should not be compelled to make a settlement of their accounts, and a copy of the order was served on the defendant Fidelity & Deposit Company of Maryland. The motion for the rule was heard on November 5, 1917, and, it appearing that Y. L. Yancy and J. W. Yancy had failed for more than two years to settle their accounts, it was ordered that they be removed from the office and that the Farmers' Bank & Trust Company be appointed administrator de bonis non of the estate. A copy of this order was served on the Fidelity & Deposit Company of Maryland. Plaintiff demanded a settlement of said Y. L. Yancy and J. W. Yancy, administrators, and the payment of any money that they might owe as such admin-

istrators, and the possession of such personal property as might be in their hands; but they refused to make any settlement with plaintiff, or to pay plaintiff any money, or to turn over to it any property belonging to the estate of W. L. Yancy. A copy of the inventory and appraisement was filed with the petition, and it shows that when the inventory was filed there were then in the hands of the administrators \$402 in money and \$578.37 in notes and other personal property.

To the foregoing petition the Fidelity & Deposit Company interposed a demurrer. Before the demurrer was acted on, plaintiff filed an amended petition, alleging in substance that the allegation of the original petition that the administrators had sold and disposed of the personal property and received the proceeds was made through oversight and mistake of fact, and that the only knowledge or information plaintiff had in regard to the property was the inventory filed by the administrators; that plaintiff did not know and was not advised as to what disposition the administrators made of the personal property. It was further alleged that the insertion of the words, "de bonis non," in the order appointing plaintiff administrator, was a clerical mispension, and that the county court had, by order, stricken out these words, and that, by the correction of that error, plaintiff was the only administrator of the estate of W. L. Yancy, deceased. The prayer was the same as in the original petition. The demurrer to the original petition was made to apply to the petition as amended and was sustained. Thereupon a second amended petition was filed, which set out with greater detail the facts stated in the original and first amended petition, and concludes with the following prayer: "That said defendants Y. L. Yancy and J. W. Yancy be required to answer and say what money or other property of the estate of W. L. Yancy came into their hands as such administrators, as well as the money of said estate now in their hands as administrators, and to account for

and turn over to this plaintiff all of said money and other property, and for judgment against all of the defendants for the said money and other property, including the property inventoried and appraised at \$980.37, and, if any of said property cannot be had, for judgment for the value thereof, with interest at 6 per cent per annum from February 15, 1917, until paid, and its costs herein."

The action of the county court in striking out the words, "de bonis non," from the order appointing plaintiff administrator, did not affect the relation which plaintiff sustained to the estate of the intestate. When the first administrators were removed, and plaintiff was appointed administrator in their stead, it thereby became administrator de bonis non, whether the words, "de bonis non," were employed in the order of appointment or not. Hence plaintiff's right to recover must be determined in the light of the fact that it is an administrator de bonis non.

Executor and administrator—  
de bonis non—who is.

The common-law rule prevails in this state, and under that rule an administrator de bonis non can recover from his predecessor or his personal representative only such estate of the decedent as remained in specie, and cannot recover the proceeds of such as had been converted into money, unless such proceeds were kept separate and were susceptible of identification. For assets wasted by the first administrator, the right of action is not in the administrator de bonis non, but in the distributees, heirs, or creditors. 11 R. C. L. § 512, p. 420, and § 523, p. 426; Graves v. Downey, 3 T. B. Mon. 356; Lawrence v. Lawrence, Litt. Sel. Cas. 123; Warfield v. Brand, 13 Bush, 77; Felts v. Brown, 7 J. J. Marsh. 147; Karn v. Seaton, 23 Ky. L. Rep. 101, 62 S. W. 737; Boyd v. Immegart, 29 Ky. L. Rep. 20, 91 S. W. 1132.

—rights of administrator de bonis non—converted assets.

Parties—action to recover assets wasted by administrator.



Hence, in order for an administrator de bonis non to recover of his predecessor and the surety on his bond, he must allege that his predecessor had in his hands unadministered assets in kind, or the proceeds

**Pleading—petition to recover assets from administrator.**

of such as had been converted into money and kept separate and unmixed with those of his own. Here the petition as amended contained no such allegation. Hence it was bad on demurrer, and the trial court did not err in so adjudging.

Judgment affirmed.

## ANNOTATION.

### Right of administrator de bonis non to recover proceeds of personal property of the estate converted by his predecessor.

- I. Introductory, 1252.
- II. General rule, 1252.
- III. Contrary doctrine, 1256.
- IV. Miscellaneous, 1259.

#### I. Introductory.

The powers of an administrator de bonis non are now usually prescribed by statute; and they are usually broad enough to cover all assets of the estate, including claims against his predecessor.

As will be seen, the great weight of American opinion, however, is that at common law an administrator de bonis non could not recover of his predecessor or his representatives for assets converted by such predecessor. In a few jurisdictions, however, a different view has been taken.

#### II. General rule.

In the absence of statute an administrator de bonis non cannot recover from his predecessor or his representatives, either at law or in equity, the proceeds of personal property of the estate converted by such predecessor.

**United States.**—United States use of *Wilson v. Walker* (1883) 109 U. S. 258, 27 L. ed. 927, 3 Sup. Ct. Rep. 277 (see also *Rose's* notes to this case); *Wilson v. Arrick* (1884) 112 U. S. 83, 28 L. ed. 617, 5 Sup. Ct. Rep. 75; *Beard v. Roth* (1888; C. C. Ark.) 35 Fed. 397.

**Alabama.**—*Chamberlain v. Bates* (1835) 2 Port. 550, 27 Am. Dec. 667; *Nolly v. Wilkins* (1847) 11 Ala. 872; *Price v. Simmons* (1848) 13 Ala. 749; *King v. Smith* (1849) 15 Ala. 264; *Hanna v. Price* (1853) 23 Ala. 826.

**Arkansas.**—*Finn v. Hempstead* (1863) 24 Ark. 111; State use of *Oliver v. Rottaken* (1879) 34 Ark. 144;

*Ludlow v. Flournoy* (1879) 34 Ark. 451; *Williams v. Cubage* (1880) 36 Ark. 307; *Brice v. Taylor* (1888) 51 Ark. 75, 9 S. W. 854.

**District of Columbia.**—United States use of *Wilson v. Ames* (1880) McArth. & M. 278.

**Florida.**—*Gregory v. Harrison* (1851) 4 Fla. 56.

**Georgia.**—*Thomas v. Hardwick* (1846) 1 Ga. 78.

**Illinois.**—*Rowan v. Kirkpatrick* (1852) 14 Ill. 1; *Bliss v. Seaman* (1897) 165 Ill. 422, 46 N. E. 279; *Graffenreid v. Kundert* (1889) 34 Ill. App. 483; *Re Richart* (1895) 58 Ill. App. 91.

**Indiana.**—*Anthony v. M'Call* (1832) 3 Blackf. 86; *Young v. Kimball* (1846) 8 Blackf. 167; *State ex rel. Pierson v. Gooding* (1847) 8 Blackf. 567; *Ormes v. Brown* (1899) 22 Ind. App. 569, 52 N. E. 1005.

**Kentucky.**—*Graves v. Downey* (1826) 3 T. B. Mon. 354; *Slaughter v. Froman* (1827) 5 T. B. Mon. 19, 17 Am. Dec. 33; *Bradshaw v. Com.* (1830) 3 J. J. Marsh. 632; *Oldham v. Collins* (1830) 4 J. J. Marsh. 49; *Anderson v. Miller* (1831) 6 J. J. Marsh. 568; *Felts v. Brown* (1832) 7 J. J. Marsh. 147; *Warfield v. Brand* (1877) 13 Bush, 77; *Boyd v. Immegart* (1906) 29 Ky. L. Rep. 20, 91 S. W. 132; *FARMERS' BANK & T. Co. v. FIDELITY & D. Co.* (reported herewith, ante, 1249).

**Maine.**—*Waterman v. Dockray* (1886) 78 Me. 139, 3 Atl. 49; *Hodge v. Hodge* (1897) 90 Me. 505, 40 L.R.A. 33, 60 Am. St. Rep. 285, 38 Atl. 535.

**Maryland.**—State use of *Morrow v. Fidelity & D. Co.* (1905) 100 Md. 256, 108 Am. St. Rep. 410, 59 Atl. 735.

**Mississippi.** — Prosser v. Yerby (1834) 1 How. 87; Stubblefield v. McRaven (1845) 5 Smedes & M. 130, 43 Am. Dec. 502; Byrd v. Holloway (1846) 6 Smedes & M. 323; Rives v. Patty (1876) 43 Miss. 338; Dement v. Beth (1871) 45 Miss. 388.

**New Jersey.** — Carrick v. Carrick (1873) 23 N. J. Eq. 364; Bradway v. Holmes (1892) 50 N. J. Eq. 311, 25 Atl. 196; Thieves v. Mason (1897) 55 N. J. Eq. 456, 37 Atl. 455; Hartson v. Elden (1899) 58 N. J. Eq. 478, 44 Atl. 156; Parker v. Stevens (1900) 61 N. J. Eq. 163, 47 Atl. 573; Roy v. Squier (1900) 61 N. J. Eq. 182, 48 Atl. 233.

**New York.** — Re Place (1849) 1 Redf. 276; Yale v. Baker (1874) 2 Hun. 468.

**Ohio.** — Blizzard v. Filler (1851) 20 Ohio, 479; Curtis v. Lynch (1869) 19 Ohio St. 392.

**Pennsylvania.** — Allen v. Irwin (1815) 1 Serg. & R. 549; Potts v. Smith (1852) 3 Rawle, 361, 24 Am. Dec. 359.

**Rhode Island.** — Brodeur v. Valley Falls Co. (1887) 16 R. I. 448, 17 Atl. 54; Probate Ct. v. Williams (1909) 30 R. I. 147, 73 Atl. 382, 19 Ann. Cas. 554, reargument denied in (1909) — R. I. —, 74 Atl. 177.

**Tennessee.** — Thomas v. Stanley (1857) 4 Sneed, 411.

**Texas.** — Murphey v. Menard (1854) 11 Tex. 673; Johnson v. Hogan (1872) 37 Tex. 77; Ward v. Ward (1880) 1 Posey, Unrep. Cas. 123.

**Utah.** — Reed v. Hume (1902) 25 Utah, 248, 70 Pac. 998.

**Virginia.** — Coleman v. M'Murdo (1827) 5 Rand. 51; Cheatham v. Burfoot (1838) 9 Leigh, 580.

**West Virginia.** — McCreery v. First Nat. Bank (1904) 55 W. Va. 663, 47 S. E. 890; MORRIS v. WESTERMAN (reported herewith) ante, 1237; Downey v. Kearney (1917) 81 W. Va. 422, 94 S. E. 509.

The rule is also stated or recognized in the following cases:

**United States.** — De Valengin v. Duffy (1840) 14 Pet. 282, 10 L. ed. 457.

**Alabama.** — Judge of Benton County Ct. v. Price (1844) 6 Ala. 36; Willis v. Willis (1846) 9 Ala. 721; Waring v. Lewis (1875) 53 Ala. 615; Martin v. Ellerbe (1881) 70 Ala. 326.

**Connecticut.** — Re American Bd. of

Comrs. for Foreign Missions (1858) 27 Conn. 344.

**Georgia.** — Giles v. Brown (1878) 60 Ga. 658; Goodwynne v. Bellerby (1902) 116 Ga. 901, 48 S. E. 275; Bailey v. McAlpin (1905) 122 Ga. 616, 50 S. E. 398.

**Illinois.** — Newhall v. Turney (1853) 14 Ill. 338; Hanifan v. Needles (1884) 108 Ill. 403.

**Indiana.** — Lucas v. Donaldson (1888) 117 Ind. 139, 19 N. E. 758.

**Kentucky.** — Thomason v. Thomason (1858) 1 Met. 53; Yager v. Bank of Kentucky (1907) 125 Ky. 177, 100 S. W. 848.

**Maine.** — Meservey v. Kalloch (1902) 97 Me. 91, 53 Atl. 876.

**Maryland.** — Hagthorp v. Hook (1829) 1 Gill & J. 270; Stewart v. Firemen's Ins. Co. (1880) 53 Md. 572.

**Mississippi.** — Kelsey v. Smith (1834) 1 How. 68; Probate Judge v. Green (1834) 1 How. 146; Weir v. Monahan (1889) 67 Miss. 434, 7 So. 291.

**Missouri.** — Harney v. Dutcher (1851) 15 Mo. 89, 55 Am. Dec. 131.

**Nebraska.** — Prusa v. Everett (1907) 78 Neb. 251, 110 N. W. 568, 118 N. W. 571.

**New Jersey.** — Brownlee v. Lockwood (1869) 20 N. J. Eq. 239; McDonald v. O'Connell (1877) 39 N. J. L. 317.

**Ohio.** — Montgomery v. Goepper (1878) 4 Ohio L. J. 67.

**Oregon.** — Gatch v. Simpson (1901) 40 Or. 90, 66 Pac. 688.

**Pennsylvania.** — Kendall v. Lee (1831) 2 Penr. & W. 482; Carter v. Trueman (1847) 7 Pa. 315.

**Tennessee.** — Bell v. Speight (1850) 11 Humph. 451; Stott v. Alexander (1855) 2 Sneed, 650; Cheek v. Wheatley (1856) 3 Sneed, 484.

**Texas.** — Collins v. Warren (1885) 63 Tex. 311.

**Virginia.** — Harman v. McMullin (1888) 85 Va. 187, 78 S. E. 349.

**Washington.** — Denton v. Schneider (1914) 80 Wash. 506, 142 Pac. 9.

**West Virginia.** — Brown v. Brown (1913) 72 W. Va. 648, 47 L.R.A. (N.S.) 995, 78 S. E. 1040.

**Wisconsin.** — Stronach v. Stronach (1865) 20 Wis. 129.

Any contrary holding or views in

**Mulford v. Mulford** (1885) 40 N. J. Eq. 163, and in **Lindsley v. Personette** (1882) 35 N. J. Eq. 355, are of no moment in view of the latter settled opinion of the New Jersey court.

The decision to the contrary in **Welman v. Armour** (1811) R. M. Charlt. (Ga.) 6, seems to have been overlooked in **Thomas v. Hardwick** (1846) 1 Ga. 78, *supra*.

"An administrator de bonis non derives his title from the deceased, and not from the former executor or administrator. To him is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered. He is entitled to all the goods and personal estate which remain in specie." **United States v. Walker** (1883) 109 U. S. 258, 27 L. ed. 927, 3 Sup. Ct. Rep. 277, *supra*.

"The collection of the testator's or intestate's debts, or a sale of his goods by the executor or administrator, is such an administration of them as to preclude the administrator de bonis non from claiming or exercising any power or authority over them or the proceeds of them. They are not embraced within his commission, which is for the administration of the goods and chattels, rights and credits, which were of the testator or the intestate at the time of his death, and remain unadministered. For unless they remain in specie, it cannot be said that they were of the goods and chattels, rights and credits, which belonged to the deceased at the time of his death." **Potts v. Smith** (1832) 3 Rawle (Pa.) 368, 24 Am. Dec. 359, *supra*.

In **Potts v. Smith** (1832) 3 Rawle (Pa.) 360, *supra*, the court referred to "the Statute 30 Car. II. chap. 7, explained and made perpetual by 4 & 5 Wm. & M. chap. 24, § 12, which makes the executor, or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, liable and chargeable in the same manner as their testator or intestate would have been if they had been living;" and said: "Now to whom would their testator or intestate have been

liable if living? To the creditors, or the legatees or distributors [distributees] if you please, but certainly not to the administrator de bonis non, because there was no such person in being. . . . Again, if the collection of debts owing to the deceased, or the sale of his goods, by the executor or administrator, had not been such an administration as to put these things beyond the reach and control of the administrator de bonis non, there was but little, if any, occasion, for the Statutes of 30 Car. II. and 4 & 5 Wm. & M., already mentioned, because the administrator de bonis non could have maintained his action, as it certainly would have been his duty to have done; so, if he had the right and the authority for the recovery of all the moneys received as well in payment of debts due to the deceased, as upon sales made of his goods, by the executor or administrator, against the personal representatives of such executor or administrator, and, when recovered, have paid the creditors, legatees, and distributees, the enactment of that statute would have been useless. The provisions, however, of these statutes prove conclusively to my mind that such right and authority were never supposed to have existed on the part of the administrator de bonis non."

It will be observed that in **MORRIS v. WESTERMAN** (reported herewith), ante, 1237, a man died leaving part of his estate to his daughter, and appointing her husband executor, and she died before her husband, who qualified as her administrator and never accounted as executor or administrator, having converted the property before the wife's death; and that it was held that the amount due from him as executor of the first estate was an unadministered asset of the wife's estate, and might be recovered by her administrator de bonis non. But as to the estate to which the fund originally belonged, it was an administered asset, and could not be recovered by the administrator de bonis non with the will annexed, of the first estate.

It must be admitted that the old law

has very little directly on the point. In *Packman's Case* (1597) 6 Coke, 18b, 77 Eng. Reprint, 281, it was said: "If an administrator waste the goods, and afterwards administration is committed to another, yet any debtee shall charge him in debt." In *Wankford v. Wankford* (1699) 1 Salk. 306, 91 Eng. Reprint, 269, Holt, Ch. J., said: "If the goods of the testator remain in specie, they shall go to his administrator de bonis non, because in that case it is notorious which were the goods of the testator, and they are distinguishable." And there are a number of cases stating that the administrator de bonis non is entitled to the goods which remain in specie, or are unconverted. An unsatisfactory analogy is claimed from the cases holding that the administrator de bonis non shall not take assets whose form has been changed. But, as has been seen, the great weight of American opinion renders the question no longer open. Probably the most learned opinions on the question are those in *Potts v. Smith* (1832) 3 Rawle (Pa.) 361, and in *Coleman v. M'Murdo* (1827) 5 Rand. (Va.) 51. The opinion in *Thomas v. Riegel* (1835) 5 Rawle (Pa.) 265, is also of value in this connection.

It may be noted that at common law, and prior to the Statute of Charles II., a *devastavit* was considered as a personal tort, dying with the person. *Tucke's Case* (1590) Leon, pt. 3, p. 241, 74 Eng. Reprint, 659; *Brown v. Collins* (1674) 2 Lev. 110, 83 Eng. Reprint, 473.

In *Ormes v. Brown* (1899) 22 Ind. App. 569, 52 N. E. 1005, the court said: "As the only right of action given by statute to an administrator de bonis non for a conversion of any part of the personal assets of the estate of his predecessor is upon his official bond, and as an action will not lie in his favor for a tort of his predecessor, as such tort dies with him, it follows that, as the complaint proceeds upon the latter theory, it was wholly insufficient."

#### Money.

"Also it is holden, that if an executor receives money in right of the

testator, and lays it up by himself, and dies intestate, that this money shall go to the administrator de bonis non, being easily distinguished to be part of the testator's effects, as goods in specie." Bacon, Abr. "Executors & Administrators" (B) 2, p. 24. This view was held in *Hackney v. Steadman* (1853) 46 N. C. (1 Jones, L.) 207. See also in *Re Hall* (1827) 1 Hagg. Eccl. Rep. (Eng.) 139, infra, III. An administrator de bonis non "is entitled to all the goods and personal estate which remain in specie. Money received by the former executor or administrator in his character as such, and kept by itself, will be so regarded." *Beall v. New Mexico* (1872) 16 Wall. (U. S.) 535, 21 L. ed. 292; *United States use of Wilson v. Walker* (1883) 109 U. S. 258, 27 L. ed. 927, 3 Sup. Ct. Rep. 277 (see also *Rose's* notes to this case).

While the question of the right of an administrator de bonis non to proceed against third parties is beyond the scope of this note, it may be observed in this connection that it has been held in *Kentucky* (although the general rule there applies) that money deposited in a bank by an executor to his credit as executor might be reached by an administrator de bonis non. Thus, in *Clark v. Farmer's Nat. Bank* (1907) 124 Ky. 563, 99 S. W. 674, it was held that an administrator de bonis non could recover of the bank for money deposited there by his predecessor to his credit as executor, and paid out to the executor's administrator before the appointment of the plaintiff, on the ground that it was assets of the decedent. On the other hand, in *Pennsylvania*, where the common-law rule has been changed by statute, it was held in *Slaymaker v. Farmer's Nat. Bank* (1883) 103 Pa. 616, where an administrator de bonis non had drawn the money deposited by his predecessor as administrator, that the depositary was liable to the executor of such predecessor, on the ground that even under the statute the administrator de bonis non would only be entitled to a balance after a settlement of his predecessor's account. So, in *Sibbs v. Philadelphia*

Sav. Fund Soc. (1893) 153 Pa. 345, 25 Atl. 1119, it was held that an administrator de bonis non could not recover from the depositary money deposited by the decedent and transferred by the plaintiff's predecessor to his name as administrator, and drawn out by such predecessor's administrator. But in *Stair v. York Nat. Bank* (1867) 55 Pa. 364, 93 Am. Dec. 759, where an administrator of an executor had settled such executor's account, showing a balance, it was held that an administrator de bonis non of the first testator might recover of the depositary money deposited by the executor, being a part of such balance and never drawn out.

### III. Contrary doctrine.

Support of opposition to the general rule has been claimed in the authorities holding that an administrator durante minore etate is liable to the executor. See, for example of such authorities, *Fotherby v. Pate* (1747) 3 Atk. 603, 26 Eng. Reprint, 1148; Bacon, Abr. "Executors & Administrators" (B) 2, p. 18; Vaughan, Ch. J., in *Brookings v. Jennings* (1674) 1 Mod. 174, 86 Eng. Reprint, 809. But it was said in *Fotherby v. Pate* (Eng.) supra, that such an administrator is "little more than a person appointed ad colligendum bona."

In *Phelps v. Sproule* (1831) 4 Sim. 318, 58 Eng. Reprint, 119, Shadwell, V. C., said that the right to call for an account fell upon the administrator de bonis non.

In *Hall's Goods* (1827) 1 Hagg. Eccl. Rep. (Eng.) 139, an action being brought in the King's bench by the administrator de bonis non against the executors of his predecessor, who left a considerable balance of the estate in the hands of his bankers, the prerogative court granted a motion that the bond be produced before the King's bench. But this case is commented on in *Beall v. New Mexico* (1872) 16 Wall. (U. S.) 535, 21 L. ed. 292, as undoubtedly founded on the theory that there was undistributed money in bank, which was a part of the original intestate's estate in specie.

For *Welman v. Armour* (1811) R. M. Charl. (Ga.) 6, see supra, II.

### New Hampshire.

The New Hampshire cases seem to take it for granted that the common-law rule is not in force there, whether they were decided before or after the statute, providing that if administration becomes vacant the judge of probate may grant administration on the estate not already administered, to such person as he may think proper, and that no person shall act as administrator until he shall have given bonds to the probate judge to pay and deliver the residue of the estate which shall be found remaining upon the account of such executor or administrator, unto such person as said judge by his decree shall limit and appoint.

An administrator de bonis non cum testamento annexo was held entitled to prosecute in the name of the judge of probate an action upon the bond of his predecessor, to recover a balance found remaining in his hands on a settlement of his final account of administration, as, where the balance remained in the hands of a deceased executor unadministered, it was peculiarly and legitimately within the province of the new administrator, as part, or the whole, of the estate of the deceased testator, of which it was his express and positive duty to take charge. *Judge of Probate v. Claggett* (1858) 36 N. H. 381, 72 Am. Dec. 314.

An administrator de bonis non was held to be the official successor in the trust, and entitled to receive whatever remained of the estate in his predecessor's hands, on the settlement of the account; and, in default of payment, was the proper person to maintain an action by a suit on the probate bond. *Prescott v. Farmer* (1879) 59 N. H. 90.

Where an executor in New Hampshire sold lands in Vermont as administrator with the will annexed, and the settlement in Vermont showed a large sum in his hands with which he was charged, and the court in Vermont ordered him to pay the same to such persons as the probate court in New Hampshire should direct, it was held that the administrator de bonis non of

the estate in New Hampshire was entitled to recover on the executor's bond for the balance in the hands of such executor. *Judge of Probate v. Heydock* (1837) 8 N. H. 491.

#### North Carolina.

In *Cannon v. Jenkins* (1830) 16 N. C. (1 Dev. Eq.) 422, it was held that an account of the proceeds of slaves demanded by legatees involved a general account of the deceased administrator's administration,—“an account to which the next of kin have no primary right, but only the administrator de bonis non of the testator.”

In *Conrad v. Dalton* (1831) 14 N. C. (3 Dev. L.) 251, the court said: “Where the goods have actually been wasted by the first executor or administrator, I am at a loss to say what is to be done. For a devastavit is in tort which dies with the person. Perhaps our acts of assembly, reviving all causes of action where property is the subject of controversy,—that is, all which are not merely vindictive,—will enable the administrator de bonis non to sustain an action, even where there has been an actual devastavit.”

In *Badger v. Jones* (1872) 66 N. C. 305, it was said that “for any devastavit on the part of the previous administrator, the administrator de bonis non ought to recover the value or the goods and effects wasted, by an action on the bond of his predecessor.”

In *Thompson v. Badham* (1874) 70 N. C. 141, it was said that an administrator de bonis non “alone, to the exclusion of creditors and distributees, can recover from the representative of a deceased administrator, not only the property remaining in specie (which is the general law), but also the value of the assets which the administrator has wasted or misapplied.”

And it is now established in North Carolina that converting assets is not administering them and that the administrator has recourse on his predecessor's bond. *Lansdell v. Winstead* (1877) 76 N. C. 366, where the court said: “Wasting an estate is not administering it. An administration can be affected only by collecting the assets, paying the debts, and making a final distribution of the

surplus among the next of kin. If an administrator dies before this is done, an administrator de bonis non must be appointed, and so on ad infinitum, until a final settlement and distribution of the estate are made. The assets which were wasted by Dillihay were unadministered, and can be administered after his death only through an administrator de bonis non, in whose name only can they, when recovered, be subjected to the demands of creditors and the claims of the next of kin.”

An administrator de bonis non may recover on his removed predecessor's bond for a devastavit. *Badger v. Jones* (1872) 66 N. C. 305 (stating the rule); *Latham v. Bell* (1873) 69 N. C. 135; *Carlton v. Byers* (1874) 70 N. C. 691. In *Tulburt v. Hollar* (1889) 102 N. C. 406, 9 S. E. 430, where the administrator had resigned, it was held that an action on his bond should be brought by an administrator de bonis non under North Carolina Code, § 1517, providing that whenever the letters of an executor, administrator, or collector are revoked his bond may be prosecuted by the person or persons succeeding to the administration of the estate. It was said: “However it may be elsewhere, under the section of the Code and decisions referred to, it is different in this state, and it is well settled that such an action cannot be maintained by the next of kin, distributees, or creditors.”

A balance in the account of the administrator is to be recovered on his bond by the administrator de bonis non. *Ham v. Kornegay* (1881) 85 N. C. 119; *University of North Carolina v. Hughes* (1884) 90 N. C. 537 (cited in *Merrill v. Merrill* (1885) 92 N. C. 657 and in *Hardy v. Miles* (1884) 91 N. C. 131); *Jones v. Wooten* (1905) 137 N. C. 421, 49 S. E. 915. It was so held in an action for undistributed moneys. *Gilliam v. Watkins* (1899) 104 N. C. 180, 10 S. E. 183.

It is the duty of an administrator de bonis non to collect in all sums due the estate, whether by the former administrator or others. *Mann v. Baker* (1906) 142 N. C. 235, 55 S. E. 102.

So, in *Wilson v. Pearson* (1889)

102 N. C. 290, 9 S. E. 707, it was said that an action for a devastavit committed by an administrator de bonis non cum testamento annexo, who had died, should be brought in the name of the succeeding administrator de bonis non, and that this was well settled in North Carolina, although a different rule prevailed elsewhere.

#### South Carolina.

In *Foster v. Brown* (1829) 1 Bail. L. 221, 19 Am. Dec. 672, it was said that an executor of the will of decedent could have compelled a preceding administrator to account. In *Easterling v. Thompson* (1838) Rice, L. 346, the court said that upon the death of an administrator his administrator was not accountable to the creditors of the first intestate. Their remedy was against the administrator de bonis non, whose duty it was to have an account from the administrator of the first administrator. In *Davis v. Wright* (1835) 2 Hill, L. 560, it was held that an administrator of an administrator was not liable for interest until an administrator de bonis non was appointed, inasmuch as, before his appointment, there was no person legally authorized to receive the money and give a discharge. In *Villard v. Robert* (1847) 1 Strobb. Eq. 393, it was held that an administrator de bonis non was competent to demand and compel an account from his predecessor, the court apparently considering as dictum the contrary view taken in *Smith v. Carrere* (1843) 1 Rich. Eq. 123, where it was held that the distributee might sue the representative of a deceased administrator without the appointment of an administrator de bonis non, the court taking the view that an administrator de bonis non could not recover of his predecessor for converted assets. The opinions in the *Villard Case*, supra, contain a review of a number of English cases, and do not admit that the general rule aforesaid was ever the common law.

The *Villard Case* was approved on principle in *Rhame v. Lewis* (1867) 13 Rich. Eq. 318, and in *Redfearn v. Craig* (1900) 57 S. C. 534, 35 S. E. 1024, where the court said: "It is con-

tended that the authorities in this state support the view that it is only unadministered assets of an intestate that pass to his administrator de bonis non, on the death of the first administrator. As long as *Smith v. Carrere*, supra, was allowed to remain as authority in this state, there was something in defendant W. D. Craig's contention; but when Chancellor Job Johnson, by his clear reasoning, with the authorities supporting his position, in *Villard v. Robert*, supra, furnished a review of Chancellor Harper's decree in *Smith v. Carrere*, supra, there was nothing left in it but its name; its authority was blasted forever. . . . The later case of *Rhame v. Lewis* (1867) 13 Rich. Eq. 269, went further, if anything, than did *Villard v. Robert*, supra."

#### Tennessee.

In Tennessee, the cases, while at first inclining to the general rule, later took the contrary view.

In *Thompson v. Childress* (1873) 1 Tenn. Ch. 369, it was said: "The nearest analogy in the law to the case before us is that of an administrator de bonis non and his right to sue his predecessor. Upon this subject, the decisions of our supreme court are not quite as clear and consistent as an inferior tribunal would like to find them. In *Shackleford v. Runyan* (1846) 7 Humph. 141, it was held that an administrator de bonis non might call his predecessor in the administration to account in a court of chancery; while in *Stott v. Alexander* (1855) 2 Sneed, 654, there is a dictum to the contrary. On the other hand, in *Thomas v. Stanley* (1857) 4 Sneed, 411, it was held that an administrator de bonis non could not maintain covenant on the administration bond of his predecessor, which decision is referred to and recognized in *Reeves v. Steele* (1859) 2 Head, 647. The latest decisions and the weight of authority are against the power to sue, at any rate upon the bond of the predecessor; and it is a suit upon the bond that is now before us."

In *Stott v. Alexander* (1855) 2 Sneed, 650, it was held that the administrator de bonis non could not main-

tain an action of trover against the representative of the former administrator for money of the plaintiff's intestate, collected by the former administrator, where the same could not be specifically distinguished and identified.

In *Thomas v. Stanley*, *supra*, it was held that an administrator de bonis non could not maintain an action on the bond of his predecessor for money received by him, which he had failed to pay over to the heirs and distributees, as the duty of administrators de bonis non only applies to such property and effects not administered as remained in specie.

In *Cheek v. Wheatley* (1856) 3 Sneed, 484, the court said that an administrator de bonis non "is to administer such assets of the estate as remain in specie at the death of the former administrator. To this extent merely, in the absence of statutory regulations, is he the representative of the estate. . . . He is not responsible for the maladministration or devastavit of his predecessor. He cannot inquire into or impeach the validity of his acts."

But in *Shackelford v. Runyan* (1846) 7 Humph. 141, it was held that an administrator de bonis non could call to account the personal representative of the first administrator. The court said: "However it may be in England, or elsewhere, an administrator de bonis non in our state is clothed with the full powers, and subject to all the duties, of the first personal representative, and is embraced and described in our statutes by the general description of administrator, whether by such statutes powers are given or duties imposed."

And where an administrator de bonis non and the heirs and distributees brought a bill against the executors

and sureties of the administrator, seeking to collect the balance found due on the last settlement and to correct all errors therein, it was held that such an action could be maintained. *Whitaker v. Whitaker* (1883) 12 Lea, 393. The court distinguished the cases of *Thomas v. Stanley*, *Stott v. Alexander*, and *Cheek v. Wheatley*, *supra*, on the ground that these cases were all actions at law, and "they necessarily, in their investigation, would have ordered a review of the accounts of the former administrator, for which the machinery of a law court is insufficient."

#### IV. Miscellaneous.

A judgment in personam for a devastavit, rendered against an executor and in favor of an administrator de bonis non by a probate court, will be assumed to have been within its powers until the state supreme court decides otherwise, in view of statutes which provide for charging an executor in his account with all the goods of the deceased that come to his possession, and with waste in case of neglect to pay over the money in his hands, or of loss to the persons interested, with liability on the bond as an alternative, and of decisions of the highest state court that money received by an administrator, and unjustifiably paid out, is still in his hands in contemplation of law, and that parties interested may surcharge or falsify his account, and that the assets of an estate are not regarded as administered until they have been collected and applied as required by law or by the will, until which time the jurisdiction of the probate court remains. *Michigan Trust Co. v. Ferry* (1912) 228 U. S. 346, 57 L. ed. 867, 33 Sup. Ct. Rep. 550, reversing (1910) 99 C. C. A. 221, 235, 175 Fed. 667, 681.

B. B. B.



## PEOPLE OF THE STATE OF NEW YORK, Appts.

v.

## BEAKES DAIRY COMPANY, Respt.

*New York Court of Appeals — February 12, 1918.*

(222 N. Y. 416, 119 N. E. 115.)

**License — condition — bond to pay debts.**

1. A corporation may be required to give bond to pay for purchases made, or to satisfy a state commissioner of its solvency, as a condition to securing a license to engage in the business of purchasing milk and cream.

[See note on this question beginning on page 1271.]

**Statutes — amendment — existing penalties.**

2. The insertion in an agricultural law of a provision requiring a license with bond to pay for purchases made before engaging in the business of buying milk makes the insertion subject to existing provisions of the law providing penalties to be collected in a civil action for violation of the statute.

[See 21 R. C. L. 220 et seq.]

**Pleading — separate counts — penalties — what considered.**

3. In an action to recover a series of penalties for purchasing milk without a license, each purchase being the subject of a separate count, each count must be read separately as though it was the only one, in determining whether or not a violation of the statutory provision is charged.

**License — purchasing milk — business.**

4. Carrying on the business of purchasing milk within the meaning of a statute requiring a license for such business implies continuity of conduct,—a continuous course of dealing, not an isolated transaction.

[See 17 R. C. L. 474, 478.]

**Pleading — failure to state cause of action.**

5. A complaint seeking penalties for a large number of separate acts of buying milk without license, without charging the carrying on of the business of buying milk for which the statute requires a license to be taken out, does not state a cause of action.

**Constitutional law — holding statute unconstitutional.**

6. To hold a statute unconstitutional is a grave thing.

[See 6 R. C. L. 73, 74.]

**— prohibiting lawful business.**

7. The state may not prohibit the business of purchasing milk and cream.

[See 6 R. C. L. 266–268.]

**— regulation of business.**

8. The legislature may regulate a business, however lawful in itself, if it may become a medium of fraud.

[See 6 R. C. L. 267, 268.]

**— right to raise question of unconstitutionality.**

9. One not affected by the unconstitutionality of a statute cannot raise the question of such unconstitutionality.

[See 6 R. C. L. 89 et seq.]

**— class legislation.**

10. A statute requiring a license of persons engaged in the business of buying milk and cream is not invalid as class legislation.

[See 17 R. C. L. 507 et seq.]

**— prohibition of.**

11. There is no constitutional prohibition against class legislation as such, if the classification is based on some reasonable grounds and is not essentially arbitrary.

[See 6 R. C. L. 378; 17 R. C. L. 509–511.]

**— delegation of legislative power.**

12. Power vested in a state commissioner to waive a provision of a statute requiring the giving of a bond conditioned to pay debts in order to secure a license to purchase milk and cream in case of persons of recognized financial ability is not an unconstitutional delegation of legislative power.

[See 17 R. C. L. 531, 532.]

**— right of corporation.**

13. A corporation has no natural right to engage in the business of pur-

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chasing milk without obtaining a license on such terms as the legislature may provide.

[See 17 R. C. L. 489.]

Corporation — right to impair charter.

14. The legislature may not, under

the guise of an amendment to a corporate charter, defeat or substantially impair the object of the grant, but it may qualify it by reasonable restrictions.

[See 7 R. C. L. 121.]

**APPEAL** by the people from a judgment of the Appellate Division of the Supreme Court, Third Department, reversing an order of a Special Term for Saratoga County (Kellogg, J.) denying defendant's motion for judgment on the pleadings, and dismissing the complaint, in an action brought to recover penalties for purchasing milk without a license in violation of statute. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles M. Stern, and C. T. Dawes, with Mr. Merton E. Lewis, Attorney General, for appellants:

In so far as defendant is concerned, the Milk-gathering Statute can be sustained as an exercise of the reserved power of the state to amend the corporate charter of one of its own corporations.

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; Adirondack R. Co. v. New York, 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Greenwood v. Union Freight & R. Co. 105 U. S. 13, 26 L. ed. 961; Lord v. Equitable Life Assur. Co. 194 N. Y. 212, 22 L.R.A. (N.S.) 420, 87 N. E. 443; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 408, 43 L. ed. 746, 748, 19 Sup. Ct. Rep. 419; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; New York v. Twenty-third Street R. Co. 113 N. Y. 311, 21 N. E. 60; Erie R. Co. v. Williams, 233 U. S. 685, 701, 58 L. ed. 1155, 1161, 51 L.R.A. (N.S.) 1097, 34 Sup. Ct. Rep. 761; Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; New York, C. & H. R. R. Co. v. Williams, 199 N. Y. 108, 35 L.R.A. (N.S.) 549, 139 Am. St. Rep. 850, 92 N. E. 404.

The state may constitutionally compel the licensing and bonding of any business which presents great opportunities for fraud.

Dent v. Virginia, 129 U. S. 114, 122,

32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; Musco v. United Surety Co. 196 N. Y. 459, 134 Am. St. Rep. 851, 90 N. E. 171; Fox v. Smith, 123 App. Div. 369, 108 N. Y. Supp. 181; Stern v. Metropolitan L. Ins. Co. 169 App. Div. 217, 154 N. Y. Supp. 472; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 2 L.R.A. (N.S.) 859, 76 N. E. 11, 5 Ann. Cas. 325; New York v. Vandewater, 113 App. Div. 456, 99 N. Y. Supp. 306; Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917C, 522; Armour & Co. v. North Dakota, 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548; People v. Charles Schweinler Press, 214 N. Y. 395, L.R.A.1918A, 1124, 108 N. E. 639, Ann. Cas. 1916D, 1059; Wright v. Hart, 182 N. Y. 330, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; Klein v. Maravelas, 219 N. Y. 383, L.R.A.1917E, 549, 114 N. E. 809, Ann. Cas. 1917B, 273.

A statute cannot be proved unconstitutional by thinking up other instances to which it might with equal propriety have been made to apply.

Southwestern Oil Co. v. Texas, 217 U. S. 114, 121, 54 L. ed. 688, 692, 30 Sup. Ct. Rep. 496; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 Sup. Ct. Rep. 856; Musco v. United Surety Co. 132 App. Div. 303, 117 N. Y. Supp. 21; Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612.

There has been no unconstitutional delegation of legislative power. The statute does not vest in the commissioner of agriculture power to arbitrarily excuse one person from the giving of a bond, and require it of another.

*People v. C. Klinck Packing Co.* 214 N. Y. 131, 108 N. E. 278, Ann. Cas. 1916D, 1051; *Stern v. Metropolitan L. Ins. Co.* 169 App. Div. 220, 154 N. Y. Supp. 472; *Saratoga Springs v. Saratoga Gas, E. L. & P. Co.* 191 N. Y. 123, 18 L.R.A.(N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; *People ex rel. Lodes v. Health Dept.* 189 N. Y. 187, 13 L.R.A.(N.S.) 894, 82 N. E. 187.

Mr. Walter Jeffreys Carlin, for respondent:

Section 55 of the Agricultural Law cannot be sustained on the ground that it is an exercise of the reserved power to alter, amend, or repeal the charter of a corporation.

*Rathbone v. Wirth*, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; *Lawton v. Steele*, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878, affirmed in 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 46 L.R.A. 687, 55 N. E. 562, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; *New York & L. I. R. Co. v. O'Brien*, 192 N. Y. 558, 85 N. E. 1113, 121 App. Div. 819, 106 N. Y. Supp. 909; *Re New York Dist. R. Co.* 107 N. Y. 42, 14 N. E. 187, 42 Hun, 621; *Re Middletown*, 82 N. Y. 196; *People ex rel. Angerstein v. Kenney*, 96 N. Y. 294; *Duryee v. New York*, 96 N. Y. 477; *Marshall Field & Co. v. Clark*, 143 U. S. 696, 36 L. ed. 311, 12 Sup. Ct. Rep. 495; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 481, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.

Section 55 of the Agricultural Law is unconstitutional, being in violation of both the state and Federal Constitutions.

*Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 982, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *People v. Windholz*, 92 App. Div. 569, 86 N. Y. Supp. 1015; *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103, 92 N. Y. Supp. 497; *Watertown v. Rodenbaugh*, 112 App. Div. 723, 98 N. Y. Supp. 885; *Grossman v. Caminez*, 79 App. Div. 15, 79 N. Y. Supp. 900; *Cody v. Dempsey*, 86 App. Div. 335, 83 N. Y. Supp. 899; *People ex rel. Duryea v. Wilber*, 198 N. Y. 1, 27 L.R.A.(N.S.)

357, 90 N. E. 1140, 19 Ann. Cas. 626; *Schnaier v. Navarre Hotel & Importation Co.* 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; *People v. Beattie*, 96 App. Div. 383, 89 N. Y. Supp. 193; *People ex rel. Moskowitz v. Jenkins*, 202 N. Y. 53, 35 L.R.A.(N.S.) 1079, 94 N. E. 1065; *People v. Gilbert*, 68 Misc. 48, 123 N. Y. Supp. 264; *People v. Ringe*, 197 N. Y. 143, 27 L.R.A.(N.S.) 523, 90 N. E. 451, 18 Ann. Cas. 474; *Hauser v. North British & Mercantile Ins. Co.* 206 N. Y. 455, 42 L.R.A.(N.S.) 1139, 100 N. E. 52, Ann. Cas. 1914B, 263; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Wyeth v. Board of Health (Wyeth v. Thomas)* 200 Mass. 474, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439, 86 N. E. 925; *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; *Re Steube*, 91 Ohio St. 135, L.R.A.1916E, 377, 110 N. E. 250; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Barrett v. State*, 220 N. Y. 423, L.R.A.1918C, 400, 116 N. E. 99; *Ex parte Hayden*, 147 Cal. 649, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183, 82 Pac. 315; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Harding v. People*, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. (Willson) 565, 19 S. W. 910; *State v. Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; *State v. Hinman*, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194; *Re Day*, 181 Ill. 73, 50 L.R.A. 519, 54 N. E. 646; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *State v. Pennoyer*, 65 N. H. 113, 5 L.R.A. 709, 18 Atl. 878; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *State v. McFarland*, 60 Wash. 98, 140 Am. St. Rep. 909, 110 Pac. 792; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *State v. Latham*, 115 Me. 176, L.R.A.

1917A, 480, 98 Atl. 578; Re Christensen, 43 Fed. 243; Zanone v. Mound City, 103 Ill. 552; East St. Louis v. Wehrung, 46 Ill. 392; People v. C. Klinck Packing Co. 214 N. Y. 121, 108 N. E. 278, Ann. Cas. 1916D, 1051; Board of Administrators v. Miles, 278 Ill. 174, 115 N. E. 841; People ex rel. Berger v. Warden, 176 App. Div. 602, 168 N. Y. Supp. 910; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Montana Co. v. St. Louis Min. & Mill. Co. 162 U. S. 160, 170, 38 L. ed. 398, 400, 14 Sup. Ct. Rep. 506; People v. Windholz, 92 App. Div. 569, 86 N. Y. Supp. 1015.

No action lies to recover a penalty for a violation of § 55 of the Agricultural Law.

Excelsior Petroleum Co. v. Lacey, 68 N. Y. 422; Depew v. Lehigh Valley R. Co. 85 Misc. 71, 149 N. Y. Supp. 265; Erie R. Co. v. Steward, 59 App. Div. 187, 69 N. Y. Supp. 57; Wormser v. Brown, 149 N. Y. 163, 43 N. E. 524; People ex rel. Davidson v. Gilon, 126 N. Y. 147, 27 N. E. 282; 36 Cyc. 1088, note, 92; Townsend v. Little, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357; United States v. Tynen, 11 Wall. 88, 92, 20 L. ed. 153, 154; People ex rel. Navano v. Van Nort, 64 Barb. 205; Dexter & L. Pl. Road Co. v. Allen, 16 Barb. 15; Re Central Park Comrs. 50 N. Y. 493; Jessup v. Carnegie, 80 N. Y. 441, 36 Am. Rep. 643; Nichols v. Squire, 5 Pick. 168; Com. v. Kimball, 21 Pick. 373; State v. Smith, 44 Tex. 443; Com. v. Howes, 15 Pick. 231; State v. Loftin, 19 N. C. (2 Dev. & B. L.) 31; State v. Snuggs, 85 N. C. 541.

If an action lies to recover a penalty for a violation of § 55, but one penalty can be recovered.

Fisher v. New York C. & H. R. R. Co. 46 N. Y. 644; Cox v. Paul, 175 N. Y. 328, 67 N. E. 586; Criffin v. Interurban Street R. Co. 179 N. Y. 438, 72 N. E. 513, 180 N. Y. 538, 72 N. E. 1142; United States Condensed Milk Co. v. Smith, 116 App. Div. 15, 101 N. Y. Supp. 129; People v. Spencer, 201 N. Y. 105, 94 N. E. 614, Ann. Cas. 1912A, 818; United States v. New York Guaranty & Indemnity Co. 8 Ben. 269, Fed. Cas. No. 15,872; Flora v. American Exp. Co. 92 Miss. 68, 45 So. 149; Washburn v. M'Inroy, 7 Johns. 134; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, P.U.R.1915A, 106, 35 Sup. Ct.

Rep. 214; Kern Trading & Oil Co. v. Associated Pipe Line Co. 217 Fed. 273; Consolidated Gas Co. v. Mayer, 146 Fed. 150; Consolidated Gas Co. v. New York, 157 Fed. 849; Van Dyke v. Geary, 218 Fed. 111; Portland R. Light & P. Co. v. Portland, 210 Fed. 667; Rail & River Coal Co. v. Yaples, 236 U. S. 338, 59 L. ed. 607, 35 Sup. Ct. Rep. 359; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; Southwestern Teleg. & Teleph. Co. v. Danaher, 238 U. S. 482, 59 L. ed. 1419, L.R.A.1916A, 1208, P.U.R.1915D, 571, 35 Sup. Ct. Rep. 886; Wilcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1184, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Pound, J., delivered the opinion of the court:

This is an action to recover judgment against defendant for 298 penalties of \$100 each for buying milk or cream within the state from certain producers for the purpose of shipping the same to New York city for consumption or manufacture, without having been duly licensed as provided by §§ 55 and following of the Agricultural Law (Consol. Laws, chap. 1), added thereto by chapter 408 of the Laws of 1913, as amended by chapter 651 of the Laws of 1915. The principal provisions of the statute are as follows:

"Sec. 55. Licensing of milk-gathering stations where milk is bought. —On and after September first, nineteen hundred and thirteen, no person, firm, association or corporation, shall buy milk or cream within the state from producers for the purpose of shipping the same to any city for consumption or for manufacture, unless such business be regularly transacted at an office or station within the state and unless such person, firm, association or corporation be duly licensed as provided in this and the ensuing sections of this article. Every such person, firm, association or corporation before engaging or continuing in the business of buying milk or cream for the purposes aforesaid, shall, annually, on or before August first, file an application with the commissioner of agriculture for a li-

cense to transact such business. The application shall state the nature of the business, as hereinabove set forth, the full name of the person or corporation applying for the license, and, if the applicant be a firm or association, the full name of each member of such firm, or association, the city, town or village and street number at which the business is to be conducted, and such other facts as the commissioner of agriculture shall prescribe. The applicant shall further satisfy the commissioner of his or its character, financial responsibility and good faith in seeking to carry on such business. The commissioner shall thereupon issue to such applicant, on payment of ten dollars, a license entitling the applicant *to conduct the business of buying milk and cream from producers for the purpose aforesaid at an office or station at the place named in the application until the first day of September next following.* . . .

"A license shall not be issued as provided in this section, on and after the taking effect of this section, unless the applicant for such license shall file with the application a good and sufficient surety bond, executed by a surety company, duly authorized to transact business in this state, *in a sum not less than five thousand dollars*, or shall be relieved from such requirement as provided herein. Such bond shall be approved as to its form and sufficiency by the commissioner of agriculture.

"Such applicant may in lieu of such bond deposit with the commissioner of agriculture money or securities in which the trustees of a savings bank may invest the moneys deposited therein, as provided in the banking law, in an amount equal to the sum secured by the bond required to be filed as herein provided.

"The bond required to be filed hereunder shall be given to the commissioner of agriculture in his official capacity and shall be conditioned for the faithful compliance by the licensee with the provisions of this chapter, as hereby amended,

*and for the payment of all amounts due to persons who have sold milk or cream to such licensee, during the period that the license is in force.*

"Upon default by the licensee in the payment of any money due for the purchase of milk or cream, which payment is secured by a bond or the deposit of money or securities as hereinbefore provided for, the creditor may file with the commissioner of agriculture, upon a form prescribed by him, a verified statement of his claim. If such creditor shall have reduced such claim to judgment or shall thereafter and before the commencement of the action by the commissioner of agriculture, as hereinafter provided for, reduce such claim to judgment, a transcript of such judgment shall also be filed with such commissioner.

"After the expiration of ninety days from the termination of any license period the commissioner of agriculture shall, by proper action wherein all such creditors and any surety upon any bond given as hereinbefore provided for and the licensee shall be parties, *proceed to determine the amount due each such creditor, and the judgment rendered in such action shall be enforced ratably for such creditors against the surety on the bond, if one there be, or against the moneys or securities deposited as hereinbefore provided for.* . . .

"A person or corporation licensed hereunder shall make a verified statement of his or its disbursements during a period to be prescribed by the commissioner of agriculture, containing the names of the persons from whom such products were purchased, and the amount due to the vendors thereof. Such statement shall be submitted to the commissioner of agriculture when requested by him and shall be in the form prescribed by such commissioner. If it appears from such statement or other facts ascertained by the commissioner of agriculture, upon inspection or investigation of

the books and papers of such licensee as authorized by section fifty-six of this chapter, that the security afforded to persons selling milk and cream to such licensee *by the bond executed or deposit made by such licensee as herein provided does not adequately protect such vendors, the commissioner of agriculture may require such licensee to give an additional bond or to deposit additional moneys or securities, to be executed or deposited as above provided, in a sum to be determined by the commissioner, but not exceeding by more than twenty-five per centum the maximum amount paid out by such licensee to sellers of milk in any one month; provided, however, that the maximum amount of the bond or deposit required from any applicant under the provisions of this section shall be one hundred thousand dollars; and that any applicant filing a bond or deposition money or securities in such maximum amount shall be exempted from filing either the statements of milk purchased, or the statements of disbursements in this section provided for.*

"If the applicant for a license under this section be a person or domestic corporation, the commissioner of agriculture may, notwithstanding the provisions of this section, *if satisfied from an investigation of the financial condition of such person or domestic corporation that such person or corporation is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors, by an order filed in the department of agriculture, relieve such person or corporation from the provisions of this section requiring the filing of a bond.*

"The term 'station' or 'milk-gathering station' as used in this and the ensuing sections of this article, shall include an established office where the business of buying milk or cream as herein provided, is carried on, without a place or premises in connection therewith for the physical handling of milk or cream."

3 A.L.R.—80.

To summarize the principal features of the enactment:

1. No person, firm, association, or corporation shall, *as a business*, buy milk or cream within the state from producers for the purpose of shipping the same to any city for consumption or manufacture without having (a) an established office within the state, and (b) a license.

2. No such person, firm, association, or corporation may obtain a license without (a) satisfying the commissioner of agriculture of his character and financial responsibility; (b) either by giving a surety company bond of not less than five thousand dollars or more than one hundred thousand dollars, or making a deposit of money or securities, or (c) if an individual or a domestic corporation, satisfying the commissioner that he "is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors."

3. On default of payment by a licensee of money due for the purchase of milk and cream the commissioner shall apply the security to the extinguishment of the claims of creditors filed with him.

Defendant is a domestic corporation. It demurred to each of the 298 causes of action set forth in the complaint, on the ground that the facts stated do not constitute a cause of action, and moved for judgment on the pleadings. At the special term the motion was denied, but the appellate division reversed the order denying the motion, and dismissed the complaint, one justice dissenting and one not voting, on the ground "that the purpose of the statute is to secure payment for the purchase price of merchandise, and is class legislation and not a valid exercise of the police power."

Does an action lie to recover a penalty for violation of § 55 of the Agricultural Law? Section 61 provides that "any person who . . . not being licensed, shall *conduct the business of buying milk* for shipment as provided in § 55, . . . shall be guilty of a misdemeanor."

But the Agricultural Law (§ 52) also provides for penalties to be collected in a civil action. "Every person violating any of the provisions of this chapter, shall forfeit to the people of the state of New York the sum of not less than fifty dollars nor more than one hundred dollars for the first violation." When §§ 55 to 61 became a part of "this chapter" (Laws 1909, chap. 9, being chapter 1 of the Consolidated Laws, known as the Agricultural Law), the provisions of § 52 applied automatically to violations thereof, except where obvious inconsistencies arose. Far

Statutes—  
amendment—  
existing  
penalties.

from being an inconsistency, it is in entire harmony with the general purpose of the Agricultural Law to provide both criminal and civil liability for violations of its provisions.

Is a violation of the provisions of § 55 charged in the complaint? The grievance to be complained of is not each act of purchasing, but the act of *conducting the business of purchasing*. The complaint charges in 298 separate counts that on or about a certain date, each count setting forth a different date, defendant *bought milk or cream* from certain producers without having been duly licensed. Each count must be read separately, as if it were the only

Pleading—  
separate counts  
—penalties—  
what con-  
sidered.

count. The complaint does not allege that at any time defendant *carried on the business* of purchasing milk or cream. Carrying on the business within the terms of the statute implies continuity of conduct in that respect, — a continuous course of dealing, not an isolated transaction. *Penn Collieries Co. v. McKeever*, 183 N. Y. 98, 2 L.R.A.(N.S.) 127, 75 N. E. 935; *People ex rel. Allen v. Whiting*, 68 Misc. 306, 123 N. Y. Supp. 769. Section 52 of the Agricultural Law provides for separate penalties for separate acts of selling, exposing for sale, using, and the like, but no provision is made for

cumulative penalties in case the purchasing is carried on or continued from day to day. The offense of carrying on the business in violation of the statute should alone be pleaded, and one penalty sued for. *People v. Spencer*, 201 N. Y. 105, 94 N. E. 614, Ann. Cas. 1912A, 818. The complaint does not state facts constituting 298 causes of action, neither does it state facts constituting one cause of action. **Pleading— failure to state cause of action.**

Defendant's demurrer should accordingly be sustained, and this opinion might end at this point.

We are asked, however, to pass upon the constitutionality of the statute. Courts often say that they will withhold a decision on the constitutionality of a statute until it becomes unavoidable for the determination of the case (*Hanrahan v. Terminal Station Commission*, 206 N. Y. 494, 504, 100 N. E. 414); but it seems like an anticlimax to the careful presentation of this appeal on constitutional grounds to dispose of it temporarily as a mere matter of the wording of the complaint. Defendant urges that this is a statute to compel the payment of indebtedness; that nothing in the business of purchasing milk or cream carries with it any special necessity for imposing unusual burdens upon those who carry it on; that the statute has no relation to the public morals, safety, or convenience, or any great public need; that it is unmistakably and palpably in excess of the legislative power; that it violates the due process clauses of the state and Federal Constitutions; that it is also objectionable as "class legislation," and because it delegates legislative power to the commissioner of agriculture. Plaintiff, on the other hand, contends that, as harmful businesses may be prohibited, so useful businesses may be regulated when the public interests will be thereby subserved; that a useful business may, by reason of local conditions or customs, prove a menace to the public welfare; that it must be presumed

that this business has fittingly come under the legislative eye and rule for the reason that, when unrestricted, it had become or threatened to become the cause of more than ordinary loss to a considerable class in the community, and that the manner of regulation is a matter of legislative discretion.

To hold a statute unconstitutional is a grave thing to do. To refuse,

**Constitutional law—holding statute unconstitutional.**

by so doing, to recognize a demonstrated evil, and to characterize the unusual in legislation as impossible, is unwise. Constitutional law is, "to a certain extent, a progressive science" (Holden v. Hardy, 169 U. S. 366, 385, 42 L. ed. 780, 788, 18 Sup. Ct. Rep. 383), and the courts have become more cautious "about pressing the broad words of the 14th Amendment to a dryly logical extreme." Noble State Bank v. Haskell, 219 U. S. 104, 110, 55 L. ed. 112, 116, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

So many decisions of the courts of his state and of the United States have dealt with the question of legislative power that only a few of the most recent will be considered. We may begin with the proposition that the state may

**prohibiting unlawful business.**

not prohibit the lawful, common,

and ordinary business of purchasing milk or cream (People ex rel. Wyroler v. Warden, 157 N. Y. 116, 3 L.R.A. 264, 68 Am. St. Rep. 763, 1 N. E. 1006; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A. (N.S.) 707, 79 N. E. 836; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 336, L.R.A.1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 73), but it may regulate a business, however honest in itself, if it may

**regulation of business.**

become a medium of fraud. It is not enough to say that

the business may be honestly conducted. The state may, to some extent, compel honesty by imposing a license fee, if widespread frauds upon and losses by its people are there-

by prevented. Any trade, calling, or occupation may be reasonably regulated if "the general nature of the business is such that, unless regulated, many persons may be exposed to misfortunes against which the legislature can properly protect them." Allen v. Riley, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 Ann. Cas. 137; Brazee v. Michigan, 241 U. S. 340, 343, 60 L. ed. 1034, 1036, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917C, 522. Passing from the general to the particular, the constitutionality of the "Blue Sky Laws" of Ohio and other states, which require dealers in corporate stocks and other securities to be licensed, has been upheld. Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, L.R.A.1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643; Caldwell v. Sioux Falls Stock Yards Co. 242 U. S. 559, 61 L. ed. 493, 37 Sup. Ct. Rep. 224; Merrick v. N. W. Halsey & Co. 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227. The evils of "get-rich-quick" schemes called for protection against the frauds of unscrupulous dealers. Licenses may be required for employment agencies. Brazee v. Michigan, 241 U. S. 340, 343, 60 L. ed. 1034, 1036, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917C, 522; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 2 L.R.A. (N.S.) 859, 76 N. E. 11, 5 Ann. Cas. 325. The business of banking by individuals and partnerships has been held subject to license (Musco v. United Surety Co. 196 N. Y. 459, 465, 134 Am. St. Rep. 851, 90 N. E. 171; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 34 Sup. Ct. Rep. 190) "because fraud could be practised in it." The business of selling patent rights, being peculiarly one in which fraud may be practised, may be regulated. Allen v. Riley, supra. Even "ice cream" may be standardized by state legislatures in order that consumers may not be misled (Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 61 L. ed. 217, 37 Sup. Ct. Rep. 28), and a standard size of bread loaves may be fixed. Schmid-



inger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284.

But all these statutes and many others have for their legitimate object the prevention of frauds, rather than the collection of debts through the agency of the state. This statute points to protection from the probability of financial loss rather than fraud, and goes far beyond any mere licensing statute by requiring the licensee to give security for payment of his debts to purchasers. The business regulated is not done with ignorant people, the chosen and easy prey of the cunning and unscrupulous impostor. It is done with men of ordinary intelligence, fully conscious of what they are about. "The state must adapt its legislation to evils as they appear." McKenna, J., in *Merrick v. N. W. Halsey & Co.* supra. If the legislature can check impending ills before they become notorious, the courts should not say that it has acted too soon. As suggested by *Klein v. Maravelas*, 219 N. Y. 383, L.R.A. 1917E, 549, 114 N. E. 809, Ann. Cas. 1917B, 273, that which seems vain and capricious to one generation may become the wisdom of the next. But it is urged that so much of this statute as aims to compel certain purchasers of milk to pay their debts, measured by the standards of the obligations of the state to its citizens as we now understand them, is a hateful interference with the freedom of men to transact ordinary business, not affected with a public interest, with other men as they see fit; that its implication is that bad debts may be secured or prevented by the exercise on the part of the state of its power to regulate trades and callings; that this is a doctrine of paternalism, in direct conflict with our judicial notion of liberty under the Constitution. *Schnaier v. Navarre Hotel & Importation Co.* 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, 21 L.R.A. (N.S.) 735, 88 N.

E. 17; *People v. Ringe*, 197 N. Y. 143, 27 L.R.A. (N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; *People ex rel. Duryea v. Wilber*, 198 N. Y. 1, 27 L.R.A. (N.S.) 357, 90 N. E. 1140, 19 Ann. Cas. 626; *People ex rel. Moskowitz v. Jenkins*, 202 N. Y. 53, 35 L.R.A. (N.S.) 1079, 94 N. E. 1065; *Hauser v. North British & M. Ins. Co.* 206 N. Y. 455, 42 L.R.A. (N.S.) 1139, 100 N. E. 52, Ann. Cas. 1914B, 263.

The question is not presented whether the statute is valid as an exercise of the police power of the state over individuals; nor is the determination of that question essential to the decision of this case.

The question here is whether the defendant, a domestic corporation, is affected by the alleged unconstitutionality of the statute in the features complained of. If it is not, it cannot complain. *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530, 61 L. ed. 472, 475, L.R.A. 1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594.

Whatever might be said of the statute as "class legislation" (*State v. Latham*, 115 Me. 176, L.R.A. 1917A, 480, 98 Atl. 578, supreme judicial court of Maine, September 9, 1916) is answered by *People v. Havnor*, 149 N. Y. 195, 205, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541. The statute there under consideration placed barbers in a class by themselves, and then subdivided the class between barbers in New York and Saratoga and barbers elsewhere for the purpose of regulating their right to work on Sunday; but *Vann. J.*, said: "The statute treats all barbers alike within the same localities . . . under like circumstances and conditions. . . ." There is no constitutional prohibition against class legislation as such.

—right to raise question of unconstitutionality.

—class legislation.

—prohibition of.

if the classification is based on some reasonable ground, and is not essentially arbitrary. The statutes are replete with instances where the legislature has selected a class of persons for regulation. *People v. C. Klinck Packing Co.* 214 N. Y. 121, 137, 108 N. E. 278, Ann. Cas. 1916D, 1051. It is only where there is no real distinction on a substantial basis that it can be said that the equal protection of the laws is denied. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

Nor can it be said that the power vested in the commissioner of agriculture to waive the requirement of a bond or other security in certain cases is a delegation of legislative power. He is not left "without check or guidance." The legislature has furnished the rule; the commissioner merely applies it. His determination is subject to judicial review. § 58. In *People v. C. Klinck Packing Co.* supra, the provisions of the statute exempted from the application of the hours of Rest Law certain employees, "if the commissioner of labor in his discretion approves." Those words were held to have the vice of vesting the commissioner with the power wholly at his volition to suspend the operation of the statute. The legislature here prescribes the regulations which are to be enforced according to the legal discretion of the commissioner. *Brazee v. Michigan*, 241 U. S. 340, 343, 60 L. ed. 034, 1036, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917C, 522. Nor does it appear that defendant has applied or failed to obtain a license without giving a bond. *Lehon v. Atlanta*, 242 U. S. 53, 61 L. ed. 145, 17 Sup. Ct. Rep. 70.

Is the statute good as the exercise of the lawful power of the state over

a domestic corporation? As a corporation created by this state, defendant has no natural right to purchase milk without obtaining a license on such terms as the state directs. Corporate charters may be altered or repealed. N. Y. Const. art. 8, § 1. Under the guise of an amendment to corporate charters the legislature may not defeat or substantially impair the object of the grant, the right of the corporation to transact business, but it may qualify it by reasonable restrictions. *Sutton v. New Jersey*, 244 U. S. 258, 61 L. ed. 1117, P.U.R.1917E, 682, 37 Sup. Ct. Rep. 508; *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 486, Ann. Cas. 1912A, 487. In *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33, a statute provided that "it shall be unlawful for any person, corporation, or association of persons to maintain or operate any college, school, or institution" where both whites and negroes were taught. Recognizing the power of the legislature to so amend the charter of Berea College or of all domestic corporations, the test applied was whether the law would have been enacted as to corporations alone had it appeared that it would be invalid as applied to the privileges of individuals; and it was held that the fact that corporations were separately mentioned in the act justified the inference that the statute was separable, and was to be so construed as to be upheld as to corporations under the reserved power to amend corporate charters. "The act itself, being separable, is to be read as though it in one section prohibited any person, in another section any corporation, and in a third any association of persons, to do the acts named. Reading the statute as containing a separate prohibition on all corporations, at least, all state corporations, it substantially declares that any authority given by

—right of corporation.

Corporation—right to impair charter.

—delegation of legislative power.

previous charters to instruct the two races at the same time and in the same place is forbidden, and that prohibition, being a departure from the terms of the original charter in this case, may properly be adjudged an amendment." p. 57. The dissenting opinion of Harlan, J., emphasizes the distinction between persons and corporations made by the prevailing opinion. It characterizes the effect of the decision as making a law in violation of the legislative intent and against the fair presumption that equality of treatment was intended. Corporations are separately named in the act before us repeatedly and with sedulous care, and the act is not distinguishable in that respect from the case cited. *New York C. & H. R. R. Co. v. United States*, 212 U. S. 481, 497, 53 L. ed. 613, 623; 29 Sup. Ct. Rep. 304; *Citizens' Ins. Co. v. Clay*, 197 Fed. 437.

In *New York C. & H. R. R. Co. v. Williams*, 199 N. Y. 108, 116, 35 L.R.A.(N.S.) 549, 139 Am. St. Rep. 850, 92 N. E. 404, this court, in dealing with the provisions of the Labor Law requiring payment of employees of certain classes of corporations and persons in cash and on the 1st and 15th of the month, approved the doctrine of the *Berea College Case*. It said: "The constitutionality of the statute is not questioned here by any individuals . . . and even if the enactment should be deemed unconstitutional so far as persons are concerned, the provision relating to them is readily separable from the rest of the statute relating to corporations, and its invalidity in this respect, if so adjudged, need not affect the application of the provision to steam surface railroad corporations. . . . It matters not that both provisions are contained in the same section. . . . In New York a special charter may be amended by a general act which does not refer specifically to such charter. . . . Such was the effect given by the Supreme Court of the United States to a general statute of

Kentucky which was construed as operative to amend the charter of Berea College."

When the companion case of *Erie R. Co. v. Williams*, 199 N. Y. 525, 92 N. E. 1084, affirmed in 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761, involving the constitutionality of the same provisions of the Labor Law, reached the Supreme Court of the United States, it was said that "cost and inconvenience would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power." p. 700.

The *Ives Case*, 201 N. Y. 281, 290, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517, decided nothing contrary when it held that the Workmen's Compensation Act of 1910 could not be upheld, in part, under the reserved power of the legislature to alter and amend corporate charters. Corporations were not specifically mentioned in the statute. The plaintiff waived the point. As in the *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, the court declined to modify the statute in order to save part of it by writing into it words not found in it, which would, if so written, be indicative of the legislative intent.

Thus viewed, the statute as applied to the defendant merely means that it cannot continue the business of purchasing milk or cream as defined by the statute, unless it satisfies the commissioner of agriculture that it is solvent, or gives a bond or other security. As an exercise of the reserved power to amend corporate charters, this regulation may, as to this class of corporations, be salutary. It is not for us to say that it cannot be. If the law is to this extent valid, we are not concerned with the abstract question of its justice or fairness.

License—condition—bond to pay debts.

The judgment of the Appellate Division should be affirmed, with costs.

Hiscock, Ch. J., Chase, Hogan, McLaughlin, and Andrews, JJ., concur; Cardozo, J., concurs in result.

# ANNOTATION.

## Validity of license law which requires security for payment of debts by licensee.

- I. Introductory, 1271.
- II. General rule, 1271.
- III. Illustrations, 1273.

### I. Introductory.

This note reviews only those cases which discuss the validity of the requirement of a bond for the payment of contract debts, growing out of the business authorized to be conducted by the licensee. It excludes bonds required of licensees by way of police regulation or to insure the good behavior of the licensee, and it does not purport to deal with the validity of statutes requiring bonds of building and loan associations, investment companies, banks, and insurance companies, nor with the constitutionality of those statutes commonly called "Blue Sky Laws."

### II. General rule.

Since the state or a municipality may regulate any business, however lawful in itself, which may be so conducted as to become the medium of fraud and dishonesty, a requirement of a bond to insure creditors of the business against financial loss is a valid enactment, and is not class legislation, if the requirement is based on reasonable grounds and is not essentially arbitrary. *Hawthorn v. People* (1883) 109 Ill. 302, 50 Am. Rep. 610; *State ex rel. Brewster v. Mohler* (1916) 98 Kan. 465, 158 Pac. 408, affirmed in (1918) 248 U. S. 112, 63 L. ed. 152, 39 Sup. Ct. Rep. 32; *State ex rel. Beek v. Wagener* (1899) 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 683, 778, 1134; *Portland v. Western U. Teleg. Co.* (1915) 75 Or. 37, L.R.A.1915D, 260, 146 Pac. 148; *Ferguson-Hendrix Co. v. Fidelity & D. Co.* (1914) 79 Wash. 528, 140 Pac. 700; *State v. Bowen & Co.* (1915) 86 Wash. 23, 149 Pac. 330, Ann. Cas.

1917B, 625. And see the reported case (*PEOPLE v. BEAKES DAIRY CO.* ante, 1260).

In *State ex rel. Brewster v. Mohler* (1916) 98 Kan. 465, 158 Pac. 408, sustaining an act requiring bond to be given by commission merchants the court stated the grounds on which such legislation was upheld as follows: "The chief objections to the act may be thus summarized: (a) The act is meddlesome, discriminatory, and class legislation, and so burdensome that it will confiscate and destroy an honorable, useful, and legitimate private business; (b) it confers judicial power on an administrative functionary; (c) it confers corporate power on the state board of agriculture; (d) it interferes with interstate commerce or unjustly burdens domestic commerce; (e) the title is defective and the act contains two subjects; (f) the act is special; (g) the judicial review is anomalous; and (h) the penalties are excessive. Examining these points in order, the act is to be justified, if at all, as an exercise of the state's police power. It is sometimes contended that the state cannot regulate private business, and that unless the business is one of public concern it is exempt from legislative interference. Probably this notion is due to the fact that the modern American state has hitherto left private business largely to its own devices, and because the state in recent years has largely concerned itself with the regulation of business as to which the public's interest was undeniable. Hence the elaborate statutes regulating public service corporations. But there can be no doubt that the state's police power may extend to private business. Our statutes relating to registration of deeds and mortgages, the statute of

Frauds, the Mechanic's Lien Law, and the like, are illustrations of the exercise of the state's police power over private business. It is also true that business which has heretofore been considered to be private may, by changes and progress in the methods of its conduct, be transformed into a public or quasi public business, and this may make it desirable and even imperative that the state concern itself in its regulation and control. Of course, such regulations must be reasonable, but if they are reasonable they must be obeyed. The business of commission merchants dealing in farm produce has grown to be one of great volume and much importance. In its development its tendency seems to be to centralize in the larger cities, far removed from the points of origin, and where by no practical possibility can the originators of the traffic, the consignors, keep personal check on the doings of the commission merchants, who are merely the agents of the consignors. Such a situation would seem to warrant a reasonable extension of the state's governmental power over the business. The act does classify commission merchants, but the classification is reasonable. It relates to all who sell farm produce on commission for resale, and this includes 'agricultural, horticultural, vegetable, and fruit products of the soil, and meats, poultry, eggs, dairy products, nuts, and honey,' but not timber, floricultural products, tea, or coffee. It practically reaches all the important and useful products of farm and truck garden. It specifically exempts matters of little consequence to the Kansas producer. If, as argued, it also exempts live stock, that, too, is a reasonable exemption, since live stock is almost invariably shipped in carloads, and is so valuable as to justify the producer or shipper in the expense of accompanying his shipment to market and personally supervising the fidelity of the commission merchant who makes the sale for him, or in making the sale himself. As modern business is now conducted, it is practically impossible for the ordinary farmer or fruit producer or truck gardener to

market his own products without the agency of the commission merchant. Nor do the exactions of the statute seem unduly burdensome. It exacts a license of \$10 per annum. That fee is not onerous. It requires a bond to insure the commission merchant's fidelity and the payment of his obligations. This is in accord with the general tendency of modern business, to relieve it from the uncertainty of fraud or insolvency. It requires the merchant to account and report promptly and completely to the consignor. Perhaps this has always been the law, for what is the relation of consignor and commission merchant but that of principal and agent, and what is this statutory requirement to account and report but the common-law duty of faithful and full disclosure to his principal of all the agent's doings? Illustrations are submitted in affidavits showing how onerous, burdensome, and expensive it would be to make a detailed account of the sales of a commission merchant. Thus, a barrel of garlic is usually sold in small quantities, the remainder being kept in cold storage until called for. A carload of onions containing 470 crates is disposed of by the commission merchant to perhaps four hundred different retail merchants. A barrel of radishes is usually sold in bunches of a few dozen. Many such illustrations are given, and while they do show that a strict compliance with the act will necessitate a good deal of bookkeeping, we cannot but marvel how commission merchants have kept track of all these details hitherto. Probably the legislature was convinced that they did not keep accurate accounts of these innumerable transactions, not through wilful breach of faith, but because it was not humanly possible for a man's memory to stand such a strain, and hence the legislative determination that the memory method, or whatever method it was, should be superseded by an accurate and detailed system of accounting. If this occasions an added expense to the business, the traffic will have to bear it." The foregoing decision was affirmed in (1918) 248 U. S.

112, 63 L. ed. 152, 39 Sup. Ct. Rep. 32. Mr. Justice McReynolds saying: "Plaintiffs in error maintain that the statute is class legislation which abridges their rights and privileges, that it deprives them of the equal protection of the laws and also of their property without due process of law, all in violation of the Fourteenth Amendment. Manifestly, the purpose of the state was to prevent certain evils incident to the business of commission merchants in farm products by regulating it. Many former opinions have pointed out the limitations upon powers of the states concerning matter of this kind, and we think the present record fails to show that these limitations have been transcended."

### III. Illustrations.

A statute requiring a person handling agricultural products on commission, to give a bond for the security of persons consigning goods to him, has been upheld in several cases: *State ex rel. Brewster v. Mohler* (1916) 98 Kan. 465, 158 Pac. 408, affirmed in (1918) 248 U. S. 112, 63 L. ed. 152, 39 Sup. Ct. Rep. 32; *State ex rel. Beek v. Wagener* (1899) 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; *State v. Bowen & Co.* (1915) 86 Wash. 23, 149 Pac. 330, Ann. Cas. 1917B, 625.

In *State v. Powles & Co.* (1916) 90 Wash. 112, 155 Pac. 774, the court held a similar act to be void because of indefiniteness as to the term "commission merchant."

In *Ferguson-Hendrix Co. v. Fidelity & D. Co.* (1914) 79 Wash. 528, 140 Pac. 700, the court had under consideration the constitutionality of a statute providing that it shall be "unlawful" for a commission merchant to engage in the business of selling farm, dairy, orchard, and garden produce "on commission" without first obtaining a license to carry on such business, and giving a bond to the state "executed by a surety company" authorized to do business in the state, the bond to be in the sum of \$3,000 for the benefit of persons consigning produce to be sold on commission, and its form to be approved by the attorney general. It

was contended that the act was unconstitutional in that the bond was required to be executed by a surety company, authorized to do business in the state, thus denying the right of the licensee to deposit money or to give personal security. The court held that it could not yield its assent to this view, saying that "it is well known that lapse of time, fluctuations in values of property, the uncertainty of human life, and the risk of a dishonest surety, often render personal security inadequate when called upon to meet its promised responsibility. This is doubtless one of the reasons which influenced the legislature in requiring that the bond be executed by a surety company authorized to do business in this state. The court further said: "It was further remarked that it was evident to the court that it would be more economical for the public to become its own insurer of the good faith of its officials, which would result, perhaps, in no official bond in any case. We had supposed that under the Constitution, the question as to whether the public welfare justified or required the state to exert its police power was a legislative question, and that, ordinarily, courts would not thwart the legislative will if any reason existed or could be suggested for the exercise of the power. It is certain that personal sureties have frequently failed to respond to their obligations, and we must assume that the legislature knew this fact and considered that the character of bond under review would afford a safer, and hence a better, security to those who would be its beneficiaries. It would seem that the power to exact the security includes the right to determine the character and sufficiency of the security; that the greater power includes the lesser power. The presumption always obtains that a legislative act is constitutional, and it will be held unconstitutional only where it so plainly appears to be so as to free the mind from reasonable doubt. Guided by these principles, and for the reasons suggested, we are constrained to hold the law a valid exercise of the police power of the state. The re-

spondent contends that there can be no recovery upon the bond because the statute makes it 'unlawful' to carry on a commission business without obtaining a license and giving a bond, and penalizes the offender, although the act does not in terms make a transaction without a license or bond void, and authorities are cited to that effect. We have held to the contrary."

In *Huson v. Brown* (1915) 90 Misc. 175, 154 N. Y. Supp. 131, the court had before it § 284 of the Agricultural Law (3 McKinney, Consol. Laws, p. 159), providing for actions brought on the bond of a commission merchant, and it was held that the principal, by giving a bond required by the statute pursuant to engaging in business, waived his right to question the constitutionality of the statute, and that the surety stood in no better position.

But in *People ex rel. Valentine v. Berrien* Circuit Judge (*People ex rel. Valentine v. Coolidge*) (1900) 124 Mich. 664, 50 L.R.A. 493, 83 Am. St. Rep. 352, 83 N. W. 594, it was held that an act requiring all merchants who sell farm produce on commission to procure a license and to execute a bond, conditioned for the faithful performance of their contracts, was unconstitutional as class legislation, and as an unjustifiable interference with the right of citizens to carry on a legitimate business. The court said: "There is no more reason why a commission merchant should pay a license fee and execute a bond to pay his debts and to do his business honestly, than there is that any other merchant should pay a like fee and file a like bond to properly do his business and pay his debts. The business requires no regulation, any more than any other mercantile pursuit. There is nothing in it hostile to the comfort, health, morals, or even convenience of a community. It is carried on by private persons in private buildings, and in a manner no different from that in which the merchant selling hardware or groceries or dry goods carries on his business. The law can find no support in the police power inherent in the state. It is not like the liquor traffic, which, under the decisions of

every court, is subject to the police power because of the injury it does to the health, morals, and peace of the community, and may be prohibited altogether. Neither is there anything in it requiring regulation, as do hack drivers, peddlers, keepers of pawnshops, and the like. The legislature of this state is not empowered by the Constitution to regulate contracts between its citizens who are engaged in legitimate commercial business, or to require any class of persons to pay a fee for the right to carry on business, or to give a bond to perform their contracts which other parties may choose to make with them. The Constitution guarantees to citizens the right to engage in lawful business, unhampered by legislative restrictions, where no restrictions are required for the protection of the public." The decision in this case was commented on by the court in *State ex rel. Brewster v. Mohler* (1916) 98 Kan. 465, 158 Pac. 408, affirmed in (1918) 248 U. S. 112, 63 L. ed. 152, 39 Sup. Ct. Rep. 32, wherein it was said: "Whatever that great court says is always read and studied with profit, but curiously enough, in that case, the particular clause or clauses of the Constitution, state or Federal, which the statute was held to infringe, are not cited nor even hinted at. The case does not cite a single precedent of any sort; and it neither persuades nor convinces, as do the decisions of the supreme courts of Minnesota, Illinois, and Washington on this subject."

In *Hawthorn v. People* (1883) 109 Ill. 302, 50 Am. Rep. 610, a statute requiring the operators of butter and cheese factories on the co-operative plan to give bonds for the faithful accounting of property for manufacture was held to be constitutional, the court saying: "It is also objected that the legislature had no power to require the manufacturer to give the bond required to enable the manufacturer to commence or continue business, in this mode, in an innocent and lawful business. The business of selling liquor by saloon keepers is lawful, unless prohibited by law, and all persons might carry on the traffic; but the law has imposed as a condition that all

persons shall execute a bond that they will not violate the law, before engaging in that traffic, and such a bond is intended as a security for damages he may inflict on persons injured by violating the law. The bond in this case is intended to secure those who intrust their property to the keeping of the manufacturer, against fraud or misappropriation by him of their property, just as the executor or administrator is required to give bond to secure those entitled to the funds of the estate, or the saloon keeper to give security that he will not violate the law, and thus inflict injury on his customers. It is urged that this is an unheard-of species of legislation, that the past has furnished no precedent for the law. If this should be conceded to be true, that would not of itself render the law unconstitutional. Government was organized and is supported to afford protection to the governed against wrong and oppression, and in its organization ample power was conferred on the legislative branch to afford such protection. That branch of the government holds, so to speak, a vast reservoir of legislative power never yet exercised, because the exigencies have not arisen requiring it to be exerted; but with our wonderful increase of population, advancing civilization, and increase and complication of business, that reserved power will certainly be called into action. The Constitution has not limited the exercise of legislative power to such enactments as have hitherto been passed. To so hold would be to embarrass good government, and would prove highly injurious, if not destructive. But it is insisted that it restrains and embarrasses business.

If that were conceded to be true, what provision of the Constitution forbids the legislature from exercising the power? We are aware of none. Most, if not all, of the states in the Union have required that persons in almost every species of business should procure and pay for a license to enable them to pursue the calling. Nor, so far as we are aware, has the constitutionality of such laws ever been questioned. They were undeniably a regulation, if not a restraint, on trade, and yet the power was clearly legislative, and properly exercised."

In *Portland v. Western U. Teleg. Co.* (1915) 75 Or. 37, L.R.A.1915D, 260, 146 Pac. 148, the court upheld the validity of a municipal ordinance, providing that no person, firm, or corporation shall engage in the general messenger business without having first obtained a license and filed with the auditor a bond conditioned for the faithful delivery of any goods, packages, notes, or letters.

In *New York* the constitutionality of a statute requiring persons engaged in selling steamship tickets, and, in conjunction therewith, receiving deposits for transmission to foreign countries, to obtain a license and to give a bond, has been upheld. *Guffanti v. National Surety Co.* (1909) 196 N. Y. 452, 134 Am. St. Rep. 848, 90 N. E. 174; *Musco v. United Surety Co.* (1909) 196 N. Y. 459, 134 Am. St. Rep. 851, 90 N. E. 171; *Benvegna v. United Surety Co.* (1909) 132 App. Div. 925, 117 N. Y. Supp. 26, affirmed in (1909) 196 N. Y. 563, 90 N. E. 1156; *Russo v. Illinois Surety Co.* (1910) 141 App. Div. 690, 125 N. Y. Supp. 991; *Goldberg v. People's Surety Co.* (1914) 162 App. Div. 385, 147 N. Y. Supp. 355. H. B.



MINNIE HATFIELD, Appt.,  
v.  
GAZETTE PRINTING COMPANY.

*Kansas Supreme Court — October 12, 1918.*

(103 Kan. 513, 175 Pac. 382.)

**Evidence — victim of libel — identification.**

1. As the publication, containing the charge of unchastity and conceded to be false, specifically named the plaintiff as the wrongdoer, and as no one else of her name resided in the community, the provisions of § 126 of the Code of Civil Procedure (Gen. Stat. 1915, § 7018) did not apply, and formal proof that the defamatory matter was published of the plaintiff was not necessary.

[See note on this question beginning on page 1279.]

**Libel — charge of unchastity.**

2. A false charge in a publication that a woman, specifically named, is immoral and unchaste, constitutes a libel; and the fact that an honest mistake was made by the publisher in the use of plaintiff's name is not a legal excuse, as the law looks to the tendency and consequences of a publication, rather than to the intention of the publisher.

[See 17 R. C. L. 280.]

**Evidence — damages.**

3. General damages from such a false publication arise by inference of law, and need not be proved.

[See 17 R. C. L. 430.]

**Trial — question for jury.**

4. As no valid defense of the libel was made herein, the only question left for submission to the jury was

the amount of damages sustained by the plaintiff.

[See 17 R. C. L. 429.]

**Libel — settlement.**

5. Certain facts relied on by the defendant are held not to constitute a settlement.

[See 17 R. C. L. 327.]

**— implication of malice.**

6. The publication of a false charge against a person without legal excuse establishes malice.

[See 17 R. C. L. 322, 323.]

**— charge of unchastity — risk of liability.**

7. One who makes an untrue charge of unchastity against a woman does so at his peril, whether it is done recklessly or with care, and takes the risk of liability for resulting injury.

[See 17 R. C. L. 280.]

Headnotes 1-5 by JOHNSTON, Ch. J.

APPEAL by plaintiff from a judgment of the District Court for Reno County in favor of defendant in an action brought to recover damages for an alleged libel. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. F. Dumont Smith and Eustace Smith for appellant.

Mr. C. M. Williams for appellee.

Johnston, Ch. J., delivered the opinion of the court:

This was an action for libel. Plaintiff alleged that the defendant, which owns a newspaper having a large circulation in and about the city of Hutchinson, had published in its Sunday morning issue the following of and concerning the plaintiff:

"Raided Rooming House.—Sheriff Scott Sprout yesterday raided the rooming house on First avenue west, conducted by Ruth Newman. Two girls, Bess Stolen and Minnie Hatfield, were charged with being inmates of an immoral house, and the Newman woman with running an immoral house. They were released on \$500 bail."

It was further alleged that the charge that plaintiff was an inmate

of an immoral house was untrue, and that the publication caused her great mental anguish, humiliation, and injury. The defense was a general denial, and an averment that the language used in the article had no reference to the plaintiff, and was so understood by persons reading it, and that there were other persons living in that community where the paper was circulated named Minnie Hatfield. It was admitted that the circulation of the newspaper on the morning in question was between 7,000 and 8,000 and there is no claim that the charge mentioned in the article as against plaintiff was true. It appears that one of the parties arrested was named Minnie Olson; that the defendant's reporter had a conversation with the sheriff who made the raid preparatory to the writing of the item for the paper; that he failed to ascertain the names of the parties involved, and, through mistake, wrote the name of Minnie Hatfield instead of Minnie Olson. Plaintiff's attorney was informed by defendant's manager that an apology would be printed, and the article republished with the name corrected. The article was again published, with the change of names, but no explanation or apology accompanied it. It does not appear that there was any other person in the community by the name of Minnie Hatfield, nor that the reporter made any effort to verify the names of the parties arrested by looking up the court record. Plaintiff asked for a peremptory instruction, and it was refused. Verdict and judgment were in favor of the defendant, and the plaintiff appeals.

The publication in plain terms specifically charged the plaintiff, a single woman of unquestioned character and reputation, with unchastity and immorality. As the imputation was untrue, malice is inferred, and of itself it constitutes a libel. *Cooper v. Seaverns*, 81 Kan. 267, 25 L.R.A. (N.S.) 517, 135 Am. St. Rep. 359, 105 Pac. 509. The

only excuse is that a mistake was made in the use of plaintiff's name; the writer saying that he did not know the plaintiff, and had no intention to hurt her, and also that he did not know how he came to use her name. This is not a valid excuse. The imputation against the plaintiff was just as hurtful as if the writer had been acquainted with the plaintiff, and had intentionally applied the charge to her. The law looks to the tendency and consequences of a publication, rather than to the intention of the publisher. It is generally said that malice is a necessary element in libel, but that element is <sup>—implication of malice.</sup> present where the publication of a false charge is made without a legal excuse. When the falsity of the charge was conceded, malice was established. There is no excuse for a false charge of unchastity and immorality, which would be understood by reasonable people to refer to plaintiff, and especially where, as here, there is a lack of care and diligence on the part of the publisher to ascertain the real facts before the publication is made. One who makes an un- <sup>—charge of un-</sup> true charge of the <sup>—chaastity—risk</sup> kind in question, <sup>of liability.</sup> whether it is done recklessly or with care, does so at his peril, and takes the risk of liability for resulting injury. It has been held that "it is not a legal excuse that defamatory matter was published accidentally or inadvertently, or with good motives and in an honest belief in its truth." *Moore v. Francis*, 121 N. Y. 199, 207, 8 L.R.A. 214, 18 Am. St. Rep. 810, 23 N. E. 1129.

It has also been held that "publication of the portrait of one person, with statements thereunder as of another, by mistake, and without knowledge of whom the portrait really is, is not an excuse. A libel is harmful on its face, and one publishing manifestly hurtful statements concerning an individual does so at his peril; and if there is no justification, other than that it was news or advertising, he is liable if the state-

**Libel—charge of unchastity.**

ments are false, or are true only of someone else." *Peck v. Tribune Co.* 214 U. S. 185, 53 L. ed. 960, 29 Sup. Ct. Rep. 554, 16 Ann. Cas. 1075 (Syl. ¶ 2.)

It is generally held that an honest mistake in identity is no defense to an action for libel, although it may be admissible in mitigation of damages. *Dunlevy v. Wolferman*, 106 Mo. App. 46, 79 S. W. 1165; *Jones v. Murray*, 167 Mo. 25, 66 S. W. 981; *Greer v. White*, 90 Ark. 117, 118 S. W. 258, 17 Ann. Cas. 270. See also *Farley v. Evening Chronicle Pub. Co.* 113 Mo. App. 216, 87 S. W. 565; *Wandt v. Hearst's Chicago American*, 129 Wis. 419, 6 L.R.A. (N.S.) 919, 116 Am. St. Rep. 959, 109 N. W. 70, 9 Ann. Cas. 864; note in 47 L.R.A. (N.S.) 240.

The defendant relies on § 126 of the Code of Civil Procedure (Gen. State. 1915, § 7018), which provides: "In an action for libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove on the trial the facts showing that the defamatory matter was published or spoken of him."

It is contended that plaintiff failed to comply with the requirements of this section, in that she did not prove that the publication related to her, or that persons reading it would understand it had reference to her.

The statute does not change the general rule that has been stated. The provisions apply to cases where there is indefiniteness as to persons defamed. The legislative purpose manifestly was to avoid setting forth at length the extrinsic facts tending to show that plaintiff was the one referred to, and making sufficient a general averment that the defamatory words were spoken or published of the plaintiff. In such a case, if the general averment is denied, it devolves upon the plaintiff to prove it as fully as if the extrinsic facts and circumstances

pointing to the plaintiff had been alleged, and probably this much would have been required, if no provision had been made as to the proof. Here there is no indefiniteness. The reference to the plaintiff by name was specific; plaintiff was the only Minnie Hatfield in the city; all who knew her would reasonably infer that she was the person against whom the charge was directed; the defamatory words are actionable per se; and no other proof was necessary as to the object of the libel, nor as to the injury to the plaintiff by reason of the publication.

So far as the damages are concerned, general damages from such a publication arise by inference of law, — damages.

and need not be proved. *Odgers, Libel & Slander*, 5th ed. 372. In view of the fact that no valid defense was made, and that the proof showed without dispute that there was no legal excuse for the libel, only a question of law was presented, and the court should have instructed the jury that the only question for its determination was the amount of damages sustained by the plaintiff.

Instead of that, the court appears to have submitted to the jury the question whether the publication referred to the plaintiff or to some other person, and instructed them unless it was shown that the publication was made of and concerning her and was false, a verdict must be returned for the defendant.

There is a suggestion that a settlement was made, based on the fact that the attorney of the plaintiff asked the defendant for a retraction and an apology, which were promised to be made, and that subsequently the article was republished, substituting the name of Minnie Olson for that of the plaintiff in the article, but making no other change nor explanation. No retraction or apology was published;

but, even if it had been, the ar-

**Evidence—**  
victim of libel—  
identification.

**Trial—question**  
for jury.

**Libel—**  
settlement.

rangement made would not have amounted to a settlement.

The judgment is reversed, and the

cause remanded for trial as to the amount of the damages to which plaintiff is entitled.

## ANNOTATION.

**Necessity and sufficiency of proof that libel or slander in which the plaintiff's name was used was published or spoken concerning plaintiff.**

- I. Necessity of proof that plaintiff is the person defamed, 1279.
- II. Sufficiency of proof, 1279.

### *I. Necessity of proof that plaintiff is the person defamed.*

The necessity of alleging, and, where such allegation is put in issue, of proving, the identity of the plaintiff with the person named in a defamatory publication, is so thoroughly understood that the courts have spoken to the point only in an incidental manner. Instances among the cases falling within the scope of this note, in which the necessity of proof that plaintiff is the person defamed has been alluded to, are: *Every Evening Printing Co. v. Butler* (1906) 75 C. C. A. 657, 144 Fed. 916; *Harlow v. Carroll* (1895) 6 App. D. C. 128; *Colvard v. Black* (1900) 110 Ga. 642, 36 S. E. 80; *Hanson v. Globe Newspaper Co.* (1893) 159 Mass. 293, 20 L.R.A. 856, 34 N. E. 462; *Farley v. Evening Chronicle Pub. Co.* (1905) 113 Mo. App. 216, 87 S. W. 565; *Byrne v. News Corp.* (1916) 195 Mo. App. 265, 190 S. W. 933.

The form in which this rule is ordinarily stated, namely, that it must be alleged and proved that the defamatory matter was published or spoken of the plaintiff, has led to a difficulty, as is illustrated by the reported case (*HATFIELD v. GAZETTE PRINTING CO.* ante, 1276), where the defamatory matter was intended to be published or spoken of another than the plaintiff; but it has been uniformly held that by such form of expression it is not to be understood that the defendant may escape liability because he had in contemplation another person. The apparent anomaly is explained by the fact that the action is, in reality, one for negligence in connecting plaintiff's name with the transaction described.

Where the libelous publication is ambiguous, either as to its meaning or as to the person to whom it applies, there must be some proof that third persons understood its actual meaning and also understood to whom the words applied. *Byrne v. News Corp.* (Mo.) supra.

As said in *Duvivier v. French* (1900) 43 C. C. A. 529, 104 Fed. 278: "The gravamen of an action for libel is not injury to the plaintiff's feelings, but damage to his reputation in the eyes of others. It is not sufficient, therefore, that the plaintiff should understand himself to be referred to in the article. It is necessary, to constitute libel, that others than the plaintiff should be in a position to understand that the plaintiff was the person referred to."

### *II. Sufficiency of proof.*

There seems to be a difference of opinion as to the extent to which it is necessary to go in order to establish the identity of the plaintiff with the person defamed.

In *Davis v. Hearst* (1911) 160 Cal. 148, 116 Pac. 530, where the plaintiff was expressly named in the alleged libelous article, it was said that no other evidence was needed than the article itself, to show that it would be understood by its readers as referring to plaintiff.

But in *Harlow v. Carroll* (1895) 6 App. D. C. 128, it is held that identity of name is not sufficient prima facie evidence to go to the jury to show the identity of the person libeled and the complainant; but it appeared that there was no proof in the case of the plaintiff's name.

In *Davis v. Marxhausen* (1891) 86 Mich. 281, 49 N. W. 50, it was held that, where the libel describes the plaintiff both by name and residence.

it is not competent for the jury to find that plaintiff was not the person libeled.

And in *Griebel v. Rochester Printing Co.* (1896) 8 App. Div. 450, 40 N. Y. Supp. 759, it was held to be error to submit a case to the jury on the theory that they might find that the article in question was not published of and concerning the plaintiff, Ferdinand Griebel, where he was a participant in the transaction described, being, however, the complaining witness, and not the person arrested on the charge of obtaining goods under false pretenses, and was the only person of the name in the city, though his surname was misspelled.

But in *Hanson v. Globe Newspaper Co.* (1893) 159 Mass. 293, 20 L.R.A. 856, 34 N. E. 462, it was held (Holmes, Morton, and Barker, JJ., dissenting) to be competent for the trial court to find as a fact that a libelous article concerning "H. P. Hanson, a real estate and insurance broker of South Boston," was not defamatory of the person thus named and described, it having been intended to refer to A. P. H. Hanson, who was also a real estate and insurance broker in South Boston.

It is not necessary for a plaintiff to satisfy every description given in the libel, as otherwise one might libel with impunity, by adding to a description which everybody would understand one which did not appertain to the person slandered. *Mix v. Woodward* (1837) 12 Conn. 262.

In *Every Evening Printing Co. v. Butler* (1906) 75 C. C. A. 657, 144 Fed. 916, it was held that evidence that the plaintiff had, for a long time, been connected with the wild west show of Buffalo Bill as an expert rifle and wing shot, under the name of "Annie Oakley," and that during this period she had exhibited constantly in this role in this country and in Europe, that she had more than once exhibited before King Edward VII. of England, in the courtyard of Buckingham palace, and that, as Annie Oakley, the plaintiff was known as the most expert rifle shot the world over, would have warranted the court in instructing the jury, as a matter of law, that

plaintiff was the person meant to be referred to in a news item, headed, "Annie Oakley Arrested, Famous Woman Rifle Shot Locked up on Larceny Charge in Chicago," and stating: "Annie Oakley, daughter-in-law of Buffalo Bill, and the most famous rifle shot in the world, was arrested in Chicago, Monday, under a Bridewell sentence, for stealing the trousers of a negro in order to get money with which to buy cocaine. This is the woman for whose spectacular marksmanship King Edward himself once led the applause in the courtyard of Buckingham palace," — notwithstanding the defendant produced evidence of the arrest, upon the charge stated in the libelous publication, of another woman who was an expert rifle shot, and as such exhibited in connection with Cody's wild west show, similar to the one run by Buffalo Bill, that she was the wife of S. F. Cody, that at the police court in Chicago she had given the name of Elizabeth Cody, and that she exhibited sometimes under the name of "Anny Oak Lay;" and, accordingly, that there was no error in submitting to the jury the question whether the plaintiff was the person meant by the libellant to be referred to.

But in *Butler v. News-Leader Co.* (1905) 104 Va. 1, 51 S. E. 213, an action based upon the same state of facts, it was held that the jury were warranted in finding a verdict for the defendant.

A publication of the likeness of the plaintiff, a stenographer whose name was Rose Ball, and who was at the time a resident of Helena, Montana, but who had formerly resided in Chicago, her family residing elsewhere, as "the latest photograph of Miss Ball," in connection with a libelous article in a newspaper relating to the death of Pearl Ball, who, as therein stated, was a pianist, and who lived in Forty-seventh place, Chicago, whose family was correctly stated by the article to reside in Chicago, her father to be engaged in business there, cannot be said, as a matter of law, to be defamatory of the plaintiff; but it is for the jury to find the effect

which would be ascribed to the publication by the readers thereof. *Ball v. Evening American Pub. Co.* (1909) 237 Ill. 592, 86 N. E. 1097.

In *International Fraternal Alliance v. Mallalieu* (1897) 87 Md. 97, 39 Atl. 93, it was held that plaintiff sufficiently identified himself with the object of a libelous article, stating: "The public is also warned against a man named Mallalieu, connected with the Metropolitan, who is staying," etc., by proving that his name was Mallalieu, that he was connected with the Metropolitan Insurance Company as its agent at the time of the publication of the libel, and that, after the publication, he was stopped on the street by a gentleman who accosted him with the remark: "I see you are a liar, and the public is warned not to trust you."

The jury are warranted in finding an article to have been published of and concerning the plaintiff, where it described the plaintiff by his right name and contained at least one paragraph which repeatedly referred to events in his life, although it also contained other statements which, to those intimately acquainted with his work and residence, might have been known not to be true of him. *Ellis v. Brockton Pub. Co.* (1908) 198 Mass. 538, 126 Am. St. Rep. 454, 84 N. E. 1018, 15 Ann. Cas. 83.

Proof that a picture published as that of the person concerning whom was written an article containing statements concerning a person of the same name which, as applied to plaintiff, were defamatory, was that of the plaintiff, is sufficient to warrant the jury in finding that plaintiff was the person defamed. *Farley v. Evening Chronicle Pub. Co.* (1905) 113 Mo. App. 216, 87 S. W. 565.

In *Van Vechten v. Hopkins* (1809) 5 Johns. (N. Y.) 211, 4 Am. Dec. 339, proof that plaintiff, at the time when the corrupt agreement was charged to have been made in the libel, was recorder of the city of Albany, and a member of the state assembly, and that he was the only person of the name of Abraham Van Vechten in the city of Albany, and kept an office there, was held sufficient to carry to

the jury the question whether he was intended to be charged as being one of the parties to the agreement charged in the alleged libelous publication which consisted of an affidavit stating that, on a certain occasion, affiant went to the office of Abraham Van Vechten, Esq., in Albany, with a certain other person, and, the conversation turning upon political matters, and severe remarks having been passed upon the political character of Governor Lewis, "Mr. Van Vechten said to him, 'These severe remarks and animadversions which you have made respecting Governor Lewis will not do, for we have agreed to support him at the ensuing election. . . .'" Mr. Van Vechten then produced a written instrument, which he put into the hands of Major Lansing, who read it. Major Lansing then laid it down on the table, and went into conversation with Mr. Van Vechten. This deponent, while these gentlemen were conversing, turned over the said instrument of writing, which purported to be an agreement containing articles of coalition. The first was an engagement by several leading Federal men, whose names were thereto subscribed, to support with all their strength and influence the next election of Governor Lewis. In consideration of this Federal article of agreement there was an article stating that the friends of Governor Lewis, whose names were therewith subscribed, should exert all their power and influence to cause the election of S. Van Renselaer, Esq., to the office of governor in the gubernatorial election of 1810. This deponent believed that there were as many names subscribed to the said agreement as fifteen or twenty, principally Quid and Federal members of the legislature."

The jury are warranted in finding that Thomas Palmer, who had been president of the De Kalb Avenue Railroad for eight years, and the only president of that name, and who had resided on De Kalb avenue for twenty-three years, was defamed by a newspaper article, headed: "President and Pauper. Speculator Dissipates a Railroad Magnate's Fortune.

In a Police Court at Last. A policeman recognizes in his prisoner a former wealthy employer," and giving a detailed account of the arrest of an intoxicated tramp, who gave the name of Edward E. Palmer, his arraignment at the police station and at the police court, and a recognition of him by the police officer as the former president of the De Kalb Avenue Railroad, and concluding as follows: "Edward E. Palmer was for several years president of the De Kalb Avenue Railroad Company in Brooklyn, and was at one time president of the bank in that city. He had a charming family, an elegant residence upon De Kalb avenue, and was possessed of considerable wealth. He speculated in cotton and lost everything, and then took to drink. He has for some years been lost to his old friends. He lives with his family a short distance out of the city. He is not doing anything, and has no means, and, when arrested, was trying to raise a drink to brace up his shattered system." *Palmer v. Bennett* (1903) 83 Hun, 220, 31 N. Y. Supp. 567, affirmed without opinion in (1897) 152 N. Y. 621, 46 N. E. 1150.

Proof that plaintiff, whose name was James Clark, was watchman of the Starr Garden park, Seventh and Lombard streets, is sufficient to carry to the jury the question whether he was the person defamed by a newspaper article, stating that "John Clark, watchman in Starr Garden park, Seventh and Lombard streets," was implicated in a burglary. *Clark v. North American Co.* (1902) 203 Pa. 346, 53 Atl. 237.

In *Jones v. Hulton* [1909] 2 K. B. (Eng.) 444, affirmed in [1910] A. C. 20, 79 L. J. K. B. N. S. 198, 101 L. T. N. S. 831, 26 Times L. R. 128, 54 Sol. Jo. 116, 47 Scot. L. R. 591, 16 Ann. Cas. 166, it was held that evidence that the plaintiff, whose name was Thomas Artemus Jones and who was a barrister on the North Wales circuit, was known on that circuit and

by the reports of his cases in the local papers as Mr. Artemus Jones, and evidence that readers of the papers, on reading the article, thought that it did refer to him, was sufficient to warrant the jury in finding that he was defamed by an article published in the defendant's paper, purporting to describe what a correspondent of the paper had witnessed at the Dieppe motor festival, containing the following passage: "Upon the terrace marches the world, attracted by the motor races—a world immensely pleased with itself, and minded to draw a wealth of inspiration—and, incidentally, of golden cocktails—from any scheme to speed the passing hour. . . . 'Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing!' whispers a fair neighbor of mine, excitedly, into her bosom friend's ear. Really, is it not surprising how certain of our fellow countrymen behave when they come abroad? Who would suppose, by his goings-on, that he was a churchwarden at Peckham? No one, indeed, would assume that Jones, in the atmosphere of London, would take on so austere a job as the duties of a churchwarden. Here, in the atmosphere of Dieppe, on the French side of the channel, he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies;"—and this notwithstanding the plaintiff was not a churchwarden, and did not reside at Peckham.

In *Kenworthy v. Journal Co.* (1905) 117 Mo. App. 327, 93 S. W. 882, it was held that plaintiff did not identify himself as the person defamed in an article naming the seven witnesses in a certain case, and alleging that three of them would be arrested for perjury, by proving that he was one of the witnesses and was the person named in the article. E. S. O.

STATE OF KANSAS

v.

J. E. McCARTY et al., Appts.

*Kansas Supreme Court—January 11, 1919.*

(104 Kan. 301, 179 Pac. 309.)

**Obstructing justice — rescuing prisoner — priority of right.**

1. In a prosecution of the defendants for knowingly and wilfully obstructing and resisting, by force and violence, a sheriff in the execution of a warrant for felony, it appeared that the sheriff took the offender into custody inside a building, in the presence of the defendants, took the offender out of the building, and, while on the way to the office of the justice of the peace who issued the warrant, the defendants fell upon the sheriff, and held, pulled, and beat him, until the offender escaped. The defendants offered to show that at the time of the arrest inside the building they were guarding the offender, at the call of a constable who was not then present, but who had reduced the offender to custody on a warrant for breach of the peace, and that the defendants apprised the sheriff of the facts. Held, the sheriff was clothed with superior authority and was vested with superior right to the custody of the offender; the offered evidence did not tend to show that the force and violence displayed outside the building were not knowingly and wilfully exercised; and the offered evidence, if true, afforded no justification for obstructing and resisting the sheriff.

[See note on this question beginning on page 1290.]

**Evidence — resisting officer — prior acts.**

2. Upon prosecution for resisting a sheriff in making an arrest after he had taken his prisoner from the building where he was found, evidence is not admissible that accused had the prisoner in lawful custody inside the building as deputy of a constable who had previously arrested him.

**Arrest — superior authority of sheriff.**

3. A sheriff holding a warrant for arrest of a person for felony may take him out of the custody of a constable who holds him under warrant for misdemeanor.

**— duty of guards.**

4. Persons charged by a constable with the duty of guarding one whom he has arrested under warrant for a misdemeanor have no right to oppose a sheriff who is attempting to execute

a warrant for arrest of the prisoner for felony.

**Criminal law — mistrial — adjournment over day.**

5. Adjourning the court from Saturday to Tuesday in which a prosecution is on trial for resisting arrest, in order to hold court in another county on Monday, does not constitute a mistrial.

[See 7 R. C. L. 990, 991.]

**Appeal — rejected evidence — non-prejudicial error.**

6. There can be no reversal for rejecting evidence which might properly have been admitted if there was no prejudice to substantial rights.

[See 2 R. C. L. 253 et seq.]

**— instruction on credibility.**

7. Prejudice resulting from giving an instruction relating to the competency and credibility of accused as witnesses will not be presumed.

[See 2 R. C. L. 285, 236.]

Headnote 1 by BURCH, J.

(Marshall and West, JJ., dissent in part.)



**APPEAL** by defendants from a judgment of the District Court for Morton County convicting them of feloniously obstructing and resisting a sheriff in the execution of a warrant of arrest. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Edgar Foster, H. A. Gas-kill, F. S. Macy, and Samuel Yaggy for appellants.

Messrs. S. M. Brewster, Attorney General, G. Porter Craddock, John W. Davis, and Mayo Thomas for the State.

**Burch, J.**, delivered the opinion of the court:

The prosecution was one for felonious obstruction and resistance of a sheriff in the execution of a warrant of arrest. The defendants were convicted, and appeal.

The prosecution grew out of the facts attending the killing of Sheriff Moore by Don Van Wormer, set forth in the opinion in the case of *State v. Van Wormer*, 103 Kan. 309, 173 Pac. 1076. Three of the defendants are the persons who claimed they were deputized by Constable Thompson to keep the custody of Van Wormer while the constable went away for a while on such business as he had. In addition to the facts narrated in *Van Wormer's Case*, it should be said that a porch extended along the front of Van Wormer's office, which faced toward the east. The door was near the center of the building. After arresting Van Wormer and taking him out of the door, the sheriff struggled with him along the porch toward the north, and the escape was effected while the sheriff and Van Wormer were on the ground at the north end of the porch. There was ample evidence that Van Wormer succeeded in breaking away from the sheriff because the defendants were at the time obstructing and resisting him, by holding, pulling, and striking him.

The transaction divides naturally into two phases—one inside Van Wormer's office, where he was taken into custody by the sheriff, and one outside the building, where he escaped. The assignments of error which are of substantial merit relate to the action of the court in

excluding evidence as to what occurred inside the building, other than the arrest and removal of Van Wormer by the sheriff in the presence of the defendants, and in restricting the defendants to whatever they might offer by way of defense respecting the mêlée which occurred outside the building.

The statute under which the defendants were prosecuted reads as follows: "If any person or persons shall knowingly and wilfully obstruct, resist or oppose any sheriff or other ministerial officer in the service or execution or in the attempt to serve or execute any writ, warrant or process, or in the discharge of any official duty in any case of felony, every person so offending shall upon conviction be punished by confinement and hard labor for a term not exceeding five years, or by imprisonment in the county jail for a term not less than six months, or a fine not less than five hundred dollars." Gen. Stat. 1915, § 3553.

It will be noted that this statute does not limit the crime to resistance only, in which the person charged must participate with greater or less display of force. 29 Cyc. 1329. The prosecution, however, was in fact so limited. The specification in the information of the manner and means whereby the sheriff was obstructed, resisted, and opposed was that the defendants, armed with deadly weapons, assaulted, struck, beat, and wounded him. The opening statement to the jury by counsel for the state connected the defendants with what occurred at the time of the arrest inside the building no further than that they were present, and saw and heard what took place, and so knew that the sheriff was duly executing a warrant of arrest. The statement continued as follows: "The sheriff seized Van Wormer, took him into his custody, and took him out of his building, and was pro-

ceeding to take him to the office of the justice of the peace. . . . Now after they had gotten out of the door of the Van Wormer real estate office, these four defendants all followed him out into the street. The sheriff and Don Van Wormer were struggling together. Van Wormer was fighting and resisting the sheriff, and Van Wormer said to these defendants, who stood just a few feet away from them, he said, 'Are you,' or 'You are a fine lot of sons of bitches to let this big son of a bitch take me,' or words to that effect. When Don Van Wormer said that, these four men all jumped onto the sheriff, and beat him, tearing his clothes, assaulting him, resisting him, and holding him, and they let Don Van Wormer escape from the sheriff's custody."

The evidence on behalf of the state developed what occurred inside the building no further than the opening statement had indicated, except that in an incidental way some statements and protests of the defendants relating to Van Wormer's being their prisoner and in their charge crept in. The case was submitted to the jury under the following instruction: "If you find from the evidence beyond a reasonable doubt that Martin E. Moore, sheriff of Morton county, Kansas, on the evening of July 22, 1916, in manner and form as charged in the information, arrested and was attempting to take, or had taken into his custody, one Don Van Wormer, and that, while the said sheriff was attempting to take Van Wormer to the office of Justice Perkins, the defendants, J. E. McCarty, Joe Littell, Walter Littell, and Lewis Perkins interfered by striking, beating, or wounding the sheriff, or by holding onto the sheriff or to Van Wormer, so that said Van Wormer was enabled to escape from the custody of the sheriff, they would be guilty of knowingly and wilfully obstructing, resisting, or opposing the sheriff in the execution of his duty, after having made the arrest, and it will

be your duty to return a verdict of guilty."

The correlative instruction was as follows: "If you find from the evidence that the defendants, J. E. McCarty, Joe Littell, Walter Littell, and Lewis Perkins, on the evening of July 22, 1916, did not strike, beat, or wound, or hold onto the sheriff, or in any wise interfere with him by obstructing, resisting, or opposing the sheriff in the arrest of Don Van Wormer, or while he was attempting to take, or had taken him into his custody, the defendants would not be guilty, and it would be your duty to so find."

While this instruction, considered technically and alone, was somewhat broader than the other, it was plainly intended to be the reverse of the other; and, reading the two together, the guilt of the defendants was made to depend solely upon actual violence displayed toward the sheriff.

The defendants desired to prove Van Wormer's arrest by the constable, their deputyship under the constable, their lawful custody of Van Wormer by virtue of their deputyship, and their notification to the sheriff while they were inside the building of their relation to Van Wormer. The purpose was to show two things: First, that the defendants did not knowingly or wilfully obstruct, resist, or oppose the sheriff; and, second, that if they did they were justified.

The evidence bore no relevancy to the gravamen of the charge, acts of violence committed outside the office. The state did not claim resistance to the officer inside the building, and, of course, the defendants made no such claim. The issue was whether or not after the arrest, after the sheriff, in further execution of the warrant, had taken the prisoner out of the building, and while the sheriff was proceeding to take the prisoner to the court which issued the warrant, the defendants set upon the sheriff and fought him and beat him. A righteous mental attitude pre-

served toward the sheriff while he was in the building, and until he was leaving the building behind him in execution of his process, had no tendency to disprove the knowing and wilful character of the physical force used.

The evidence was not admissible in justification of the violence displayed toward the sheriff. Conceding that the defendants originally had authority to hold Van Wormer in order that he might be brought to justice, they had no right to stage a forcible and violent rescue after the sheriff had peaceably, so far as they were concerned, reduced the offender to his own custody. The state of Kansas was exercising authority over the person of Van Wormer through its executive officers. Its interests were the paramount interests. Officers charged with identical duty to preserve the public peace, suppress riots and affrays, and bring to punishment violators of the criminal laws must not cast off that duty and turn raging combatants of each other. To do so is to thwart the purpose of the state in appointing them. In this instance it led to the escape of the prisoner fought over, and to murder.

The defendants, however, were not equal in authority with the sheriff. If the constable had been present when the sheriff appeared, the sheriff would have had the right to supersede him. It is true that a constable exercises powers of the same general character as those of a sheriff, respecting preserving the public peace, apprehending criminals, and the like. Gen Stat. 1915, § 11,590. But the sheriff is the state's chief executive and administrative officer in his county. In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he represents the sovereignty

of the state, and he has no superior in his county. When a situation arises like that which confronted the community of Rolla on July 22, 1916, it becomes the sheriff's right, and it is his duty, to determine what the public safety and tranquillity demand, and to act accordingly. He must, of course, act according to law; but if, holding a felony warrant, he should deem it necessary to take custody of a disturber held by a constable under a misdemeanor warrant, it is his duty to do so, and it is the duty of the constable to yield. In such a case, the justification of the constable lies in the rightful exercise of overruling authority by the sheriff.

In this instance, the defendants were only bystanders, called on to guard, during the temporary absence of the constable, a man whom the constable had arrested for breach of the peace. The defendants were not general deputies, clothed with the general powers of the constable, and they held no writ or process of any kind. The authority of the sheriff under his felony warrant was clearly superior to theirs, and they were not justified in opposing him at all, much less with physical force. In the Van Wormer Case, it was said the evidence left little room for substantial doubt that the purported arrest by the constable, and the placing of Van Wormer in charge of a guard of friends, was a sham and a pretense; the real purpose being to obstruct the sheriff. Granting that in this case the good faith of the scheme would be a matter for the jury, if it were properly before them, it did not constitute legitimate defense.

There is nothing else of importance in the case. The defendants were prosecuted, convicted, and sentenced under the statute quoted. It did not work a mistrial when the

Evidence—  
resisting officer  
—prior acts.

Obstructing  
justice—  
rescuing  
prisoner—  
priority of  
right.

Arrest—  
superior  
authority of  
sheriff.

—duty of  
guards.

Criminal law—  
mistrial—  
adjournment  
over day.

court adjourned from Saturday until Tuesday in order to hold a session of court in Grant county on Monday.

Certain evidence complained of was properly admitted. While some of the rejected evidence offered by the defendants, other than that which has been considered, might have been admitted, and in some instances more extended cross-examination might have been permitted, the issue on which guilt or innocence depended was very narrow, and the defendants suffered no prejudice

Appeal—  
rejected evi-  
dence—  
nonprejudicial  
error.

to their substantial rights. Prejudice resulting from giving an instruction relating to the competency and credibility of the defendants as witnesses will not be presumed. Re-instruction on credibility. requests for instructions relating to the powers and duties of constables were properly refused. The jury were correctly and adequately instructed.

The judgment of the District Court is affirmed.

Johnston, Ch. J., and Mason, Porter, and Dawson, JJ., concur.

Marshall, J., concurring specially:

I concur in the conclusion reached by the court that the judgment be affirmed; but I dissent from the holding that a sheriff, armed with a warrant issued by a justice of the peace, commanding the sheriff to arrest the person named in the warrant, has a greater right to the custody of that person than has a constable armed with another warrant issued by a justice of the peace for the same person, commanding the constable to arrest that person and take him into custody. Neither officer can legally take the person named in his warrant from the custody of the other. The warrant held by the constable can be executed by either the sheriff or the constable, and the warrant held by the sheriff, if in the form pre-

scribed by law, is directed "to any sheriff or constable of the state of Kansas." In the present action, after the sheriff obtained custody of Don Van Wormer, the defendants had no right to oppose, or interfere with the sheriff in that custody.

West, J., joins in the foregoing concurrence and dissent.

A petition for rehearing having been filed, Burch, J., on March 8, 1919, handed down the following additional opinion:

The defendants file a petition for a rehearing on the ground they have been denied the right to be fully heard in this court.

The cause was argued orally by the attorney who signs the petition and by counsel for the state. The defendants' abstract and brief were on file, but the state's counter abstract and brief had not been completed. Time was given for this to be done, and the defendants were given leave to reply by further abstract and brief, if necessary. The state's counter abstract and brief were not filed within the time allowed, and did not reach the attorney until a few days before the opinion affirming the judgment of the district court was filed. The attorney now says he would have submitted further abstract and brief, had he been given an opportunity.

The extent to which the defendants were harmed may be judged by the fact that no additional abstract or brief is tendered. Furthermore, no subject which additional abstract might illuminate is indicated, and no statement or argument contained in the state's brief, to which the attorney desired to reply, is specified. The fact is, the court's opinion was written before the state's belated counter abstract and brief were received. The determining questions in the case were clearly delineated and fully argued in the district court. The statements of their positions by counsel for the respective parties, their arguments, and the views of the trial court were fully presented

in the defendants' abstract. The abstract, the defendants' brief, and the oral arguments at the hearing in this court put the court in full possession of the case. The court was able to reach a decision without further assistance from counsel for the state, and did so. When the state's counter abstract and brief came in, they required no modification of the opinion already prepared, which treated the case as the defendants had presented it, and it would not advance their interests for them to go to the trouble and expense of replying to anything the state's counter abstract and brief contained.

The petition for a rehearing charges that the court's opinion was based on an unfounded assumption that the warrant held by the constable was one for breach of the peace only. The defendants are far from clear in their statements about the character of the warrant. They say the warrant was for an occurrence at the back door of Van Wormer's office, where he discharged a shotgun, a deadly weapon; some of the shot striking the defendant, Perkins. They do not assert positively that the warrant was not for breach of the peace, but sometimes they call it a felony warrant.

In stating the case to the jury the attorney signing the petition said the evidence would show that his clients were deputized to guard Van Wormer, while the constable went to get a warrant and to arrange for a trial, after service of the warrant. In the colloquy between court and counsel over the theory of the case, the court indicated that it understood the warrant was for a misdemeanor, and was not corrected. When the constable was on the witness stand, the attorney offered to prove by him that he was informed that Van Wormer had disturbed the peace by shooting out of the rear door of his office, and some of the shot had wounded Perkins; that Van Wormer surrendered to the constable, and he deputized the defendants to guard the prisoner;

that he went to the justice of the peace, made complaint, and received the warrant; that he returned and served the warrant on Van Wormer; and that he again left the prisoner in custody of the defendants while he went to the justice of the peace and arranged for the trial on the charge contained in the complaint and warrant. Other offers of proof follow:

"Mr. Macy: The defendants, and each of them, offer to prove by this witness now on the stand that the witness appointed the defendants, J. E. McCarty, Joe Littell, and Walter Littell, as officers to guard and keep the custody of Don Van Wormer, until such time as he could make arrangements for the holding of a session of the court to try the defendant for the crime for which he had just arrested Don Van Wormer.

"Thereupon Fred Thompson arrested Van Wormer, and appointed and deputized Joe Littell, Walter Littell, and J. E. McCarty to guard Van Wormer, while he went to the justice of the peace's office and got a warrant for his arrest. That soon after Constable Thompson came back to the Van Wormer office with a warrant, and formally arrested Van Wormer under the warrant, and again appointed and required Joe Littell, Walter Littell, and J. E. McCarty to remain at the Van Wormer office, and to guard and hold Don Van Wormer while he arranged for a trial on the charge contained in the complaint, filed by Constable Thompson, and also contained in the warrant which had just been served on Don Van Wormer.

"The defendants and each of them now offer to prove by the witness on the stand that when Martin E. Moore entered the Van Wormer office, he said to Don Van Wormer, 'I have a warrant for you, Don,' to which both Walter Littell and Cy McCarty replied to Martin E. Moore: 'Don is already under arrest by Officer Thompson, and he has appointed us to guard him until he can arrange a place for trial.'"

One feature of these offers which stands out in bold relief is the contemplated trial of Van Wormer. The constable was informed that Van Wormer had disturbed the peace. The constable went to Van Wormer's office, found him there, and Van Wormer voluntarily surrendered. For some undisclosed reason, the constable did not proceed to take his prisoner before a magistrate. He recognized that under the circumstances he had business with the justice of the peace, but, after mounting a guard over the culprit, he went alone. Finding the justice of the peace, the constable made complaint, and a warrant was issued. The constable then returned to Van Wormer's office, found him in the secure keeping of the deputies, and "arrested" him. The constable, however, had omitted, for some reason, to arrange with the justice of the peace for the trial. He again requisitioned the services of his guardsmen, and went back alone to arrange for the trial. When the sheriff appeared, the defendants told him they were guarding Van Wormer until the constable could arrange for the trial. The constable did arrange for the trial, and the trial was to be on the charge contained in the complaint made by the constable and stated in the warrant. Now, this story is singular enough; but the court hesitates to believe that whoever invented it intended to add a finishing touch of absurdity by having the constable make formal arrangements for felony trial before a justice of the peace.

In the petition for a rehearing it is said that if the acts of the defendants, from the time the sheriff arrived at Van Wormer's office until he was killed, were continuing acts, the rejected evidence should have been admitted. The evidence was offered for just two purposes, stated in the former opinion, and neither purpose was subserved, whether the acts of the defendants were successive,—protest inside the building,

followed by force displayed outside the building,—or were continuing acts of protest, or force, or both, beginning inside the building and continuing until Van Wormer was set at liberty.

Complaint is made because the original opinion made no mention of an offer to prove a conversation between the constable and the sheriff, occurring after the constable had procured, but before he had served, his warrant, in which the sheriff told the constable he was doing all right and to go ahead. The evidence, if admitted, would have shown proper noninterference with the constable while he was apparently pursuing,—somewhat irregularly, but pursuing,—the course of an officer of the law. The evidence had no tendency to exculpate the defendants for what occurred two or three hours later, when the sheriff, holding a felony warrant for the offender, found him still at his office, surrounded by his friends, the constable's warrant still unexecuted, and the constable absent.

It is said the court assumes a state of facts to exist by reference to the Van Wormer Case. What state of facts the court assumed, and what effect the assumption had on the decision, the petition forbears to disclose.

It is said the court refers to statements made by Van Wormer, and an argument is made that the defendants were not bound by such statements, unless there was a conspiracy, and conspiracy was not charged. A reading of the opinion will disclose that, in showing the prosecution was limited to obstruction and resistance of the sheriff by force and violence, the court quoted from the opening statement to the jury by counsel for the prosecution. In the quotation was a statement attributed to Van Wormer.

The petition for a rehearing is denied.

All the Justices concur.

### ANNOTATION.

#### Dispute over custody as affecting charge of obstructing or resisting arrest.

A careful search has failed to disclose any case other than the reported case (*STATE V. MCCARTY*, ante, 1283) passing on the question whether a dispute over the custody of a prisoner is a justification to a charge of obstructing or resisting arrest.

In that case it appeared that a prisoner had been left in the custody of three deputies of a constable while the constable went to arrange for the trial of the accused before a justice of the peace. In his absence, the sheriff of the county arrived with a warrant for

the arrest of the accused on a felony charge. He took the accused into his custody, and was taking him away, when he was attacked and beaten by the three deputy constables, and as a result the prisoner escaped. It was held that the fact that the deputies had custody of the prisoner was no defense to a charge of obstructing and resisting the sheriff in the performance of his duty, as he had a superior right to the custody of the prisoner.

B. F. D.

EARLE H. RORABACK, Appt.,

v.

MOTION PICTURE MACHINE OPERATORS' UNION of Minneapolis  
et al.

*Minnesota Supreme Court — August 2, 1918.*

(140 Minn. 481, 168 N. W. 766, 169 N. W. 529.)

#### Conspiracy — "bannering" — legality.

1. "Bannering" plaintiff's place of business as unfair to organized labor, and thereby deterring the public from patronizing him, if done for the purpose of compelling him not to work as an operative himself in his own business, is unlawful and may be enjoined.

[See note on this question beginning on page 1295.]

#### — combination to secure lawful end.

2. Men, either singly or in combination, may use any lawful means to accomplish a lawful purpose, although the means adopted may cause injury to another; but they may not intentionally injure or destroy the business of another to accomplish an unlawful purpose.

[See 5 R. C. L. 1068-1070.]

#### Constitutional law — right to labor.

3. The Constitution guarantees to everyone the right to work in his own business, and any attempt to deprive him of that right is unlawful.

[See 6 R. C. L. 266-268.]

#### Injunction — denial — discretion.

4. As the facts are not free from doubt, the trial court did not abuse its discretion in refusing to issue a temporary injunction.

[See 14 R. C. L. 312, 313.]

#### Appeal — ruling as to injunction pendente lite.

5. Granting or refusing an injunction pendente lite rests so largely in the discretion of the trial court that an appellate court is not justified in interfering, unless the conclusion reached is clearly erroneous, and will result in an injury which it is the duty of the court to prevent.

[See 14 R. C. L. 313, 314.]

**APPEAL** by plaintiff from an order of the District Court for Hennepin County (Dickinson, J.) in favor of defendants in an action brought to enjoin them from interfering with plaintiff's business. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. Nathan H. Chase for appellant.  
Messrs. Fifield & Finney for respondents.

Taylor, C., filed the following opinion:

The defendants are the Motion Picture Machine Operators' Union of Minneapolis, known as Local 219, and composed of motion picture machine operators; the Trades and Labor Assembly of Minneapolis, composed of representatives from a large number of labor unions of Minneapolis, of which Local 219 is one; and a large number of individuals, who are officers or members of one or the other, or both, of these associations.

Plaintiff has operated a motion picture theater, known first as the Orient and later as the New National Theater, in the city of Minneapolis from May 1, 1916, until the present time. He employed members of Local 219 to operate his machines until September 10, 1916. Since that date he claims to have operated the machines himself unassisted. Several conferences took place between plaintiff and representatives of the defendants concerning the re-employment of union operators, but no agreement was reached. In December, 1916, the Trades and Labor Assembly declared plaintiff's theater "unfair to organized labor;" and thereupon and repeatedly thereafter, defendants published in the Labor Review, their official paper, that the New National Theater was "unfair to organized labor." In February, 1917, defendants caused a banner bearing the words, "Unfair to Organized Labor," to be carried back and forth in the street in front of the theater, and at the time of the hearing were still "bannering" the theater in that manner. In May, 1917, plaintiff brought this action for an injunction, and, upon the complaint supported by affidavits, applied for a temporary injunction

pendente lite. Defendants answered, and, upon the answer supported by affidavits, opposed the issuance of the temporary injunction. The court declined to issue it and plaintiff appealed.

Defendants admit the acts above mentioned, and also an intention to continue them, and insist that they have the legal right to do so. Plaintiff alleges that prior to the commission of such acts he had built up and enjoyed a large and lucrative business. He also alleges that these acts deter the public from patronizing his theater to such an extent that his business has been greatly injured, and will be ruined if they are continued, and that he has no adequate remedy at law.

The undisputed facts, some of which are mentioned above, show plainly that the purpose of defendants is to injure and perhaps destroy plaintiff's business unless he accedes to their demands, and that the course adopted is having the effect intended, and that plaintiff has no adequate remedy at law.

No person or combination of persons has the right maliciously to injure or destroy the business of another, by acts which serve no legitimate purpose of his own. Tuttle v. Buck, 107 Minn. 145, 22 L.R.A. (N.S.) 599, 131 Am. St. Rep. 446, 119 N. W. 946, 16 Ann. Cas. 807; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461, filed December 10, 1917. As said in Ertz v. Produce Exch. 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737: "One man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him."

Defendants may use any lawful



means to accomplish a lawful purpose, although the means adopted may incidentally cause injury to plaintiff;

**Conspiracy—combination to secure lawful end.**

but they may not intentionally injure or destroy plaintiff's business to accomplish an unlawful purpose. *Gray v. Building Trades Council*, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *Hitchman Coal & Coke Co. v. Mitchell*, supra; *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; *Connors v. Connolly*, 86 Conn. 641, 45 L.R.A. (N.S.) 564, 86 Atl. 600; *March v. Bricklayers & Plasterers Union*, 79 Conn. 7, 4 L.R.A. (N.S.) 1198, 118 Am. St. Rep. 127, 63 Atl. 291, 6 Ann. Cas. 848; *Brennan v. United Hatters*, 73 N. J. L. 729, 9 L.R.A. (N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; *Hopkins v. Oxley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 218, 7 L.R.A. (N.S.) 976, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 Ann. Cas. 1184.

Defendants cite and rely upon the case of *Steffes v. Motion Picture Mach. Operators' Union*, 136 Minn. 200, 161 N. W. 524, as authorizing them to do the things complained of, and the showing which they make indicates that they intended to, and probably did, confine their acts to those which were recognized in that case as permissible for the purpose, and under the circumstances there disclosed. In that case the purpose sought to be accomplished was found to be a lawful one, and, to bring the present case within the doctrine of that case, the purpose sought to be accomplished in the present case must also be a lawful purpose.

Plaintiff is not a member of the operators' union, and cannot become a member, because the constitution of the union provides that no owner, or part owner, or manager of a place of amusement shall be admitted to membership. It also provides that any member who shall become own-

er, part owner, or manager of a place of amusement must either withdraw or be expelled. Plaintiff opens his theater at about 10 o'clock in the forenoon, and closes it at about 11 o'clock at night. He insists upon working as an operator of his motion picture machines for one half the time each day in order to save expense. Defendants insist that only members of the union shall work as operators of the machines, and, as plaintiff is not a member of the union and cannot become a member of it, that he shall not work as an operator, although qualified to do so. Plaintiff asserts that the only controversy between himself and the defendants is as to whether he shall be permitted to perform the work of an operator himself in his own theater, and that the action taken by defendants is solely for the purpose of compelling him to cease working as such operator. He claims that he is not, and never has been, unfair to union labor; that he has always employed union labor, and none other; that he employed union operators until he began work as an operator himself; that, before beginning work himself, he endeavored to make an arrangement to work half the time each day himself, and to employ union operators upon union terms for the remainder of the time; but that the members of the union refused to work in the theater if he worked as an operator himself; that at the several conferences with defendants and their representatives he made the same proposition, and has been ready to carry it out at all times; that he ceased to employ union operators solely for the reason that they refused to work in the capacity of fellow workmen with him; and that ever since he has operated his machines himself without any assistance whatever.

In the *Steffes Case*, *Steffes* employed a nonunion operator, and the purpose of the union was to secure the employment of a union operator. No question as to whether the owner should be permitted to work him-

self was involved. In the present case, according to the claim of plaintiff, the sole question involved is whether the owner shall be permitted to work himself in his own business.

If, men, either singly or in combination, may lawfully injure or destroy the business of another for the purpose of compelling him not to work in such business himself, it will have far-reaching consequences. Such a doctrine would limit the field of business to those who have sufficient capital to carry on a business without becoming operatives therein themselves, and would debar those who have little or no capital, except their personal skill and ability, from seeking to better their condition by engaging in business on their own account. Such a doctrine means that a machinist who starts a machine shop may lawfully be prevented from working therein as a machinist; that a carpenter who starts a carpenter shop may be required to have all his work done by others; that a barber who opens a barber shop must cease to work as a barber. It means that the man in any occupation who starts in business for himself, relying upon his personal skill and ability to attain success, must forego the right to profit by his own skill, at the arbitrary behest of another, or see his business ruined. Such is not the law. The right of every person to work in his own business is a fundamental right,

Constitutional  
law—right to  
labor.

guaranteed to him by the Bill of Rights in the Constitution and by the 14th Amendment to the Federal Constitution, and any attempt to deprive him of that right is necessarily unlawful. *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. Ann. Cas. 1917B, 283. However ar members of an organization may go in an attempt to force an employer to employ members of the organization, an attempt to force him to

desist from working himself in his own business is clearly an invasion of the rights secured to him by the Constitution. *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Willner v. Silverman*, 109 Md. 341, 24 L.R.A.(N.S.) 895, 71 Atl. 962; *Gray v. Building Trades Council*, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *Brennan v. United Hatters*, 73 N. J. L. 729, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; *Hundley v. Louisville & N. R. Co.* 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; *De Minico v. Craig*, 207 Mass. 593, 42 L.R.A.(N.S.) 1048, 94 N. E. 317; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, L.R.A.1918C, 497, 62 L. ed. 260, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461.

If the facts bear out plaintiff's claim that the purpose of defendants is to compel him to cease working as an operator in his own business, it will follow that they are seeking to accomplish an unlawful purpose, and that the acts by which they are attempting to prevent the public from patronizing him will fall within the class of acts which the law deems malicious, and which it is the duty of the courts to restrain. *Hitchman Coal & Coke Co. v. Mitchell*, supra. Acts which may not be unlawful if committed for the purpose of inducing an employer to discharge one workman, or set of workmen, in order to give employment to another workman, or set of workmen, may be enjoined if committed for the purpose of depriving the employer of the right to use his own skill and ability in the furtherance of his own business; for his right to work in his own business is superior to the right of any other in respect to such business.

Granting or refusing an injunction

tion pendente lite rests so largely in the discretion of the trial court, however, that an appellate court is not justified in interfering unless the conclusion reached is clearly erroneous, and will result in an injury which it is the duty of the court to prevent. While the question as to whether plaintiff shall work as an operator is, doubtless, the principal controversy between the parties, defendants deny that that is the only controversy. They assert that plaintiff discharged his union operators without cause, and refused to re-employ union operators unless they would work with nonunion operators. Also that he employed nonunion men to make improvements and repairs in the theater, and has had nonunion operators, other than himself, operating his machines. Defendants could not well complain of the employment of nonunion operators, if union operators refused to work for the sole reason that plaintiff worked himself; but we understand defendants to claim, that plaintiff required union men to work with nonunion men other than himself. The refusal of the trial court to issue the injunction requires us to take the view of the facts most favorable to the defendants, and we cannot say that plaintiff's contention is conclusively established. The case is presented upon the pleadings and upon affidavits pro and con; it has not yet been tried. If, when the case is tried and findings are made determining the facts, it shall appear that plaintiff's contention is correct, he is entitled to relief, but we cannot say that the trial court abused its discretion in refusing to issue an injunction before the facts are ascertained; and the order appealed from is affirmed.

Hallam, J.:

I concur in the result.

**Appeal—ruling  
as to injunction  
pendente lite.**

**Injunction—  
denial—  
discretion.**

I do not understand that the right of a man to work in his own business is questioned, nor do I understand that there is any claim of right of defendants to "destroy plaintiff's business" on any ground.

I understand that defendants have the right to refuse to work as fellow workmen with nonunion men or with an employer, and that they have a right, in a proper and orderly manner, to advise one another, or the public, that a certain employer does not employ union operatives, or that he insists on operating his own machines. It seems to me the main question in the case is whether the conduct of defendants has amounted to more than that. If not, their acts have not been unlawful.

A petition for rehearing having been filed the following Per Curiam response was handed down December 7, 1918:

Plaintiff applied for a rehearing, claiming that the admitted facts show a violation of § 8973 of the General Statutes of 1913. The matter was submitted to the trial court upon the pleadings and upon affidavits pro and con, and that court refused to issue a temporary injunction. Defendants relied upon the Steffes Case, 136 Minn. 200, 161 N. W. 524, and apparently assumed that they had brought themselves within the rule applied in that case. The right to and necessity for a temporary injunction is not so conclusively established that we feel required to order that one issue, notwithstanding the refusal of the trial court to issue it. To direct its issuance under the circumstances would be, in effect, to determine the case upon affidavits, and the rights of the parties can be more satisfactorily determined after the parties adduce their evidence at the hearing upon the merits.

Rehearing denied.

ANNOTATION.

**Justifiability of interference with another's business for the purpose of compelling him not to work as an operative therein.**

The reported case (*RORABACK v. MOTION PICTURE MACH. OPERATORS' UNION*, ante, 1290) seems to be one of first impression upon the question whether a labor organization may resort to tactics calculated to interfere with another's business, for the purpose of coercing him to employ a member of the organization to do work which the proprietor of the business has himself undertaken to do.

Although the conclusion reached in the reported case commends itself as a proper one, some of the language used therein, so far as it conveys the impression that any attempt to deprive a person of the right to work in his own business is necessarily unlawful, would seem to require qualification. If one's habits or conduct or character may constitute a justification for a combination of his fellow workmen to refuse to work with him, in consequence of which their employer dispenses with his services (see *Berry v. Donovan* (1905) 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *De Minico v. Craig* (1911) 207 Mass. 593, 42 L.R.A.(N.S.) 1048, 94 N. E.

317), it would seem that one's employees might, on like grounds, lawfully combine to refuse to continue in his employment, although, when confronted with the alternative, he might elect not to work, rather than to part with his employees. So also, it would seem that in order to procure the work for themselves, one's employees might lawfully give their employer the option of relinquishing the work done by him, or of doing without their services (compare *National Protective Asso. v. Cumming* (1902) 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *Pickett v. Walsh* (1906) 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638); even though they may not do so for the purpose of compelling him to employ another member of their union. It is, however, by no means certain that the courts will be logically consistent when these questions come before them.

The explorer of this terra incognita may derive some benefit from a consultation of Labatt on Master and Servant, chapters CXV. and CXVI.

E. S. O.

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MAUDE LICKLEIDER, Appt.,

v.

IOWA STATE TRAVELING MEN'S ASSOCIATION.

*Iowa Supreme Court—February 9, 1918.*

(— Iowa, —, 166 N. W. 363, 168 N. W. 884.)

**Insurance — accident — sclerotic arteries.**

1. Recovery on an accident policy cannot be prevented by the fact that the arteries of insured were sclerotic, if they were no more so than was natural to a man of the age of insured, although a bodily injury would more likely be fatal than would be the case if such condition did not exist.

[See note on this question beginning on page 1304.]

**Evidence — burden of proof — cause of death.**

2. One suing for a death loss on an accident insurance policy has the burden of showing that deceased came to his death by accidental means, within the terms of the policy.

[See 14 R. C. L. 1437.]

**— affirmative defense.**

3. An insurer against death by accident has the burden of establishing his defense that death was caused by overexertion, within the exception in the policy.

[See 14 R. C. L. 1437.]

**Trial — jury — cause of death.**

4. Whether one insured against accident died from disease or accident is, upon the conflicting evidence, for the jury.

**Definition — accident.**

5. When the words, "accident," and "accidental," are used in an insurance policy, they are to be construed and considered according to the common speech and common usage of people generally.

[See 14 R. C. L. 1238.]

**Insurance — accident.**

6. That an injury happens to one through his own voluntary act does

not prevent its being an accident within the meaning of that term as used in an insurance policy.

[See 14 R. C. L. 1238-1241.]

**— voluntary act.**

7. Death due to a strain or injury to a vital organ, when one, in attempting to remove a tire from an automobile by the exertion of his strength with some degree of violence, is caused to stagger or fall back by the sudden giving way of the tire, is accidentally caused, within the meaning of an accident insurance policy.

[See 14 R. C. L. 1239-1241.]

**— when result of voluntary act accident.**

8. When injury or death results from the voluntary act of the insured and the act is one which is not manifestly dangerous, but which is ordinarily done or performed without serious consequences to the doer, such result is caused by accidental means.

[See 14 R. C. L. 1239, 1240.]

**— effect of negligence of insured.**

9. Recovery on an accident insurance policy is not defeated by the mere fact that negligence of the insured contributed to the injury.

[See 14 R. C. L. 1256.]

**APPEAL** by plaintiff from a judgment of the District Court for Polk County (Dudley, J.) in favor of defendant in an action brought to recover the amount alleged to be due on a certificate of accident insurance. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Clinton L. Nourse, for appellant:

When, in view of all the facts and circumstances, the question is one as to which men may honestly differ, the case is one for the jury; and this rule is not changed merely because the facts are not in dispute.

*Rothrock v. Cedar Rapids*, 128 Iowa, 252, 103 N. W. 475; *Long v. Ottumwa R. & Light Co.* 162 Iowa, 11, 142 N. W. 1011; *Philpott v. Jones*, 164 Iowa, 730, 146 N. W. 861; *Meardon v. Iowa City*, 148 Iowa, 12, 126 N. W. 939; *Paulsen v. Modern Woodmen*, 21 N. D. 235, 130 N. W. 231.

Before the court is warranted in directing a verdict on an issue tendered, every fact favorable to the party against whom the verdict is asked must be considered as established.

*Ney v. Eastern Iowa Teleph. Co.* 162 Iowa, 525, 144 N. W. 385; *Degelau v. Wright*, 114 Iowa, 52, 86 N. W. 36;

*Hartman v. Chicago G. W. R. Co.* 132 Iowa, 582, 110 N. W. 10; *Scott v. St. Louis, K. & N. W. R. Co.* 112 Iowa, 54, 83 N. W. 818, 8 Am. Neg. Rep. 391.

A case should be submitted to the jury if there is any evidence tending to show that there was anything unintended, unexpected, unforeseen, or miscalculated in the events leading up to the death of the insured.

*Hastings v. Travelers' Ins. Co.* 190 Fed. 261; *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 539, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; *Smouse v. Iowa State Traveling Men's Asso.* 118 Iowa, 437, 92 N. W. 53; *Jenkins v. Hawkeye Commercial Men's Asso.* 147 Iowa, 113, 30 L.R.A. (N.S.) 1181, 124 N. W. 199; *Lehman v. Great Western Acci. Asso.* 155 Iowa, 737, 42 L.R.A. (N.S.) 562, 133 N. W. 752; *Shanberg v. Fidelity & C. Co.* 19 L.R.A. (N.S.) 1206, 85

(— Iowa, —, 166 N. W. 363, 168 N. W. 884.)

C. C. A. 343, 158 Fed. 1; Standard Life & Acci. Ins. Co. v. Schmaltz, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. E. 49; Martin v. Travelers' Ins. Co. 1 Fost. & F. 505; North American Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43.

When, upon the evidence, there may arise an honest difference of opinion as to whether the death was accidental, it is a question of fact for the jury.

Smith v. Aetna L. Ins. Co. 115 Iowa, 219, 56 L.R.A. 271, 91 Am. St. Rep. 153, 88 N. W. 368; American Acci. Co. v. Reigart, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191; Maryland Casualty Co. v. Hudgins, — Tex. Civ. App. —, 72 S. W. 1047; Miller v. Fidelity & C. Co. 97 Fed. 836.

Where both accident and disease are shown, either of which might have caused death, it is a question of fact for the jury to determine which was the proximate cause.

Morrow v. National Masonic Acci. Asso. 125 Iowa, 634, 101 N. W. 468; Kenny v. Bankers Acci. Ins. Co. 136 Iowa, 146, 113 N. W. 566; Vernon v. Iowa State Traveling Men's Asso. 158 Iowa, 597, 138 N. W. 696.

The burden of proof is on defendant to show that the case comes within an exception to the risk undertaken.

Correll v. National Acci. Soc. 139 Iowa, 36, 130 Am. St. Rep. 294, 116 N. W. 1046; Fenton v. Iowa State Traveling Men's Asso. 139 Iowa, 167, 117 N. W. 251; Kirkpatrick v. Aetna L. Ins. Co. 141 Iowa, 74, 22 L.R.A. (N.S.) 1255, 117 N. W. 1111; McClure v. Great Western Acci. Asso. 141 Iowa, 350, 118 N. W. 269.

"Voluntary overexertion" means overexertion, the inevitable result of which the insured was conscious of and intended.

Rustin v. Standard Life & Acci. Ins. Co. 58 Neb. 792, 46 L.R.A. 253, 76 Am. St. Rep. 136, 79 N. W. 712; Jones v. United States Mut. Acci. Asso. 92 Iowa, 666, 61 N. W. 485; Matthes v. Imperial Acci. Asso. 110 Iowa, 224, 81 N. W. 484; Smith v. Aetna L. Ins. Co. 115 Iowa, 220, 56 L.R.A. 271, 91 Am. St. Rep. 153, 88 N. W. 368; Correll v. National Acci. Soc. 139 Iowa, 43, 130 Am. St. Rep. 294, 116 N. W. 1046.

Messrs. Sullivan & Sullivan, for appellee:

Plaintiff can only recover, under the contract sued on, for indemnity for death caused by external, violent, and

accidental means, independently of all other causes.

Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Taylor v. Pacific Mut. L. Ins. Co. 110 Iowa, 621, 82 N. W. 326; Feder v. Iowa State Traveling Men's Asso. 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; Smouse v. Iowa State Traveling Men's Asso. 118 Iowa, 436, 92 N. W. 53; Binder v. National Masonic Acci. Asso. 127 Iowa, 25, 102 N. W. 190; Whitlatch v. Fidelity & C. Co. 149 N. Y. 45, 43 N. E. 405; Laessig v. Travelers' Protective Asso. 169 Mo. 272, 69 S. W. 469; Aetna L. Ins. Co. v. Milward, 118 Ky. 716, 68 L.R.A. 285, 82 S. W. 364, 4 Ann. Cas. 1092; Cronkhite v. Travelers' Ins. Co. 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; National Asso. v. Scott, 83 C. C. A. 652, 155 Fed. 92; Illinois Commercial Men's Asso. v. Parks, 103 C. C. A. 286, 179 Fed. 799; White v. Standard Life & Acci. Ins. Co. 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; Lehman v. Great Western Asso. 155 Iowa, 737, 42 L.R.A. (N.S.) 562, 133 N. W. 752.

If the plaintiff has not proved that the insured came to his death from external, violent, and accidental means, her case has failed, and the court should direct a verdict for the defendant.

Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Taylor v. Pacific Mut. L. Ins. Co. 110 Iowa, 623, 82 N. W. 326; Illinois Commercial Men's Asso. v. Parks, 103 C. C. A. 286, 179 Fed. 794; Conners v. Burlington, C. R. & N. R. Co. 74 Iowa, 383, 37 N. W. 966; Powers v. Council Bluffs, 45 Iowa, 660, 24 Am. Rep. 792; Magee v. Chicago & N. W. R. Co. 82 Iowa, 255, 48 N. W. 92; Platt v. Chicago, St. P. M. & O. R. Co. 84 Iowa, 697, 51 N. W. 254; Tucker v. Tucker, 138 Iowa, 348, 116 N. W. 119; Morgan v. Sutlive Bros. 148 Iowa, 318, 126 N. W. 175; Doty v. Brasks, 151 Iowa, 23, 126 N. W. 1108, Ann. Cas. 1913D, 193; National Asso. v. Scott, 83 C. C. A. 652, 155 Fed. 92; Travelers' Ins. Co. v. Selden, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285; Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 623, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; Laessig v. Travelers' Protective Asso. 169 Mo. 272, 69 S. W. 469; Clark v. Bankers' Acci. Ins. Co. 96 Neb. 381, 147 N. W. 1118; Hess v. Preferred

Masonic Mut. Acci. Asso. 112 Mich. 196, 40 L.R.A. 444, 70 N. W. 460; Badenfeld v. Massachusetts Mut. Acci. Asso. 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769; Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765, 35 L.R.A. 258, 44 Pac. 996; Smith v. Travelers' Ins. Co. 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607.

Under the law and the contract sued on, if the insured did what he intended to do in the manner in which he intended, and his death resulted, this would not be death from accidental means. The contract insures against accidental means, not against accidental results.

Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Feder v. Iowa State Traveling Men's Asso. 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; Smouse v. Iowa State Traveling Men's Asso. 118 Iowa, 435, 92 N. W. 53; Shanberg v. Fidelity & C. Co. 19 L.R.A.(N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1; Lehman v. Great Western Acci. Asso. 155 Iowa, 737, 42 L.R.A.(N.S.) 562, 133 N. W. 752; Schmid v. Indiana Travelers' Acci. Asso. 42 Ind. App. 483, 85 N. E. 1032; Fidelity & C. Co. v. Carroll, 5 L.R.A.(N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955; Hastings v. Travelers' Ins. Co. 190 Fed. 258; Clidero v. Scottish Acci. Ins. Co. 29 Scot. L. R. 303, 19 Sc. Sess. Cas. 4th series, 355; Cobb v. Preferred Mut. Acci. Ins. Co. 96 Ga. 818, 22 S. E. 976; Preferred Acci. Ins. Co. v. Patterson, 130 C. C. A. 175, 213 Fed. 595; Smith v. Travelers' Ins. Co. 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607.

If the diseased condition of the insured's arteries contributed to his death, there can be no recovery in this case, even though he sustained an accidental injury.

Binder v. National Masonic Acci. Asso. 127 Iowa, 25, 102 N. W. 190; Delaney v. Modern Acci. Club, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91; National Asso. v. Scott, 83 C. C. A. 652, 155 Fed. 92; Hubbard v. Mutual Acci. Asso. 98 Fed. 931; Commercial Travelers' Mut. Acci. Asso. v. Fulton, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; National Masonic Acci. Asso. v. Shryock, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; Sharpe v. Commercial Travelers' Mut. Acci. Asso. 139 Ind. 92, 37 N. E. 353; Western Commercial Travelers' Asso. v.

Smith, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; Maryland Casualty Co. v. Morrow, 52 L.R.A.(N.S.) 1213, 130 C. C. A. 179, 213 Fed. 599; Travelers' Ins. Co. v. Selden, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285; Illinois Commercial Men's Asso. v. Parks, 103 C. C. A. 286, 179 Fed. 799; White v. Standard Life & Acci. Ins. Co. 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83.

Weaver, J., delivered the opinion of the court:

The defendant, an accident insurance association, issued its policy or certificate to one Bert A. Dunbar, insuring him against bodily injury occurring through external, violent, and accidental means, and resulting, independently of all other causes, in death, within ninety days from the date of the accident. While this insurance was in full force, and the insured was a member of the association in good standing, Dunbar died, and this action was brought on said contract of insurance by the beneficiary therein named on the theory that his death was the result of accidental bodily injury, within the scope and meaning of said contract. The defendant resists payment of the insurance, alleging that Dunbar's death resulted from natural causes, disease, or bodily infirmity, or voluntary overexertion, and that for death so resulting there is no liability under the terms of the policy.

The policy was issued November 21, 1910. It provides against liability of the insurer for death of the insured, resulting wholly or partially, directly or indirectly, from disease or bodily infirmity, or from voluntary overexertion. At the date of the contract Dunbar was in apparently strong and robust health. He was a traveling salesman for a wholesale grocery house at Des Moines, and had his headquarters at Carroll, Iowa. In his business he kept and made frequent use of an automobile. On July 1, 1913, with another man and two women as guests in his car he set out for a trip

to Glidden and Coon Rapids, and thence back to Carroll. On the road one of the tires on the car sustained a puncture, and Dunbar, with the aid of the other man, took off the tire, patched the inner tube, and then, replacing the tube and casing on the wheel, started to complete the trip. It soon appeared that the puncture had not been effectually mended, and, stopping again, he, working alone, attempted once more to remove the tire, but for some reason it resisted his efforts. Kneeling upon one knee he took hold of the casing with both hands, pulling and jerking at it for some time, when it came off with a snap, and with such suddenness as to cause him to slip or stagger back with the tire in his hands. He immediately turned pale, complained of being very ill, put his hand to his head, and lay down on the ground. Help was called, and he was removed to a hotel, where he died about an hour later. A post mortem examination was made of the body by three physicians, who found that the immediate cause of death was due to a blood clot in the right coronary artery near the heart. Two of them gave it as their opinion that Dunbar died of arteriosclerosis and obstruction of the coronary artery, that he was afflicted with abnormal arteriosclerosis, and that the coronary arteries were quite sclerotic. On the other hand, the third doctor testified that he found no more arteriosclerosis than is usual with a man of the size and age of the deceased. He further said that blood clot was due to inflammation, or injury to the artery, and that he did not observe or find any such inflammation in the body.

The foregoing is a brief summary of the record as to the facts, but is sufficiently complete for our consideration of the question whether they made a case upon which plaintiff was entitled to go to the jury.

When the issues joined are viewed in connection with the testimony of the medical experts, it is too clear for argument that the court could not properly rule as a matter of law

that Dunbar's death was the result of disease, or other natural causes, and we do not understand that such was the position of the trial court, or that it is insisted upon in this court. It is quite apparent that the direction of a verdict in defendant's favor was grounded upon the thought, either that the insured did not come to his death through accidental means, or that his death resulted from voluntary overexertion. Upon the first of these propositions the burden was doubtless upon plaintiff to present evidence from which the jury could properly find

**Evidence—  
burden of proof  
—cause of death.**

that the death of the deceased resulted from injuries of the nature or kind against which the policy insured him; but the claim or assertion that he died from overexertion is in the nature of an affirmative defense, upon which the defendant assumes the burden. We, therefore, turn to a consideration of those features of the case as shown by the record.

I. Was there any evidence on which the jury could be permitted to find that the death of Dunbar was the result of external, violent, and accidental means, independent of all other causes?

As we have seen, it is not open to doubt that the question whether he died of disease was for the jury. The only evidence tend-

**Trial—jury—  
cause of death.**

ing to show that the death was the natural result of disease is that of the two physicians who express the opinion that he died of arteriosclerosis, which, as we understand it, is the technical term for hardening of the arteries; but this is met by other evidence that the sclerosis discovered in this case was such only as is ordinarily found in men of his size and age; and the weight and influence to be accorded to these conflicting opinions was for the jury. If the arteries of the deceased were sclerotic, but the sclerosis was such only as is the natural or usual accompaniment of increasing years,



the fact, if it be a fact, that a bodily injury sustained by him would more likely be fatal than would be the case

**Insurance—  
accident—  
sclerotic  
arteries.**

if such condition did not exist, would not prevent a recovery on the policy should it otherwise appear that the injury was of the nature or kind described in the contract. *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013.

Coming, then, to the question whether there is in this record any testimony tending to show that the death of the insured was the result of injury from accidental cause or means, we confront again the oft-recurring inquiry: What is an accident? And when is a means or cause accidental within the meaning of the contract? It is not always easy to define a word, though one of familiar, common, and daily use, in other words or terms which shall at once be so clear, accurate, and comprehensive as to be everywhere and always applicable. Attempts to accomplish such a definition quite as often serve to confuse as to elucidate, and usually courts can well assume that common speech and common usage are as little susceptible to judicial explanation as an axiom in mathematics is susceptible to improvement by changing its form of expression. One thing at least is well settled, the words, "accident" and "accidental," have never acquired any technical meaning in law, and when used in an insurance

**Definition—  
accident.**

contract they are to be construed and considered according to the common speech and common usage of people generally. Hundreds of attempts have been made by the courts to define these words in other terms, and while some of them may be regarded helpful in so far as they adhere to popular usage, others have served only to confuse the situation, if not in fact to grossly mislead. Certain it is that no attempt in this direction is in any respect an improvement upon the definition found in our stand-

ard lexicons, and from these by way of illustration we quote from Webster's International Dictionary:

"Accident. An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance; contingency."

"Accidental. Happening by chance or unexpectedly. Synonyms: Undesigned; unintentional; unforeseen; unpremeditated."

This is also the meaning given to these words in *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755. It is an event from an unknown cause, or an unexpected event from a known cause. *Raiford v. Wilmington & W. R. Co.* 130 N. C. 597, 41 S. E. 806. A thing done or disaster caused without design or intention. *The Blue Wing v. Buckner*, 12 B. Mon. 250. An unusual and unexpected result, attending the performance of a usual or necessary act. *Providence L. Ins. & Invest. Co. v. Martin*, 32 Md. 310. Mr. Cooley, in his very thorough compilation of the cases, says that an event which the actor did not intend to produce is produced by accidental means. 4 Cooley, Briefs, on Ins. 3156. The same thought is adopted, though variously expressed, in *Joyce, Ins.* § 2863; *Bouvier's Law Dict.*; *Kerr, Ins.* p. 380; 2 *Bacon, Ben. Soc.* § 482; *Richards v. Travelers' Ins. Co.* 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; *Railway Officials & E. Acci. Asso. v. Drummond*, 56 Neb. 235, 76 N. W. 562. The list could be extended quite indefinitely, but it can hardly be denied that these authorities, cited from courts and writers of the highest standing, make clear that the meaning of these words in law differs in no essential respect from the meaning attributed to them in popular speech.

There is, however, another alleged definition which has had a degree of judicial sanction, which ought not to be passed without notice. According to this definition,

(— Iowa, —, 166 N. W. 563, 168 N. W. 884.)

if correctly interpreted by counsel for the defense, an injury happening to the insured through his own voluntary act is not an accident, nor is his hurt to be attributed to accidental means—a proposition which is wholly at variance with every statement of the true rule as illustrated in the numerous authorities above cited. It may be, and it is, true that if the insured does a voluntary act, the natural, usual, and to-be-expected result of which is to bring injury upon himself, then a death so occurring is not an accident in any sense of the word, legal or colloquial; and it is only when thus limited that the rule so stated has any proper application. To illustrate: A may be foolhardy enough to believe that he can leap from a fourth-story window with safety, and, trying it, is killed. B, desiring to descend from the same floor, climbs out upon a fire escape, which collapses, and he falls to his death. In no proper sense of the word is A's death accidental, or caused by accidental means, nor can any reasonable person deny that B's death is accidental and produced by accidental means; yet neither would have happened but for the voluntary act of the deceased. To say that the deceased in the case at bar did just what he attempted and intended to do, that is, he attempted to remove and did remove the tire from the wheel, and therefore there was no accident or accidental means producing his injury, is to beg the whole question and to ignore the well-established meaning of words. Says Mr. Cooley in 4 Briefs on Ins. 3156: Accident insurance companies do business mostly with the common people, and the term "accident" as used in these policies should be defined according to the ordinary and usual understanding of its significance.

It makes no difference whether the injured man or some other person voluntarily sets in motion the first of a series of events which, in connected line of causation, results

in his injury or death. If, to use the language I have quoted, the resulting injury and violence to him "unexpectedly took place," or was "an unexpected result from a known cause," or was produced "without design or intention," or was "an unusual and unexpected result, attending the performance of a usual or necessary act," or was an "event happening without the concurrence of the will of the person by whose agency it was caused," or if it was "caused or produced without design," it falls directly within the letter and spirit of the definition which has been placed upon the words by the most competent lexicographers, as well as by our most eminent jurists who have given attention thereto. True, the deceased did undertake to remove the tire, and, finding it more difficult than he anticipated, he exercised his strength with a considerable degree of violence to pull or jerk it loose, and this action was undoubtedly voluntary. But it is

—voluntary act.

equally apparent that the tire gave way or came loose with an unexpected suddenness, causing him to stagger or fall back from the stooped and strained position he was occupying, and in our judgment it was open to the jury to find from all these circumstances that in this involuntary and undesigned movement, so unexpectedly produced, he sustained a strain or injury to some of his vital organs, which proved fatal. A death so produced would be accidental, both in cause and in effect.

That this is correct may be demonstrated by very many precedents. These cases are so numerous that any attempt to mention them in much detail would unduly prolong this opinion. At the head of the list, however, we mention the case of *United States Mut. Acci. Asso. v. Barry*, supra. There Dr. Barry, with two or three companions, in leaving a railway station platform, jumped to the ground below, a distance of 4 or 5 feet. His act was perfectly voluntary, but in some way not shown by any direct proof he

sustained a jar, which, it was claimed, caused an injury to his bowels, resulting in his death, and although there was no evidence by any witness that he was seen to slip or fall, or that he alighted in any other manner than he intended, it was held that the jury were at liberty to find that, by some unexpected or unforeseen or involuntary movement of his body in his descent from the platform to the ground, the injury was caused. The Supreme Court also examined and approved an instruction to the jury to the effect that while, if Barry jumped and alighted just as he intended, and nothing unforeseen, unexpected, or involuntary occurred, affecting his movement or causing him to strike the ground in any different way than he intended, then his injury was not caused by accidental means; but if "there occurred from any cause any unforeseen or involuntary movement, turn, or strain of the body which brought about the injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he intended to make, or as it would be natural to expect under such circumstances, and injury resulted therefrom, the injury would be attributable to accidental means." If this be good law (and the eminence of the court pronouncing it commands our respect), then the case at bar was one for a jury. If any reference to other cases which are in all essential respects like this in fact and principle is needed, we may mention the following, in each of which the insured was allowed to recover: In *Young v. Railway Mail Asso.* 126 Mo. App. 325, 103 S. W. 557, the insured, in lifting a mail sack, ruptured a blood vessel. In *McCarthy v. Travelers' Ins. Co.* 8 Biss. 362, Fed. Cas. No. 8,682, the insured suffered a similar injury in exercising with Indian clubs. In *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49, the insured, a worker in a machine shop, undertook to remove

a piston head, which coming off more easily than expected, the man exerted considerable strength to prevent its falling, and was immediately taken sick and died. In *Atlanta Acci. Asso. v. Alexander*, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616, the insured, a blacksmith, in swinging a heavy hammer, suddenly felt a severe pain in his abdomen, where a hernia appeared with fatal results. In *Rodey v. Travelers' Ins. Co.* 3 N. M. 543, 9 Pac. 348, the insured, while bathing, dived from a plank into the water, causing injury to his eardrum. In *Horsfall v. Pacific Mut. L. Ins. Co.* 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028, the insured lifted a heavy iron bar, causing, dilatation of the heart, causing in death. In *Martin v. Travelers' Ins. Co.* 1 Fost. & F. 505, the insured was injured in lifting a heavy burden. In *Ludwig v. Preferred Acci. Ins. Co.* 113 Minn. 510, 130 N. W. 5, the insured, a baseball player, was running a base, and voluntarily "made a dive for second," and was injured. In *McGlinchey v. Fidelity & C. Co.* 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13, the insured sustained a strain caused by trying to hold a frightened horse. In *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 51, 8 Am. Rep. 212, the assured, while assisting in loading hay, received a strain or injury resulting in death. In *Fetter v. Fidelity & C. Co.* 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592, the insured was using a pole to raise a window, when the pole slipped, causing him to fall forward and receive an injury. In *Hamlyn v. Crown Accidental Ins. Co.* [1897] 1 Q. B. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663, the insured stooped to pick up a marble for a child, and in doing so dislocated his knee. To the same legal effect is *Clark v. Iowa State Traveling Men's Asso.* 156 Iowa, 209, 42 L.R.A.(N.S.) 631, 135 N. W. 1114, where the insured was drowned by reason of shock, resulting from his

(— Iowa, —, 166 N. W. 363, 168 N. W. 884.)

voluntary entry into the cold water. With perhaps a single exception, the insurer in each and every one of the foregoing cases had stipulated against liability for injury or death of the insured except from accidental cause, and in each and in every one a recovery was allowed.

The rule clearly deducible from the overwhelming weight of authority is that, when injury or death follows or results from a voluntary act of the insured, and the act is one which is not manifestly dangerous, but which is ordinarily done or performed without serious consequences to the doer, such result is caused by accidental means. This is nowhere better stated than by Sanborn J., in *Western Commercial Travelers' Asso. v. Smith*, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401, where he says: "An effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and . . . cannot be charged with the design of producing, . . . is produced by accidental means."

This same proposition in substantially like terms was quoted and approved by this court in *Jenkins v. Hawkeye Commercial Men's Asso.* [47 Iowa, 117, 30 L.R.A.(N.S.) 181, 124 N. W. 199. The mere fact that the insured may have been negligent, and that such negligence may have contributed to his injury, is no defense to the action on the policy.

*Bohaker v. Travelers Ins. Co.* 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 U. S. 342. In the recent case of *Lanley v. Fidelity & C. Co.* 180 Iowa, 805, 161 N. W. 114, we had occasion to consider the request of an insurer for an instruction to the jury that if the insured was voluntarily doing an act by means which were "exactly what the man [he] intended to use, and did use, and was prepared to use," then, while

an injury to him in doing such an act might be accidental, the means by which it was produced would not be accidental. We sustained the trial court in refusing to so instruct, and in so doing said: "To have charged as thus asked would have been to utterly mislead the jury into the thought that, if Hatfield voluntarily undertook to drive the screw and in so doing was injured by slipping or falling upon the screwdriver, then such injury was not accidentally caused within the meaning of the policy, a rule which, if carried to its logical extent, would render the protection of an accident insurance policy the merest farce. Practically speaking, every unexpected or unintended personal injury may be traced in some of its lines of causation to the voluntary act of the victim."

It is manifest, from what we have said, that the injury was accidental. To come within the terms of the policy, such accident must have been external and violent.

Myrtle Caldwell was asked, on cross-examination: Did you not notice Mr. Dunbar slip, did you?

A. Only when the tire came off. It came off suddenly with a jerk.

If, then, Dunbar in pulling the tire from the wheel, slipped as might be found from this testimony, and fell in consequence thereof, the jury might have concluded, not only that the injury was accidental, but that it was due to slipping as the wheel came off, and that this was accidental means. No argument is required to demonstrate that such means might have been found external and violent. For the reason stated, we are of the opinion that the trial court erred in directing a verdict, and the judgment is reversed.

Preston, Ch. J., and Ladd, Evans, Gaynor, Salinger, and Stevens, JJ., concur.

Petition for rehearing denied September 30, 1918, with modification of opinion to form printed above.

## ANNOTATION.

**Arterio sclerosis as affecting right to recovery under accident policy.**

The fact that arterio sclerosis, the technical term for hardening of the arteries, is a condition frequently found in persons as they advance in years, emphasizes the importance of the question of its effect upon the right of recovery under accident insurance policies.

It will be observed that in the reported case (*LICKLEIDER v. IOWA STATE TRAVELING MEN'S ASSO.* ante, 1295), under a policy insuring against bodily injury occurring through external, violent, and accidental means, and resulting, independently of all other causes, in death, it was held that a recovery was not prevented by the fact that the insured's arteries were sclerotic, if they were no more so than was natural to a man of his age, although the bodily injury sustained by an accident was more likely to be fatal than would be the case if such condition did not exist.

The provisions in the policies are not entirely uniform, and under the varying phraseology a recovery has been allowed in some cases, notwithstanding the presence of a sclerotic condition; while in others such a condition has been held to preclude liability by the insurer.

*Moon v. Order of United Commercial Travelers* (1914) 96 Neb. 65, 52 L.R.A. (N.S.) 1203, 146 N. W. 1037, Ann. Cas. 1916B, 222, strongly supports the conclusion in the reported case. In the *Moon Case* the contract provided for a benefit, if a member of a benefit association sustained bodily injury through accidental means which, alone and independent of all other causes, should occasion death, and also that the payments authorized should not extend to any death or disability resulting in consequence of bodily infirmity, nor to any death or injury resulting from or in consequence of any disease, or loss caused wholly or in part by bodily infirmity or disease, nor any death or disability, unless caused by bodily injury which was accidental, and the proximate, sole, and only

cause of the death or disability. The insured in this case accidentally fell, striking near his heart on a rock, and died in a short time; and it was contended that the walls of his heart and arteries were thinned by the effect of advancing years, and that because of their condition there could be no recovery under the policy. The court, however, refused to sustain the contention, saying: "To this it may be said that, if the insurance is to be defeated because of the fact that the walls of the heart grow thinner by advancing years, or the arteries become sclerosed, or the valves of the heart act improperly, and this condition is the result of age, then the collection of the insurance money may nearly always be defeated by the effect of increasing years, which change the condition of the assured. We do not believe this to be the policy of the law. If it was the policy of the law, it would permit the defeat of meritorious cases. It would, in effect, allow an association of this sort to conduct a business and to furnish salaries to those engaged in managing the affairs of the association, and it would give the members of such an association and their families nothing upon which there might be any reliance."

The court in the *Moon Case* also refused to sustain the further contention that the insured's death was in consequence of disease, and that it was caused wholly or in part by bodily infirmity, and that the injury was not the proximate cause of death, although there was evidence for the defendant that an injury such as the insured sustained could not produce such a rupture as he suffered, in a normal heart. The court stated that, from anything that appeared in the evidence, the insured might have lived many years but for the accident, and that they were of the opinion that the fall was the proximate cause of his death, and that the injury sustained was within the conditions of the certificate of membership.

In *Hooper v. Standard Life & Acci. Ins. Co.* (1912) 166 Mo. App. 209, 148 S. W. 116, it was held that notwithstanding the fact that the insured's arteries were diseased and his death resulted from apoplexy, yet if he accidentally fell and ruptured a blood vessel, which caused the apoplectic stroke, his death was accidental. The court remarked that if a man is so afflicted that he will die from such affliction within a few hours, yet if, by some accidental means, his death is caused sooner, it is a death from accident; and it was, therefore, held an important question of fact in the case whether the insured fell and thereby caused a rupture of a blood vessel. It does not appear in this case exactly what the phraseology of the policy was.

In *Binder v. National Masonic Acci. Asso.* (1905) 127 Iowa, 25, 102 N. W. 190, however, where the accident policy involved provided that no benefits should be paid for any death or disability happening directly or indirectly, wholly or in part, accidentally or otherwise, because of, or resulting in or from, any disease or bodily infirmity, it was held that an instruction was erroneous that if the insured sustained a fall, and the bursting of an artery was caused thereby, there could be a recovery, even though it was found that the artery was in a weakened condition by reason of disease. The court here stated that the instruction entirely ignored the stipulation in the contract above set out, and that, as long as parties who are capable of so doing shall be permitted to make their own contracts, it is the plain duty of the court to enforce them as written, unless fraud or public policy intervene.

In *Commercial Traveler's Mut. Acci. Asso. v. Fulton* (1897) 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423, affirmed in (1899) 85 C. C. A. 493, 93 Fed. 621, where the policy provided that it should not cover accidental injuries or death resulting from, or caused directly or indirectly, wholly or in part, by, disease in any form, it appeared that at the time the insured sustained an

accident he was suffering, among other diseases, from calcification of the arteries, which made them rigid and fragile, and it was held that there could be no recovery for the insured's death unless the accidental injury was sufficient of itself to cause death to a healthy man; that if his diseased condition contributed to his death the insurer could not be held liable.

And in *Maryland Casualty Co. v. Morrow* (1914) 52 L.R.A.(N.S.) 1213, 130 C. C. A. 179, 213 Fed. 599, where the policy insured against injuries effected solely through external, violent, and accidental means that, independently of all other causes, resulted in death or injury, and it appeared that at the time the insured accidentally injured his toe he was suffering from numerous diseases, including arterio sclerosis, it was held that under the provision of the policy there could be no recovery, as it was admitted that the insured's death was caused by the concurring action of the injury and of pre-existing disease.

And in *North American Acci. Ins. Co. v. Miller* (1917) — Tex. Civ. App. —, 193 S. W. 750, where the policy insured against injury sustained through accidental means, and resulting directly, independently, and exclusively of all other causes in total disability and death, it was held that if the insured's death was not alone produced from an accidental blow, but was caused in part by arterio sclerosis, no recovery could be had under the policy. The evidence in the case, however, was held sufficient to show that the insured died from aneurism of the aorta, caused alone by a blow accidentally received by him.

A recovery of a benefit was sought in *Miskern v. United Brotherhood, C. J.* (1904) 93 App. Div. 364, 87 N. Y. Supp. 640, on the theory that on a certain date insured was suffering from arterio sclerosis, and that the strain to which he was subjected in lifting heavy timber ruptured a blood vessel and unfitted him for further labor at his trade. The evidence in the case, however, was held insuffi-

cient to make out an accidental injury, it amounting to nothing more than a statement that he suddenly became dizzy while endeavoring to put up the frame and rafters upon an addition to a house.  
J. T. W.

STATE OF WISCONSIN EX REL. WALTER C. OWEN, Attorney General, Respt.,  
v.

LOUIS SCHOTTEN, Appt.

*Wisconsin Supreme Court — January 16, 1917.*

(165 Wis. 88, 160 N. W. 1066.)

**Municipal corporation — power of council to correct minutes.**

1. A municipal council has no authority to change the minutes of a prior meeting at which liquor licenses were granted, for the purpose of making a correction in the record as to the order in which the licenses were granted, after rights have attached under the action as recorded in the minutes.

*[See note on this question beginning on page 1308.]*

**Intoxicating liquor — number of licenses — dry period.**

2. In determining the number of licenses to sell intoxicating liquor which may be issued, upon a return to the license system after a town has been dry for a year, the number al-

lowed by statute for the number of inhabitants of the town must prevail, and the number of licenses existing before the town went dry does not govern under the statutory proviso for protection of existing saloons.

*[See 15 R. C. L. 299, 300.]*

**APPEAL** by defendant from a judgment of the Circuit Court for Monroe County enjoining him from maintaining a saloon without a valid license.  
*Affirmed.*

Statement by Vinje, J.:

Action to enjoin defendant from maintaining a saloon in the village of Norwalk because no valid license was issued to him. The facts found by the court are these: The village of Norwalk had a population of between 500 and 1,000 on June 19, 1916. In April, 1915, the electors of the village voted "no license" for the license year beginning July 1, 1915, and ending July 1, 1916, so no licenses were issued. In April, 1916, the electors voted in favor of license, and on the 19th day of June the village authorities granted three licenses for the year from July 1, 1916, in the following order: one to John Weibel, one to W. C. White, and one to the defendant herein. The minutes of the meeting showed that the licenses were issued in the order stated, and such minutes were read

and approved at the next regular meeting held July 6, 1916; but after this action was begun and on the 3d of August, 1916, three members of the village council, with six out of the seven members present, voted in favor of the following motion, and three did not vote: "That error in the minutes of the regular meeting be corrected thus—placing Louis Schotten second, and W. C. White third." As conclusions of law the court found that the license granted to defendant was void, and that he should be enjoined from conducting a saloon in the village of Norwalk. From a judgment entered accordingly he appealed.

Messrs. Wolfe, Wolfe, & Reid, for appellant:

A public body may correct its records at any time.

Chippewa Bridge Co. v. Durand, 122

Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603; Dill. Mun. Corp. § 554; Ryder v. Alton, 175 Ill. 94, 51 N. E. 821; McQuillin, Mun. Corp. § 626; Boston Turnp. Co. v. Pomfret, 20 Conn. 590; Whitney v. Hudson, 69 Mich. 189, 37 N. W. 184; Jones, Ev. § 46; 28 Cyc. 339.

Defendant, by reason of § 1565d of the statute, should not lose his right to operate the saloon business.

Koch v. State, 157 Wis. 437, 147 N. W. 366; State ex rel. Platte County v. Sheldon, 79 Neb. 455, 113 N. W. 208; Harrington v. Smith, 28 Wis. 68.

Messrs. Walter C. Owen, Attorney General, and J. E. Messerschmidt, Assistant Attorney General, for respondent.

Vinje, J., delivered the opinion of the court:

The defendant contends that the village council had the power to, and did on August 3d, correct the minutes of the regular meeting of June 19, 1916, to correspond with the fact that defendant was granted the second license. Assuming that the language of the motion is adequate to express the fact that an error was made in the original minutes, and that such error was corrected to correspond to the fact, namely, that the second license was granted to the defendant; and assuming further that the motion was carried,—an assumption negatived in *Oconto County v. Hall*, 47 Wis. 208, 2 N. W. 291,—we are of the opinion that the council had no power to make such correction because the rights of

Municipal corporation—power of council to correct minutes.

third parties had intervened and would be prejudicially affected by such correction. The original minutes showed that Mr. White

was voted the second license, and the evidence shows a license was issued to him. On July 6, 1916, the minutes of the meeting of June 19th were read and approved, and no effort was made to correct them till August 3d, after this action was begun. In the meantime Mr. White, relying upon the fact that the minutes correctly showed that he was granted the second license, paid for

it, and presumably has operated under it. Should the minutes be permitted to be corrected as it is claimed they were, he would be subject to the penalties prescribed for running a saloon without a license, if only two licenses could be legally granted by the village. He would thus not only lose his license fee, but would be subject to severe penalties, not through any fault or neglect on his part, but solely because he was led astray by a record upon which he had a right to rely. Dillon states the rule thus: "The council, unless private rights have attached, may doubtless order the record of its own proceedings, even after it has once been approved, to be corrected according to the facts. But if third parties have acted in reliance upon the record, and private rights have accrued thereunder, the record cannot be amended." 2 Dill. Mun. Corp. 5th ed. § 554; *Sawyer v. Manchester & K. R. Co.* 62 N. H. 135, 13 Am. St. Rep. 541; *California Improv. Co. v. Moran*, 128 Cal. 373, 60 Pac. 969; *New Haven, M. & W. R. Co. v. Chatham*, 42 Conn. 465.

Defendant further contends that under the proviso in § 1565d, Stat. 1915, three valid licenses could be issued notwithstanding the fact that no licenses were issued for the year ending July 1, 1916, since three valid licenses had been issued by the village before it voted dry in 1915. The claim is that a vote of no license for a year or more, and the failure to grant licenses during a no-license period, do not constitute a lapse within the meaning of the proviso of § 1565d, so as to bring the number back to that prescribed in the first part of the section, viz., one license for every 500 inhabitants or fraction thereof. The claim is not well founded.

Intoxicating liquor—number of licenses—dry period.

As explained in the cases of *State ex rel. Marvin v. Larson*, 153 Wis. 488, 140 N. W. 285, *Zodrow v. State*, 154 Wis. 551, 143 N. W. 693, and *Koch v. State*, 157 Wis. 437, 147 N. W. 366, the purpose of the proviso was to protect exist-



ing saloon business in such a way as to create as little hardship there-to as possible, and at the same time provide a method for reducing the number of saloons to the ratio prescribed in the first part of the section. A saloon that has been out of business for one year, due to the inability to secure a valid license, is no longer an existing business. It needs no protection because it has no existence. It was not the object of the statute to foster or create new business beyond the limit of the ratio. On the contrary, it sought to reduce the number down to the ratio limit as speedily as possible without

disturbing existing business. A vote of "no license" destroyed all the saloon business for a year. At the end thereof there was no existing business to invoke the aid of the proviso. If a no-license vote of one year did not have this effect, then a no-license vote for ten years or more would not have it. Since the defendant is unable to show an existing business entitled to the protection of the statute, he fails to show that a valid license was issued to him, for confessedly the village could grant but two valid licenses under the ratio limit.

Judgment affirmed.

## ANNOTATION.

### Power of municipal council to correct its minutes.

#### I. Correction by council:

- a. In general, 1308.
- b. Intervention of rights of third persons, 1312.
- c. Election of new council, 1314.

#### II. Correction by clerk:

- a. In general, 1315.
- b. Rule in New Hampshire, 1320.

#### I. Correction by council.

##### a. In general.

A municipal council may, at a subsequent meeting, if no intervening rights of third persons have arisen, order the minutes or record of its own proceedings at a previous meeting to be corrected according to the facts, so as to make them speak the truth, though the record has once been approved.

**Alabama.**—*Anniston v. Davis* (1893) 98 Ala. 629, 39 Am. St. Rep. 94, 13 So. 331.

**Arkansas.**—*White v. Clarksville* (1905) 75 Ark. 340, 87 S. W. 630.

**California.**—See *California Improv. Co. v. Moran* (1900) 128 Cal. 373, 60 Pac. 969.

**Connecticut.**—Compare *Samis v. King* (1873) 40 Conn. 298.

**Georgia.**—*Owens v. Dalton* (1916) 144 Ga. 656, 87 S. E. 913.

**Illinois.**—*Ryder v. Alton* (1898) 175 Ill. 94, 51 N. E. 821; *Gilberts v. Rabe* (1898) 49 Ill. App. 418; *Belknap v.*

*Miller* (1894) 52 Ill. App. 617. See also *St. Charles v. O'Malley* (1857) 18 Ill. 407; *Adams County v. Quiney* (1889) 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 624.

**Indiana.**—*Logansport v. Crockett* (1878) 64 Ind. 319; *Chamberlain v. Evansville* (1881) 77 Ind. 542; *Everett v. Deal* (1897) 148 Ind. 90, 47 N. E. 219; *Wagner v. State* (1910) 173 Ind. 603, 91 N. E. 1.

**Iowa.**—*Mann v. Le Mars* (1899) 109 Iowa, 251, 80 N. W. 327.

**Massachusetts.**—See *Chase v. Springfield* (1876) 119 Mass. 556.

**Michigan.**—See *People ex rel. Cady v. Ihnken* (1902) 129 Mich. 466, 89 N. W. 72.

**Missouri.**—*Webb v. Strobach* (1910) 143 Mo. App. 459, 127 S. W. 680.

**Wisconsin.**—See the reported case (*STATE EX REL. OWEN v. SCHOTTEN*, ante, 1306).

"The courts are liberal respecting amendments of corporate records. If, through inadvertence or misapprehension, the record has been defectively made, it is competent to complete it according to the truth." *White v. Clarksville* (Ark.) supra.

"A liberal and favorable construction should prevail to support the proceedings of cities and towns, and this may well be the rule when no one is injured by it, or deprived of his rights;

and especially, as in this case, when the object is only to declare of record as done that which was done." *Chamberlain v. Evansville* (1881) 77 Ind. 542.

The right of amendment by a board of aldermen of its minutes or by the clerk of a municipal corporation is very broad. *Webb v. Strobach* (Mo.) *supra*.

A public corporation may, like every court of record, amend its record *nunc pro tunc*. *Logansport v. Crockett*, *Chamberlain v. Evansville*, *Everett v. Deal* (Ind.) and *Webb v. Strobach*, (Mo.) *supra*.

Thus, under a mandatory statute requiring the votes of the common council of a city to be taken by ayes and noes, and a record to be made of the proceedings of the council, where it appears that the clerk has omitted to record the ayes and nays of a vote on a resolution of the council, a *nunc pro tunc* entry of the omitted proceedings may be made. *Logansport v. Crockett* (Ind.) *supra*.

In *Anniston v. Davis* (Ala.) *supra*, it appeared that the original minutes of the council meeting at which the proceedings were had stated that the plaintiff was "unanimously" elected to fill a vacancy in the council, the charter requiring "a majority vote of the remaining members." At a subsequent meeting, held by the same members of the council, a resolution was adopted to correct the previous minutes, "to make them speak the truth and show the facts," striking out the word "unanimously" as not in accordance with the facts, and stating that three members voted for the plaintiff, and, of the other two members, one voted against him and the other did not vote. It was held that the correction was properly made.

In *Ryder v. Alton* (Ill.) *supra*, it was objected that the report of a committee making an assessment of the cost of an improvement was never approved by the city council. The record produced recited that the special committee appointed under the ordinance made a report, which was approved, all the members voting aye, and then set out the report so made to the city

council. It was attempted to be shown by certain witnesses who examined the records of the city clerk that the same, when examined by them, did not show the approval of the report of the committee. Whether the record was written up at the time the examination was made by the witnesses was not shown. The court said that, if the record could be attacked only for fraud and if it was not written up at the time of its examination, the clerk might amend the same according to his knowledge of the truth, so long as he had the custody thereof as clerk; and also that the city council might, unless private interests had attached, order the record of its own proceedings to be corrected according to the facts, even after it had once been approved.

In *Gilberts v. Rabe* (1893) 49 Ill. App. 418, it appeared that the record of a meeting of a village board consisting of six members, as originally made by a clerk *pro tem*, recited that all the members except one were present, and that the ordinance in question was passed, but it contained no recital of the manner of its passage. The ordinance was duly approved, and copies were posted. During the pendency of a prosecution for violations of it some five months later, at a regular meeting of the same board at which all the members were present, it was, by unanimous vote, ordered that the record of the proceedings at the previous meeting should be corrected so as to correspond with the facts, by inserting after the word "passed," where the passage of the ordinance was shown, the word "unanimously," and the record was amended accordingly. The record was in like manner amended so as to show that the member not present at the opening of the meeting came in and took his seat before the passage of the ordinance. The court held that the village board had the right to amend the record of its proceedings so as to correspond with the facts, and make the truth appear by supplying the omitted facts. It was, however, also contended that, inasmuch as the record did not, at the time the ordinance was violated, show that it had been passed by the affirm-

ative vote of a majority of the board, the defendant had acquired some sort of vested right to immunity, which could not be disturbed by the subsequent amendment, or that the subsequent amendment was *ex post facto* in its character, and void as to him. In denying this contention, the court said: "The record as originally made recited that the ordinance was passed, and it was approved and published as an ordinance of the village. When defendant contemplated a violation of its provisions, ordinary prudence would require that he should ascertain whether it was in fact passed in the required mode. He is presumed to have known that the law authorized the board to amend its record by adding any omitted fact, and he could acquire no vested right that the prosecution for his wrongdoing should be governed by the record in its incomplete form. When he undertook to violate the ordinance, because he thought that the village would not be able to prove its passage, he took the risk of such proof being made, and had no right to insist that the proof should not be made. When the record was completed by adding the omitted fact that the vote on the passage of the ordinance was unanimous, the record had the same force and effect as though originally made as amended, and showed that the ordinance was legally passed July 31, 1890. . . . It was in full force when it was violated by the defendant, and the completion of the record did not make that an offense which was not an offense when committed."

In *Owens v. Dalton* (Ga.) *supra*, it appeared that the city council adopted a resolution which recited the entry of the minutes of a meeting held eight months previous; that the latter portion of the motion actually made and adopted at that meeting, which was set out, had been inadvertently omitted from the minutes by the clerk; and that the minutes should be amended by adding the omitted words. It was held that the resolution was simply a correction of an erroneous entry made by the clerk, and was within the authority of the council.

In *White v. Clarksville* (Ark.) *supra*, it appeared that the ordinance in question was challenged because the original record failed to show that it was read on three separate days, or that such three separate readings were dispensed with by a two-thirds vote, as required by the statute (Kirby's Dig. § 5481). The council, after the suit was instituted, and before the last trial, passed a resolution reciting and declaring that the minutes omitted to record the fact that by a two-thirds vote the rules were suspended, and the ordinance passed under such suspension, and directing the minutes to be corrected accordingly to make them speak the truth. The personnel of the council was unchanged so far as the record disclosed, except that at this meeting all the members were not present who were present at the other meeting, but all present at the last meeting were present when it was passed. The court held that the right of amendment existed.

In *Wagner v. State* (Ind.) *supra*, the question for determination was the power of the common council, after the expiration of over one year after a special meeting, the record of which showed a resolution appointing the defendant a councilman, adopted by an aye and nay vote, to correct that record by another vote, which was a tie and decided by the vote of the mayor, so as to leave it reading, as corrected: "The resolution was passed." The second vote did not attempt to change the record so that it would show that another person was in fact appointed, but only so that it would appear that the yea and nay vote was not taken. The court said that it was not an open question that the record of a common council might be corrected to speak the truth, and also that the resolution of appointment was not such an act as was required to be in the form of a resolution and the ayes and nays to be taken, the statute so requiring referring only to legislative action. The court stated that the effect on the rights of others, acquired in the faith of a record before changed, need not be considered, for the right to a public office, though a substantial

right recognized by the law, was not a property right.

In *Chamberlain v. Evansville* (1881) 77 Ind. 542, it appeared that the proceedings of the common council with respect to certain street improvements were entered at full length on the minute book or record of the council; but, by a clerical omission, no order was entered on the minute book assessing the several amounts against the several pieces of property chargeable with the costs of the improvement, although the report was approved by the council and an order passed charging against each lot its appropriate share of the expenses. About a year and a half later, the action of the council approving the report and charging the cost of the improvements against the adjacent lots was entered *nunc pro tunc*. It was held that the council had the right, like a court of record, to amend its record *nunc pro tunc*.

In *Mann v. Le Mars* (Iowa) *supra*, it appeared that the record of a city council showed a tie vote for street commissioner, that a councilman desired to change his vote, but was ruled out of order by the mayor, whose vote on the tie elected the plaintiff. At the next regular meeting, the record was corrected so as to show that the councilman so desiring was allowed to change his vote, and that there was no election; and, as modified, was approved. The court held that the sections of the statute, providing that the council should "determine the rules of their own proceedings and keep a journal" (Code, § 668), and providing that the clerk should "make an accurate record of all the proceedings had" (Code, § 659), contemplated the control of its own record of proceedings by the city council, and that until this had been approved at the next succeeding regular meeting, it was open to such modifications as might be necessary to truthfully exemplify what had been done.

In *Adams County v. Quincy* (1889) 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 624, the court stated that the right of the city council to amend the records of its meetings, to make them accord with

the facts, was not questioned. It was shown that the record of a meeting was amended by order of the city council so as to show a formal approval of the report made by a committee appointed by the council to levy a special tax for the cost of a proposed improvement.

In *People ex rel. Cady v. Ihnken* (Mich.) *supra*, the question was whether the clerk of a village council should be permitted to raise the objection that the record of a meeting of the council was inaccurate, in that the trustee who purported to sign the record as clerk *pro tem*, was not present at the meeting, or whether, the record on its face having been authenticated by the president of the council and by one purporting to act as clerk *pro tem*, he should enter the record, subject to correction by the council itself. The court held that while, under the statute (1 Comp. Laws 1897, § 2731), it was the duty of the clerk to enter the record, it was always within the province of the council to correct any errors that had occurred; and that the proper proceeding was for the clerk to enter the record, and for the council then to make the correction of any error which was apparent.

In *Chase v. Springfield*, (Mass.) *supra*, wherein it appeared that the record of the board of aldermen with respect to an assessment for the improvement of a street was defective in not showing what the amount of that expense was, it was held that the defect might and should be cured by an amendment of that record.

In *St. Charles v. O'Mailey* (1857) 18 Ill. 407, the court said that it did not perceive any objection to an amendment of the entry of the proceedings of the board of trustees of a town, to make it set forth the truth.

A California statute (Stat. 1885, p. 149) provides that on an appeal to the city council from a street assessment "all the decisions . . . of said city council . . . shall be final and conclusive . . . as to all errors, informalities and irregularities which said city council might have remedied and avoided." Thereunder, in Cali-

fornia Improv. Co. v. Moran (1900) 128 Cal. 873, 60 Pac. 969, it was held that while the city council could "remedy and correct any error or informality in the proceedings," correct and revise the acts of the superintendent of streets, "confirm, amend, set aside, alter, modify, or correct the assessment," etc., it could not dispense with, alter, amend, modify, or correct any proceeding previously taken, on which its jurisdiction to act depended, so as to confer a jurisdiction which it had failed to acquire by such proceeding. Hence, the council remaining unchanged, the court conceded that it might have directed the clerk to correct the record so as to conform to the fact, but stated that no such determination was made. The court stated that the council confirmed the assessment, but did not amend the record, which the evidence now showed could not have been amended in conformity with the truth so as to confer jurisdiction on the council.

In *Samis v. King* (Conn.) *supra*, it appeared that the question was whether the official record of a meeting of the common council, duly certified by the clerk of the city, or the record as attempted to be amended at a subsequent meeting of the council, was to be treated as the true record and as evidence of what took place at the meeting. The court stated that if the clerk had made a mistake in his record he might doubtless correct it, and it might be corrected, if erroneous, by mandamus, but held that the record, until amended by the clerk, or by order of the court on mandamus, was the proper evidence of what took place at the meeting.

The commissioners of highways have the right to control the amendment of a record of their proceedings according to the facts, and to order the clerk to make the amendment accordingly. *Du Page County v. Martin* (1891) 39 Ill. App. 298. In that case it appeared that the records of the commissioners of highways on page 396 showed that at a meeting of the commissioners, February 19, 1887, it was decided "to build an iron bridge in place of the one swept away" at

Garry's Mills, and the legal notices inviting bids for the construction of the bridge were proposed, and afterwards posted and recorded. Then the record of a meeting of the commissioners of highways at the bridge site at Garry's Mills for the purpose of letting the contract of building the bridge, held March 1, 1887, was introduced, and in connection therewith an amended record was read and inserted on the same page before the record of the bridge contract, which showed that the board at the same meeting found that the immediate building of the bridge in question was necessary, and a delay in so doing detrimental to the public interest, and it was unanimously voted that the bridge be immediately built, as provided by law, and that aid be asked of the county board as provided by statute. The part of the record last recited was inserted on the 16th day of September, 1889, pursuant to a vote of the commissioners to correct the record, which record of the order to correct was read, and showed that at a meeting of the commissioners of highways of the town, duly called and held on the 16th day of September, 1889, C. D. Clark was appointed clerk protem., the clerk being absent from the county, and thereupon a motion was duly and unanimously voted that the minutes and record of the previous meeting of the board be amended and corrected to correspond with the fact by inserting the following on page 398 before the record of the bridge contract. The court held that the commissioners of highways had the right to order the clerk to make an amendment of the record according to the facts.

*b. Intervention of rights of third persons.*

An erroneous record of the proceeding of a municipal council cannot be corrected or amended, to the destruction of rights acquired under it in good faith, without notice of the error. *California Improv. Co. v. Moran* (1900) 128 Cal. 373, 60 Pac. 969; *New Haven, M. & W. R. Co. v. Chatham* (1875) 42 Conn. 465; *Sawyer v. Manchester & K. R. Co.* (1882) 62 N. H. 135, 13 Am. St. Rep. 541.

In the reported case (*STATE EX REL. OWEN V. SCHOTTEN*, ante, 1306), it appeared that village authorities had granted three licenses to keep saloons in the village, whereas, under the statute (Stat. 1915, § 1565d), only two licenses could be legally granted by them, the record of the meeting showing that the third license was granted to the defendant. These minutes were read and approved at the next regular meeting; but a month later three members of the village council, with six out of the seven members present, voted in favor of a motion correcting the error in the regular license meeting, placing the defendant second, and the previous second licensee third. The second licensee, relying on the fact that the minutes correctly showed that he was granted the second license, paid for it, and was presumably operating under it, with the result that, if the minutes were corrected, he would not only lose the license fee, but would be subject to the penalties prescribed for running a saloon without a license, not through any fault or neglect on his part, but solely because he was led astray by a record on which he had a right to rely. The court holds that the council had no power to make the correction, because the rights of third persons had intervened and would be prejudicially affected by the correction.

In *New Haven, M. & W. R. Co. v. Chatham* (1875) 42 Conn. 465, it appeared that a town, for the purpose of aiding a railroad company, had, under authority of the legislature, voted to guarantee a certain amount of bonds of the railroad company, the resolution and the warning of the meeting at which the town acted on the matter stating that the voters should pass on the matter by ballot. In the warning, it was stated that those in favor of the adoption of the proposition would deposit a ballot marked, "Yes," and those who were opposed, a ballot marked, "No." The record made by the town clerk of the action of voters stated: "Voted, that the resolutions prescribed in the warning be adopted, Yes, 178; No, 86." The officers and inhabitants of the town knew, after this record was made and exhibited

to the public, that the company and the contractors under it, relying on the vote of the town, and on the record thereof as evidence that it was legally passed, were expending large sums of money and incurring obligations in completing the road, and adding substantial value to property in which the town had made large previous investments, and that the work of construction was carried on wholly on this pledge of assistance from the defendant town and other towns in like situation. When asked from time to time to place the guaranty upon the bonds, by the company and by the contractors whom they had seen expending money and performing labor on the faith of their record, they received the request in silence or refused compliance for varying reasons; but no officer or individual citizen ever gave any notice or even intimation to the company or any person that there was any defect or informality in the manner of passing the vote, or any error in the record thereof, until the road had been completed and they had derived all possible benefits from silence, when, three years later, it was claimed that the vote on the passage of the resolutions was not taken by ballot, but by dividing the house and counting the affirmative and negative votes. It appeared that a peremptory writ of mandamus was then obtained to compel the then town clerk, but not the town clerk at the time the record was made, to correct the record of the vote, directing him to correct the record so as to conform to the fact, by recording, in addition to what before appeared and at the end thereof, the following words, viz.: Said vote was taken by a division of the house and a count, and not by ballot. In addition to which and at the suggestion of the court a conspicuous memorandum of the correction was inserted by him on the same page in the record book as that on which the original entry was made, explaining the time when, and on whose application, and by what order it was done. The court held that the town was estopped from correcting the record.

In *Sawyer v. Manchester & K. R. Co.*

(N. H.) *supra*, it appeared that the warning of a special meeting of a town stated that one of its purposes was to see what sum the town would raise and appropriate as a gratuity to a railroad company, the road "to be completed on or before the 1st day of January, 1878." The vote of the town, as recorded by the town clerk, stated that it was voted to raise 5 per cent of the present valuation of the town as a gratuity to the railroad. Over three years later, on the application of the town, it was ordered by the court that the record of the vote be amended by adding thereto the words, "and complete the road on or before the 1st day of January, 1878." It was held that the court could not properly permit the erroneous record to be amended according to the truth, to the destruction of rights acquired under it in good faith, without notice of the error.

In *California Improv. Co. v. Moran* (Cal.) *supra*, it was held that whether or not a new municipal council had power to change the record of a preceding council, it clearly could not exercise that power if it injuriously affected intervening rights.

In *New Albany v. Endres* (1895) 143 Ind. 192, 42 N. E. 683, it appeared that a petition to widen a street was pending before the common council on July 21, 1890, and that the property in question was conveyed to the plaintiff on December 2, 1890. On the final report of the city commissioners to meet, view, report for appropriation, and assess for damages, filed on December 15, 1890, and approved by the common council on the same day, the records of the proceedings of the council failed to show the vote taken. The statute (Rev. Stat. 1894, § 3630; Rev. Stat. 1881, § 3167) providing for a two-thirds vote by the council, on March 30, 1893, by *nunc pro tunc* the resolution calling out the city commissioners was corrected so as to show the vote thereon, and by *nunc pro tunc* the resolution adopting the final report of the commissioners was corrected by setting out the vote thereon, showing the two-thirds vote in favor of such action. It was held that the proceedings were binding on the plaintiff,

and that he had no intervening right, the fact that he was an intervening purchaser between the adoption of the resolution and the *nunc pro tunc* entry not relieving him from the binding force of the action of the common council.

*c. Election of new council.*

Conceding the existence of the power of the same city council, at a subsequent meeting, to correct an error in the journal in relation to their proceedings at a previous meeting, it does not follow that a different council, whose only knowledge of the proceedings that actually occurred at a previous meeting of the board would have to be derived from the information of other persons, can properly exercise such a power. *Covington v. Ludlow* (1858) 1 Met. (Ky.) 295; *Locke v. Com.* (1894) 15 Ky. L. Rep. 840; *Pontiac v. Axford* (1882) 49 Mich. 69, 12 N. W. 914.

In *Covington v. Ludlow* (Ky.) *supra*, it appeared that some two years later the words, "passed unanimous," were added to an ordinance for the improvement of a street by an order of the city council, when an entirely new board had come into office. The court held that the new board had not the power to amend an entry on the journal so as to make it appear, not only that an ordinance had been reported, but also that it had been acted on and passed by unanimous vote of the city council. The court said: "The city council keep a journal of their proceedings. The entries in that journal furnish the evidence of their action in their official capacity. If changes and amendments can be made at a remote period, and by a different board, then all the entries become uncertain, and none can be relied upon, even by those who are acting under them. The evils resulting from such a practice would be innumerable. All confidence in the entries in the journal would be destroyed, and the action of the city council, at the meetings held by them, would be a matter open for controversy, which would have to be determined by an appeal to the uncertain recollection of witnesses. We con-

clude, therefore, that the amendment of the entry of the proceedings of the city council . . . was unauthorized."

In *Locke v. Com.* (1894) 15 Ky. L. Rep. 840, it appeared that the minutes of a meeting in January of the board of trustees of a town were not signed by the chairman or any other member of the board. At the following September meeting of the board, which was then a different board, though three of the members were on both boards, it was ordered that the first record be amended so as to show that the minutes were signed by the clerk and the chairman. It was held, following *Covington v. Ludlow* (Ky.) *supra*, that a new board could not correct errors and omissions in the journal entry of official actions of their predecessors.

In *Pontiac v. Axford* (Mich.) *supra*, it appeared that a city charter required that "the votes of all the members of the common council in relation to any act, proceeding, or proposition had at any meeting shall be entered at large in the minutes," and a subsequent clause particularly applied this provision to the taxation or assessment of property. In that case the minutes relating to a city tax voted only showed the names of persons present at meetings, without showing their presence at the passage of any of the measures in question, which were stated in general terms, and without any names of voters, to have been unanimously passed. Some time later, amendatory resolutions were passed by a subsequent council, including a portion, but less than a majority, of the members in office when the first action was had, whereby the records were made to show the names of those who had voted. The court held that, assuming that such amendments might cure the defects, this could be the case only where it appeared that the amendment was made by the same council that originally acted, and therefore had knowledge of what took place at its meetings. This could not be made out, the court held, by matter ascertained by a subsequent council, inquiring on testimony, and

not acting on any knowledge of its members.

A new municipal council has no power to change the record of a preceding council, if it injuriously affects intervening rights. *California Improv. Co. v. Moran* (1900) 128 Cal. 373, 60 Pac. 969.

## II. Correction by clerk:

### a. In general.

It is generally held that the clerk of a town or other municipal corporation has the right and power to amend the minutes or records of the proceedings of the municipality, so long as he has the custody thereof, according to the facts and his knowledge of their truth, where, through inadvertence, mistake, or neglect, the record of the proceedings is incomplete or defective. *Boston Turnp. Co. v. Pomfret* (1850) 20 Conn. 590; *Ryder v. Alton* (1898) 175 Ill. 94, 51 N. E. 821; *Du Page County v. Martin* (1891) 39 Ill. App. 298; *Schuyler County v. Missouri Bridge & Iron Co.* (1912) 173 Ill. App. 435, judgment affirmed in (1912) 256 Ill. 348, 100 N. E. 239; *Chamberlain v. Dover* (1836) 13 Me. 466, 29 Am. Dec. 517; *Welles v. Battelle* (1814) 11 Mass. 477; *Halleck v. Boylston* (1875) 117 Mass. 469; *Com. v. McGarry* (1883) 135 Mass. 553; *Webb v. Strobach* (1910) 143 Mo. App. 459, 127 S. W. 680; *Mott v. Reynolds* (1855) 27 Vt. 206. See also *Samis v. King* (1873) 40 Conn. 298. See, however, II. b, *infra*.

This is on the ground that he is a public officer appointed to keep the records and sworn to perform this duty, has the custody of the records, and is presumed to know the fact in relation to which the amendment is made. *Chamberlain v. Dover* (1836) 13 Me. 466, 29 Am. Dec. 517; *Welles v. Battelle* (1814) 11 Mass. 477; *Halleck v. Boylston* (1875) 117 Mass. 469; *Com. v. McGarry* (1883) 135 Mass. 553.

In *Boston Turnp. Co. v. Pomfret* (1850) 20 Conn. 590, the court said: "Our statutes expressly require town clerks to keep the record books of their respective towns, and to enter truly all the votes and proceedings of the town. Title 3, chap. 5, § 58, p. 147. This duty is not performed by an erroneous



entry of those votes and proceedings; and unless we are to adopt the technical idea that, as to any particular proceeding of the town, the clerk is *functus officio* as to his power of recording it, when he has once made an entry of it, however untruly, on the record book, we can perceive no good reason why it may not be rectified by him. We know of no authority which requires so narrow a construction of his powers; and it would, in many cases, work great inconvenience and injustice, not only to the town whose proceedings are thus recorded, but to others who are interested in those proceedings."

So, it has been said that to deny the clerks of corporations such as cities and villages the right to complete or correct the journal entries according to the facts might involve such corporations, and the officials executing their laws or ordinances, in most serious trouble, without subserving any good purpose. *Belknap v. Miller* (1894) 52 Ill. App. 617.

These reasons do not apply, however, where one of the selectmen of a town, by appointment of his associates, keeps the minutes of their proceedings. He does not keep a record required by law, nor act under the sanction of an oath of office as clerk, and hence has not the power to make amendments of the minutes which will give them the character of records, constituting independent and conclusive evidence. *Com. v. McGarry* (1883) 135 Mass. 553.

The amendment of the records is to be confined to the officer whose duty it was originally to make them, and is allowed even to him only while he is in office. *Boston Turnp. Co. v. Pomfret* (Conn.) *supra*. But the clerk may amend an entry in the record, where he was the person who officiated at the time of the first entry, and has been re-elected to the same office, if at the time he undertakes to amend he is in office, and amends only what was done by him when he was in the same office before. *Schuyler County v. Missouri Bridge & Iron Co.* (1912) 173 Ill. App. 435, judgment affirmed in (1912) 256 Ill. 343, 100 N. E. 239; *Welles v. Battelle* (1814) 11 Mass. 477; *Halleck*

*v. Boylston* (1875) 117 Mass. 469; *Mott v. Reynolds* (1855) 27 Vt. 206. So, where a clerk continues in office several years, by repeated annual elections, he may amend the record of a former year, notwithstanding an election has intervened, and though he does not hold the office under the same appointment. *Welles v. Battelle* (1814) 11 Mass. 477; *Halleck v. Boylston* (1875) 117 Mass. 469. But the town clerk of a former year, who does not at the time hold office, cannot be allowed to come in and amend the record of a former year, made whilst he was in that office. *Hartwell v. Littleton* (1832) 13 Pick. (Mass.) 229. See also *Mott v. Reynolds* (Vt.) *supra*. Compare, however, the New Hampshire cases set out in II. b, *infra*.

The town clerk may not amend the record of the proceedings of the town made the day preceding the day of the meeting at which he was elected town clerk, as he was not town clerk on the first day, and had no control of the records, and no official knowledge of what took place before his election. *Taylor v. Henry* (1824) 2 Pick. (Mass.) 397. And the clerk of a school district cannot amend the record made while he was in office, after his successor has been sworn into office and he has been out of office for many years. *Third School Dist. v. Atherton* (1846) 12 Met. (Mass.) 105.

The clerk as custodian and keeper may amend the record according to the truth without direction or authority of the officials who took the original action; nor is it necessary that it should be made from some official memorandum of that action. *Schuyler County v. Missouri Bridge & Iron Co.* (Ill.) *supra*. So, if the same clerk who made the entry is still in office, he may, without an order of the board, amend the journal entry according to the truth, being liable for an abuse of the right. *Belknap v. Miller* (Ill.) *supra*.

The amendment of the record by the town clerk is not invalid on the ground that it affects the terms of a contract between the parties. The vote is only an action of the town, which furnishes evidence of the contract; and in regard to the propriety of allowing it to be amended, there is no difference

between such a vote and any other, by which its own interests or those of another may be affected. *Boston Turnp. Co. v. Pomfret (Conn.) supra.*

Nor is the amendment invalid because it was made by the town clerk, not on his own personal knowledge, but on information derived from others. *Boston Turnp. Co. v. Pomfret (Conn.) supra*, wherein the court said: "An amendment of a record stands on the same ground, in this respect, as the original record; and neither can be impugned by an inquiry into the sources of knowledge on which it was made. It is not unusual that entries in our public records, even in those of a judicial character, are made by the recording officer, without any personal knowledge of the truth of what is recorded; but when thus made, has it ever been supposed that they were not to be deemed records on that account? It is sufficient that the fact recorded is ascertained by him, by whatever means, and that it is recorded by him, or by his authority. Nor is his power originally to make, or afterwards to amend, a record, to be determined by an inquiry into the truth of it, as so made or amended. Such power is derived solely from his official character, and does not depend on the permission of the court in which the record is offered as an instrument of evidence. The only inquiry, then, is whether it is a record. Being shown to be such, it imports absolute and uncontrollable verity, and is, therefore, conclusive evidence of the facts which it states."

However, it has been held that the officer may not ordinarily alter or amend a record on the testimony of third persons, and ought not to do it on his own recollection, unless in very obvious cases of omission or error. *Mott v. Reynolds (1855) 27 Vt. 206.* Such an omission, it was held, was shown in that case. It did not appear therein, from the book of records of a school district, that the warning for the meeting in question had ever been signed by the clerk of the district, further than that he had signed the attestation immediately under the warning. The clerk testified that he had signed the original, and that he was clerk at

that time and at the time of the trial, though another person had been clerk during a portion of the time between those periods. The clerk was there allowed to amend his record, by adding thereon his signature as clerk to the record of the warning. The court held that the clerk had the power so to amend the record, if the amendment was according to the truth, and that the amendment was properly made.

If the clerk makes an erroneous record, the town is not bound by it merely because others confide in its correctness, but is entitled to have it set right. Otherwise the council members would be concluded, not by their own votes, but by whatever, by design or accident, might be improperly entered by the clerk, and that without any chance of relief by amendment. *Chamberlain v. Dover (1836) 13 Me. 466, 29 Am. Dec. 517.*

In *Ryder v. Alton (1898) 175 Ill. 94, 51 N. E. 821*, it was objected that the report of a committee making an assessment of the cost of an improvement was never approved by the city council. The record produced recited that the special committee appointed under the ordinance made a report, which was approved, all the members voting aye, and then set out the report as made to the city council. It was attempted to be shown by certain witnesses who examined the records of the city clerk that the same, when examined by them, did not show the approval of the report of the committee. Whether the record was written up at the time the examination was made by the witnesses was not shown. The court held that the record could be attacked only for fraud, and said that, if it was not written up at the time of its examination, the clerk might amend the same according to his knowledge of the truth, so long as he had the custody thereof as clerk, and also that the city council might, unless private interests had attached, order the record of its own proceedings to be corrected according to the facts, even after it had once been approved.

In *Schuyler County v. Missouri Bridge & Iron Co. (Ill.) supra*, it was claimed that the clerk could not amend

the records according to the truth, because he had no independent recollection of the proceedings, and because there was no official memorandum by which to make the amendments. The evidence of the clerk on this point was that by direction of the new commissioners he, with one of the attorneys for the defendant, amended the records so that they would be all right, and that he was furnished with a typewritten statement of the amendments to be made by the attorney, which he used in writing up the amended records. But while such aid was furnished him, and while he made some statements in connection with the proceeding that left some doubt whether he had any independent recollection, so that he could record the truth, or whether he took the attorney's statement for his data, yet he testified that the attorney helped him amend the record; that the statement was dictated by the attorney under his direction, and from his statement of the facts, and further said that the amended records spoke the truth. The court said that it would not be justified in holding adversely to the trial judge that the records were not properly made.

In *Welles v. Battelle* (1814) 11 Mass. 477, it appeared that on the record of the meeting of the inhabitants of a town for the purpose of electing the necessary municipal officers, it was stated that a named person was chosen clerk for the ensuing year, and the word "sworn" was immediately added, without any certificate of his oath. By the same record, it also appeared that the defendants were chosen assessors, and the words, "all sworn into office," were added. Some three years later the same person who acted as clerk in the year of the meeting added to the record words sufficient to show that the clerk was sworn by the moderator of the meeting, no justice of the peace being present, and that the assessors were sworn by the clerk on the evening of the day of the meeting. It was held that the clerk had a right to amend the record in the manner and at the time he did.

In *Chamberlain v. Dover* (Me.) su-

pra, it appeared that the records of the proceedings of a town meeting commenced as follows: "The inhabitants of Dover met agreeably to warrant and opened the meeting by reading the warrant, and adjourned the meeting to A. S. Patten's store. Met according to adjournment and proceeded to business in the following manner, viz." In the margin of the book of records, and opposite the foregoing extract, the town clerk had made the following entry: "The inhabitants of Dover met in the highway near the schoolhouse, in district No. 2, and read the warrant in the open air, and adjourned the meeting to A. S. Patten's store." The court stated that it was the duty of the town clerk to record the doings and proceedings of the town, and held that if, through inadvertence or misapprehension, the record had been defectively made, it was competent for him, while in office, to complete it, by amending it according to the truth.

In *Halleck v. Boylston* (1875) 117 Mass. 469, it appeared that a vote of a town "to re-establish the school district system" was adjudged (1872; 110 Mass. 214) to be defective and insufficient because it failed to show that the vote was adopted by two thirds of the legal voters present and voting thereon, as required by the statute (Stat. 1870, chap. 196). After the rendition of that judgment, the town clerk then in office, who held the office when the vote was passed, and had remained in office by successive annual elections, amended the record by adding to the words, "to re-establish the school district system," the words, "two thirds of the legal voters present and voting thereon having voted therefor, 103 voting in the affirmative, and 5 in the negative." It was held that the clerk had the right to amend the record made by him.

In *Hoag v. Durfey* (1826) 1 Aik. (Vt.) 286, it appeared that the record of the proceedings of a town meeting stated the warning of the meeting to have been on the 17th, and the meeting to have been held on the 19th of the month. The town clerk testified that he had made a mistake in the record,

and that the original warning stated the 29th, so that there was the requisite twelve days' notice. It was held that it was the duty of the clerk to have made the record according to the truth, and that he would have been justified in making the correction, though the court refused its assent.

In *Belknap v. Miller* (1894) 52 Ill. App. 617, wherein it appeared that the record of the village board stated that it had adopted certain ordinances, all the members being present, the question was whether the yeas and nays must appear on the journal in order to give validity to the ordinances. The court stated that while apparently the record showed that all the members were present, the word "adopted" signified that a "majority" of the members of the village board had voted for the passage of the ordinance, yet if this should not be the correct legal position, and the word "majority," or "unanimously," should have been entered in the journal, in addition to the word "adopted," according to what the actual fact might have been, the village board had the right, on proper proof, to supply an omitted or correct an erroneous entry, and thus make the record complete. And the court held that if the same clerk who made the entry was still in office, he could, without an order of the board, amend the journal entry according to the truth, being liable for an abuse of the right.

In *Samis v. King* (1873) 40 Conn. 298, the question was whether the official record of a meeting of the common council, duly certified by the clerk of the city, or the record as attempted to be amended at a subsequent meeting of the council, was to be treated as the true record and as evidence of what took place at the meeting. The court stated that if the clerk should have happened to have made a mistake on his record, he might doubtless correct it, and it might be corrected, if erroneous, by mandamus, but held that the record, until amended by him, or by order of the court on mandamus, was the proper evidence of what took place at the meeting.

In *Taylor v. Henry* (1824) 2 Pick. (Mass.) 397, it appeared that on the day preceding the supposed election of

the petitioner as town clerk, there was a town meeting, the proceedings of which were recorded by the petitioner; but no adjournment of that meeting was recorded. The record of the meeting of the next day, at which he was elected, was merely that "at an adjourned meeting," etc., without saying of what meeting it was an adjournment, and the question was whether the petitioner might not amend the record so as to show that the meeting on the second day was held by adjournment of the meeting of the day preceding. It was held, however, that he was not town clerk on the first day, and that he had no control of the records and no official knowledge of what took place before his election.

In *Webb v. Strobach* (1910) 143 Mo. App. 459, 127 S. W. 680, it appeared that in April the board of aldermen passed a resolution declaring the necessity of improving a named street. In the following June, the board ordered interlineations in the nature of a nunc pro tunc amendment to the resolution, which appeared in the record as follows: "It appearing to the board of aldermen that in the minutes of the proceedings of this board, appearing on page 388 of the city minute-book record of the meeting of April 8, 1909, the minutes are incomplete, and do not show the exact proceedings of the board, it is, therefore, ordered that in order that the minutes of the said meeting may show the exact proceedings held at said time, the minutes of said meeting be corrected by the interlining in said record of the said meeting, of the seventeenth line of the said page 388, the following: 'It is further ordered by the board of aldermen that said resolutions Nos. 4 and 5 be published in the city of Rolla, No. 4 in the Rolla New Era, and No. 5 in the Rolla Herald-Democrat, and the clerk is ordered to have the same published.' It is further ordered that the clerk interline this order of correction." In sustaining the right to make this amendment, the court said: "The authorities show that the right of amendment by a board of aldermen of its minutes, or by the clerk of a municipal corporation, is very broad. A nunc pro tunc amendment may be made on

the minutes at a succeeding meeting. 'The city clerk may amend the minutes in the record of the corporation made by himself, according to his knowledge of the truth, so long as he has custody of them.' 28 Cyc. 346. 'Whenever the city clerk in charge of the municipal records has, through inadvertence or neglect, recorded proceedings so that they are incomplete, he may amend the record so as to make it speak the truth.' 'In the event of the neglect or inadvertence of the clerk in failing to keep a complete record which has been discovered by the council, the latter may order the record amended so that it will give a correct recital of the proceedings.' 21 Am. & Eng. Enc. Law, 10; Ryder v. Alton (1898) 175 Ill. 94, 51 N. E. 821. Under these authorities, the board of aldermen had the right to correct the minutes of April 8, 1909, by the entries made by the clerk on June 28, 1909, and, as amended, they show that the board of aldermen, in publishing the resolution, acted in strict compliance with the statute."

*McClain v. McKisson* (1898) 15 Ohio C. C. 517, 8 Ohio C. D. 357, was an action of mandamus to compel the clerk of a city council to correct the council record of a meeting. In denying the writ the court stated that the statutes (Rev. Stat. §§ 1679, 1755), requiring the record of the council to be kept by the clerk, and giving the council the right to adopt rules governing its procedure, construed together, gave the council the right to determine when the journal truly set forth its proceedings. These provisions of law, the court declared, were intended to require the clerk to make an accurate record of all the doings of the council while in session, which record should be presented to the council at its next meeting for examination, and for such corrections as the council should determine were necessary, to make the journal fully conform to the action of the council. After the journal or record had thus been corrected and disposed of by the council, the court held, the clerk had no further right to change it, nor was there any duty enjoined on him by the law so to do.

In *California Improv. Co. v. Moran*

(1900) 128 Cal. 373, 60 Pac. 969, the court stated that, without determining whether the clerk might at any time while in office, without any order of the council, amend the record according to the truth, being liable for any abuse of the right, it was sufficient to say that, according to testimony of the clerk, the change was not in accordance with the truth, for he testified that the name of the newspaper in which the notice of an assessment was to be published was placed in the resolution when he drew it, was there when passed by the council and when recorded in the resolution book, and remained there from July until the following February, when, on his own motion, he changed it.

#### *b. Rule in New Hampshire.*

In New Hampshire, it is held that the clerk may not amend the record, except under the direction of the court, and on a showing that justice requires it. *Pierce v. Richardson* (1858) 37 N. H. 306; *Sawyer v. Manchester & K. R. Co.* (1882) 62 N. H. 135, 13 Am. St. Rep. 541. The general rule is that amendments or records are made with a saving of the rights of third persons, acquired since the existence of the defect. *Gibson v. Bailey* (1838) 9 N. H. 168. So, it is immaterial whether the clerk in making the record acts as the agent of the town, or as a public officer in the performance of a duty imposed by law. At any time before the rights of third persons have attached, a town may rescind its votes, or the record thereof, if erroneous, may be amended in accordance with the facts; but not after others have acquired rights based on the original record. *Sawyer v. Manchester & K. R. Co. supra.*

Under these conditions it has been held that the records of towns may be amended to conform to the truth. *Bishop v. Cone* (1826) 3 N. H. 513; *Gibson v. Bailey, supra*; *Cavis v. Robertson* (1838) 9 N. H. 524; *Cass v. Bellows* (1855) 31 N. H. 501, 64 Am. Dec. 347; *Pierce v. Richardson, supra*; *Jaquith v. Putney* (1868) 48 N. H. 138. And it is well settled in this state that the court may, by an order, allow

amendments of town records by the officer by whom they were made, even after he has ceased to hold office, where the amendments can be made consistently with the truth. *Gibson v. Bailey*, *supra*; *Bean v. Thompson* (1848) 19 N. H. 290, 49 Am. Dec. 154; *Cass v. Bellows* (1855) 31 N. H. 501, 64 Am. Dec. 347; *Pierce v. Richardson*, *supra*. The order of the court sets out in terms the precise amendment to be made, after being satisfied, by the testimony of witnesses in writing, that the amendment can be made consistently with the truth of the case. It does not permit any erasures, or interlineations of the original record, but requires the amendment to be written on a separate sheet of paper, signed by the proper officer, and with it a copy of the order allowing the amendment; and this paper is then annexed to the original record. *Pierce v. Richardson*, *supra*. See also *Gibson v. Bailey*, *supra*.

In *Bishop v. Cone*, *supra*, it appeared that the record of the vote of a town at a meeting was as follows: "Voted, to raise  $\frac{1}{2}$  of 1 per cent on the grand list, to repair highways and bridges." It was moved that the town clerk for that year might have leave to amend the record of the vote, according to the truth, which was granted, and the amended record read as follows: "Voted, to raise the amount of the grand list, to repair highways and bridges the present year." The court held that there was no doubt that a record might be amended to conform to the truth. In *Jaquith v. Putney*, *supra*, it was held that as the rights of third persons had not intervened, the amendment of the records of the county convention proving the grant of the county tax, which purported to be signed by the clerk, but did not show that he had been sworn, so as to show that the clerk took the oath of office, being conformable to the truth, might be allowed.

Where what is necessary, in the proceedings of a town, although not formally entered of record, is so far stated as to lead to a belief that a correct record might have been made, a subsequent purchaser of land sold for

taxes takes his title from the former owner, subject to the right of others whom it may concern, to have the record amended if the truth will warrant it. *Gibson v. Bailey* and *Bean v. Thompson*, *supra*. See also *Cass v. Bellows* (1851) 31 N. H. 501, 64 Am. Dec. 347.

In *Gibson v. Bailey*, *supra*, it was said: "The general rule is, that amendments of records are made with a saving of the rights of third persons, acquired since the existence of the defect. . . . To apply this rule, however, to all cases of defects in sales of land for taxes, would, in effect, be very nearly denying a right to amend; as the owner of the land sold would attempt to defeat any amendment, by conveying to some friend, who would bring a suit in his behalf. It would, at least, be necessary to confine the application of the principle to cases where the land had been actually conveyed bona fide. But instances might exist, where the purchaser, although he might not have found upon the records all that was necessary to make a formal and valid record, might have been well assured, from what he did find, that all that was necessary had in fact been done. For instance, in relation to the two first defects in the records in this case—in the return of the warning of the meeting, and in the record of the oath of the collector—although these records are not sufficient in point of law, they lead the mind of anyone to the belief that what was requisite was probably done. And in such cases, where the fact appears to be stated, but not in a formal manner, there is no reason that he who purchases should not be subjected to the same liability to have the amendment made and the record put in form that his grantor would have been, had he attempted to recover the land. There are cases where, although all that is required may not appear of record, it may be left to a jury to presume that all that was required was done. . . . Whether that principle could be applied against a subsequent purchaser, it is not necessary to determine. But where what is necessary is, although not formally stated, so far set down as

to lead to a belief that a correct record might have been made, there seems to be no reason why a purchaser who has access to the records should not take it subject to a right to have the record put in form, if the truth will warrant it. Where, on the other hand, nothing appears upon the record in relation to any particular fact necessary to make out a title, nor is anything set down from which it is naturally to be inferred that the fact existed, a subsequent bona fide purchaser ought not to have his title defeated by supplying a record instead of amending a record." It appeared, in that case, that the record of the return of a warrant for a town meeting stated that "we, the selectmen of Unity, certify that we have posted up a true copy of the within warrant at the house of Francis Chase, fifteen days previous to said meeting," which was signed by the selectmen. It also appeared that the record of the election of one John Thirston, as collector, at that meeting, stated, "Qualified by Francis Chase, Esq." It was moved that these proceedings of the town, under which the land was sold for taxes, be amended to show when the warrant for the town meeting was posted up; that it was posted at a public place; and that the collector chosen took the oath of office prescribed by law. The court said: "Upon these principles, if the facts will warrant it, the return in relation to the meeting may be so amended as to show the time when the warrant was posted up, it being stated in the original record to have been fifteen days before the meeting; and that Francis Chase's, where it is stated to have been posted, was a public place. So, as to the record stating that Thirston, the collector, was 'qualified by Francis Chase, Esq.,' an amendment may be made, setting forth that the oath prescribed by law was administered to him by Francis Chase, a justice of the peace. So, if the truth will admit of it, the return of the collector, that he 'proceeded to open the vendue at 1 o'clock, P. M.,' etc., may be amended, by stating that the sale was closed before 6 o'clock, P. M., and to the fact

that it was struck off to Gage may be added that he was the highest bidder, if such was the fact."

In *Bean v. Thompson*, supra, it was stated that, no return appearing upon the warrant calling the town meeting at which the tax was voted and the officers chosen, the persons who had been selectmen in 1842, and whose duty it had been to make such return, were, on motion, and on satisfactory evidence that the facts would justify them, permitted by the court to make the proper return, and the town clerk for that year had leave also to amend the record accordingly. In holding that the amendments were correctly allowed, the court said: "Leave is often granted to officers, whose returns of their doings or records of public transactions are by law made evidence, to correct errors or to supply omissions to conform to the truth. The interest which the public has in the correctness and fullness of the record, and the responsibility of the officer himself for the accuracy of his own doings, are primarily a good cause for granting such indulgences, tending to the promotion of reasonable objects. And it has never been deemed an objection to the amendment of a return or a record that proceedings were pending which might be affected by it, except that, where rights or claims bona fide have intervened, amendments that would entirely defeat them have in some instances been denied. The extent to which such claims would be regarded, in settling applications to amend the returns and records of town officers, was discussed somewhat in *Gibson v. Bailey*, supra, in which case it was held, in substance, that where the record contains enough to lead to a reasonable belief that all that was necessary was done, and that a correct record might have been made, the purchaser, having access to such records, should take the land subject to the right of others, whom it might concern to have the record amended. We think this case falls within the principles there laid down. The warrant itself was recorded, with evidence on its face of having been seasonably issued. The meeting

was held in pursuance of its exigency, and a record of the meeting accordingly made up. All the facts stated in the return might reasonably be presumed by anyone searching the records for information, and that the omission to enter such return upon the warrant was not owing to the omission of the formal acts, of which the return would have furnished evidence. It appeared to the court of common pleas that these for-

malities were complied with, and they correctly allowed the amendments.

In *Cass v. Bellows*, supra, it was held that, on the authority of *Gibson v. Bailey*, supra, the records of a town could have been amended, so as to show that the collector took the oath of office prescribed by law, had the town clerk who was in office at the time the defective record was made been living.

H. D. B.

## PEOPLE OF THE STATE OF ILLINOIS

v.

LEE BUCKNER, Plff. in Err.

*Illinois Supreme Court—December 19, 1917.*

(281 Ill. 340, 117 N. E. 1028.)

### Limitation of actions — criminal prosecution — former indictment — exclusion of crime.

1. An indictment quashed because the jurors were not sworn is within the operation of a statute, declaring that the time which elapsed during the maintenance of an indictment subsequently quashed shall not be reckoned within the time limited by statute for the prosecution of the crime.

[See note on this question beginning on page 1330.]

**Criminal law — failure to swear jury — quashing indictment.**

2. An indictment may be quashed on motion when the record fails to show that the jury was duly summoned, impaneled, and sworn.

[See 12 R. C. L. 1027-1030; 14 R. C. L. 200, 201.]

**Limitation of actions — change of statute.**

3. The statutes limiting the time for prosecution for crime may be changed or repealed in any case where a right to acquittal has not been absolutely acquired by the completion of the limitation period.

[See 17 R. C. L. 672, 673, 704.]

**Evidence — horse tracks.**

4. Upon trial of one for statutory rape, alleged to have been committed in the woods to which accused drove with his victim, evidence is admissible of tracks of a horse going into and out of the woods, and of their character and measurements, for the pur-

pose of showing that they were made by an animal belonging to accused.

[See 10 R. C. L. 993.]

**Criminal law — instruction — assumption of facts.**

5. An instruction in a prosecution for statutory rape, which, under the statute, may be committed on a girl under sixteen years of age by a man over seventeen years of age, that neither the element of force nor the question of consent has any application in the case, is erroneous in assuming that the parties are of the age described by the statute.

[See 14 R. C. L. 738-740.]

**Appeal — assumption of facts — instructions.**

6. It is not reversible error for the court to assume, in instructing the jury in a criminal case, facts which are not disputed in the case.

[See 2 R. C. L. 259.]

**Criminal law — comment by prosecutor.**

7. The prosecutor may, in his argument to the jury in the prosecution



of a minister of the gospel for statutory rape on one of his parishoners, comment upon the enormity of the crime committed under such circumstances.

[See 2 R. C. L. 425-427.]

— sentence — place of confinement.

8. There is no error in sentencing a convict to a penitentiary "at" a certain place if from public statutes it is manifest that the public officials understand that it is located there.

**ERROR** to the Circuit Court for Wayne County (Kern, J.) to review a judgment convicting defendant of statutory rape. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Creighton & Thomas and Arthur Poorman for plaintiff in error.

Carter, Ch. J., delivered the opinion of the court:

An indictment was returned at the October, 1911, term of the circuit court of Wayne county against plaintiff in error, for the crime of statutory rape. At about that time he left the state and was not found until the spring of 1916, when he was located in Missouri and brought back to this state for trial under said indictment. At the October term, 1916, of said circuit court, the indictment was quashed on motion of plaintiff in error. At the same term of court the grand jury, being then in session, returned against him another indictment containing four counts, for the same offense. On motion of plaintiff in error the first and fourth counts were quashed, and he pleaded not guilty to the second and third. The state elected to prosecute him on the second count, and he was tried and found guilty under that count, and sentenced to the penitentiary at Chester, Illinois, for the period of five years. This writ of error has been sued out to review the judgment of the trial court.

The evidence upon which the jury found plaintiff in error guilty is substantially as follows: In June, 1911, plaintiff in error was a minister of the Methodist Protestant denomination and pastor of the Wayne City and Hopewell churches of that denomination, in Wayne county. The prosecutrix's name at the time the offense was committed was Mary E. Johnson. At the time of the trial she had recently been married to a man named Schell. At the time of the alleged

offense she was fourteen years of age and had recently been taken into the church of which plaintiff in error was pastor, and of which her father and mother were both members. In the early part of June, 1911, plaintiff in error went to the home of W. H. Johnson, father of the prosecutrix, and obtained the consent of her parents for her to accompany him to his home to act as company for his wife while he was away for a week. On Friday evening, June 9, 1911, plaintiff in error returned home, and on the following Saturday morning he hitched a black horse to a single top buggy, and, with his wife and two children and the prosecutrix in the buggy, drove north out of Wayne City, where he then resided. After driving about 2 miles north he let his wife and children out of the buggy, and they walked west about half a mile to the home of Ed. Woolever. Plaintiff in error drove on north with the prosecutrix with the ostensible purpose of taking her to her home. After driving about a mile further north, to what is known as the Matthews corner, where he should have gone east to take the prosecutrix home, he told her he wished to drive west to the home of James Brocher, to get some money for the church. Upon arriving at the home of Brocher he drove past, telling the prosecutrix that Brocher was working in the woods about a half mile further west, and that he would have to go there. When the plaintiff in error, this case, passing the Brocher home, there laid, seen and recognized by Bailey, Brocher's face of having. Just over the fence, The meeting side of the road on

in error was driving, and just east of the woods, two farmers, Clevenger and Singleterry, were planting corn. As plaintiff in error drove past they both recognized him and had a word or two of conversation with him, and Clevenger recognized the girl. Singleterry and Bailey also saw her, but did not know her at the time. Plaintiff in error drove on west to a tract of timber which was on the south side of the road. His horse and buggy were seen to enter and leave the woods about that time by a witness named Sherman Harris, who was planting corn about a quarter of a mile west, and on the other side of the road. Plaintiff in error drove into the timber about 100 feet, and tied his horse to a tree where the underbrush obstructed the view from the road. He went to the buggy, took out a lap robe, spread it upon the ground, and asked the prosecutrix to get out and have sexual intercourse with him. She testified that at first she refused, and said it was not right and she did not wish to do so; that he explained it was not wrong for her to have intercourse with him, a minister of the gospel, and told her it would not hurt her. After about five or ten minutes' persuasion plaintiff in error prevailed upon the prosecutrix to get out of the buggy, and he then laid her on the lap robe upon the ground and had sexual intercourse with her. When the act was consummated, he obtained from the prosecutrix a promise never to tell of the crime, and then drove with her back along the road east, again passing and talking to Clevenger and Singleterry, and arrived at the Johnson home about 11 o'clock. He watered his horse and talked briefly with Mrs. Johnson, and, although asked to remain to dinner, said he could not do so, and left immediately, arriving at Woolever's about noon, where his wife asked why he had been gone so long. On the following Monday, in a conversation by plaintiff in error in the presence of Clevenger, Singleterry, and Wool-

ever, when they joked him about going into the woods with a girl, he became quite angry, and told them he went into the woods to collect 25 cents from Brocher to pay the president of the church; that it was not right to joke him about that in the presence of anybody, as Johnson would be mad about it.

Upon the following Tuesday Clevenger was passing through the woods in question, and noticed where the buggy had gone on the Saturday previous. He followed the tracks into the woods, and came to the place where the horse had been tied. The ground being low, wet, bottom land, the buggy and horse had made tracks about an inch and a half deep. He observed the prints of a cloth on the ground near where the buggy had been standing, and the impression in the ground where a human body had been lying upon it. Just east of where the cloth had been were marks on the ground from 1 to 2 inches deep that had been made by the toes of a man's shoe, and also marks of a man's and woman's shoes where parties had alighted from the buggy. He also observed tracks made by a horse when tied to the tree, and observed tracks both going in and coming out therefrom, and noticed that the horse that made the tracks had been shod on the front feet with heavy toes in front. He apparently had examined Buckner's horse before this, when Buckner was trying to sell the horse to him, and observed that the horse was shod with heavy toes in front, and said that from his observation the tracks in the woods were made by Buckner's horse. He also said there was only one horse and buggy track going into and returning from the woods at that place. On the following Wednesday, Singleterry, Ed. Woollever, P. C. Green, and Clevenger went to the woods, and there the other three parties observed the same marks on the ground as Clevenger. Green measured the horse tracks in the woods, and then measured the track which had been

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made by Buckner's horse on the day of the alleged crime, in a small ditch at the side of the road east of Woolever's home where Green and Buckner had stopped to talk, and the measurements and appearance of the tracks were identical.

After seeing these tracks in the woods Clevenger told Johnson, the father of the prosecutrix, what he had seen and had been told by Buckner, and Johnson immediately asked his daughter about it, and she then told him of the alleged crime. A complaint was filed before a justice of the peace and a warrant issued for the arrest of Buckner on or about June 15, 1911. The warrant was placed in the hands of the sheriff, who went to the home of Buckner in Wayne City and made a search for him. Buckner at that time was about 5 miles away, where he was apparently notified that the crime had been discovered and that a warrant was in the hands of the sheriff for his arrest. He then got the person he was visiting to take him to the nearest railroad station, and he fled from the state. Warrants were in the hands of the Wayne county sheriff continuously from the time the first was issued until Buckner's arrest in 1916. Warrants were also, during that time, sent to different counties in Illinois, and some to other states, for the arrest of Buckner, without results, until he was finally located in Missouri in April, 1916, where he was arrested. Requisition papers were issued by the governor of Illinois, but Buckner came without obliging the sheriff to have them honored by the governor of Missouri. Buckner had been in Missouri most of the time since August, 1912, and on his return to this state he told the sheriff who brought him about his eluding a former sheriff, Anderson, when Anderson was looking for him in Missouri. He also told the sheriff that he went west with the prosecutrix from the Matthews corner on the day of the alleged crime.

On the trial plaintiff in error took

the stand in his own behalf, and admitted driving north on June 10, 1911, with his wife and children and the prosecutrix, and letting his wife and children out of the buggy to go to Woolever's at about 10 o'clock, and testified that he then drove to the home of the prosecutrix, a distance of about 2 miles, and returned immediately to Woolever's, arriving there about noon, having traveled about 4 miles and consuming two hours in doing so. He denied driving west from the Matthews corner, or having seen Clevenger, Singleterry, and Bailey on that day, or having the conversation at the home of Woolever on the Monday following, and denied having had intercourse with the prosecutrix. He admitted receiving the note on Thursday, June 15, 1911, that there was a warrant out for his arrest, and getting the person on whom he was calling to take him to a town on another railroad, so he could leave. The father of plaintiff in error testified that he came to Wayne City on Saturday, June 17, and took plaintiff in error's wife and children, her household furniture, and the black horse in question back home with him to Clark county, where he then lived. He testified that at the time the black horse was not shod.

The principal question urged by counsel for plaintiff in error is that the conviction was barred by the Statute of Limitations, for the reason that the indictment under which he was tried was returned more than three years after the commission of the alleged crime. Section 3 of division 4 of the Criminal Code provides that all indictments for felonies of this character must be found within three years next after the commission of the crime. Hurd's Rev. Stat. 1916, p. 938. It is conceded by the state that the indictment here in question was returned more than three years after the commission of the alleged offense, but it is insisted that the running of the statute was arrested by § 6 of said division 4, which reads: "When an indictment, information

or suit is quashed, or the proceedings on the same are set aside, or reversed on writ of error, the time during the pendency of such indictment, information or suit, so quashed, set aside or reversed, shall not be reckoned within the time limited by this act, so as to bar any new indictment, information or suit for the same offense."

Plaintiff in error insists that the first indictment returned against him did not toll the operation of the statute, for the reason that the record shows that the grand jury by which it was returned was not sworn, as required by law. The record in this case shows with reference to the organization of the grand jury at the October term, 1911, as follows: "And now on this 16th day of October, A. D. 1911, comes the sheriff of Wayne county, and returns into open court the names of the persons who were summoned by him according to law to serve as grand jurors for the circuit court of Wayne county for the October term, A. D. 1911, being as follows, to wit: [Naming twenty-three different individuals]—who, on being called, all answered to their names, and are by the court charged touching their present service, whereupon Ed. Keen was by the court designated as foreman, and R. F. Bogle officer in charge."

It seems to be conceded that the record does not show that the first grand jury which found the first indictment was impaneled and sworn as the law directs. This court has held that where the record fails to show the jury was duly summoned, impaneled, and sworn, the indictment may be quashed on motion. *Yates v. People*, 38 Ill. 527; *Williams v. People*, 54 Ill. 422; *Sullivan v. People*, 156 Ill. 94, 40 N. E. 288; *People v. Gray*, 261 Ill. 140, 49 L.R.A. (N.S.) 1215, 103 N. E. 552.

It is contended by counsel for plaintiff in error that under the above authorities, and under a proper construction of the provi-

sions of the Criminal Code heretofore referred to, an indictment which is thereafter quashed, in order to be effective to toll the statute, must be a valid indictment, and not one that is void. Statutes of limitations are measures of public policy only. They are entirely subject to the will of the legislature, and may be changed or repealed altogether in any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation. Such a statute is an act of grace in criminal prosecutions. The state makes no contract with criminals, at the time of the passage of acts of limitations, that they shall have immunity from punishment if not prosecuted within the statutory period. 17 R. C. L. 704. Said § 6 of division 4 of the Criminal Code does not state that when a "valid" indictment is quashed it will be a bar to a new indictment for the same offense, but simply states, "When an indictment is quashed," etc., without any adjective or modifying word as to the kind of an indictment. It is clear, as a matter of public policy, that the Statute of Limitations in criminal cases is enacted for the purpose of allowing the accused to defend himself while the charge is new, and the evidence as to actual facts can be more readily obtained than if there had been a long delay in bringing the charge. It is also manifest that the provision that the Limitation Statute will not run against the charge if an indictment is quashed is put upon the same basis; for, if the indictment is originally brought within the time, the accused has knowledge of the charge, and can look up his evidence and be prepared to defend himself against the accusation. The Statute of Limitations is not grounded upon mere delay in the prosecution, but rather upon delay in commencing the prosecution, and the running of the statute is also suspended if the accused is absent from the state to avoid prosecution. There is no case in this

Limitation of actions—change of statute.

Criminal law—failure to swear jury—quashing indictment.

state that is decisive of the question. In *Swalley v. People*, 116 Ill. 247, 250, 4 N. E. 381, 6 Am. Crim. Rep. 414, the court said: "Whether the time during which the first indictment was pending is not to be reckoned depends upon whether the proceedings on the first indictment were 'set aside,' within the meaning of the section above cited. The section names three modes of disposition of the indictment: Quashing it, reversal of the proceedings thereon on error, and setting aside the proceedings on it. The first two are specific modes; the last is general. To 'set aside' is very broad in scope, 'to defeat the effect or operation of;' and we think it may well be held to embrace here every other mode of defeat of the proceedings on an indictment than quashing it and reversal on error, and so that the manner of disposal of the first indictment amounted to a setting aside of the proceedings under it, and came within the saving clause of the section."

In this last case an order was entered which nolle prossed the former indictment. The reasoning of the opinion above quoted shows that the court intended to construe the statute herein questioned as applying to all proceedings in which a former indictment was for any reason set aside. There is no suggestion in the reasoning as to whether it must be a valid indictment or not. Indeed, from the reasoning it would seem that, if it was set aside or quashed for any reason, the statute would be tolled. If an indictment is valid, how can it be legally quashed?

In *State v. Hansbrough*, 181 Mo. 348, 80 S. W. 900, an indictment charging bigamy was nolle prossed by the prosecuting attorney. That indictment stated that the alleged bigamous marriage occurred in a county to the grand jurors unknown, and as that court had held that an indictment for a bigamous marriage could only be prosecuted in the county where the marriage occurred, no conviction could be had under the first indictment, because

the court would be without jurisdiction. The court there said, in construing a statute very similar to the one here under consideration (181 Mo. 352): It "does not restrict its operation to any particular cause or causes for which the indictment may be quashed, set aside, or reversed, and must therefore include any and all grounds which may be held by the court to be sufficient grounds for quashing the indictment."

See also as bearing on this question: *State v. Child*, 44 Kan. 420, 24 Pac. 952; *Stafford v. State*, 59 Ark. 413, 27 S. W. 495; 12 Cyc. 254; 19 Am. & Eng. Enc. Law, 163, 165, and cases cited.

There can be no question that the offense charged in this last indictment, and the offense charged on the former indictment which was quashed, are one and the same offense. The statute here under consideration should receive a reasonable construction. We do not think it reasonable to construe § 6 of division 4 of the Criminal Code as if it read, "When a valid indictment is quashed," inserting the word "valid" before "indictment." On the ground of public policy we do not see any reason why, under the circumstances of this case, the Statute of Limitations should be considered as having run; the evidence clearly showing that the accused knew all about the warrant being issued shortly after the offense was committed, and undoubtedly knew about the original indictment, and was in no way misled to his injury in the trial by the fact that the original indictment was not valid. When any indictment, valid or invalid, is quashed, or the proceedings thereunder are set aside or reversed by writ of error, we think the Statute of Limitations does not run during the pendency of such indictment, and, therefore, the trial court did not err in entering judgment on this verdict or in giving the instructions as to the running of the Statute of Limi-

—criminal  
prosecution—  
former indict-  
ment—exclusion  
of time.

tations which are objected to as misleading the jury.

It is objected by counsel for plaintiff in error that the testimony as to the buggy and horse tracks in the woods by Clevenger and others was improperly admitted. Whatever testimony tends directly to show the defendant guilty of the crime charged is competent. The test of admissibility is the connection of the facts proved with the offense charged. *People v. Jennings*, 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077, and cases cited. Under the reasoning of this court, under somewhat similar conditions, in *People v. Pfanschmidt*, 262 Ill.

**Evidence—** 411, 104 N. E. 804,  
**horse tracks.** Ann. Cas. 1915A, 1171, we think the testimony as to these tracks, their measurements, etc., was admissible.

The objection is also made by counsel that the trial court erred in permitting plaintiff in error to be cross-examined as to certain things to which it is claimed no reference was made in his direct examination. We think the subject-matter that was referred to in the questions asked of him on cross-examination had been referred to in the examination of plaintiff in error in chief. We do not find any error in this regard. See *Jones*, Ev. §§ 820-825; *People v. Strauch*, 247 Ill. 220, 93 N. E. 126.

Counsel for plaintiff in error further insist that the trial court erred in giving the fifteenth instruction for the people. This instruction, in the language of the statute, told the jury that any female under the age of sixteen years shall be incapable of consenting to the act of intercourse, and that anyone over seventeen years, having sexual intercourse with a girl under sixteen years, would be guilty of rape whether he had obtained the consent of the girl or not, and then concluded: "In the present case neither the element of force nor the question of consent has any application. The prosecutrix could not consent, and the law resists for her."

3 A.L.R.—84.

It is insisted that this instruction should not have been given because it invades the province of the jury, and assumes that the prosecutrix was under the age of sixteen years, and that the plaintiff in error was over seventeen years. We think the instruction in this form should not have been given, but

we cannot see how it is possible that the jury was in any way misled by it. No one disputed the fact that the prosecuting witness was under sixteen years of age. Four witnesses testified that she was between fourteen and fifteen years at the time of the crime, and that fact was also proved from the family records. Several witnesses testified that plaintiff in error was over the age of seventeen years, and he testified on the stand that he was thirty-eight years of age at the time of the hearing in March, 1917. Therefore, according to his own testimony, he would have been thirty-two years of age at the time the crime was committed. There was no conflict of any kind in the evidence as to the age of the prosecuting witness or that of plaintiff in error, and, therefore, the giving of this instruction was harmless error. See *People v. Probst*, 237 Ill. 390, 86 N. E. 588.

**Criminal law—**  
**instruction—**  
**assumption of**  
**facts.**

**Appeal—**  
**assumption of**  
**facts—**  
**instructions.**

It is further contended by counsel for plaintiff in error that the arguments of one of the attorneys for the state were very inflammatory, and prejudiced the plaintiff in error before the jury. The remarks of the assistant prosecutor are set out in full in the abstract. In that part objected to, apparently, the assistant prosecutor commented on the enormity of this crime as being committed by a man who was a preacher of the gospel. We think the comments were justified, in view of the uncontradicted evidence in the record as to the nature and character of the offense.

**Criminal law—**  
**comments by**  
**prosecutor.**

It is further insisted by counsel for plaintiff in error that the judgment of the court in sentencing the plaintiff in error to the "penitentiary at Chester, Illinois," is erroneous; it being insisted that there is no penal institution at such place in this state. This criticism of the form of the judgment is without merit. Section 75 of chapter 108 (Hurd's Rev. Stat. 1916, p. 1975) refers to the Southern Illinois penitentiary at Chester. The order

granting plaintiff in error a super-sedeas, and permitting him to remain out on bail pending the decision of this court on the case, was directed to "the penitentiary at Chester, Illinois." It is manifest that public officials understand that there is a penitentiary at Chester.

We find no reversible error in the record, and the judgment of the Circuit Court will be affirmed.

## ANNOTATION.

### Exclusion of time of pendency of prior indictment in computation of limitation.

#### I. General rule:

- a. Under express statute, 1330.
- b. In absence of express statute, 1331.

#### II. Effect of insufficiency of first indictment, 1333.

#### III. Identity of offense, 1334.

#### IV. Burden of avoiding bar of statute, 1335.

##### I. General rule.

##### a. Under express statute.

It is expressly provided by statute in many jurisdictions that the time during which a prior indictment, which has been quashed or set aside, was pending, shall be deducted from the period of limitation applicable to the prosecution.

**Alabama.**—*State v. Dunham* (1846) 9 Ala. 76; *Foster v. State* (1863) 38 Ala. 425; *Smith v. State* (1878) 62 Ala. 29; *Weston v. State* (1879) 63 Ala. 155; *Coleman v. State* (1882) 71 Ala. 312; *Bube v. State* (1884) 76 Ala. 73; *Smith v. State* (1885) 79 Ala. 21; *White v. State* (1893) 103 Ala. 72, 16 So. 63; *Davis v. State* (1906) 145 Ala. 69, 40 So. 663; *De Bardeleben v. State* (1918) — Ala. —, 77 So. 979, affirmed on certiorari in (1918) — Ala. —, 78 So. 877.

**Arkansas.**—*Jester v. State* (1854) 14 Ark. 552; *Gill v. State* (1882) 38 Ark. 524; *Stafford v. State* (1894) 59 Ark. 413, 27 S. W. 495.

**Colorado.**—*Ross v. People* (1917) 62 Colo. 193, 162 Pac. 152.

**Illinois.**—*Swalley v. People* (1886)

116 Ill. 247, 4 N. E. 381, 6 Am. Crim. Rep. 414.

**Kansas.**—*State v. Child* (1890) 44 Kan. 420, 24 Pac. 952.

**Missouri.**—*State ex rel. Graves v. Primm* (1875) 61 Mo. 166; *State v. Owen* (1883) 78 Mo. 367; *State v. Hansbrough* (1904) 181 Mo. 343, 80 S. W. 900; *State v. Nicholas* (1910) 149 Mo. App. 121, 130 S. W. 96.

**Nebraska.**—*State v. Robertson* (1898) 55 Neb. 41, 75 N. W. 37.

Thus, in *Smith v. State* (1885) 79 Ala. 21, a motion in arrest of judgment was made on the ground that the record showed that the indictment, when it was found, was barred by the Statute of Limitations. A previous indictment within the statutory period was then proved, which indictment had been dismissed because it was not properly indorsed. The court, applying the statute, held that the time elapsing between the finding of the two indictments must be deducted in computation of the period of limitation.

In *Davis v. State* (1906) 145 Ala. 69, 40 So. 663, an indictment was quashed for defects, and the court ordered another indictment for the same offense, which second indictment was preferred two years subsequent to the original. It was held that the order quashing the first indictment and directing another eliminated the time elapsing between the preferring of the first and subsequent indict-

ments, from the time limited for the prosecution of the offense charged.

In *Swalley v. People* (1886) 116 Ill. 247, 4 N. E. 381, 6 Am. Crim. Rep. 414, the court construed the Illinois statute, which provides as follows: "Where an indictment, information, or suit is quashed, or the proceedings on the same are set aside or reversed on writ of error, the time during the pending of such indictment, information, or suit so quashed, set aside, or reversed shall not be reckoned within the time limited by this act, so as to bar any new indictment, information, or suit for the same offense." It was held that the entry of a nolle prosequi to an indictment is a sufficient "setting aside" thereof within the terms of the statute, to prevent the running of the statute.

To the same effect, the court said, in *State v. Child* (1890) 44 Kan. 420, 24 Pac. 952: "Where any indictment or information is quashed, set aside, or judgment reversed, the time during which the same was pending shall not be computed as a part of the time of the limitation prescribed for the offense. . . . It is immaterial whether the indictment or information is quashed, set aside, nolle, or the judgment reversed. The accused in such action may, within the time prescribed, be again proceeded against for the same offense."

In *State v. Hansbrough* (1904) 181 Mo. 348, 80 S. W. 900, the Missouri statute, providing that "when an indictment shall be quashed, set aside, or reversed, the time of the pendency thereof shall not be computed as part of the period of limitation," has been construed as including an indictment as to which a nolle prosequi was entered.

See, to the same effect, *State ex rel. Graves v. Primm* (1875) 61 Mo. 166.

*b. In absence of express statute.*

In some jurisdictions it has been held, independently of statute, that the pendency of a prior indictment for the same offense tolls the Statute of Limitations, provided the disposition of the first indictment and the finding of the second are such as to constitute one continuing prosecution.

**Louisiana.** — *State v. Thomas* (1878) 30 La. Ann. 301.

**Kentucky.**—*Tully v. Com.* (1877) 13 Bush, 142; *Louisville & N. R. Co. v. Com.* (1883) 4 Ky. L. Rep. 627; *Newport News & M. Valley Co. v. Com.* (1892) 14 Ky. L. Rep. 196; *R. M. Hughes & Co. v. Com.* (1907) 31 Ky. L. Rep. 179, 101 S. W. 1194; *Com. v. T. J. Megibben Co.* (1897) 101 Ky. 195, 40 S. W. 694; *Berkley v. Com.* (1915) 164 Ky. 191, 175 S. W. 364.

**North Carolina.** — *State v. Cox* (1846) 28 N. C. (6 Ired. L.) 440; *State v. Williams* (1909) 151 N. C. 660, 65 S. E. 908.

**South Carolina.**—*State v. Howard* (1868) 49 S. C. L. (15 Rich.) 274.

**Tennessee.**—*Hickey v. State.* (1914) 131 Tenn. 112, 174 S. W. 269.

**Texas.**—*Carr v. State* (1896) 36 Tex. Crim. Rep. 390, 37 S. W. 426; *Brown v. State* (1910) 57 Tex. Crim. Rep. 570, 124 S. W. 101.

**Vermont.**—*State v. Stevens* (1892) 64 Vt. 590, 25 Atl. 838.

Thus, in *Berkley v. Com.* (1915) 164 Ky. 191, 175 S. W. 364, the indictment under which the defendant was tried was returned after the expiration of the statutory period therefor. On appeal, the commonwealth proved a prior indictment found within the period of limitation, which had been dismissed for insufficiency, with leave to resubmit. The court held that there had been a continuous prosecution, and that the operation of the statute as to the later indictment had been suspended.

See, to the same effect, *Louisville & N. R. Co. v. Com.* (1883) 4 Ky. L. Rep. 627; *Louisville & N. R. Co. v. Com.* (1886) 7 Ky. L. Rep. 836.

In *Newport News & M. Valley Co. v. Com.* (1892) 14 Ky. L. Rep. 196, it was held that, where a new indictment contains a recital referring to a prior indictment and showing its disposition, the new indictment will be considered a continuation of the first, and that, this being so, the time pendency of the first indictment will not be computed in determining whether the statute has run against the subsequent bill.



Likewise, in *R. M. Hughes & Co. v. Com.* (1907) 31 Ky. L. Rep. 179, 101 S. W. 1194, it was held that, where an indictment is shown to be in lieu of a prior one for the same offense, the time of pendency of the first will be deducted in computation of the period of limitation.

In *Tully v. Com.* (1877) 13 Bush. (Ky.) 142, the indictment on which defendant was tried was returned after the period of limitation had expired. On a motion in arrest of judgment, the prosecution was able to prove the return of a prior indictment within the period of limitation, which indictment had, however, been found fatally defective. The court decided that, although the first indictment was defective, yet it was a commencement of prosecution which had since been continuous, and so the statute would not raise a bar to conviction.

But, unless a prosecution is clearly shown to have been a continuous one, the Statute of Limitations will operate as a bar to conviction on an indictment found after the expiration of the period of limitation, although for the same offense as that embraced in the original proceedings. *Com. v. T. J. Megibben Co.* (1897) 101 Ky. 195, 40 S. W. 694.

In Louisiana, it is held that, where the first prosecution was not voluntarily abandoned, the plea of prescription would not avail as against an indictment found after the expiration of the time limited. *State v. Thomas* (1878) 30 La. Ann. 301.

But, where the first prosecution has been abandoned by the state, it must be considered as never having taken place, and it cannot be invoked by the state as preventing the running of the statute. *State v. Vines* (1882) 34 La. Ann. 1073; *State v. Baker* (1878) 30 La. Ann. 1134.

In North Carolina, it has been held that an indictment is the beginning of a prosecution, and, as such, suspends the operation of the Statute of Limitations during its pendency. *State v. Williams* (1909) 151 N. C. 660, 65 S. E. 908.

In the early case of *State v. Cox* (1846) 28 N. C. (6 Ired. L.) 440, the

indictment on which the defendant was tried had been returned after the prescribed period of limitation. The defendant moved for an acquittal on this ground, whereupon the prosecution proved an earlier presentment of a bill for the same offense, within the statutory period. The court held the first presentment was a commencement of prosecution, and prevented the running of the statute thereon.

But see *State v. Tomlinson* (1842) 25 N. C. (3 Ired. L.) 32, wherein the court, in construing a statute which provided that, unless the "indictment be commenced within twelve months from the date of the offense, the prosecution shall not be carried on," held that the fact of another indictment for the same offense, brought within the proper time, was not an answer to the objection.

In an early South Carolina case, it was held that where the original prosecution was continued, and later another indictment preferred therefor, the running of the statute was suspended during the intervening time. The court said: "The connection of time which must subsist between one step in a case and the next has not been fixed in criminal proceedings, as it has been in civil, and to the wise discretion of a grand jury in rejecting bills that have been improperly delayed, or of a judge in urging trials after bill found, the defendant called to answer a stale charge must generally look for protection." *State v. Howard* (1868) 49 S. C. L. (15 Rich.) 274.

In Tennessee, in the absence of express statute, it was held that the period between the return of an original defective indictment and a subsequent valid one should not be computed as part of the time limited by statute, within which prosecution could be brought. The court said: "The question now arises whether in this state, in the absence of any statute on the subject, the prosecution under this second indictment may be considered such a continuation of the original prosecution that the Statute of Limitation cannot apply. We think there is no doubt but that it was the

same prosecution under both indictments. While the first indictment was defective and invalid because it did not contain the name of the person upon whom the assault was committed, yet it was a prosecution for the same offense as that embraced in the second indictment." *Hickey v. State* (1914) 131 Tenn. 112, 174 S. W. 269.

The Texas court, in construing a Statute of Limitation which provided that, in computing the lapse of time prior to prosecution, the time of entry of the indictment should be considered as the time of commencement of the prosecution, held that, where an indictment was found as a substitute for another, which had been lost or destroyed, the period between the finding of the first and second indictments should be deducted in computation of the period of limitation. *Brown v. State* (1910) 57 Tex. Crim. Rep. 570, 124 S. W. 101.

In construing a Vermont statute providing that, "if an action, complaint, information, or indictment . . . is commenced after the time limited, such proceedings shall be void," it was held that, where an indictment is a proceeding in continuation of a prosecution previously commenced, it should not be held insufficient because filed after the lapse of the permitted time. *State v. Stevens* (1892) 64 Vt. 590, 25 Atl. 838.

The entry of a *nolle prosequi* is an abandonment of the prosecution which will prevent its pendency from tolling the statute. *United States v. Ballard* (1844) 3 McLean, 469, 24 Fed. Cas. No. 14,507; *State v. Baker* (1878) 30 La. Ann. 1134, overruling *State v. Cason* (1876) 28 La. Ann. 40; *State v. Vines* (1882) 34 La. Ann. 1073.

## II. Effect of insufficiency of first indictment.

In some jurisdictions it is held that the first indictment, to toll the running of the statute, must be one on which a valid conviction could have been founded. *State v. Disbrow* (1906) 130 Iowa, 19, 106 N. W. 263, 8 Ann. Cas. 190; *State v. Curtis* (1878) 30 La. Ann. 1166; *State v. Mor-*

*ris* (1889) 104 N. C. 837, 10 S. E. 454; *Redfield v. State* (1859) 24 Tex. 133.

In *State v. Disbrow* (1906) 130 Iowa, 19, 106 N. W. 263, 8 Ann. Cas. 190, the court declared that the first indictment must, in order to suspend the running of the statute, be one on which a valid conviction or judgment can be founded, saying: "It seems to us a reasonable and just proposition that, in the absence of any statute saving such right to the state, the running of the Statute of Limitations ought not to be interrupted or suspended by the return and pendency of an indictment upon which no valid conviction or judgment can be founded. Such an indictment is no indictment."

Where a bill sent to the grand jury was returned with the indorsement, "Continued," for want of material witnesses, and so entered, this was held not to be a sufficient presentment to stop the running of the statute. *State v. Morris* (1889) 104 N. C. 837, 10 S. E. 454.

It has been held that, where a second indictment is found after the lapse of the time limitation, the fact that a conviction was obtained on a previous defective indictment within the time limit is not sufficient to prevent the bar of the statute. *Redfield v. State* (1859) 24 Tex. 133.

Where the first prosecution has been declared a nullity, it is as if no indictment had been found, and does not interrupt prescription. *State v. Morrison* (1879) 31 La. Ann. 211; *State v. Precovara* (1897) 49 La. Ann. 593, 21 So. 724.

Likewise, in *State v. Curtis* (1878) 30 La. Ann. 1166, it was held that a conviction obtained on a fatally defective indictment is without legal effect in favor of the state, to interrupt prescription.

In other jurisdictions it is held that, although the first indictment was so defective that a conviction thereon would be reversed, yet the time between its rendition and the return of a subsequent indictment will be deducted, in computing the period of limitation. *Foster v. State* (1863) 38 Ala. 427; *Weston v. State* (1879)

63 Ala. 155; *State ex rel. Graves v. Primm* (1875) 61 Mo. 166; *Hickey v. State* (1914) 131 Tenn. 112, 174 S. W. 269.

Thus, it has been held that an indictment charging a person with the sale of liquor to a slave, "whose name and owner are unknown," although fatally defective on demurrer, is sufficiently specific to uphold a recognition thereon to another term of the court, which will toll the statute. *Foster v. State* (Ala.) *supra*.

So, though a first indictment was defective, because it did not contain the name of the person on whom an assault charged was committed, it has been held to be a sufficient commencement of the prosecution to toll the statute as to a new and valid indictment, subsequently returned. *Hickey v. State* (Tenn.) *supra*.

Where the magistrate before whom a complaint was filed, charging a person with crime and causing his arrest and detention, had no jurisdiction to try the accused for the offense, it is not such a commencement of prosecution as will raise a bar to the statute. *Bube v. State* (1884) 76 Ala. 73; *State v. Robertson* (1898) 55 Neb. 41, 75 N. W. 37.

### III. Identity of offense.

The first and subsequent indictments must charge an identical offense, arising from the same transaction, and affecting the same parties and subject-matter. Otherwise, the indictment will be of no avail in preventing the running of the statute as to the subsequent indictment. *State v. Dunham* (1846) 9 Ala. 76; *Smith v. State* (1878) 62 Ala. 29; *Buckalew v. State* (1878) 62 Ala. 334; *Jester v. State* (1854) 14 Ark. 552; *Ross v. People* (1917) 62 Colo. 193, 162 Pac. 152.

In *Ross v. People* (1917) 62 Colo. 193, 162 Pac. 152, the court held that an information charging the offense of "seduction under pretense of marriage" was not sufficient to stop the running of the Statute of Limitations as to an information charging the offense of "seduction under promise of marriage."

In *Buckalew v. State* (1878) 62 Ala. 334, 34 Am. Rep. 22, the court held that an indictment for exhibiting a gaming table was not such a continuation of a prosecution for exhibiting a lottery as would prevent the running of the Statute of Limitations.

And in *Jester v. State* (1854) 14 Ark. 552, a second indictment, which charged the crime of gaming, alleged that the illegal games were played by three persons, whereas the first indictment, adduced in evidence by the state to avoid the bar of the statute, disclosed a charge against them for betting at games played by four persons. The court held that the record of the previous indictment must show that the game was played by the same persons, and that, as the record adduced showed a material variance, it was not competent.

But see *Lay v. State* (1883) 42 Ark. 105, holding that, although a person is charged in the first indictment as a principal and in the second as an accessory, the first is sufficient to prevent the running of the statute thereto.

See also *Foster v. State* (1863) 38 Ala. 425, wherein an indictment which charged the selling of spirituous liquor to "a certain male slave, whose name and owner are unknown," was demurred to, and a second indictment found which charged the selling to "a slave named Moses, belonging to James Chapman." It was here held that there was a sufficient description of the offense charged in the first instance to prevent the running of the statute.

An early Alabama statute provided that the period of time elapsing between the preferring of a defective indictment, and the finding of a second or subsequent indictment, should be deducted from any term limited for the prosecution of the offense. Construing this statute, where a defective indictment charged the defendant with selling goods without a license as a peddler, and recited the sale of a hair comb to Joshua A. Lowe, and the second indictment charged the sale of one bonnet and one pair of shoes to Henry Williams, the court

held that the variance was fatal, and that the second indictment would not come within the sanatory influence of the statute. *State v. Dunham* (1846) 9 Ala. 76.

Where a first indictment against Henry Smith charged that he uttered offensive language in the dwelling house of Sarah Holly, and the second indictment was against James Henry Smith and charged the commission of the offense in the dwelling of John S. Turner, the court held that the discrepancy between the two indictments was material, and that to prevent the running of the Statute of Limitations the offense and the offender must be shown to have been the same. *Smith v. State* (1878) 62 Ala. 29.

In *Smalley v. People* (1886) 116 Ill. 247, 4 N. E. 379, 6 Am. Crim. Rep. 414, an indictment charged the commission of a crime on the 2d day of February, 1885, and, after the entry of a nolle prosequi to that indictment, a second indictment was returned charging the same crime, but giving the date of commission as May 1, 1884. The court held that, the identity of offense being proved, the operation of the Statute of Limitation was defeated.

Similarly, where the first indictment, charging defendant with having forged a check indorsed, "W. H. Peters," with the intent to cheat Funsten & Company and W. H. Peters, was nolle prossed, and the second indictment set out the same check and alleged the forged indorsement of the name of "W. H. Peters," with intent to cheat H. K. Wade, the court held that both indictments were based on the same transaction. *Stafford v. State* (1894) 59 Ark. 413, 27 S. W. 495.

#### IV. Burden of avoiding bar of statute.

The burden of proving a state of facts which would suspend the operation of the Statute of Limitations is on the prosecution. *White v. State* (1893) 103 Ala. 72, 16 So. 63; *Jester v. State* (1854) 14 Ark. 552; *Gill v. State* (1882) 38 Ark. 524; *Ross v. People* (1917) 62 Colo. 193, 162 Pac. 152; *R. M. Hughes & Co. v. Com.* (1907) 31 Ky. L. Rep. 179, 101 S. W. 1194.

The court, in *Gill v. State* (1882) 38 Ark. 524, held that it was necessary to a conviction for the state to prove, either that an offense had been committed within the period of the statute, or that there had been a former indictment found for the offense within the period of limitation, which indictment had been quashed or set aside.

Likewise, in *R. M. Hughes & Co v. Com.* (Ky.) supra, the court stated that, to avoid the bar of the statute, it was "indispensably necessary to charge and prove that the last indictment was in lieu of the prior one, which had been dismissed and resubmitted by order of the court," and that "it devolved upon the commonwealth to prove it."

In *Jester v. State* (1854) 14 Ark. 552, it was held that, to displace the bar of the statute, it was necessary for the state to prove the pendency and quash all of a former prosecution for the same offense.

In *White v. State* (1893) 103 Ala. 72, 16 So. 62, it is held that, where the first indictment was quashed as defective, it is essential to prove its presentment, and that it has been quashed, to obviate the defense of the Statute of Limitations which might otherwise arise during the time between the rendition of the first and a subsequent indictment.

In order that the state may avail itself of a statute suspending the period of limitation during the pendency of an indictment, a sufficient entry of record must be made, setting forth the facts as to the finding and setting aside of the original indictment. *De Bardeleben v. State* (1918) — Ala. —, 77 So. 979, affirmed on certiorari in (1918) — Ala. —, 78 So. 877.

Likewise, in *Coleman v. State* (1882) 71 Ala. 312, it is held that, when a new indictment is ordered, the disposal of the previous indictment must be set forth in the judgment entry in order to prevent the running of the Statute of Limitations.

So, in *State v. Davis* (1892) 44 La. Ann. 972, where an indictment on its

face showed that the statute had run against prosecution, and there was no statement of facts which might have suspended the statute, the indictment was ordered quashed.

It has been held that, unless the new indictment sets forth the facts as to the finding of the previous indictment and the orders of the court in relation thereto, then there is nothing therein to put the defendant upon notice that it is a continuous prosecution, and the statute will be an available defense. *Newport News & M. Valley Co. v. Com.* (1892) 14 Ky. L. Rep. 196; *Com. v. T. J. Megibben Co.* (1897) 101 Ky. 195, 40 S. W. 694.

So, in *R. M. Hughes & Co. v. Com.* (1907) 31 Ky. L. Rep. 179, 101 S. W. 1194, the court said: "Appellant could not have been convicted under the last indictment without showing that it was a continuation of the proceeding or prosecution under the former indictment, for the offense was barred by the Statute of Limitation, counting from the return and

filing of the last indictment; therefore, it was indispensably necessary to charge and prove that the last indictment was in lieu of the prior one, which had been dismissed and resubmitted by order of the court of a subsequent grand jury."

In *Com. v. T. J. Megibben Co.* (Ky.) *supra*, it was held that an averment in a new indictment that "the offense herein charged is the same offense charged in indictment No. 1014, filed in this honorable court on February 16, 1896," fails to show whether the other indictment was pending or dismissed, and does not make the prosecution a continuous one, so as to prevent the statute from running.

But in *Brown v. State* (1809) 57 Tex. Crim. Rep. 570, 124 S. W. 101, it was held that, where a copy of an indictment is substituted for an original, which was lost, it is not necessary to set out the facts of the loss, since the Statute of Limitations applies only to new, and not to substituted, indictments. R. E. B.

## INDUSTRIAL COMMISSION OF COLORADO et al., Plffs. in Err., v.

### ÆTNA LIFE INSURANCE COMPANY.

*Colorado Supreme Court (In Banc) — May 6, 1918.*

(— Colo. —, 174 Pac. 589.)

#### Conflict of laws — Workmen's Compensation Act — extraterritorial effect.

1. An employee of one doing business in a state having a Workmen's Compensation Act, whose duties require him temporarily to perform service in another state, may recover compensation under the act for injury received in such other state.

[See note on this question beginning on page 1351.]

#### Workmen's compensation — negligence.

2. The question of negligence is not involved under the principle of compensation provided by the Workmen's Compensation Acts.

#### — purpose of act.

3. The purpose of the Workmen's Compensation Acts is primarily to relieve the public of the burden of supporting injured workmen and their de-

pendents, who may, by reason of such injuries, become objects of charity.

#### — scope of employment — meaning.

4. It was not the purpose of the Workmen's Compensation Acts to hold the right of compensation to such strict construction of the term, "scope of employment," as in cases of tort, where the employer may be held to compensation for his own negligence.

#### — injury while going from job to job.

5. Injury, by the overturning of the

private conveyance in which he is riding, to a foreman of construction work, going from one job to another, arises out of and in the course of his employment within the meaning of the Workmen's Compensation Act.

**Master and servant — contract of employment — Compensation Act.**

6. The provisions of the Workmen's Compensation Act are to be considered written into contracts of employment, and are therefore a part of the same.

(White and Bailey, JJ., dissent.)

**ERROR** to the District Court for the City and County of Denver (Burke, J.) to review a judgment vacating an award by the Commission to claimants, in a proceeding by them under the Workmen's Compensation Act to recover compensation for the death of their decedent. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Leslie E. Hubbard, Attorney General, John L. Schweigert, Assistant Attorney General, and Walter E. Schwed for plaintiffs in error.

Messrs. Milton Smith, Charles R. Brock, and W. H. Ferguson, for defendant in error:

It does not appear that at the time of the accident Mr. Lynch was performing a service arising out of and in the course of his employment; nor does it appear that the accident arose out of and in the course of his employment.

*Industrial Commission v. Anderson*, — Colo. —, L.R.A.1918F, 885, 169 Pac. 135; *De Constantin v. Public Service Commission*, 75 W. Va. 32, L.R.A. 1916A, 329, 83 S. E. 88; *Hewitt's Case*, 225 Mass. 1, L.R.A.1917B, 249, 113 N. E. 572.

The Workmen's Compensation Act of this state has no extraterritorial effect.

*Black*, Interpretation of Laws, 2d ed. 107, 108; *Kennerson v. Thames Towboat Co.* L.R.A.1916A, 444, and note, 89 Conn. 367, 94 Atl. 372; *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60; *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, L.R.A.1917E, 642, 162 Pac. 93.

Mr. John P. Akalb also for defendant in error.

**Scott, J.**, delivered the opinion of the court:

This is an appeal by the Industrial Commission of the state, from a judgment of the district court, vacating an award by that Commission under the Workmen's Compensation Statute (Laws 1915, p. 515). The claim for compensation is by Cora M. Lynch, widow, and Clyde and Or-

ville Lynch, dependent children of Charles E. Lynch, deceased.

The cause was tried upon an agreed statement of fact both before the Commission and the district court, as follows:

"Charles E. Lynch, from a time prior to August 1, 1915, when the Workmen's Compensation Act became effective, and until the time of his death, on September 14, 1915, was an employee of the C. E. Walker Contracting Company. Mr. Lynch was a resident of the state of Colorado, and the C. E. Walker Contracting Company was and is a Colorado corporation, with its principal office in the city and county of Denver. The contract whereby Mr. Lynch was originally employed or hired was made in the state of Colorado.

"The C. E. Walker Contracting Company has a general contract with the Mountain States Telephone & Telegraph Company for the construction of telephone exchange buildings at different points in the states of Colorado, Wyoming, Idaho, Montana, Utah, Arizona, and New Mexico. Lynch was employed to act as foreman in connection with the construction of these buildings.

"On September 13, 1915, Lynch had just completed his work as foreman in connection with the erection of a telephone exchange at Afton, in the state of Wyoming. He intended to leave Afton that day by the regular stage running to Montpelier, Idaho, where he was to undertake the work of foreman on a similar job. For some reason, however,

he missed the stage and was invited to ride to Cokeville, Wyoming, in a Ford automobile and there catch a train for Montpelier, the only way out of Afton. The automobile was privately owned and operated by an acquaintance residing at Afton, and he was invited to take the trip as a guest; no payment of compensation being expected. In addition to the owner of the machine and Mr. Lynch, there were two other passengers. When the machine approached Cokeville, it skidded for some reason and turned absolutely over. When the car was lifted, Mr. Lynch was unconscious. He was taken to the hospital at Montpelier on the first train, and there operated on. It developed that the base of his skull was fractured, and that nothing could be done for him. He died approximately twenty-four hours later and on the 14th day of September, 1915. The accident which resulted in his death happened in the state of Wyoming.

"That the average weekly wage of the said Lynch exceeded \$16."

The defendant in error, having complied with the statute, in that respect admits its liability if the award was properly allowed under the Workmen's Compensation Statute.

The judgment of the trial court is based on the conclusion that the facts do not support an award by the Commission to the dependents of the deceased workman.

It is contended by defendant in error that the judgment should be sustained for the reasons: (a) That it does not appear that the accident arose out of and in the course of the employment; and (b) that the Workmen's Compensation Act of this state has no extraterritorial effect.

As relates to the first question raised, § 8, chap. 179, Laws 1915, provides: "The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury or death accidentally sustained on and

after August 1, 1915, shall obtain in all cases where the following conditions concur:

"I. Where, at the time of the accident, both employer and employee are subject to the provisions of this act.

"II. Where, at the time of the accident, the employee is performing service arising out of and in the course of his employment.

"III. Where the injury is proximately caused by accident arising out of and in the course of his employment, and is not intentionally self-inflicted or intentionally inflicted by another."

The agreed statement limits the inquiry to that of whether or not, under the law applicable, is this a case where the injury was proximately caused by accident arising out of and in the course of his employment. At the time of his employment and at the time of the accident and death, Lynch was a resident of the state of Colorado. The employment was to act as foreman for his employer in the construction of telephone exchange buildings for a telephone company, operating and erecting buildings in the several states of Colorado, Wyoming, Idaho, Montana, Utah, Arizona, and New Mexico. To do this he must necessarily proceed from one point to another within these several states, and it must be assumed that he was to so proceed to and from such places as directed by his employer. He had just completed a duty within his employment at the town of Afton, Wyoming. He was proceeding under direction of his employer to the town of Montpelier in the state of Idaho, to perform a like duty. He was proceeding to the railroad station at Cokeville by automobile, the only way provided to reach the railroad station. There is no indication of any unnecessary loss or waste of time. Was he, then, acting in the course of his employment at the time of the accident?

Workmen's compensation laws are comparatively new in the United States, and it is but natural that in

(— *Colo.* —, 174 *Pac.* 589.)

this early period of judicial interpretation there should be divergent views as between the courts of the several states in some respects. The difficulty in this particular seems to have arisen because of an apparent failure in some cases to clearly recognize the distinction in principles to be applied in such cases, and those applicable in negligence cases.

Under the principle of compensation awarded and commanded by the state, the question of negligence is

**Workmen's  
compensation—  
negligence.**

in no sense involved.

The validity of these statutes, in so far as has been determined by our courts, rests upon the basis of a proper exercise of the police power, as being in the interest of the public welfare. The purpose primarily is to

relieve the public of —purpose of act.

the burden of supporting injured workmen and their dependents, who may, by reason of such injuries, become objects of charity. The expense is to be treated as an additional cost of the operation of business, and, under our statute, is collected by the state from the employer in the nature of premiums, based upon the number of employees, wages paid, the character of employment, and other considerations calculated to establish a reasonable charge for accident insurance. This fund is designated as an insurance fund, from which the Commission is required to make allowances to the workman and his dependents, according to nature and character of the injury as provided and detailed in the statute.

It is quite apparent that it was not the purpose of the law to hold

**—scope of  
employment—  
meaning.**

the right of compensation to such strict construction of the term, "scope of employment," as in cases of tort, where the employer may be held to compensation for his own negligence. In fact the term, "in the course of employment," used in the statute, may well be said to differ in meaning from the term, "scope of employment," as used in judicial determina-

tions in negligence cases. In truth, the payment of compensation does not fall upon the employer at all, but is to be charged to the expense of operation of the business, and is, therefore, made a part of the cost of the product,—as much so as the cost of labor, materials, and other actual expenses of operation,—so that this expense of insurance becomes ultimately and in fact a part of the price to the purchaser of the product, and to that extent is paid by the public.

Our courts are in agreement that these acts should be broadly and liberally construed, to the end that their beneficent intent and purpose may be reasonably accomplished. Upon this point, it was said in *Zappala v. Industrial Ins. Commission*, 82 Wash. 314, L.R.A.1916A, 295, 144 Pac. 54: "In construing the language of the act, we must have in mind the evident purpose and intent of the act to provide compensation for workmen injured in hazardous undertakings, reaching 'every injury sustained by a workman engaged in any such industry; and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received.' *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A. (N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599, and that the act should be liberally interpreted, to the end that the purpose of the legislature in suppressing the mischief and advancing the remedy be promoted, even to the inclusion of cases within the reason, although outside the letter, of the statute, and that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employees regardless of the cause of the injury. *Peet v. Mills*, 76 Wash. 437, L.R.A.1916A, 358, 136 Pac. 685, Ann. Cas. 1915D, 154, 4 N. C. C. A. 786."

Construing a statute similar to our own, it was said in *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1: "The purpose of this act has been



stated several times. Briefly, it was to substitute a method of accident insurance in place of the common-law rights and liabilities for substantially all employees, except domestic servants, farm laborers, and masters of and seamen on vessels engaged in interstate or foreign commerce, and those whose employment is casual or not in the usual course of trade, business, or employment of the employer, and probably those subject to the Federal Employers' Liability Act. It was a humanitarian measure, enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common law, and under the Employers' Liability Act, had failed to accomplish that measure of protection against injuries and of relief in case of accident which it was believed should be afforded to the workman. It was not made compulsory in its application, but inducements were held out to facilitate its voluntary acceptance by both employers and employees. It is manifest from the tenor of the whole act that its general adoption and use throughout the commonwealth by all who may embrace its privileges is the legislative desire and aim in enacting it. The act is to be interpreted in the light of its purpose, and, so far as reasonably may be, to promote the accomplishment of its beneficent design."

The English Workmen's Compensation Acts were adopted some years prior to that of any American statute on that subject, and the question now under consideration has been frequently construed by the English courts. The subject is reviewed at length by Mr. Chartres, in his work on Judicial Interpretations of the Law Relating to Workmen's Compensation 1915, beginning at page 137. It seems to be generally held by the English courts that employment is not necessarily synchronous with contract of service, but that, in all those things that he is entitled to do by virtue of his contract, he is, for the purposes of the act, employed to do; and they

are, therefore, within his contract of employment. The author quotes, among many other authorities, the language of Farwell, L. J., in *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 544, which seems to be a fair statement of the English law: "It is well settled that the employment is not confined to the actual working, whether in a pit or at any other trade, in which the workman may be engaged. He is employed not only to work in the pit, but also to do other things that he is entitled to do by virtue of his contract of employment; for example, he is entitled to do, and therefore employed to do, such acts as coming on the employer's premises, passing and re-passing for all legitimate purposes connected with his work on the premises, such as getting to the pit's mouth, going to get his wages, going to make proper inquiries from proper officers, or taking a train which he is entitled to use by virtue of his contract of service, as in the cases of *Cremins v. Guest, Keen & Nettlefolds* [1908] 1 K. B. 469, 77 L. J. K. B. N. S. 326, 98 L. T. N. S. 335, 24 Times L. R. 189, and *Holmes v. Great Northern R. Co.* [1900] 2 Q. B. 409, 69 L. J. Q. B. N. S. 854, 64 J. P. 532, 48 Week. Rep. 681, 83 L. T. N. S. 44, 16 Times L. R. 412. All those things that he is entitled to do by virtue of his contract he is, for the purposes of the act, employed to do, and they are, therefore, within his contract of employment. I would qualify this by saying that he must make a reasonable user of the facilities and rights which are given to him in this way."

In the case at bar it was an essential part of his employment that the deceased should travel from the place where he had installed one plant to the place where he was to install another. It is also clear that he adopted a reasonable and apparently the only facility for such travel under the circumstances, and as safe as any other that may have been available. No case is cited that adopts a different rule, and we know of none, as ap-

plied to Workmen's Compensation Statutes.

It is urged that the case of Industrial Commission v. Anderson, — Colo. —, L.R.A.1918F, 885, 169 Pac. 135, supports the contention of defendant in error. We do not think so. In that case Anderson was permitted to do his work either at his home or at his employer's place of business. This was a matter of choice with him, and not either a direction or a requirement of his employment. He was going from one of these places to the other. The case was decided upon this principle. In this case, the contract of employment, impliedly at least, required the deceased to proceed from the one place of employment to another. He was traveling on his employer's business, which by his contract he was bound to do, and for which it is reasonably assumed he was being paid to do, for it is not to be presumed that he was, under the circumstances, traveling such distances upon his own time. It may be safely said that he was doing that which was incidental to the character of the business, and

—injury while  
going from  
job to job.

not independent of  
the relation of master  
and servant, but

rather had its origin in a risk connected with the employment.

This distinction is well supported by authority. In the case of Terlecki v. Strauss, 85 N. J. L. 454, 89 Atl. 1023, 4 N. C. C. A. 584, where a factory employee quit work at her machine shortly before noon, and was, in accordance with custom, combing particles of wool out of her hair preparatory to going home, and at a point 32 feet from her machine, when her hair was caught in other machinery and she was seriously injured, it was held that the accident arose out of and in the course of her employment.

In Kunze v. Detroit Shade Tree Co. 192 Mich. 435, L.R.A.1917A, 252, 158 N. W. 851, involving an award by the industrial accident board, under a state of facts as follows: "Having been with the de-

fendant company for about two years, on July 18, 1914, he was employed as a foreman, and, in the course of this employment, it was his duty to go from job to job about the city. On the day aforementioned, he had inspected a job on Virginia park, a street in the city of Detroit, and, having completed this inspection at about 9 o'clock in the morning, he left the work in charge of another employee and started east on Virginia park to the intersection of Woodward avenue, where it is to be reasonably inferred from the evidence he was about to take a car to inspect another job north of Virginia park at the corner of Josephine avenue and Woodward avenue; and it also appears that there was another job for inspection at the corner of Mt. Vernon and John R. streets, which was also north of Virginia park. While at the intersection of Virginia park and Woodward avenue, he was knocked down by an automobile, seriously injured, and died the following day,"—it was held that the accident arose out of and in the course of the employment.

In the very interesting case of Foley v. Home Rubber Co. 89 N. J. L. 474, 99 Atl. 624, the employee lost his life in the sinking of the Lusitania, while engaged as a traveling salesman and en route to visit his employer's London office, and it was held that the accident arose out of and in the course of his employment. The court said: "If the Lusitania had been lost through a collision, fire, or storm at sea, resulting in the death of Foley, it would, under the principle enunciated in all the cases bearing on this subject, be held to have been an accident arising out of his employment. Foley's presence on the ship was connected with the very employment in which he was engaged. The fact that the Lusitania was lost through none of the common perils of the sea, but by an extraordinary peril, does not make the extraordinary peril less a cause of accident arising out of Foley's employment.

Both Foley and his employer were chargeable with knowledge of the perils of war upon the high seas. They must be assumed to have known that a belligerent vessel sailing under a belligerent flag, carrying contraband of war, subjected the vessel to attack by an enemy vessel, and that as a result of such attack, under many contingencies recognized by the law of nations, not only the loss of the vessel attacked, but the loss of lives of those upon her, might result."

In the very recent English case of *White v. W. & T. Avery*, 53 Scot. L. R. 122, and under the following facts: "A machine fitter, whose duty it was to go round to various places where his employers had erected or executed repairs upon weighing machines, was engaged in inspecting railway weighing machines. To one of the machines he proceeded to walk upon a road rendered slippery by frost after rain. While endeavoring to avoid a vehicle, he slipped and fell, breaking his wrist,"—it was held, following an unbroken line of English decisions, that the injury was caused by accident arising out of as well as in the course of the employment. This was under the Workmen's Compensation Law.

The case of *Summers v. California Iron Works and London & Lancashire Indemnity Co.*, first appellate district of California, reported in *Five Decisions Industrial Acci. Commission*, 386, is almost parallel to the one at bar. It was there held that an injury sustained by a millwright while journeying in an automobile belonging to his son, to a place where he had been directed to go by his employer to install machinery, is an injury arising out of his employment within the Workmen's Compensation Act, where it is shown that his employment was in the nature of a traveling employment, requiring him to go to any particular place where a contract for the installation of machinery had been obtained. It was there said: "On behalf of the respondent herein, it is conceded

that the general rule governing ordinary cases arising under the Workmen's Compensation Act is that for which the petitioner herein contends; but the respondent herein argues, we think convincingly, that the facts of this case bring it within the exceptions to the general rule. The exceptional cases are those wherein the employment itself is one in which the employee is required to travel from place to place at the will of the employer, and hence where the risks of such travel are directly incident to the employment itself, and hence wherein the accident occurring by reason of such risk is one arising out of the employment, and therefore a proper subject of compensation under the Employers' Liability Act"—citing *Cameron v. Pillsbury*, 173 Cal. 83, 159 Pac. 149; *Milwaukee v. Althoff*, 156 Wis. 68, L.R.A.1916A, 327, 145 N. W. 238, 4 N. C. C. A. 110.

We now come to the question as to whether or not the Colorado Workmen's Compensation Act has what is termed "extraterritorial effect." It is contended that there can be no recovery for the reason that the accident occurred in the state of Wyoming, notwithstanding the contract was made in Colorado; that both parties to it at all times resided in Colorado; and that the services under it were to be performed partially, at least, in this state.

Counsel concede that it is within the legislative power to give extraterritorial effect by express provision, but contend that in the absence of such expressed purpose it must be conclusively presumed that general words were intended to be limited in their application to the territorial jurisdiction of the legislature using them. The *Gould Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60, is cited to support this contention. This case construed the statute of Massachusetts, which, in respect to the question at issue, is like the Colorado law, in that the statute is voluntary, and that it does not in

express terms provide for compensation in case of accidents occurring without the state. It was there held that the statute does not apply. This decision was perhaps the first involving the question by an appellate court in this country, and the doctrine there announced has not generally been followed, but, on the contrary, has been very generally disapproved by courts of last resort. The Gould Case was followed and approved by Mr. Bradbury in the first edition of his work on Workmen's Compensation and State Insurance, but in the 2d edition of this work the author recedes from this position, and announces his belief that the doctrine which must be finally established will be, in effect, that the law of the place where a contract of employment is made will govern the rights and liabilities of employees and employers to claim and to pay compensation. It will be noted that in the Gould Case the court relied largely on the English cases, which were in fact the only authority it had; but the author quite clearly points out the inapplicability of these authorities as follows:

"In Great Britain the conditions are entirely different from those existing in the American states, although the decisions hereinbefore cited arose in relation to accidents which happened entirely outside the United Kingdom. True the accidents in one of the cases, at least, happened on a British vessel. Under the decisions in the cases of McDonald v. Mallory, 77 N. Y. 546, 33 Am. Rep. 664, and Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430, it might be that even the Massachusetts act would be held to apply in similar circumstances. In this respect the British decisions are in conflict with adjudications of our Federal Supreme Court. But the principal difference in the conditions between Great Britain and the United States is that in the former the Compensation Act applies to the whole of the territory of the United Kingdom. Thus, if an employer in London

sends an employee to Scotland, Wales, or Ireland, and he is there injured, the Compensation Act applies, while, under the doctrine of the Gould Case, supra, if a Massachusetts employer should send a workman to New York, the Massachusetts act would have no application whatsoever, and the employee would have no claim whatsoever on his employer, unless he could base it on negligence. This, of course, would be assuming there was no compensation law in New York.

"Therefore, partially receding from the position taken in the first edition of this work, although that position has been sustained by eminent authority, it is believed that the doctrine which must be established finally will be, in effect, that the law of the place where a contract of employment is made will govern the rights and liabilities of employees and employers to claim and to pay compensation." 1 Bradbury, Workman's Comp. 2d ed. p. 55.

The later authorities in this country base the conclusion chiefly on the proposition that, under voluntary compensation statutes such as ours, the cause of action of petitioner is ex contractu, and that the *lex loci contractus* governs the construction of the contract and determines the legal obligations arising under it.

The provisions of the Compensation Act are to be construed as written into the contract, and therefore a part of it. The reasoning of these cases is well stated in Deeny v. Wright & C. Lighterage Co. 36 N. J. L. 121, to be:

"It appears that there is an implied contract to compensate for injuries arising out of and in the course of the employment, and under it all other methods and rights to any other form of compensation are relinquished. The statute can have no extraterritorial effect, but it can require a contract to be made by two parties to a hiring that the contract shall have an extrater-

Master and servant—contract of employment—Compensation Act.

ritorial effect. The contract is binding on the employee himself, and upon the employer, and it is conclusively presumed that the parties have accepted the provisions of § 11, and have agreed to be bound thereby. The method of termination of the contract is provided for in ¶ 10. It would seem that the reasonable construction of the statute is that it writes into the contract of employment certain additional terms. The cause of action of petitioner is *ex contractu*. The *lex loci contractus* governs the construction of the contract, and determines the legal obligations arising from it. 9 Cyc. 664. That the cause of action is *ex contractu*, see *Sexton v. Newark Dist. Teleph. Co.* 34 N. J. L. J. 368, 2 N. C. C. A. 839, and 35 N. J. L. J. 8; *Perlsburg v. Muller*, 35 N. J. L. J. 202.

"The English cases cited in *Bradbury's* book are not precedents, because a claim under the English act is *ex delicto*.

"The objects of our act are to protect the citizens and inhabitants of New Jersey. It is based upon the proposition that the inherent risks of an employment should, in justice, be placed upon the shoulders of the employer, who can protect himself by an addition to the price of his product, and so cause the burden ultimately to fall upon the consumer; that indemnity to an injured employee should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that under our former system the loss fell immediately upon the employee, who is almost invariably unable to bear it, and therefore ultimately upon the community, which is taxed for the support of the indigent; and that our former system was uncertain, unscientific, and wasteful, and fostered a spirit of antagonism between employer and employee, which it is to the interest of the state to remove.

"The contract here was to be partly performed in New York and

partly in New Jersey. The law of New York, the admiralty law, or the act of New Jersey applies. The parties chose the law of New Jersey by making the contract here without giving the notice required by the act to come under § 1. Shall the public policy of New Jersey to place the burden on the industry be carried into effect, or shall the sole loss fall on the petitioner, in violation of the law of his state? It would be contrary to public policy to place the burden on the employee under the facts in the case."

The principle is concisely and curtly stated in *Rounsaville v. Central R. Co.* 87 N. J. L. 371, 94 Atl. 392, in the following language: "We are now dealing with the simpler question, whether a New Jersey court will enforce a New Jersey contract according to the terms of a New Jersey statute. The question hardly calls for an answer. The place where the accident occurs is of no more relevance than is the place of accident to the assured in an action on a contract of accident insurance, or the place of death of the assured in an action on a contract of life insurance."

In the case of *Grinnell v. Wilkinson*, 39 R. I. 447, L.R.A.1917B, 767, 98 Atl. 103, Ann. Cas. 1918B, 618, the court entered upon a most elaborate review of the authorities, and fully answers many contentions in the brief of counsel in this case, concerning particular expressions in our act quite similar to those found in the Rhode Island act, which it was there urged, as in this case, lends support to the construction contended for. The court concluded as follows:

"The latest case which has come to our attention is *Post v. Burger*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, 10 N. C. C. A. 888 (January, 1916), a New York case, where the same question arose under the Workmen's Compensation Act of New York [Consol. Laws, chap. 67]. The case follows substantially the same line of argument, and arrives at the same con-

clusion as the cases of *Kennerson v. Thames Towboat Co.* 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372, supra, and *Rounsaville v. Central R. Co.* supra, both of which it cites with approval. See also *Deeny v. Wright & C. Lighterage Co.* 36 N. J. L. J. 121; 1 *Bradbury, Workmen's Compensation*, pp. 50, 52 et seq., cited with approval in the *Kenner-son Case*, 89 Conn. 378, L.R.A. 1916A, 436, 94 Atl. 372, supra, and in the *Post Case*, supra.

"We are of the opinion that the reasoning of the cases above cited from New York, New Jersey, and Connecticut is quite applicable to the case at bar; that under the *Workmen's Compensation Act* of Rhode Island the relation of employer and employee is contractual, and the terms of the act are to be read as a part of every contract of service between those subject to its terms; that on principle and in reason, and in view of the purpose, scope, and character of the act, it should be construed and held to include injuries arising out of the state as well as those arising within it; and that the weight of authority upon acts similar to our own gives full support to our conclusion."

The New York statute, in the respect we are considering, is not materially different from that of Colorado, and it was held in the case of *Post v. Burger*, supra, after an extensive review of the authorities, that "the act, taken as a whole, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory, that the employer shall pay, as provided by the act, for a disability or the death of the employee as therein stated. The duty under the statute defines the terms of the contract. Where, therefore, a resident of this state, employed by a corporation engaged in business in this state, is sent by his employer to perform work in another state away from the plant of the employer, but

under the employer's express direction, and, while engaged therein, is injured, he is entitled to compensation when in other respects he comes within the provisions of the law."

The difficulties and injustice that may arise in case the law shall be held to apply to accidents occurring within the state only are forcibly stated in the well-reasoned case of *Kennerson v. Thames Towboat Co.* supra, where it was said:

"The remedy provided by our *Compensation Act* is substitutionary in character, furnishing what was purposed to be a more humanitarian and economical system, as a substitute for one deemed wasteful to industrial enterprises and commerce, and unfair to employees. Its intent was to afford its protection to all Connecticut employers and employees who might voluntarily choose to make its provision for compensation for injury a part of their contracts of employment. It assumed that accident is incident to employment, and purposed to charge its cost, in the case of every injury not caused by the wilful and serious misconduct or intoxication of the injured employee, to the industry in which it occurred. It intended that the employee should know what compensation he or his dependents, would receive in the event of injury, and that payment should be made speedily by a procedure at once simple and inexpensive. It intended that the employer should know his liability in this regard, and so might include it among the items charged to operation. If our act intends its contracts of employment to include compensation for injuries occurring only within our jurisdiction, it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the state, and the employee or his dependents may not collect the same.

"Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the act,

and no provision for insurance of this liability will be practically possible, since it may not ordinarily be known what part of the service will be in and what part out of the state, or in what jurisdiction the service will be performed, in industries and commercial enterprises engaged in intrastate and interstate employment. The state boundary is not the limit of very many businesses. To subject them to the laws of the many jurisdictions in which they may be engaged will be especially burdensome to them, and involve them probably in greater expense and liabilities and far greater difficulties than under the old system.

"Equally hard will it prove to the employee, since he must pursue his remedy in the state of the accident, or the Federal court applying that state's law, and thus he may be brought under any one of many different compensation acts, with whose provisions he cannot hope to be familiar; some acts contractual in character, some compulsory, some optional, and some *ex delicto*; and he may find he has forfeited the benefit of the foreign act through failure to comply with its provisions. A reading of the several acts now in force convinces us that these difficulties are not imaginative, but imminent actualities.

"Is it reasonable to infer that our legislature, inaugurating a new system based upon humanitarian and economical considerations, should intentionally frustrate the object of the new system, and cast a multitude of employers and employees into a maelstrom of trouble, uncertainty, and liability? On the other hand, is it not reasonable to infer that the legislature, having botomed the right to compensation upon contract, deemed unimportant the place of injury, since it must be presumed to have known that the contract, and not the place of injury, would govern the recovery. Such a construction of the act would lift insuperable burdens from in-

men, and give to each his course and the ascertained fruits of the contract of his will."

Continuing, the court said: "Where as with us, the determination of the award is committed to a board or commission under a specified procedure, there will be serious obstacles to the enforcement of the contract in a foreign-jurisdiction. 1 Bradbury, *Workmen's Comp.* 2d ed. p. 52. If it should be necessary to so rule, no hardship would result; the parties in interest would be relegated to the place where they had elected to make their contract and no questions of conflict of laws could arise. At the base of this question is the character of the compensation. Mr. Bradbury, repudiating his earlier view, stoutly maintains that, if the act be contractual, the contracts arising will, unless a contrary intent appears, be found to cover injuries without as well as within the state. We think his later conclusion sound, and one which will prove beneficial alike to employer and employee."

Counsel, however, urge that § 5 of the Act of 1915, by the use of the words, "for a personal injury sustained within this state," supports the contention that compensation may be allowed for accidents occurring within the state only. The section deals only with negligence cases, not with compensation, and denies the defenses, in such cases, of assumed risk, the fellow-servant rule, and contributory negligence. The very purpose of the provision is to induce employers to accept the Compensation Law, in so denying such defenses in negligence cases. Beside, the act should be construed as a whole, in the light of its purposes. It was held in the case of *Gooding v. Ott*, 77 W. Va. 487, L.R.A.1916D, 637, 87 S. E. 862, where the Compensation Statute was seemingly limited to persons "as shall have received injuries in this state," that it was a construction too narrow to hold that these words limited the right of compensation to injuries occurring within

the state, in view of the objects and purposes of the act.

In the case at bar, if we are to determine, in the absence of any provision of the statute to the contrary, that the doctrine of *lex loci contractus* does not govern, it will be to destroy the very spirit and purpose of the law as it affects the employer, the employee, and the public welfare. If we assume that there are no Workmen's Compensation Laws in the states where the deceased was to perform his services outside of Colorado, then there can be no recovery of compensation, notwithstanding all premiums sufficient to maintain the workers' accident insurance had been fully paid. On the other hand, if we are to assume that a Workmen's Compensation Law prevails in each of the seven states of Colorado, Wyoming, Idaho, Montana, Utah, Arizona, and New Mexico, then the employer must be compelled to comply with each statute, and to pay the premiums required by the law of each state for the protection of the one employee, or approximately seven times the amount otherwise required. If this were legally permissible, the expense would make it prohibitive. The result in this case must be that the employer has paid the full premium demanded by the state to insure his employee against accident; the employee has relied on the pledge of his state for the protection of himself and his dependents; his widow and children

discover the whole arrangement to be a delusion and a snare, and find themselves without protection. Thus the employer, the employee, his dependents, and the public have all been deceived and cheated, because, forsooth, the accident occurred beyond the imaginary line that marks the boundary of the commonwealth, though it happened within the line of employment. We cannot assume that the legislature ever intended such an injustice and absurdity, in the absence of some clear and express provision in the statute to that effect, which we do not find.

Conflict of laws  
—Workmen's  
Compensation  
Act—extraterri-  
torial effect.

The judgment is reversed, with instruction to enter judgment confirming the award of the Industrial Commission theretofore allowed.

White and Bailey, JJ., dissent.

Petition for rehearing denied, July 1, 1918.

#### NOTE.

As to the extraterritorial operation of compensation statutes and conflict of laws, see the annotation to *STATE EX REL. CHAMBERS v. DISTRICT Ct.* post, 1351. The decision of the Colorado supreme court in the reported case (*INDUSTRIAL COMMISSION v. ÆTNA L. INS. CO.* ante, 1336), is in line with the greater weight of authority in holding that compensation statutes are applicable in case of injuries occurring outside of the state.

STATE OF MINNESOTA EX REL. LENA CHAMBERS et al.,  
Plffs. in Certiorari,

v.

DISTRICT COURT, HENNEPIN COUNTY, et al.

*Minnesota Supreme Court — January 11, 1918.*

(139 Minn. 205, 166 N. W. 185.)

**Workmen's compensation — injury out of state.**

1. The Minnesota Workmen's Compensation Act is elective. By becoming subject to it the employer and employee agree that the employer will

Headnotes by DIBELL, C.



pay and the employee receive for an accidental injury the compensation fixed by the statute, and that the employee will forego his common-law right of action. It is not important who is at fault or whether anyone is. The right to compensation is not based on tort. It is contractual. The relator's husband was a resident of North Dakota. He entered into a contract of employment with a Minnesota corporation doing a grain brokerage business in Minnesota and having its place of business in Minneapolis, and, so far as appears, none elsewhere. The contract was made there. It contemplated that he should solicit business for the corporation in Minnesota, North Dakota, and elsewhere. An automobile was furnished him for use in his work. While using it in the course of his employment it accidentally overturned at a point in North Dakota and he was killed. Under these facts it is held that the Minnesota Compensation Act is applicable, and an award of compensation should be made.

[See note on this question beginning on page 1351.]

**Certiorari** — orders in compensation case.

2. The writ of certiorari does not bring to this court for review orders in a compensation proceeding not in their nature appealable. It does not

lie to review an order for judgment on the pleadings, for such an order is not in its nature appealable. It lies to review the judgment entered pursuant to such an order.

[See 5 R. C. L. 253, 254.]

**CERTIORARI** to the District Court for Hennepin County to review a judgment denying relator compensation, under the Workmen's Compensation Act, for the death of her husband. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. McNamara & Waters for relator.

Mr. John F. Bernhagen for respondents.

Dibell, C., filed the following opinion:

Certiorari to the district court of Hennepin county to review a judgment denying the relator compensation under the Workmen's Compensation Act for the death of her husband.

1. Judgment was entered on the pleadings on motion of the defendant employer. The facts stated in the complaint, which we are to take as established, are substantially these: The relator's husband was a resident of North Dakota. He was employed by C. C. Wyman & Company a Minnesota corporation doing a general grain brokerage business in Minnesota and having its place of business in Minneapolis. It does not appear that it had a business situs elsewhere. The contract of employment was made in Minneapolis. It contemplated the rendi-

tion of services by the deceased in soliciting business in Minnesota, North Dakota, and elsewhere. The company furnished him an automobile which he used in performing such services. While he was in North Dakota on May 5, 1917, the automobile was accidentally overturned and he was killed. The accident arose out of and in the course of the employment.

The question is whether, with the facts as stated, the motion of the employer for judgment on the pleadings was rightly granted. Liability would be conceded had the accident happened in Minnesota. The claim of the employer is that compensation cannot be awarded for an accident occurring outside the state.

The Minnesota Compensation Act provides for elective compensation. Gen. Stat. 1913, §§ 8202 et seq.; Mathison v. Minneapolis, Street R. Co. 126 Minn. 286, L.R.A.1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871. The employer and employee become subject to the act only by agreement,

(139 Minn. 205, 186 N. W. 185.)

express or implied. If they elect to become subject to it they in effect contract that the employee shall receive and the employer will pay the statutory compensation for all accidental injuries arising out of and in the course of the employment, and the employee waives his common-law right of action. It is unimportant whether the cause of the accident is referable to a tortious or a blameless act, or whether, if tortious, the employer or some third person is blameworthy, or even that the employee is at fault, if not wilfully so. The statute requires compensation of the employer, when the employer and employee have elected to become subject to the act, "in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of employment, without regard to the question of negligence, except accidents which are intentionally self-inflicted or when the intoxication of such employee is the natural or proximate cause of the injury. . . . Gen. Stat. 1913, § 8203. The statute evidences no affirmative purpose to restrict the operation of the contract to accidental injuries happening within the state. That a statute might make such limitation expressly is clear; or the wording of it might require such construction by way of proper inference.

In Connecticut, New York, Rhode Island, West Virginia, Indiana, and New Jersey, under varying statutes and with facts changing from case to case, it is held that compensation may be awarded for an injury occurring outside the state. *Kennerson v. Thames Towboat Co.* 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372; *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, 10 N. C. C. A. 888; *Grinnell v. Wilkinson*, 39 R. I. 447, L.R.A. 1917B, 767, 98 Atl. 103, Ann. Cas. 1918B, 618; *Gooding v. Ott*, 77 W. Va. 487, L.R.A.1916D, 637, 87 S. E. 862; *Hagenback v. Leppert*, — Ind. App. — 117 N. E. 531; *Rounsaville v. Central R. Co.* 87 N. J. L. 371, 94

Atl. 392. And see *Foley v. Home Rubber Co.* 89 N. J. L. 474, 99 Atl. 624, where the right to compensation was tacitly conceded. Massachusetts and California are opposed. *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60; *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, L.R.A. 1917E, 642, 162 Pac. 93. And so are the English cases. *Tomalin v. S. Pearson & Son* [1909] 2 K. B. 61, 78 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477, 2 B. W. C. C. 1; *Schwartz v. India Rubber, Gutta Percha & Teleg. Works Co.* [1912] 2 K. B. 299, 81 L. J. K. B. N. S. 780, 106 L. T. N. S. 706, 28 Times L. R. 331, [1912] W. C. Rep. 190, 5 B. W. C. C. 390; *Hicks v. Maxton*, 124 L. T. Jo. 135, 1 B. W. C. C. 150. The cases are collected and discussed in the treatises and annotated cases. 1 *Honnold, Workmen's Comp.* § 8; 1 *Bradbury, Workmen's Comp.* 34-68; *Dosker's Manual Comp.* §§ 261-263; *Kennerson v. Thames Towboat Co.* 89 Conn. 367, L.R.A.1916A, 443, 94 Atl. 372; *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, 10 N. C. C. A. 888.

A consideration at length of the arguments which support the diverse views does not serve our present purpose. Different arguments appeal to different courts. Often a distinction is drawn between an elective and a compulsory act, with the suggestion that in the case of the former there is a contract to pay which is the basis of the right to compensation; that a contract is not local as is a tort, and therefore state boundaries are not important. Whether an agreement to pay is imported into the contract of hiring where a compulsory act is in force is not material to our inquiry, for ours is not such an act. That under our act there is a contract obligation is clear. The weight of authority supports the view that under an elective act like ours, and with facts such as are present, an accidental injury, though it occurs outside the state, is compensable. This view we

adopt. There is nothing in *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620, opposed. The injury there involved occurred in Wisconsin and the employer and employee were by their election subject to the Compensation Act of that state. It was held that the employee could not maintain a common-law action in Minnesota for the Wisconsin injury. A basic thought underlying the Compensation Act is that the business or industry shall in the first instance pay for accidental injuries as a business expense or a part of the cost of production. It may absorb it or it may put it partly or wholly on the consumer if it can. The economic tendency is to push it along, just as it is to shift the burden of unrestrained personal injury litigation. When a business is localized in a state, there is nothing inconsistent with the principle of the Compensation Act in requiring the employer to compensate for injuries in a service incident to its conduct, sustained beyond the borders of the state. The question of policy is with the legislature. It may enact an elective compensation act bringing such result if it chooses. In the case before us the business of the employer was localized in the state. What the employee did, if done in Minnesota was a contribution to the business involving an expense and presumably resulting in a profit. It was not different because done across the border in North Dakota. It was referable to the business centralized in Minnesota. Sometimes the construction which we adopt will result to the immediate advantage of the employee and against the employer, and sometimes the result will be the reverse. Whatever view is adopted, perplexing situations may arise. Business has scant respect for state boundaries. An industry may be located a part in one state and a part in another, or it may have separate business situs in two or more, and its employees may from time to time work in each and may reside in one

or another at their convenience. Situations may arise where it is difficult to say whether the employment is referable by the act of the parties or by intendment of law to a business conducted in one state or another, and whether the governing law applicable to an injury coming from the employment is that of the one or the other, or whether there may be a recovery of the employer under the Compensation Act of one state and of a third person under the common law of the state of the injury. They are safely left for determination when they arise. Here, if the facts stated in the complaint are true, the employment was referable to the business conducted in Minnesota, and its Compensation Act is the governing law between employer and employee. We hold that judgment on the pleadings should not have been directed for the employer.

Workmen's compensation—  
injury out of  
state.

2. The statute contemplates the review of questions of law arising in the administration of the Compensation Act by certiorari. Gen. Stat. 1913, § 8225. It does not intend the review by certiorari of orders and judgments not in their nature appealable under our practice. An order for judgment on the pleadings from early times has been held not appealable. 1 Dunnell Dig. (Minn.) § 309. The writ sought to review the order granting the motion for judgment. To convenience the parties we allowed a remand of the case for the entry of judgment and the making of amendments appropriate to bring the judgment here for proper review. Some inconvenience has resulted to the parties from relator's improper procedure. We emphasize the importance of the observance of the statute and settled practice by withholding from the relator statutory costs.

Certiorari—  
orders in com-  
pensation case.

Judgment reversed.

## ANNOTATION.

**Extraterritorial operation of Workmen's Compensation Statutes; conflict of laws.****I. Introductory, 1351.****II. Extraterritorial operation of statutes:**

- a. Extraterritorial operation necessary to carry out purpose of statutes, 1351.
- b. Acceptance of elective acts as constituting contract effective in other states, 1355.

*I. Introductory.*

There is a sharp conflict of authority as to whether the compensation statutes have extraterritorial operation, and this conflict is based upon the views of the individual courts as to the general purposes of the statutes, and upon the provisions of the statutes themselves, rather than upon any general underlying principles of law. Compensation statutes may be divided into two general classes; those which are compulsory and those which are elective; but this fundamental distinction does not afford any guide in determining whether or not the statutes are to be considered as applying to injuries occurring outside of the state, since statutes of both classes have been construed to apply and not to apply to such injuries. Consequently the decisions of one state have but little weight in determining the proper construction of the statutes of another state. This point has been recognized by the supreme court of Iowa.

Thus, in *Pierce v. Bekins Van & Storage Co.* (1919) — Iowa, —, 172 N. W. 191, the court said: "We conclude that resort to the decisions in other jurisdictions would be of very doubtful value in interpreting the Iowa act, and we shall refrain from so resorting."

So, too, in *STATE EX REL. CHAMBERS v. DISTRICT CT.* (reported herewith), ante, 1347, the Minnesota supreme court said: "A consideration at length of the arguments which support the diverse views does not serve our present purpose. Different arguments appeal to different courts."

**II.—continued.**

- c. Effect of miscellaneous provisions in statutes, 1357.
- d. Doctrine that statutes do not have extraterritorial operation, 1359.

**III. Conflict of laws, 1361.**

The question of the extraterritorial operation of the statutes and the question of conflict of laws are so closely interwoven that it is necessary to discuss both questions in one annotation.

**II. Extraterritorial operation of statutes.***a. Extraterritorial operation necessary to carry out purpose of statutes.*

The doctrine is put forward in some cases that the Compensation Acts rest upon the basic principle that the business or industry shall in the first instance pay for accidental injuries as a business expense or a part of the cost of production; and, consequently, work done by an employee acting within the scope of his employment is presumably done to advance the business, although the work may be performed across the border of the state; and any accidents suffered by him while so engaged should be compensated by the business, precisely the same as if it were performed within the state boundary. Therefore, an employee, although injured outside of the state, is entitled to the benefit of the statute unless the statute itself clearly shows the intention of the legislature to confine its operation to accidents occurring within the state.

This is the view taken in *STATE EX REL. CHAMBERS v. DISTRICT CT.* (reported herewith) ante, 1347. A concise statement of this view may be repeated here to show more clearly the position of the court: "When a business is localized in a state there is nothing inconsistent with the principle of the Compensation Act in requiring the employer to compensate

for injuries in a service incidental to its conduct, sustained beyond the borders of the state. The question of policy is with the legislature. It may enact an elective compensation act bringing such result if it chooses. In the case before us the business of the employer was localized in the state. What the employee did, if done in Minnesota, was a contribution to the business, involving an expense and presumably resulting in a profit. It was not different because [it was] done across the border in North Dakota. It was referable to the business centralized in Minnesota."

The same view was adopted by the Minnesota court in *State ex rel. Maryland Casualty Co. v. District Ct.* (1918) 140 Minn. 427, 168 N. W. 177, and in *State ex rel. McCarthy Bros. Co. v. District Ct.* (1918) — Minn. —, 169 N. W. 274.

The Wisconsin supreme court also, in holding that the act would apply to an injury occurring in another state, based its decision upon the theory that the Compensation Act is based upon the economic theory that it is in the interest of the general welfare that the damages arising from injuries sustained by persons engaged in particular industries shall be borne by that industry. *Anderson v. Miller Scrap Iron Co.* (1919) — Wis. —, 170 N. W. 275. The court said: "If the application of the law be limited to injuries occurring within this state, then in the case of injuries sustained without the state the employer will not be liable, except he be negligent, and where he is not negligent the whole loss must be borne by the employee, and the whole legislative purpose is, as to injuries sustained without the state, defeated. We have extensive borders; thousands of employees are passing out of and into Wisconsin daily and almost hourly, in the discharge of their ordinary duties. Can it be that the legislature intended that every time these employees crossed the state line their right to compensation for injuries incidental to and growing out of their employment should be changed, and that as to injuries which occur beyond the state line the old

system, instead of the new, should apply?"

So, too, the Connecticut supreme court in *Keenerson v. Thames Towboat Co.* (1915) 89 Conn. 367, L.R.A. 1916A, 436, 94 Atl. 372, said that the act assumed that "accident is incident to employment," and purposed to charge the cost in the case of any injury not caused by the wilful and serious misconduct or intoxication of the injured employee to the industry in which it occurred. It intended that the employee should know what compensation he or his dependents would receive in the event of injury, and that the employer should know his liability in this regard, and so might include it in the items charged to operation. The court said: "If our act intends its contract of employment to include compensation for injuries occurring only within our jurisdiction, it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the state, and the employee or his dependents may not collect the same. Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the act."

To hold that the Colorado statute did not apply to injuries occurring outside of the state would destroy the very spirit and purpose of the law as it affects the employer, the employee, and the public welfare, said the Colorado supreme court in *INDUSTRIAL COMMISSION v. AETNA L. INS. CO.* (reported herewith) ante, 1336. In this case the employer did business not only in Colorado, but in a number of surrounding states. The contention of the court was that, if the statute was held not to apply extraterritorially, then, if it were assumed that there are no compensation laws in the states where the employees were to perform their services, there could be no recovery of compensation notwithstanding all premiums sufficient to maintain the workers' accident insurance had been fully paid. On the other hand, if it was assumed that the Workmen's Compensation Law pre-

vailed in each of the states in which the employer did business, then the latter must be compelled to comply with each statute, and to pay the premiums required by the law of each state for the protection of one employee.

And in *Pierce v. Bekins Van & Storage Co.* (1919) — Iowa, —, 172 N. W. 191, the Iowa supreme court said that if the statute contained an express provision limiting its application to injuries occurring within the state, it would make impossible the accomplishment of the one purpose of the act, namely, to bring about speedy payment by procedure at once simple and inexpensive; and it would further tend to nullify another thing intended; namely, that the employer shall be enabled to charge to the industry what injury to the employee engaged therein will cost. The court said: "As to the first, compelling the employee to bring a common-law suit, and to apply to its decision the statutes of another state, is certainly not calculated to promote speedy payment by procedure simple and inexpensive. As to the second, the employer could fix no tax upon his business to meet expenditures for compensation because he would not pay statute compensation where the injury occurred outside of the state, and could not foretell what proportion of injuries to be compensated for would arise outside of the state."

So, too, in *Gooding v. Ott* (1916) 77 W. Va. 487, L.R.A.1916D, 637, 87 S. E. 862, it was held that it would work great injustice on the part of both the employer and employee were the compensation to be paid limited to cases of injuries received within the state. The court said: "So construed, the statute would impose unequal burdens upon and give unequal protection to mine owner and miner from whom premiums were exacted. They would both be liable for benefits not received." This view of the court was reasserted in *Fouthey v. Ott* (1917) 80 W. Va. 88, 92 S. E. 143, 15 N. C. C. A. 919.

Again, in *Pierce v. Bekins Van & Storage Co.* (Iowa) supra, it was

held that the view that it was not intended to limit recovery under the act to injuries sustained while in the state is supported by an application of the reasoning upon which the rule "designatio unius est exclusio alterius" rests. The court stated that the statute repeatedly asserts that the employer is to provide compensation for injuries sustained arising out of and in the course of the employment, and that the only cases excepted from the statute are those which do not arise out of and in the course of the employment. The court said: "Where stated things are enumerated, things not named are excluded. On the same reasoning, where a statute declares that compensation under its terms is to be made for any and all injuries sustained, without limitation beyond that they shall occur in the course of and arise out of the employment, it is the declared intention that compensation shall be made under the statute if the injury be of the class named in the statute; the only limitation is the relation of the injury to the duty. No exception based on the place where the injury occurs is found in the language, and if it is to be ingrafted upon that language it must be done by judicial legislation."

The Connecticut court in *Kennerston v. Thames Towboat Co.* (1915) 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372, also laid special emphasis upon the fact that the expression "any injury" was repeatedly used throughout the statute, without any limitation as to the place in which the injury arose.

And the New York act, which is a compulsory statute, has been held to apply to accidents which occur outside of the state, since the cost of insurance to be carried by the employer is determined by the number of his employees and the wages paid to them, and not by the number of employees employed within the state. *Post v. Burger & Gohlke* (1916) 216 N. Y. 544, 111 N. E. 350, Ann. Cas. 1916B, 158, 10 N. C. C. A. 888. So, too, the word "employees," as defined by the act, includes the person engaged in the course of his employment away from the plant of the employer; the lan-

guage of the statute, if construed literally, expressly includes an employee who was injured in another state, away from the plant of his employer, but under the employer's express direction. The court further said that one of the objects of the act was to prevent injured workmen and their dependents from becoming objects of charity, and the danger of injured workmen and their dependents becoming objects of charity was just as great when the accident occurred outside the boundaries of the state as when it occurred within.

The decision in the Post Case has been followed in *Fitzpatrick v. Blackall & B. Co.* (1917) 220 N. Y. 671, 116 N. E. 1044; *Jenkins v. T. Hogan & Sons* (1917) 177 App. Div. 36, 163 N. Y. Supp. 707; *Gilbert v. Des Lauriers Column Mould Co.* (1917) 180 App. Div. 59, 167 N. Y. Supp. 274; *Holmes v. Communipaw Steel Co.* (1919) 186 App. Div. 645, 174 N. Y. Supp. 772.

So, a claimant who was employed under a New York contract, and was injured while performing services for his employer away from the plant of such employer in the state of New Jersey, is under the protection of the New York statute rather than under the New Jersey statute, and the fact that the claimant was induced to invoke the New Jersey statute in the first instance does not deprive him of his rights under the New York statute, and the insurance carrier is not aggrieved if credited with the amount it had paid under the provision of the New Jersey act. *Gilbert v. Des Lauriers Column Mould Co.* (1917) 180 App. Div. 59, 167 N. Y. Supp. 274.

In support of the contention that the New York statute applies extra-territorially because the amount which an employer is required to pay into the insurance fund is based solely upon the size of his pay roll and the character of his business, and the fact that one of his employees may, from time to time, be outside the state in the course of his employment, does not diminish the amount of premium which the employer has to pay, the court, in *Spratt v. Sweeney & G. Co.* (1915) 168 App. Div. 403, 153 N. Y.

Supp. 505, 9 N. C. C. A. 918, said: "The employee cannot refuse to do the master's bidding within the course of the employment upon the ground that it requires him to pass over the state line, and the law cannot contemplate that he shall lose the benefit of the act because he is performing the duties of his employment. The statute must have a broad and liberal interpretation to protect the employee and to compensate him for all injuries received in the course of the employment, and to charge upon the fund or the insurer the loss which otherwise must fall upon the master. By complying with the act the employer is guaranteed protection, and the moneys which he has paid into the fund or secured to be paid must bear the losses which they were intended to meet; otherwise the employer and the employee are suffering at the hands of the state." The decision in this case was affirmed by the court of appeals in (1916) 216 N. Y. 763, 111 N. E. 1100, on authority of *Post v. Burger & Gohlke* (N. Y.) *supra*.

So, too, in *Gooding v. Ott* (1916) 77 W. Va. 487, L.R.A.1916D, 637, 87 S. E. 862, the court called attention to the fact that employers were compelled to pay into the state compensation fund upon the basis of the entire wages paid to the employees.

It was held in *Rounsaville v. Central R. Co.* (1915) 87 N. J. L. 371, 94 Atl. 392, that the fact that the accident happened in another state is irrelevant when the proceedings were brought in New Jersey for liability under the New Jersey act, and the contract of employment was a New Jersey contract. The supreme court said: "The place where the accident occurs is of no more relevance than is the place of accident to the assured in an action on a contract of accident insurance, or the place of death of the assured in an action on a contract of life insurance." The judgment of the supreme court in this case was reversed by the court of errors and appeals in (1917) 90 N. J. L. 176, 101 Atl. 182, upon the ground, not within the scope of this note, that the injury

was received in the course of interstate commerce.

The question whether the Kansas act applies to injuries received outside the state was suggested but not decided in *Hicks v. Swift & Co.* (1917) 101 Kan. 760, 168 Pac. 905. The court said that the operation of the statute is not in so many words limited to the state, but contains some incidental expressions implying an assumption that the injuries to which it relates would occur in Kansas. Releases, agreements, and awards under it are required to be filed in the "county in which the accident occurred," and provisions relating to defenses are made applicable to an action "for a personal injury sustained within the state."

The Indiana act expressly provides that the statute shall be applicable to injuries received outside of the state, and it has been held by the Indiana court that this provision can be defeated only by other words within the statute which are equally plain, unmistakable, and rigid. *Hagenback v. Leppert* (1917) — Ind. App. —, 117 N. E. 531.

The New York statute expressly applies to the operation without the state, "including repair of vessels other than vessels of other states or countries used in interstate or foreign commerce." In *Edwardsen v. Jarvis Lighterage Co.* (1915) 168 App. Div. 368, 153 N. Y. Supp. 391, it was held that the captain of a lighter, who was injured while his lighter was being unloaded, was engaged in the "operation" of the lighter, and consequently was entitled to compensation although the injury took place outside of the state.

In *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372, the court said that unless the intention to have a statute operate beyond the limits of a state is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject-matter, or history, the presumption is that the statute is intended to have no extraterritorial effect, and that a like presumption should control the opera-

tion of a contract based upon statutory authority.

But the rule that statutes shall not be construed to have extraterritorial operation unless authority for such construction is found in the act in unequivocal language, or plain and unmistakable words, was held by the Iowa supreme court in *Pierce v. Bekins Van & Storage Co.* (1919) — Iowa, —, 172 N. W. 191, to be applicable to cases in delicto only, and not to the construction of a compensation statute.

*b. Acceptance of elective acts as constituting contract effective in other states.*

In some decisions it is pointed out that under the elective acts the rights and duties as to compensation are contractual, and consequently it is immaterial that the injury occurs outside of the borders of the state.

Thus, in *STATE EX REL. CHAMBERS v. DISTRICT CT.* (reported herewith), ante, 1347, the court said: "Often a distinction is drawn between an elective and a compulsory act, with the suggestion that in the case of the former there is a contract to pay which is the basis of the right to compensation; that a contract is not local, as is a tort, and therefore state boundaries are not important. Whether an agreement to pay is imported into the contract of hiring where a compulsory act is in force is not material to our inquiry, for ours is not such an act. That, under our act, there is a contract obligation, is clear. The weight of authority supports the view that, under an elective act like ours, and with facts such as are present, an accidental injury, though it occurs outside the state, is compensable."

In response to the contention that no distinction in construction is to be based upon whether the act is compulsory or elective, the Iowa supreme court in *Pierce v. Bekins Van & Storage Co.* (1919) — Iowa, —, 172 N. W. 191, said that the fact that the statute is elective has controlling bearing on one thing that is highly important; namely, where the statute is elective as to both employer and employee, payment of compensation is not the



performance of a statutory duty, but the performance of conditions in the contract of hiring, which conditions are in the contract by means of reading the compensation statute into the contract. The court said: "It follows, then, that it is quite unnecessary to make this case turn upon a holding that the statute itself is operative in Nebraska. It suffices if employer and employee contracted in Iowa that, if injury was sustained in Nebraska, compensation should be governed by the terms and conditions found in the Iowa statute, to which, by law, such contract makes reference."

And in *Deeny v. Wright & C. Light-erage Co.* (1913) 136 N. J. L. J. 121, the court said: "The statute can have no extraterritorial effect, but it can require a contract to be made by two parties to a hiring, that the contract shall have an extraterritorial effect."

So, in *Gooding v. Ott* (1916) 77 W. Va. 487, L.R.A.1916D, 637, 87 S. E. 862, the West Virginia supreme court of appeals said: "A distinction has been noted in some of the authorities between cases arising under compulsory statutes and those controlled by statutes, as in New Jersey, and we think in this state, which are optional. Where the statute compels submission by the employer and employee, there is no contract, as a general rule, enforceable outside of the state. But where, as in New Jersey and in this state, the statute makes acceptance optional, and the parties freely enter into the contract of employment with reference to the statute, the statute should be read into the contract as an integral part thereof, binding the parties, and enforceable in any jurisdiction, the same as any other contract."

The court further said: "Employment under these new compensation acts, when elective, and not compulsory, and voluntarily entered into, are treated as contracts of employment, to be interpreted and enforced as all other contracts, and as binding upon the parties for injuries or death sustained in any place to which such contracts of employment extend the rights of the parties."

So, too, in *Grinnell v. Wilkinson*

(1916) 39 R. I. 447, L.R.A.1917B, 767, 98 Atl. 103, Ann. Cas. 1918B, 618, after citing the Connecticut, New Jersey, and New York cases referred to above, the Rhode Island supreme court said: "We are of the opinion that the reasoning of the cases above cited from New York, New Jersey, and Connecticut is quite applicable to the case at bar; that under the Workmen's Compensation Act of Rhode Island the relation of employer and employee is contractual, and the terms of the act are to be read as a part of every contract of service between those subject to its terms; that on principle and in reason, and in view of the purpose, scope, and character of the act, it should be construed and held to include injuries arising out of the state as well as those arising within it; and that the weight of authority upon acts similar to our own gives full support to our conclusion."

Again, in *Pierce v. Bekins Van & Storage Co.* (1919) — Iowa, —, 172 N. W. 191, the Iowa court said that the contention that the statute could not have an extraterritorial application because a statute is a law only within the state in which it was enacted overlooked the distinction that the statute may be so read into a contract of hiring as that compensation according to the terms of the statute may be recovered, though the injury was sustained in the jurisdiction in which such statute was not effective as a law.

On the other hand, the Wisconsin supreme court in *Anderson v. Miller Scrap Iron Co.* (1919) — Wis. —, 170 N. W. 275, in taking the view that the statute had an extraterritorial application, said that in their opinion it did not matter that the law had an elective feature and was noncompulsory. The Wisconsin court also took sharp issue with the Minnesota court which held that the liability of employers in compensation cases was based upon contracts. The liability was purely statutory, although it grew out of and was incidental to a relationship based upon contracts, but this fact did not make it contractual any more than it made the liability of the employer at

common law contractual, for that, too, was a liability which grew out of and was incidental to a like relationship. The court said that if, as had been said in some cases, the liability of the employer under the law is a contractual obligation, then the rights and liabilities of the parties would always be referable to the law in force at the time the contract of employment was entered into; and if this was true, the law is not subject to amendment as against existing contracts in any respect which would impair the contract within the meaning of that term as used in the Constitution. "Such construction is to be avoided in the interest of a simple and correct administration of the law, and should not be adopted unless the clearly expressed legislative intent excludes other construction."

The mere fact that a contract of employment was made within the state cannot bring the employer within the act, where it related solely to work to be performed outside of the state, and no service in the state was contemplated or performed.

Thus, in *Gardner v. Horseheads Constr. Co.* (1916) 171 App. Div. 66, 156 N. Y. Supp. 899, the court, in holding that an award of compensation was erroneous, said: "The contract of employment did not contemplate any work by him within the state; no such work was done. The statute in question is intended to regulate the relations between the employer and employee in hazardous employments within the state, and to protect the employee within the state from the ordinary risks of the employment, and to charge those risks upon the ultimate consumer. The mere fact that an employee is engaged by a resident of the state to go out of the state for service, and no service in the state is contemplated or done, cannot bring the employment within the act. Ordinarily a statute has no extraterritorial effect. But where the regular service of the employee is being performed in the state, and, as an incident to it, he goes over the state line temporarily, we have held that such temporary absence from the state does not relieve

the employer from liability under this statute. The relations between the decedent and the company with reference to the work at Ford City depended upon the laws of the state of Pennsylvania, and the protection there given to the employer and the employee. The mere fact that the contract was made in the state, if it was made in the state, is not material here, when we understand that the contract related solely to work to be performed outside of the state. It follows, therefore, that the employment of the decedent was outside of the state of New York, and that he was not an employee or engaged in an employment within the state at the time of his death."

The New York act has no application in case of an injury to an employee in another state, where the contract of employment, although made in New York, was made prior to the enactment of the Compensation Act, and the hazardous business of the employer had been removed from the state prior to such enactment, and at the time of the injury no hazardous business to which the act applied was being conducted by the employer within the state. *Smith v. Heine Safety Boiler Co.* (1918) 224 N. Y. 9, 119 N. E. 878, Ann. Cas. 1918D, 316.

#### *c. Effect of miscellaneous provisions in statutes.*

Section 25 of the West Virginia act provides that the compensation commissioner is authorized to disburse the compensation funds to employees "who shall have received injuries in this state in the course of and resulting from their employment." The supreme court of West Virginia, however, has held that, considering the object and purposes of the statute and all the terms and provisions thereof, to hold that no compensation was recoverable where an employee was injured outside of the state would be to place too narrow a construction upon the statute. *Gooding v. Ott* (1916) 77 W. Va. 487, L.R.A.1916D, 637, 87 S. E. 862. In the case at bar, the employee was a miner, and was injured while working in a mine, the entrance to which was within the state, but the point at which he was injured was a

short distance beyond the state line. Certain amendments to the statute were held by the court to clearly show the intention of the legislature to have the act apply to injuries occurring outside of the state, notwithstanding the provision refers to the payment of funds out of the compensation fund.

And in *Anderson v. Miller Scrap Iron Co.* (1919) — Wis. —, 170 N. W. 275, it was contended that various provisions in the statute itself showed that it was the intention of the legislature to limit its application to injuries arising within the state. The Wisconsin act is an elective statute, and in case the employer does not elect to become bound by the terms of the provision relating to compensation, he is deprived of certain affirmative defenses available to him under the prior law, and the statute provides that these defenses shall be denied him "in any action to recover damages for personal injury sustained within this state." It was contended that this phrase "within the state" clearly limited the operation of the entire act to injuries arising within the state, but the court pointed out that, entirely aside from the statute, the state of Wisconsin could not prescribe liability of employers for purely tortious injuries to employees occurring outside of the state, because the liability in such cases is that prescribed by the law of the place where the injury occurred, and therefore the phrase in question is to be considered merely as declaratory of the existing general law, and not as a limitation upon the operation of the compensation features of the statute.

It was also contended that the provisions in the statute relating to minors "who were legally permitted to work under the laws of the state" indicated a restriction of the operation of the statute. But in reply to this contention, the court said that the legislature had no power to require safeguards or to authorize the employment of minors, or to regulate or supervise places of employment without the state, and so again, this provision could not be considered as limiting the application of the act, but as

relating solely to particular classes of injuries, and as conferring special powers upon the Industrial Commission.

The court further pointed out that the portion of the statute withdrawing the common-law defenses from the employer in actions for tortious injuries was distinct from that portion imposing the statutory obligation for compensation upon the employer, and that in the latter portion of the statute there was no language from which it may be inferred that its application was intended to be limited to injuries which occur within the state.

So, too, the Colorado supreme court in *INDUSTRIAL COMMISSION v. AETNA L. INS. CO.* (reported herewith) ante, 1336, held that the use of the words, "for a personal injury sustained within this state," in the section dealing only with negligence cases, and not with compensation, and denying the defenses of assumed risks, the fellow-servant rule, and contributory negligence, did not show the intention of the legislature to limit the compensation features of the statute to accidents occurring within the state only.

Again, in *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372, the court held that a provision in the act that each commissioner had jurisdiction of all claims arising in his district does not show an intention that the act should not apply to injuries arising in other states, since the claim may be said to arise at the domicile of the injured party. It was further held that a provision that awards and agreements as to compensation might be filed in the office of the clerk of the court within the county in which the injury occurred should not be given a mandatory construction so as to prevent applicability of the act to injuries arising out of the state. And so, too, a provision that an appeal from the Commission's award may be had to the "superior court of the county in which the injury was sustained" does not prevent the application of the act to injuries outside the state, since the injury may be said to have been

sustained in the place where the contract was made.

The contention was also made in *Pierce v. Bekins Van & Storage Co.* (1919) — Iowa, —, 172 N. W. 191, that the provisions of the statute that failure to give notice within a stated time should work a bar to recovery, and that on request the employee must submit himself to a medical examination within a reasonable time, indicated an intent to limit the scope of the statute to the state, because if the injury were suffered at a greater distance from the place of hiring in Iowa, the employee might be prevented from giving notice within the time required, and might be subjected to great hardship to submit to an examination at the place elected by the employer. The court pointed out, however, that this inconvenience was merely a matter of degree, and that it might be easier for the employee to give notice and submit himself to examination if the injury occurred across the state line, than if it occurred at a far distant point within the state; furthermore, the provision as to examination does not enter into the question at all, where both the injury and the death therefrom occurred in another state.

The Nebraska supreme court in *Pierce v. Bekins Van & Storage Co.* (Iowa) *supra*, also overruled contentions to the effect that to construe the act to apply to injuries outside the state would work class legislation, and that the limitation of the statute to injuries occurring within the state was shown by the provision making the statute inapplicable to interstate commerce, the provision relating to subrogation to rights of employees, the provision prohibiting the employer from relieving himself by contract or other device from liability under the statute, and the provision relating to safety devices to be installed by the employer.

*d. Doctrine that statutes do not have extraterritorial operation.*

On the other hand, a number of courts have held that the Compensation Statutes, both elective and compulsory, do not apply in case of in-

juries received while the employee was at work in another state. Various reasons have been ascribed by the courts for so limiting the application of the statutes.

Thus, in *Gould's Case* (1913) 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60, in holding that the Massachusetts act had no application to accidents occurring outside the state, the court said that, in the absence of unequivocal language to the contrary, it was not to be presumed that statutes respecting this matter are designed to control conduct or fix the rights of parties beyond the territorial limits of the state. The court further pointed out that there were several provisions of the statute which indicate solely intrastate operation. It was provided that the employee who had received an injury should submit himself, on request, to be examined by a physician or surgeon with authority to practise medicine under the laws of the commonwealth; the part of the act dealing with procedure dealt only with the boards and courts within the commonwealth; the hearings of the committee on arbitration were to be held in the city or town where an injury occurred; upon resort to the court, copies of the papers were to be presented "to the superior court for the county in which the injury occurred, or for the county of Suffolk," in which county the officers of the Industrial Accident Board were; employers were to make report of accidents within forty-eight hours. The Massachusetts employees' insurance association created by the act, with power to make and enforce reasonable rules and regulations for the prevention of injury on the premises of the subscribers, "and to this end its inspectors shall have free access to such premises during working hours," could have such power only within the state. The act disclosed no purpose to exempt from its operation nonresident employees of alien employers while working within the state, and if the Massachusetts act is to be interpreted as having extraterritorial force, similar effect must be accorded to like laws of other states. Agree-

ments made by employees to waive the provisions of the act are made invalid; and it was provided that no payment under the act shall be liable in any way for debts of the employee. The court also called attention to the fact that the act was copied largely from the English Workmen's Compensation Act, and that that act, although it has been generally held to be inoperative outside of the United Kingdom, in express terms applies to masters, seamen, and apprentices in the sea service under certain conditions, and definitely points out the manner of proving and enforcing claims for injury occurring therein with reference plainly to those outside the United Kingdom; and had the legislature intended to make the act apply extraterritorially, it should have so expressly provided.

The court further said that a number of foreign acts made careful and definite provisions for accidents occurring outside of their territory, and in a footnote the following list was given: 24 Annual Report of U. S. Com. of Labor, vol. 2 (1909); France: Acts of 1898, 1902, 1905, and 1906, p. 2501; Austria: Law of 1894, art. 2, pp. 2456, 2457; Belgium: Act of 1903, art. 26, p. 2464; Germany: Law of 1900 (a), art. 4, p. 2517 (see also German Ins. Code of 1911, art. 157, translated in Boyd, Workmen's Comp. p. 1252); Hungary: Act No. 19 of 1907, arts. 4, 5, and 6, p. 2569; Italy: Law of 1904, arts. 21 and 25, p. 2617; Luxemburg: Law of 1902, art. 3, pp. 2621, 2622; Netherlands: Law of 1901, art. 9, p. 2641.

So, too, the Michigan act does not apply to injuries occurring outside the borders of the state. *Keyes-Davis Co. v. Alderdyce*, Detroit Legal News, May 3d, 1913 (Mich.) 3 N. C. C. A. 639, note. The court based its decision upon two grounds: First, a general rule of statutory construction that every statute is confined in its operation to persons, property, and rights which are within the jurisdiction of the legislature which enacted it; second, the provision of pt. 3, § 8, of the act, which requires that the hearing to adjudicate disputed claims for

compensation "shall be held at the locality where the injury occurred."

So, too, in *Union Bridge & Constr. Co. v. Industrial Commission* (1919) 287 Ill. 396, P.U.R.1919D, 171, 122 N. E. 609, the Illinois supreme court held that the Illinois act did not have any application to injuries occurring without the state. The court held that such an application of the statute was negatived by the wording of the title to the effect that the act provided compensation for accidental injuries or death suffered in the course of the employment "within the state," by provisions for a personal inspection by the arbitrator or committee of arbitration of the premises relating to questions in dispute, and provision as to the place of hearing, and also the provision that either party may present a certified copy of the decision of the Commission "to the circuit court of the county in which the accident occurred, or either of the parties are residents."

This question was raised but not decided in an earlier Illinois case in which it was held that upon an application by an employee for judgment to enforce an award, under the provisions of the Illinois statute, the court has no jurisdiction to determine whether the statute applies to injuries outside the state, the statute providing for a review of the determination of this question either by a writ of certiorari or by a suit in chancery, to be instituted within twenty days after the award. *Friedman Mfg. Co. v. Industrial Commission* (1918) 284 Ill. 554, 120 N. E. 460.

The California supreme court has held that the compulsory Compensation Act of that state does not apply in case of injuries occurring outside the borders of the state; the liability of the employer to pay compensation arises from the law itself rather than from any agreement of the parties, so that the question whether it is to be given an extraterritorial effect is determined from the statute itself, and the intention to make the act operative as to occurrences outside of the state will not be declared to exist unless such intention is clearly expressed or

reasonably to be inferred from the language of the act, or from its purpose, subject-matter, or history. *North Alaska Salmon Co. v. Pillsbury* (1916) 174 Cal. 1, L.R.A.1917E, 642, 162 Pac. 93.

The California court said that the Connecticut, New Jersey, West Virginia, and New York decisions were distinguishable; the decisions in the first three states were under elective statutes and the liability to compensation was consequently based on a contract; while the New York statute, although compulsory, as was the California statute, was one providing for the payment of compensation out of an insurance fund, and the amount of premiums was based upon the pay roll and the number of men employed, without regard to the fact that from time to time some of them worked outside of the state.

This view of the California statute was reasserted in *Kruse v. Pillsbury* (1917) 174 Cal. 222, L.R.A.1917E, 645, 162 Pac. 891.

So, in *Hartman v. Toyo Kisen Kaisha S. S. Co.* (1917) 244 Fed. 567, the Federal court followed the supreme court of California in holding that the California Industrial Accident Commission has no jurisdiction to award compensation for injuries inflicted outside the territorial limits of the state. In this case it should be noted in addition that the injuries arose out of a maritime transaction, and consequently were not within the application of the California act. (A judgment for the plaintiff in this case upon the ground of defendant's negligence was reversed by the circuit court of appeals (1918) — C. C. A. —, 253 Fed. 422.)

Section 7 of the English act makes provision for awarding compensation for injuries to workmen in the sea service; except as it is expressly given in § 7, the act has no application outside the territorial limits of the United Kingdom. *Tomalin v. S. Pearson & Son* [1909] 2 K. B. (Eng.) 61, 78 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477, 2 B. W. C. C. 1 (English contractor not liable for compensation for death of workman engaged in working for him in the

island of Malta); *Schwartz v. India Rubber, Gutta Percha, & Teleg. Works Co.* [1912] 2 K. B. (Eng.) 299, W. N. 98, 28 Times L. R. 331, 81 L. J. K. B. N. S. 780, [1912] W. C. Rep. 190, 106 L. T. N. S. 706, 5 B. W. C. C. 390 (no compensation for death of workman lost in the Bay of Biscay while on his way to work at Teneriffe); *Hicks v. Maxton* (1907; County Ct.) 124 L. T. Jo. (Eng.) 135, 1 B. W. C. C. 150 (no compensation for injuries to charwoman taken from England by a Frenchwoman to do work for her in France, and injured while in that country); and see *Vincent v. La Cie de Chemin de Fer du Grand Fronc* (1914) Rap. Jud. Quebec 45 C. S. 353.

### III. *Conflict of laws.*

This annotation does not include cases merely passing upon the question whether the Federal Employers' Liability Act or a state compensation act applies, where the answer to the question depends wholly upon the fact whether, at the time of the injury, the employer and employee were both engaged in interstate commerce.

It is not proposed to enter the field of conflict of laws further than to show what have been the decisions in this branch of the law in cases involving the compensation statute. Any attempt to deduce general rules from these cases would be useless, since the general principles of conflict of law are well settled and are not in any way affected by the compensation statutes.

In a number of decisions the law of the state in which the injury occurred has been applied, although a different law prevailed in the state in which the action or proceeding was brought.

Thus, the Washington supreme court in *Reynolds v. Day* (1914) 79 Wash. 499, L.R.A.1916A, 432, 140 Pac. 681, 5 N. C. C. A. 814, held that the maintenance of a common-law action for damages in accordance with the law of the state in which the injury occurred is not precluded by a local compensation statute which abolished all civil actions for such an injury, and provided a system of industrial insurance.

So, in *Hamm v. Rockwood Sprinkler Co.* (1916) 88 N. J. L. 564, 97 Atl. 730, the maintenance in New Jersey of a common-law action in accordance with the law of the place where the contract was made and the injury occurred is precluded neither by the existence of the compensation statute in New Jersey, or by the facts that the workman was a resident of New Jersey and the defendant corporation was authorized to do business in that state.

So, too, the supreme court of Rhode Island has held that an action for damages cannot be maintained in accordance with the law of Rhode Island, where a compensation statute was in force and applicable in the state in which the contract of employment was made and the injury occurred. *Pendar v. H. & B. American Mach. Co.* (1913) 35 R. I. 321, L.R.A. 1916A, 428, 87 Atl. 1, 4 N. C. C. A. 600.

In *Albanese v. Stewart* (1912) 78 Misc. 581, 138 N. Y. Supp. 942, which was a common-law action by a servant against his master to recover for personal injuries sustained in the course of his employment in the state of New Jersey, the New York supreme court overruled a demurrer to the answer, which set up as defenses the provisions of the New Jersey Compensation Act. To the same general effect is *Wasilewski v. Warner Sugar Ref. Co.* (1914) 87 Misc. 156, 149 N. Y. Supp. 1035, holding that an employee, although a resident of New York, cannot bring an action in the New York courts based on the New Jersey Employers' Liability Act, where the contract of employment was made in New Jersey, and he was bound by the terms of the New Jersey Compensation Act.

But it has also been held that an elective statute accepted by the parties would preclude the maintenance of an action for damages, even in the state in which the injury occurred. Thus, in *Barnhart v. American Concrete Steel Co.* (1917) 181 App. Div. 881, 167 N. Y. Supp. 475, it was held that a judgment for personal injuries received within the state must be reversed where the decedent was a resident of New Jersey, the defendant was a New Jersey corporation, and the

contract of hiring was made in that state, since, under those circumstances, the New Jersey Compensation Law controls. There was a dissenting opinion by Blackmar, J., who took the position that the Constitution of the state provided that the right of action now existing to recover damages for injuries resulting in death shall never be abrogated; that the amendment to the Constitution of 1913, permitting the passage of a compensation act, restored the legislative competency over this class of actions in so far as they grew out of the relations of master and servant, but that the amendment did not confer on the legislature of New Jersey the power to abrogate this cause of action, which was protected by the Constitution.

A lower New York court has held that the Workmen's Compensation Act of Germany, to which both the employer and employee subscribe, is a bar to an action in New York state for injuries to the employee received while on the vessel of defendant as it was leaving quarantine to dock at New York city. *Schweitzer v. Hamburg American Line* (1912) 78 Misc. 448, 138 N. Y. Supp. 944. The court said: "A foreign law to which both employer and employee engaged in interstate and foreign commerce and transportation have subscribed, and upon the basis of which the contract of employment was made and entered into, where the cars or ships of the employer enter our state, and in or upon which, while within our borders, an accident occurs to the employee through his employer's negligence, particularly where the contract of employment provides for a fixed compensation in case of specified injury, to take the place of a right of action at law, and which is lawful both in the place where made and that in which the cause of action arose, should obtain recognition and enforcement here. To hold otherwise works not for benefit, but rather injury to our interstate and foreign commerce."

A citizen of the state of California, who was employed under a contract made in that state, and who made a settlement in that state for injuries

received in the state of Nevada, cannot subsequently bring proceedings under the Compensation Act of the latter state for the same injury. *Leach v. Mason Valley Mines Co.* (1916) 40 Nev. 143, 161 Pac. 513. The court said: "As appears from the record in this case, appellant was at all times a citizen of the state of California. At the time the contract and settlement were made, he was a resident and citizen of that state. Such settlement was in accordance with the laws of the state of California and was a complete bar to any action which might be instituted in that state to recover damages for such injuries. Such settlement in the state of his residence was a complete extinguishment of his chose in action. When he came to the state of Nevada, after such settlement, he brought nothing with him that could form the basis of an action, because he had finally settled his cause of action in the state of his residence."

It is a rule asserted by the courts of several jurisdictions that the local compensation act will be applied in case of injuries occurring within the state, although the contract of employment may have been made elsewhere.

Thus, the Wisconsin Compensation Act will apply in case of injuries occurring within that state, to the exclusion of a common-law action in Minnesota, in which state the contract was made. *Johnson v. Nelson* (1914) 128 Minn. 158, 150 N. W. 620.

So, although the contract of employment was made in New York, the New Jersey Compensation Act applies where the injury occurred in New Jersey, and the contract of employment contemplated the performance of the employee's duties partly in New York and partly in New Jersey, and there was nothing in the contract to show that the employer sought to be exempted from the New Jersey act, and he had given no notice under § 2 of the statute that he elected not to be bound by it. *American Radiator Co. v. Rogge* (1914) 86 N. J. L. 436, 92 Atl. 85, 7 C. C. A. 144, affirmed in (1915) 87 N. J. L. 314, 93 Atl. 1083,

error dismissed in (1917) 245 U. S. 630, 62 L. ed. 520, 38 Sup. Ct. Rep. 63, for want of jurisdiction, and followed in *Davidheiser v. Hay Foundry & Iron Works* (1915) 87 N. J. L. 688, 94 Atl. 309, and in *West Jersey Trust Co. v. Philadelphia & R. R. Co.* (1915) 88 N. J. L. 102, 95 Atl. 753, reversed in (1917) 90 N. J. L. 730, 101 Atl. 1055, because injury was received in course of interstate commerce.

An employee is within the protection of the New York act, where he was injured in that state and had been in business there for some time, although his employers were located in another state, in which the contract of employment had been made. *Royal Indemnity Co. v. Platte & W. Ref. Co.* (1917) 98 Misc. 631, 163 N. Y. Supp. 197.

So, the Connecticut act is applicable in case of injuries occurring within the state, although both parties lived in Massachusetts and the contract of employment was made in that state, where both parties had accepted the provisions of the Connecticut act, and the Massachusetts act had been construed to possess no extraterritorial effect. *Douthwright v. Champlin* (1917) 91 Conn. 524, 100 Atl. 97, Ann. Cas. 1917E, 512, 15 N. C. C. A. 870. The court said: "The express acceptance of our act by these parties added its compensation features to their contract. In the absence of their refusal, the law would have added this to their contract; in either case it would have become a part of the contract. If the Massachusetts act had by her court been construed to have an extraterritorial effect, we should have endeavored, in an action for an injury suffered here by an employee who contracted in Massachusetts, to have given effect to the act as broadly as her own courts would have done. We should have treated the contract as subject to the law of the place where it was made just as we would if the claim had been for a breach of any of its provisions."

So, too, the Connecticut act has been held applicable to injuries received within the state, although the employer was a resident of Massachusetts and



the original contract of employment was made in New York, where the employee went to Connecticut under what was substantially a new contract, and was given the option to go or to refuse to go. *Banks v. Albert D. Howlett Co.* (1918) 92 Conn. 368, 102 Atl. 822. The court said: "The rule thus invoked (although perhaps limited in its practical application), to wit, that a Connecticut employment which is the specific and sole subject of the contract of employment, whenever made, comes within the operation of the Connecticut law governing the payment of compensation in cases of personal injury arising therefrom, appears to be one better calculated than any other to make for uniformity of treatment both as between those engaged upon a given work and as between persons employed in Connecticut work generally, for simplicity and convenience in remedial proceedings and for the preservation to Connecticut citizens of the benefits which it has seen fit to prescribe for the protection of Connecticut workmen."

A New York court has said that the provisions of the New Jersey statute apply only when the contract of hiring was made in that state. *Pensabene v. F. & J. Auditore Co.* (1913) 155 App. Div. 368, 140 N. Y. Supp. 266. The court held that a complaint in an action under the New Jersey statute, which fails to set up a hiring made in that state, will be dismissed on demurrer.

In a few cases the question has arisen whether or not the compensation act of one state will be enforced by the courts of another state.

There have been several decisions by lower New York courts that they do not have jurisdiction to enforce proceedings under the New Jersey act, since that act specifically provides the court in which the proceeding must be brought.

Thus, as the New Jersey act provides the forum for the settlement of disputes between the parties, namely, the court of common pleas of that state, the New York courts will not assume jurisdiction of a case arising under that statute. *McCarthy v. Mc-*

*Allister S. B. Co.* (1916) 94 Misc. 692, 158 N. Y. Supp. 563.

The supreme court of New York state does not have jurisdiction of a proceeding under § 18 of the New Jersey act, which provides that in case of a dispute or failure to agree upon a claim for compensation between the employer and employee, either party may submit the claim to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, merely because the complaint alleges that personal service cannot be obtained upon the defendant, which is a corporation and has removed its place of business to the state of New York, in which state it was incorporated. *Lehmann v. Ramo Films* (1915) 92 Misc. 418, 155 N. Y. Supp. 1032.

Although there is no objection to the maintenance of an action in the courts of New York, based upon a foreign statute not contravening any public policy of New York, the New Jersey Compensation Act cannot be enforced by New York courts, since it, by its own terms, has provided an administrative remedy by prescribed procedure in New Jersey courts as a substitute for any cause of action that there might otherwise be. *Verdicchio v. McNab & H. Mfg. Co.* (1917) 178 App. Div. 48, 164 N. Y. Supp. 290.

But it has been said that the relation of employer and employee under the West Virginia act, being voluntary and noncompulsory, is contractual, the statute becoming an integral part of the contract, limiting the rights and liabilities of employer and employee, binding upon the parties, and enforceable in other jurisdictions, unless opposed to the public policy thereof, as all other foreign contracts are enforceable therein. *Gooding v. Ott* (1916) 77 W. Va. 487, L.R.A.1916D, 637, 87 S. E. 862.

And in *Douthwright v. Champlin* (1917) 91 Conn. 524, 100 Atl. 97, the court said that the only actions to secure compensation under a foreign statute which they could not enforce were those "where right and remedy are so united that the right cannot be

enforced except in the manner and before the tribunal designated in the act."

In *Bozo v. Central Coal & Coke Co.* (1919) — *Utah*, —, 180 Pac. 432, the Utah supreme court said that a cause of action arising in Wyoming, under the Wyoming statute, is permitted to be instituted in the courts of Utah merely by reason of the comity existing between the several states.

In *Anderson v. Miller Scrap Iron*

*Co.* (1919) — *Wis.* —, 170 N. W. 275, the court said: "We do not consider in this case, because it is neither argued nor necessary to the decision, whether the Workmen's Compensation Law of this state should be enforced by the courts of Michigan, under the facts and circumstances in this case. Neither do we consider whether or not, were the facts and circumstances reversed, we should enforce a like law of a sister state." W. M. G.

## MAGNOLIA BANK, Appt.,

v.

## BOARD OF SUPERVISORS OF PIKE COUNTY.

*Mississippi Supreme Court (In Banc)—October 23, 1916.*

(111 Miss. 857, 72 So. 697.)

### Tax — banking capital — discrimination against.

1. No unconstitutional violation of the provision for equal and uniform taxation, or of due process of law, or the equal protection of the laws is effected by taxing the capital of a bank at full value while other property is assessed at only a percentage of its value, where the Constitution expressly authorizes the taxing of banking capital according to the value thereof, and requires the valuation of corporate property at its true value.

[See note on this question beginning on page 1370.]

### — effect of Federal Constitution.

2. Each state has the sovereign right to classify property for taxation, and, so long as property of the same class bears the same rate, there is no viola-

tion of the provisions of the Federal Constitution guaranteeing due process of law and equal protection of the laws.

[See 6 R. C. L. 426, 427.]

APPEAL by petitioner from a judgment of the Circuit Court for Pike County sustaining a demurrer to and dismissing a petition filed for the reduction of an assessment against it for taxation. *Affirmed.*

Statement by Stevens, J.:

Appellant presented its petition to the board of supervisors of Pike county, objecting to the assessment against it for taxation for the year 1915, and praying that its assessment be reduced from \$76,000 to \$43,636.66. The petition, in substance, avers that the capital stock of appellant, in the sum of \$55,000, is assessed at par, and that this valuation is augmented or increased by the surplus and undivided profits, less real estate, in the amount of \$21,000, making a total valuation of

its capital stock, surplus, and undivided profits, \$76,000, from which is deducted real estate valued at \$10,545; that this assessment is excessive, and, if approved, will force appellant to pay taxes at a rate in excess of taxes paid by other "moneyed capital in the hands of individual citizens in the county of Pike, where said bank is located;" that the tax assessor of Pike county, in making the assessment, did "systematically and intentionally" assess the property of appellant at full market or par value of the shares,

augmented by surplus and undivided profits, while assessing other property for taxes in said county at 66 cents on the dollar; that this method of assessing appellant at full value, and other taxable property at 66 cents on the dollar, is in violation of § 181 of the Constitution of Mississippi, and also is in violation of the 14th Amendment of the Federal Constitution, in that it denies objector the equal protection of the law. The prayer of the petition is that the assessment of appellant's bank should be reduced to conform to other valuations placed upon real and personal property in Pike county. The board of supervisors overruled the objections and denied the relief sought; and appeal was prosecuted from the order of the board to the circuit court, in accordance with the provisions of § 81 of the Code. On the trial of the case anew in the circuit court, demurrer was interposed to the petition and sustained by the court. From the order sustaining the demurrer to and dismissing the petition, appellant has appealed to this court; and, in the presentation of the case, counsel for appellant invokes § 112 of our Constitution, as well as § 181 thereof, and the 14th Amendment of the Constitution of the United States. It is the contention of appellant that the method adopted by the taxing authorities of Pike county, as set forth in the petition, violates the equality and uniformity clause of our state Constitution, and denies appellant due process of law, in violation of the Federal Constitution.

Messrs. Mayes & Mayes, Moody & Williams, and L. Brame for appellant.

Mr. George H. Ethridge, Assistant Attorney General, for appellee.

Stevens, J., delivered the opinion of the court:

It is conceded by appellant that the shares of its capital stock, augmented by surplus and undivided profits, are worth the amount at which the stock is assessed. It may be here observed, also, that the petition makes no complaint at the valuation of the bank's real estate,

and no relief is sought against the assessment of its realty. The contention, briefly stated, is simply this: Appellant admits that its capital stock, surplus, and undivided profits are worth \$76,000. This is the true value, and the value upon which the Constitution and statutes of our state contemplate taxes shall be paid. The bank, while conceding that it is under the primary obligation to pay taxes upon this valuation, yet seeks a reduction of 34 per cent, because it says that real estate and taxable personal property owned by individual citizens of the county of Pike are being systematically assessed at 66 cents on the dollar, or, in other words, individual citizens, by and with the consent of the board, are paying on assessments much lower than the law requires and the government exacts. Does the petition of the bank, then, state a legal cause for complaint? Section 181 of our Constitution provides: "The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate."

Section 112 of our Constitution provides: "The legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property. . . . But all such property shall be assessed at its true value," etc.

By these express provisions of the Constitution the legislature is authorized to place banks and banking capital in a class to themselves, and to adopt a method of assessment which the framers of our organic law thought equitable and just. In pursuance of this constitutional authority the legislature has enacted § 4273, Code 1906, requiring the president, cashier, or other officer to

make out and deliver to the assessor a written statement under oath of the number and amount of all shares of the capital stock paid in; the amount of undivided profits, surplus, or accumulations of any sort, exclusive of real estate; the value of each share, estimated at par and increased by the surplus or accumulations; and stipulating that banks shall be assessed in conformity with the plan suggested and the authority expressly conferred by § 181 of the Constitution. We assume that appellant, in accordance with the statute, executed the written statement provided for, and upon this statement the assessor placed upon the assessment roll of Pike county a perfectly lawful assessment of appellant's bank.

Counsel frankly admit that, if the relief prayed for in this case is granted, appellant will not pay in accordance with the literal provisions of § 181 of the Constitution, but contend that § 112, providing that "taxation shall be uniform and equal throughout the state," and that "property shall be assessed for taxes under general laws, and by uniform rules, according to its true value," and the further provisions of § 181 that "the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals," justify and demand the relief sought. Some of the authorities cited by counsel from other states apparently justify their contention, but each case is largely controlled by the specific language of the Constitution of the state under which the case arises. The rights of appellant in the present case are, of course, measured and controlled by our own Constitution, and, looking to the express provisions of both §§ 112 and 181, the legislature is authorized to provide a special mode of assessment of banks and banking capital; and when appellant has been assessed in accordance with this method it has no complaint to regis-

ter. There is no intimation of any discrimination as between banks or banking capital. All banks in Mississippi are assessed exactly alike, and all pay the same rate of taxation. They all do business in accordance with and are protected by the laws of our state. The method adopted for their assessment, as compared with the method of assessing individuals, is highly favorable to the banks. This provision, so favorable to banks, has already been alluded to by our court in *Bank of Oxford v. Oxford*, 70 Miss. 504, 12 So. 203, where Campbell, Ch. J., calls attention to the fact that the solvent credits of an individual are taxable assets, but that the assets of a bank invested in securities of various kinds are not taxable, and further observes: "Why this is so is not for judicial inquiry; but so the law is written, and has been in this state for about half a century, and it has been embodied in the Constitution of 1890, permissively, but suggestively to the legislature. § 181."

Although the individual money lender may be operating upon borrowed capital, he yet must pay on all money on deposit, loaned, or invested in solvent credits. Banks invest not only their capital stock, but money placed with them on deposit, whether subject to check immediately or placed on time certificates. There can be no contention, therefore, that banks, as a class, are discriminated against by the revenue laws of our state. The bold request is here made to give them a discount not authorized by the law, simply because the other taxpayers of Pike county are not measuring up to the requirements of the law. This, in our judgment, is not a sufficient ground for complaint. There are no positive averments of fraud in the petition, and we are not called upon to vitiate or condemn the entire assessment on the ground of fraud. We are not called upon to declare a statute invalid as being in violation of the Constitution. The assessment here in question is in

strict accord with the Constitution, and to grant the relief prayed for would, in a sense, defeat, rather than accomplish, the provisions of § 181. We are mindful of the fact that our statutes apparently do not provide a specific method whereby one taxpayer can object to the assessment against another taxpayer, at least, to the extent of granting in such case an appeal from the order of the board of supervisors to the circuit court. It yet remains that it is the duty of each person, in fixing the value of his property, to estimate the same at its cash value, and the board is under the duty to increase or diminish the valuation as it may deem just and proper, and it is also the duty of the board to report any taxpayer who wilfully undervalues his property, to the grand jury of the next circuit court of the county, in accordance with the provisions of § 4268 of the present Code. The maladministration of the law by members of the board of supervisors in one of the eighty counties of our state should not have the far-reaching and destructive effect contended for in this case.

Counsel for appellant rely upon the case, among others, of *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903, but this very case well observes that "while it may be true that this system of submitting the different kinds of property subject to taxation to different boards of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them."

If the board of supervisors systematically assesses taxable property at much less than its true value, and appellant is accorded the right to have its assessment reduced to this unlawful minimum, then why should not all the banking establishments in all the other seventy-nine counties of the state have the con-

stitutional right to a reduction of their assessment to conform to the assessment accorded appellant? If this method were pursued to its last analysis, we would have the ridiculous spectacle of the board of supervisors in one county forcing an arbitrary reduction of all the taxable property of the state far below that which the Constitution and laws demand.

But, it is contended that this court, in *Adams v. Mississippi State Bank*, 75 Miss. 701, 23 So. 395, and *Adams v. Bank of Oxford*, 78 Miss. 533, 29 So. 402, made a distinction between the provisions of § 112 of our present Constitution and the like provisions in the Constitution of 1869. We think the two cases last mentioned are materially different from the case at bar. In the first of these cases, the primary question at issue was the constitutionality of chapter 29, Acts 1894, declaring that no city or town shall impose or collect a greater tax on banks or solvent credits than the state tax for the same year. The court held this statute obnoxious to the equality and uniformity clause of our Constitution. The weakness of this statute was the effort to impose a smaller municipal tax on banks and solvent credits than other taxable property was required to pay. In *Adams v. Bank of Oxford*, supra, the constitutionality of an act of the legislature of 1890, prohibiting cities and towns from levying on banks or solvent credits a tax greater than 75 per centum of the state tax, was asked to be held in violation of the Constitution of 1869, following the first decision, *Adams v. Mississippi State Bank*, supra. The court declined to disturb its prior decisions, or to give the views expressed in the first case a retroactive effect. It must be observed that each of these statutes attempted to apply a different rate of municipal taxation on banks and solvent credits than that which was being applied generally upon all other taxable property within the

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confines of municipalities. That is not the case now before us.

The case of *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, is cited with much confidence as authority for appellant. The case was decided by the circuit court of appeals, then composed of Judges Taft, Lurton, and Severens; and the opinion of these eminent jurists is, of course, high authority. That case, however, arose under the Constitution of Tennessee (Const. art. 2, § 28), which has the express provision that "all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value."

The action in that case was against the board of equalization of Tennessee, and the showing was made that the railroad property of the state was assessed at its real value, while all other taxable property of the state was being systematically assessed at not exceeding 75 per cent of its true value. In other words, this suit involved state-wide action by the board of equalization, and even then the opinion of the court admitted that "the court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution."

The Tennessee Constitution did not place railroads in a class to themselves, but forbids discrimination as between species of property. The dilemma that confronted the court in that case would be insignificant compared with the dilemma into which all the revenue laws of our state would be plunged should

we grant the relief asked for in the instant case. Our state tax is uniform throughout the confines of our commonwealth, and the ultimate amount of the tax to be paid by a particular bank or individual will, of course, depend upon the assessment. If Pike county unlawfully and arbitrarily establishes a low-value assessment on certain species of property, and appellant, as a resident bank, is thereby accorded the right to cut its assessment to the unlawful minimum, then all the other banks in Mississippi should, in equity, be accorded the same right; and such a holding would result in putting it within the power of the board of supervisors of one county to establish an arbitrary minimum and unlawful standard of values or criterion by which all the other counties must be governed. Furthermore, if this equitable view of our Constitution should be strictly applied, why should not the bank in this case have a right to complain that much valuable property has escaped taxation altogether? As a matter of fact there are many successful "tax dodgers" in our state, who ought to be bearing their part of the burdens of taxation. After all, we must get back to the admitted fact that the law itself does not authorize unequal taxation, and that in the enforcement of the revenue laws exact equality cannot, in all cases, be attained.

There is no merit in the contention that a denial of the relief sought would in any wise violate the 14th Amendment of the Federal Constitution, guaranteeing due process of law and equal protection of the laws. Each state has the sovereign right to classify property for purposes of assessment and taxation, and so long as property of the same class bears the same rate, or, to <sup>—effect of</sup> state differently, so <sup>Federal</sup> long as there is no <sup>Constitution.</sup> discrimination between property of the same class, there is no violation of these provisions of our Federal Constitution. *Michigan C. R. Co. v.*

Powers, 201 U. S. 300, 50 L. ed. 764, 26 Sup. Ct. Rep. 459, and authorities there mentioned.

By paying the full tax for which appellant is assessed in this case, it will pay only what the supreme law of the land has exacted. It will

simply be rendering "unto Cæsar the things that are Cæsar's."  
Affirmed.

Appeal dismissed by the Supreme Court of the United States, January 7, 1919, 248 U. S. 546, 63 L. ed. —, 39 Sup. Ct. Rep. 135.

### ANNOTATION.

**Assessment of corporate property at full value according to law when valuations generally are illegally fixed lower.**

- I. In general, 1370.
- II. In equity courts, 1371.
- III. On appeal from assessment, 1375.
- IV. As a Federal question, 1377.

#### *I. In general.*

This note does not include cases turning upon the constitutionality of statutes attempting to discriminate against corporate property in assessments. That class of cases involves the power of the legislature to classify property for the purposes of taxation. The note deals exhaustively only with cases in which it appears that there are two perfectly consistent provisions, either constitutional or statutory, the one providing for uniformity of taxation, and the other requiring that all property shall be assessed at its full value. Where either or both provisions are lacking, a case is not good authority upon the question here discussed. Provisions requiring taxation of all property at full value were, undoubtedly, adopted or enacted for the purpose of breaking up, or at least changing, what was once an almost universal custom—the custom of assessing all property at a fixed percentage of what the assessing officials judged to be its full value. Taxing officials have, in numerous instances, persisted in following the custom, even after the adoption of a provision, or the enactment of a statute, requiring full-value assessments of all property. In some instances, they have followed the old custom, in spite of the provision, in assessing property generally, but have assessed some species of corporate property at its full value. This is an obvious violation of the principle of uniformity in taxation;

but, when the injured party has appealed to the courts or asked the interference of equity, the provision requiring full-value assessment has been invoked. The court is thus placed "in a dilemma" spoken of in *Taylor v. Louisville & N. R. Co.* (1898) 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, *infra*, and quoted by the court in the reported case (*MAGNOLIA BANK v. PIKE COUNTY*, ante, 1365). The "escape" from this dilemma is the dominant theme of the note.

The court has, in practically all of the cases in which the issue was squarely presented, escaped from the dilemma in the same way that it escaped in the *Taylor Case*, "by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution." In other words, they have given relief to the injured party, in some form, according to the nature of the proceeding and the power of the court therein. But it should be noted here that it requires a high standard of proof of a clean-cut, narrow issue to place the court in the dilemma. In several cases cited herein, the principle here stated is fully approved, but the relief denied, for the reason that proof was lacking. This is not surprising in view of the fact that a general custom of undervaluation must be proved, or, as some courts say, the undervaluations must be shown to be systematic and intentional. This must be the rule, since courts will not interfere if the assessing officers have attempted to assess all property at full

value, no matter how much or how general the undervaluations. Interference under such circumstances would be merely disturbing assessments for errors of judgment. And the burden of showing a systematic, intentional undervaluation of other classes or species of property is, of course, upon the complainant.

The court in the reported case (*MAGNOLIA BANK v. PIKE COUNTY*) distinguishes that case from the *Taylor Case* by the fact that in the latter there was a clause in the state Constitution, prohibiting discrimination between different species of property. Such argument would seem to be more appropriate to legislative classifications of property for taxing purposes. The argument that the valuations of bank stock for the whole state would be disturbed, if the court should interfere, by valuations in one county, would, however, appear to be a sound basis for the refusal of relief.

In many cases it has been either directly or indirectly held that, under a provision requiring uniformity of taxation, a corporation whose property has been assessed at its full value, according to a provision requiring full-value assessment of all property, is entitled to relief in some form, upon proof by it that other property has been intentionally and systematically assessed at less than 100 per cent of its full value:

**United States.**—*Pelton v. Commercial Nat. Bank* (1880) 101 U. S. 144, 25 L. ed. 901; *Cummings v. Merchants' Nat. Bank* (1880) 101 U. S. 153, 25 L. ed. 903; *New York v. Barker* (1900) 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121 (see also *Rose's Notes* to these cases); *Railroad & Teleph. Cos. v. Board of Equalizers* (1897) 85 Fed. 302; *Nashville, C. & St. L. R. Co. v. Taylor* (1898) 86 Fed. 168, appeal dismissed in (1899) 44 L. ed. (U. S.) 1219, 20 Sup. Ct. Rep. 1022; *Taylor v. Louisville & N. R. Co.* (1898) 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Southern R. Co. v. North Carolina Corp. Commission* (1900) 104 Fed. 700; *Louisville & N. R. Co. v. Coulter* (1903) 131 Fed. 282, reversed in (1905) 196 U. S. 599, 49 L. ed. 615,

25 Sup. Ct. Rep. 342; *Michigan R. Tax Cases* (1905) 138 Fed. 223, affirmed in (1906) 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

**Arkansas.**—*Ex parte Ft. Smith & V. B. Bridge Co.* (1896) 62 Ark. 461, 36 S. W. 1060.

**Illinois.**—*Bureau County v. Chicago, B. & Q. R. Co.* (1867) 44 Ill. 229; *Chicago & N. W. R. Co. v. Boone County* (1867) 44 Ill. 240.

**Michigan.**—*Newport Min. Co. v. Ironwood* (1915) 185 Mich. 668, 152 N. W. 1088.

**Missouri.**—*State ex rel. Gottlieb v. Western U. Teleg. Co.* (1901) 165 Mo. 502, 65 S. W. 775, affirmed in (1903) 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730.

**New York.**—*People ex rel. New York C. & H. R. R. Co. v. Woodbury* (1910) 74 Misc. 130, 133 N. Y. Supp. 135, order affirmed in (1911) 145 App. Div. 900, 129 N. Y. Supp. 1141; *People ex rel. New York, O. & W. R. Co. v. Shaw* (1911) 143 App. Div. 811, 128 N. Y. Supp. 177, affirmed in (1911) 202 N. Y. 556, 95 N. E. 1137.

**Pennsylvania.**—*Shamokin, S. & L. R. Co.* (1900) 3 Dauphin Co. Rep. 168; *Com. v. Lake Shore & M. S. R. Co.* (1900) 3 Dauphin Co. Rep. 172; *Com. v. Jamestown & F. R. Co.* (1900) 3 Dauphin Co. Rep. 214; *Com. v. Mammoth Vein Coal & I. Co.* (1900) 3 Dauphin Co. Rep. 220; but see quotation from 188 Pa. 169, *infra*, III., in connection with these cases.

**Utah.**—*First Nat. Bank v. Christensen* (1911) 39 Utah, 568, 118 Pac. 778.

The following cases appear to be opposed to this general principle, but the question of uniformity of taxation does not appear to have been considered: *Paducah Street R. Co. v. McCracken County* (1899) 105 Ky. 472, 49 S. W. 178; *Louisville R. Co. v. Com.* (1899) 105 Ky. 710, 49 S. W. 486; *Lowell v. Middlesex County* (1890) 152 Mass. 375, 9 L.R.A. 356, 25 N. E. 469.

## II. In equity courts.

Where the assessing officers or boards of equalization adopt the policy of assessing property, generally, at a certain per cent of its actual value, in the face of a statute or constitutional



provision requiring the assessment of all property at its full value, and at the same time apply to some species of corporate property the rule or policy of assessing it at its full value, equity will grant relief to the owners of the corporate property on the ground that maladministration is resulting in injustice and in an infringement of the constitutional provision that taxation must be uniform. *Taylor v. Louisville & N. R. Co.* (1898) 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Southern R. Co. v. North Carolina Corp. Commission* (1900) 104 Fed. 700; *State ex rel. Gottlieb v. Western U. Teleg. Co.* (1901) 165 Mo. 502, 65 S. W. 775, affirmed in (1903) 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730 (relief refused on other grounds; see same case, *infra*); *First Nat. Bank v. Christensen* (1911) 39 Utah, 568, 118 Pac. 778 (relief denied for failure of evidence).

In *State ex rel. Gottlieb v. Western U. Teleg. Co.* (1901) 165 Mo. 502, 65 S. W. 775, affirmed in (1903) 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730, *supra*, the court, while holding that the decision must be against the corporation, since the action was at law, and only an equity proceeding could avail the corporation, also held that the evidence of systematic undervaluation of other property was not sufficient, even though the proceeding had been a proper one in equity. Although relief was denied, the decision quite strongly supports the general rule above stated. The court said: "The defendant contends that it has been discriminated against, contrary to the provisions of § 4 of article 10 of the Constitution of Missouri, and of the 14th Amendment to the Constitution of the United States, in this: that the Constitution of Missouri relied on provided that 'all property subject to taxation shall be taxed in proportion to its value,' and the 14th Amendment to the Constitution of the United States prohibits any state to deny any person in its jurisdiction the equal protection of the laws, and that the state board of equalization has assessed defendant's property at its full value, while the local assess-

sors throughout the state have only assessed the property of other persons at from 35 to 40 per cent of its value. In support of its contention the defendant cites a great number of cases, among them *Cummings v. Merchants' Nat. Bank* (1880) 101 U. S. 153, 25 L. ed. 903; *Nashville, C. & St. L. R. Co. v. Taylor* (1898) 86 Fed. 168, appeal dismissed in (1899) 44 L. ed. (U. S.) 1219, 20 Sup. Ct. Rep. 1022; *German Nat. Bank v. Kimball* (1881) 103 U. S. 732, 26 L. ed. 469; *Pelton v. Commercial Nat. Bank* (1880) 101 U. S. 143, 25 L. ed. 901; *Balfour v. Portland* (1886) 28 Fed. 738; *Cincinnati Southern R. Co. v. Guenther* (1884) 19 Fed. 395; *Chicago, B. & Q. R. Co. v. Republic County* (1895) 14 C. C. A. 456, 32 U. S. App. 224, 67 Fed. 411; *Chicago, B. & Q. R. Co. v. Atchison County* (1895) 54 Kan. 781, 39 Pac. 1039; *Stanley v. Albany County* (1887) 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234. The principle here contended for is tersely expressed by Mr. Justice Miller in the case of *German Nat. Bank v. Kimball* (1881) 103 U. S. 732, 26 L. ed. 469, as follows: 'It is held in these opinions that when the inequality of valuation is the result of a statute of the state, designed to discriminate injuriously against any class of persons or any species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together, and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on numerous instances of partial and unequal valuations, which establish no rule on the subject.' The defendant has not brought itself within the rule announced in those cases, for it has shown no combination among assessors, and no course of conduct among them to discriminate against the de-

fendant or other telegraph companies and other property owned by citizens generally. It has only shown by the testimony of one member of the state board of equalization that, in his judgment, the valuation put upon property, generally, is only 35 or 40 per cent of its true value. The law contemplates that for purposes of taxation property shall be assessed at its true value in money (Rev. Stat. 1899, § 9180); and it also presumes that all officers do their duty (*Agan v. Shannon* (1890) 103 Mo. 661, 15 S. W. 757; *State ex rel. Gracy v. Bank of Neosho* (1894) 120 Mo. 161, 25 S. W. 372; *Mathias v. O'Neill* (1887) 94 Mo. 520, 6 S. W. 253). The evidence adduced is not sufficient to overthrow this presumption, nor to establish a combination or unlawful course of conduct. It is only enough to show what the witness believed to be the value of the property, but not enough to convict the local assessors of intentional or systematic violation of duty."

In *Railroad & Teleph. Cos. v. Board of Equalizers* (1897) 85 Fed. 302, *supra*, the holding that equity will interfere on the ground that the assessment violates both the uniform tax clause of the state Constitution and the equal protection clause of the United States Constitution is based upon the finding that there is no provision that property must be assessed at its full value; nevertheless, Judge Clark, in arguing the point, says: "Conceding, for the purpose of testing the soundness of this proposition, that the constitutional term, 'according to its value,' means the same thing as 'at its full value,' the contention of the state then, stated with reference to its effect, is this: That it may assess the property of A at its full value, in obedience to the Constitution, and the property of D at one half of its value, in violation of the Constitution, and, when A complains that the result has been to violate the Constitution in respect to the equality provision, the answer is that the objection is not open to A, because he is taxed on no more than the full value of his own property, and that he must pay 50 per cent more on the same actual value than D. Now, it will cer-

tainly be admitted that the simple statement of such a proposition suggests its utter untenableness. If decisions may be found which apparently uphold a result such as this, they promulgate a doctrine which cannot be accepted as 'good law.' Another decision by the same judge (*Nashville, C. & St. L. R. Co. v. Taylor* (1898) 86 Fed. 168, appeal dismissed in (1899) 44 L. ed. (U. S.) 1219, 20 Sup. Ct. Rep. 1022) proceeds upon a similar basis, and the holdings are very materially strengthened by the decision in *Taylor v. Louisville & N. R. Co.* (1898) 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, where the same conclusion is reached, the assessment having been made in the face of a statute requiring all property to be assessed at its full value. It should be noted here that the court, in the reported case (*MAGNOLIA BANK v. PIKE COUNTY*, ante, 1365), distinguishes these cases on the facts from the one it was deciding, because of a different wording in the state Constitution, which, in the Federal cases, practically prohibits even a legislative classification of property such as would permit the assessment discussed.

In *Southern R. Co. v. North Carolina Corp. Commission* (1900) 104 Fed. 700, *supra*, the court, in giving instruction to the standing master, adopted this same view of the matter, when it said: "The Constitution of the state of North Carolina, and the acts of assembly passed under the authority thereof, require all real and personal property in the state to be assessed for taxation at its actual value in money. The Corporation Commission, which is intrusted with the assessment of railroad property for taxation, assessed the property of the several complainants at a certain sum each. The complainants thereupon come into this court, alleging that the method adopted with regard to them differs materially from the method adopted with regard to all other real and personal property in the state, so that they are exposed to unjust discrimination. On that allegation they ask an injunction. On the truth of that allegation depends the action of this court. It can-

not assess the value of property, nor perform any of the functions of the assessor. It cannot pass upon the assessment, and say whether or not it be excessive, whether it be illegal, irregularly imposed, or unjust. *State R. Tax Cases* (1876) 92 U. S. 575, 23 L. ed. 669. There must be some ground for the interference of a court of equity. And its interference cannot go to the reassessment of the property, but to the removal of the unlawful action. In the present case we must assume that the Commission did its duty and fulfilled the constitutional and statutory requirement in assessing the railroad property. The amount of the assessment this court cannot question. The sole question is, Does there exist in North Carolina a rule or practice universal enough to presume the existence of a rule whereby all real and personal property other than railroad property is assessed below its value for taxation? The burden of showing this is on complainants. Until this burden is removed, the inquiry must be directed to it. If it be removed, then it may possibly be competent for the defendants to show that, if such a rule or practice does exist, it is applied also to the railroad companies, and as to them there is no discrimination. The standing master will conduct the examination in accordance with these rulings."

And in *Michigan R. Tax Cases* (1905) 138 Fed. 223, affirmed in (1906) 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459, the suit was dismissed on complainant's failure "to show a fraudulent, intentional, systematic undervaluation of property," assessed under a statute other than the one under which complainant's railroad properties were assessed. The court explained that the undervaluation required to justify interference must be systematic and intentional to that extent that, in effect, amounts to fraud. The case of *Louisville & N. R. Co. v. Coulter* (1903) 131 Fed. 282, directly supports the proposition stated supra; but the case was reversed in (1905) 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342, on the ground

that a case of habitual and systematic undervaluation was not proved by the evidence.

And in *First Nat. Bank v. Christensen* (1911) 39 Utah, 568, 118 Pac. 778, the court, while holding the evidence insufficient to show that the assessed value of plaintiff's property—national bank stock—was proportionally higher than the assessed value of other bank stock and other "moneyed capital," within the meaning of the statute providing for uniformity and equality of tax rates and valuations, said: "Though the Constitution and the statute require the taxing officers to assess all taxable property at 'its full cash value,' yet, should taxing officers of a county assess real estate, live stock, merchandise, and chattels at 50 to 70 per cent of their actual or cash value, and moneys or shares of stock in manufacturing or industrial enterprises or investments, at their actual or cash value, the assessment would not be equal or uniform. In such case, those whose property was intentionally assessed at a higher percentage or valuation than was placed on the general mass of taxable property in the county may invoke the aid of courts to compel the taxing officers to reduce the excessive assessment so made, to the same proportion of value as was placed upon the general mass of other taxable property in the county. A denial of such right results in inequality and a want of uniformity in the assessment and taxation. *Lively v. Missouri, K. & T. R. Co.* (1909) 102 Tex. 545, 120 S. W. 852; *Raymond v. Chicago Union Traction Co.* (1907) 207 U. S. 20, 52 L. ed. 78, 38 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; *Taylor v. Louisville & N. R. Co.* (1898) 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 364; 37 Cyc. 737. If, therefore, plaintiff's shares of stock were assessed at a value greater in proportion to that placed upon the general mass of taxable property in the county, it is entitled to have that value reduced to the proportion placed on such mass of taxable property. But on the evidence adduced we cannot say such was the case."

*III. On appeal from assessment.*

Courts will, on an appeal from the assessment, grant relief to a corporation whose real property has been assessed at its full value, upon proof that all the real estate in the county has been systematically assessed at a percentage of its full value, by reducing the assessment to such per cent of its full value as will make the assessments uniform, even though a statute requires that all property be assessed at its full value. *Ex parte Ft. Smith & V. B. Bridge Co.* (1896) 62 Ark. 461, 36 S. W. 1060; *Bureau County v. Chicago, B. & Q. R. Co.* (1867) 44 Ill. 229; *Chicago & N. W. R. Co. v. Boone County* (1867) 44 Ill. 240; *Newport Min. Co. v. Ironwood* (1915) 185 Mich. 668, 152 N. W. 1088 (relief denied for lack of proof); *People ex rel. New York C. & H. R. R. Co. v. Woodbury* (1910) 74 Misc. 130, 133 N. Y. Supp. 135, order affirmed in (1911) 145 App. Div. 900, 129 N. Y. Supp. 1141; *People ex rel. New York, O. & W. R. Co. v. Shaw* (1911) 143 App. Div. 811, 128 N. Y. Supp. 177, affirmed in (1911) 202 N. Y. 556, 95 N. E. 1137; *Com. v. Shamokin, S. & L. R. Co.* (1900) 3 Dauphin Co. Rep. (Pa.) 168; *Com. v. Lake Shore & M. S. R. Co.* (1900) 3 Dauphin Co. Rep. (Pa.) 172; *Com. v. Jamestown & F. R. Co.* (1900) 3 Dauphin Co. Rep. (Pa.) 214; *Com. v. Mammoth Vein Coal & I. Co.* (1900) 3 Dauphin Co. Rep. (Pa.) 220.

In *Chicago & N. W. R. Co. v. Boone County* (1867) 44 Ill. 240, *supra*, the court said: "It cannot be that one portion of the taxpayers in a county, owning taxable property, shall be required to pay more taxes in proportion to its value, no matter how that may be ascertained, than another portion in the same county. If the assessors, regardless of the strict injunction of the law, shall place a value upon property far below its real cash value, and such a practice goes on unchallenged, and is recognized by the authorities having special charge of the revenue of the state, that misconduct must also contain within itself the great and cardinal principle of uniformity. No warrant is given, if the law is not strictly observed in the

case of individuals, and their property is not assessed at its actual value, that the property of a corporation situate in the same county shall be assessed at greater proportional value than that of individuals, even though the enhanced assessment is not on the actual cash value of the property of such corporation. The same rule which is applied to individuals, justice and the Constitution demand shall be applied to corporations. To demand of appellants that they should schedule their property at its cash value, while individuals may schedule their property at one third, or less, of such value, would be to demand of the former three times the amount of taxes demanded of the latter."

The principle stated above is quite clearly enunciated by the court in *Amoskeag Mfg. Co. v. Manchester* (1899) 70 N. H. 200, 46 Atl. 470, although the statement does not have reference to corporate property as such, and the holding is such that it does not fall clearly within the scope of the note. The court said: "It is, in fact, conceded by the plaintiffs 'that the constitutional rule of equality requires a proportional and equal valuation of the different kinds of taxable property.' It is also true, as claimed in the plaintiffs' brief, that 'it is elementary that the law requires all property to be appraised at its true value. Yet if A's estate is appraised at that value, and all other property in the town of X at 50 per cent of that value, A is entitled to a reduction of his valuation from the legal to the illegal rate.' The reason is that in no other convenient way can A's tax on the property owned by him be made proportional to that paid by his neighbors; for the remedy of a reassessment of the whole tax upon all taxable property in the town, upon a legal appraisal at its true value, would be inconvenient and impossible of execution."

And in *People ex rel. New York C. & H. R. R. Co. v. Woodbury* (1910) 74 Misc. 130, 133 N. Y. Supp. 135, order affirmed in (1911) 145 App. Div. 900, 129 N. Y. Supp. 1141, it was held that a city must assess special fran-

chises at 76 per cent of their actual values, if it assesses the real estate in the city at that rate. The court said: "I think there should be a reduction in all assessments in Buffalo of 24 per centum of the amount thereof, to equalize them with the assessments of the other real property on the local rolls. It appears by the equalization tables made by the state board of equalization that other real estate in the tax district—that is, in the city of Buffalo—is assessed at only 76 per centum of its full value. The defendants urge that the local assessors are required by law to assess all real estate at its full value, and that they have appended to their rolls their affidavits, as required by law, that they have done so in this instance. But it is well known that in many localities, if not in most, these affidavits are made by the assessors as a matter of form, because required by law, rather than as a matter of conscience, and when the state board of equalization, after investigation, has, in the discharge of its duty, made its tables showing that real estate in Buffalo has, notwithstanding the formal oaths of the assessors to the contrary, been assessed at only 76 per centum of its value, such tables should not be ignored in a matter of this kind; and the deduction stated should be made for the purpose of equalization." And the same rule was applied in *People ex rel. Rochester Teleph. Co. v. State Tax Comrs.* (1912) 134 N. Y. Supp. 987.

The court in *People ex rel. New York, O. & W. R. Co. v. Shaw* (1911) 143 App. Div. 811, 128 N. Y. Supp. 177, affirmed in (1911) 202 N. Y. 556, 95 N. E. 1137, after adopting a rule for the valuation of railroad property, and computing the value of a particular property thereunder, deducted from the value so fixed 45.26 per cent,—other property being assessed at 54.74 per cent of its actual value,—and thus obtained its value for assessment purposes. While it does not appear in this case that the undervaluation was illegal, that fact does appear in the preceding case from the same state.

In *Co. v. Lake Shore & M. S. R.*

*Co.* (1900) 3 Dauphin Co. Rep. (Pa.) 172, Simonton, P. J., said: "We are aware that it was said in the case above cited (*Com. v. New York, P. & O. R. Co.* (1898) 188 Pa. 169, 41 Atl. 594) that, 'the actual value being a pure question of fact, appellant has no standing to complain of discrimination in methods so long as its capital stock is not assessed in excess of that value. It may be that the Reading and some other corporations are taxed on less than the actual value of their capital stock; if so, the commonwealth is not here appealing, and, consequently, it is not our business to inquire into the matter.' We submit, with all deference, that this leaves out of view the mandate of the Constitution that 'taxes shall be uniform,' and that, if adopted as a principle, corporations that are taxed out of proportion to others of the same kind would be without remedy. The commonwealth cannot appeal from a settlement for taxes, and, therefore, if for any reason the methods adopted by the accounting officers lead to a want of uniformity, or tend to discriminate between corporations alike taxable, those discriminated against would be helpless. The constitutional provision that 'taxes shall be uniform' surely means more than that the Taxing Acts shall provide for uniformity." And it may be observed that this case, as well as the other Dauphin county cases cited above, were decided on this rule, notwithstanding the statement of a contrary idea by the highest court of the same state. It would seem, however, that the statement quoted was dictum, as it seems unlikely that the point was raised in the lower court, or proof of undervaluation presented to the court that made the statement. Apparently Judge Simonton tried the former case, and his decision was affirmed on appeal.

In *Newport Min. Co. v. Ironwood* (1915) 185 Mich. 668, 152 N. W. 1088, supra, it appeared to be conceded that, if mining property had been assessed at a higher rate than nonmining property, the tax levy would be void, but it was held that there was nothing "in the record which clearly justifies the

finding that mining property was assessed relatively higher than other property in the same city." Ostrander, J., in writing the opinion for the court, said: "I am impressed that sufficient appears to show that the burden placed upon mining property, including that of plaintiff, when compared with nonmining property, was excessive, that no sufficient data appears for determining what would be a relatively equal burden, and that the whole tax ought to be held fraudulent and void. A majority of the justices are, however, not convinced that this fact is made to appear in the particular case. In support of an opposed conclusion, it is said that it cannot be assumed for the purposes of this case that the nonmining property in the county in 1912 was substantially the same in value as the nonmining property there in 1911, and that in any event we are not required in this case to consider the valuation in the entire county. The record discloses no specific data for the conclusion that nonmining property in the city of Ironwood was not assessed in 1911 as high, relatively, as was the mining property. It has been pointed out that Mr. Finlay gave it as his opinion that the mining property in the city was worth \$35,170,000. The board valued it at \$23,283,000. Assuming that the valuation fixed by the board was the fair cash value, how can it be determined that other property in the city was not relatively assessed at its cash value? The board reported to the state board of equalization that real estate, as a whole, was assessed in the county at 22.7 per cent of its actual value. But it does not follow that in Ironwood, in which the plaintiff's mine and others were situated, real estate, other than mining, was assessed at only 22.7 per cent of its value. Mining property in the city was assessed at only 10 per cent of its value, as finally determined by the board. There can be no doubt about the rule relied upon by plaintiff. It has been repeatedly announced and applied by this court. While exact equality in taxation can never be achieved, in-

tentional inequality of assessment invalidates the tax. *Merrill v. Humphrey* (1871) 24 Mich. 170; *Auditor General v. Hughitt* (1903) 132 Mich. 311, 93 N. W. 621; *Solomon v. Oscoda Twp.* (1889) 77 Mich. 365, 43 N. W. 990; *Auditor General v. Pioneer Iron Co.* (1900) 123 Mich. 521, 82 N. W. 260. It is as well settled that fraud in the assessment must be made out. The things supposed by plaintiff to be tangible evidence of the fact that the valuation of one class of property in the city was raised, and that the valuation of another, or of other classes, known to be undervalued, was not raised, are: First, the general impression concerning the general undervaluation of all property; second, the increase in assessed valuation of other property in the city in 1912; third, the report of the board to the state board of equalization, which is treated as an admission of its information upon the subject. The reply is that no one can point to anything in the record which clearly justifies a finding that mining property was assessed relatively higher than other property in the city in 1911."

#### IV. As a Federal question.

Where the assessing officers on boards of equalization adopt the policy of assessing the stock of national banks at full market value, and at the same time systematically fix, for taxation purposes, the value of "other moneyed capital" at a percentage of its full value, the Federal courts have jurisdiction to interfere, on the ground that such a system "is subversive of the act of Congress allowing such shares to be taxed, and intended to protect the owners thereof from greater burdens than were imposed on other moneyed capital" at the place where the bank is located; so, where the bank has paid the tax justly assessable, the court will enjoin the collection of the unpaid balance. *Pelton v. Commercial Nat. Bank* (1880) 101 U. S. 144, 25 L. ed. 901; *Cummings v. Merchants' Nat. Bank* (1880) 101 U. S. 153, 25 L. ed. 903.

In *Cummings v. Merchants' Nat.*

Bank (U. S.) *supra*, where one board had fixed the value of all real estate, for taxing purposes, at one third of its value, another board had fixed the taxing value of money and invested capital at  $\frac{1}{4}$  of its actual value, and another had fixed the assessment valuation of all bank stock at its full market value, it being the duty of another board to fix the assessment value of all railroad property, each of the four boards operating independently of the others, the court, after holding that the statute of Ohio expressly authorizes the interference of equity, said: "Independently of this statute, however, we are of the opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and, if supported by the testimony, relief ought to be given." Then, after discussing the probable reason why many boards persist in assessing real property at a percentage of its full value, in the face of a statute requiring its assessment at full value, the court further said: "But, whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property, around which the Constitution of the state has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied so far as the judicial power can give remedy. The complainant having paid to defendant, or into the circuit court for his use, the tax which was its true share of the public burden, the decree of the circuit court enjoining the collection of the remainder is affirmed."

And under the same circumstances the Federal courts have jurisdiction to interfere upon the ground that the

procedure is in violation of the equal protection clause of the Federal Constitution: *Western U. Teleg. Co. v. Missouri* (1903) 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730 (relief denied on other grounds; see same case, *infra*); *Taylor v. Louisville & N. R. Co.* (1898) 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Railroad & Teleph. Cos. v. Board of Equalizers* (1897) 85 Fed. 302; *Nashville, C. & St. L. R. Co. v. Taylor* (1898) 86 Fed. 168, appeal dismissed in (1899) 44 L. ed. (U. S.) 1219, 20 Sup. Ct. Rep. 1022; *Southern R. Co. v. North Carolina Corp. Commission* (1900) 104 Fed. 700; *Louisville & N. R. Co. v. Coulter* (1903) 131 Fed. 282, reversed for lack of proof in (1905) 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342.

In *Western U. Teleg. Co. v. Missouri* (U. S.) *supra*, the court affirmed a decision of the supreme court of Missouri, denying relief to the corporation on the ground that the proceeding was an action at law, the corporation being the defendant in an action to collect the taxes. The state court (see *State ex rel. Gottlieb v. Western U. Teleg. Co.* (1901) 165 Mo. 502, 65 S. W. 775, cited *supra*) had also based its decision upon lack of proper proof of undervaluation of the other property in a systematic way, but that point is not mentioned by the Federal court.

In *New York v. Barker* (1900) 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121, affirming (1899) 158 N. Y. 709, 53 N. E. 1130, counsel endeavored to raise the question of whether or not the assessing of corporate real estate at full value, while real property belonging to individuals is assessed at less than full value, is a denial to corporations of the equal protection of the laws; but the court refused to decide the question, for the reason that there was a failure to allege and prove any general custom to undervalue the property belonging to individuals. The court said: "In this record there is no averment and no proof of any violation of law by the assessors of New York. There is no allegation in the petition for the

writ of certiorari that there has been any undervaluation of real estate, either with regard to individuals or corporations; but, on the contrary, it is therein asserted that the assessed valuation of the real estate of the company was its actual value, and that it had been overvalued in the valuation of the capital of the company. The mere fact that the law gives the assessors, in the case of corporations, two chances to arrive at a correct valuation of their real estate, when they have but one in the case of

individuals, cannot be held to be a denial to the corporations of the equal protection of the laws, so long as the real estate of the individual is, in fact, generally assessed at its full value. But we are nevertheless asked by the argument at bar, in the absence of allegations or proof of habitual, or indeed of any, undervaluation, to assume or take judicial notice of its existence, notwithstanding such undervaluation would constitute a clear violation of the law of the state."

J. W. M.

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WALTER M. B. HARTLEY, Respt.,

v.

EAGLE INSURANCE COMPANY of London, England, Appt.

*New York Court of Appeals—January 8, 1918.*

(222 N. Y. 178, 118 N. E. 622.)

**Usury — lump sum — uncertain term — possibility of exceeding legal interest.**

1. An agreement to pay an amount which may be more or less than the legal interest for the use of money, depending upon a reasonable contingency, is not ipso facto usurious because of the possibility that more than the legal rate will be paid.

[See note on this question beginning on page 1385.]

**Appeal — question open.**

2. Under the New York Constitution, upon unanimous affirmance by the appellate division of the supreme court of a verdict, the only question open in the court of appeals on the facts is whether or not they support the conclusions of law if no reversible error in the admission or exclusion of evidence is claimed.

[See 2 R. C. L. 180.]

**— question of law.**

3. The question whether or not the facts found support the conclusions of law is one of law, in deciding which the appellate court is not limited to the grounds urged or adopted in the courts below.

[See 2 R. C. L. 189.]

**Usury — assignment of interest in remainder.**

4. An assignment of an interest in a remainder will not be upheld in any case if the purpose is to evade the

statutes against usury, no matter what form the transaction may take.

[See 23 R. C. L. 572.]

**Appeal — finding of fact.**

5. A finding that an arrangement by which an amount advanced to a remainderman, upon assignment of a much larger amount to be paid upon termination of the life estate, was a loan with undertaking to pay the full amount with maximum interest, and was usurious and void, is not a finding of fact which is binding on the appellate court where it was denominated a conclusion of law by the trial court.

[See 2 R. C. L. 202.]

**Evidence — mortality tables.**

6. Tables of mortality are, at best, only slight evidence of the expectancy of life of any particular person, to be considered in connection with proof of his health, constitution, habits, and mode of living.

[See 19 R. C. L. 222, 223.]



**Usury — lump sum — mortality tables.**

7. An agreement for payment of interest in a lump sum, calculated at the legal rate for expectancy of life according to mortality tables of one afflicted with an incurable disease, is usurious.

**— exceeding mortality table rate.**

8. An agreement to pay interest in a lump sum for a period measured by the probable duration of a life is not necessarily usurious because it may slightly exceed the legal rate for the period indicated for such life by mortality tables.

**— concrete case.**

9. The mere fact that \$18,400 was assigned, to take effect at the expiration of a life having an expectancy of about nine years under mortality tables, to secure a present loan of \$9,500, does not conclusively show usury, although more than the legal rate would be paid if the indicated expectancy was not exceeded.

**Appeal — absence of finding — effect.**

10. A judgment setting aside a transaction for usury cannot be allowed to stand if no finding of usury has been made.

**APPEAL** by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term, Part VIII., for New York County, in favor of plaintiff in an action brought to set aside as void for usury, a contract between plaintiff and defendant, and the instruments executed in connection therewith. *Reversed.*

The facts sufficiently appear in the opinion of the court.

Messrs. Nathan L. Miller, Henry H. Pierce, Philip L. Miller, with Messrs. Sullivan & Cromwell, for appellant:

Where a contract of loan leaves the rate of interest to be determined by hazard, so that the lender may ultimately receive either more or less than legal interest, as the chance turns out, and the speculation is a real and not a colorable one, the transaction is not within the Usury Statute.

Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Colton v. Dunham, 2 Paige, 267; Hall v. Dagget, 6 Cow. 653; Clift v. Barrow, 108 N. Y. 187, 15 N. E. 327; Johnston v. Ferris, 14 Daly, 302; Trask v. Hazazer, 4 N. Y. Supp. 635; De Moltke-Huitfeldt v. Garner & Co. 145 App. Div. 766, 130 N. Y. Supp. 558; Lord v. Cronin, 9 App. Div. 9, 40 N. Y. Supp. 1097; Hagaman v. Reinach, 48 Misc. 206, 96 N. Y. Supp. 719; Home Ins. Co. v. Dunham, 33 Hun, 415; Jestons v. Brooke, Cowp. pt. 2, p. 793, 98 Eng. Reprint, 1365; Tate v. Wellings, 3 T. R. 531, 100 Eng. Reprint, 716; Potter v. Yale College, 8 Conn. 52; Truby v. Mosgrove, 118 Pa. 89, 4 Am. St. Rep. 575, 11 Atl. 806; Wright v. McAlexander, 11 Ala. 236; Rapier v. Gulf City Paper Co. 77 Ala. 126; White Water Valley Canal Co. v. Vallette, 21 How. 414, 16 L. ed. 154; 29 Am. & Eng. Enc. Law, 2d ed. 486; 39 Cyc. 952.

The contingency that the defendant

would not receive its money back with legal interest was real, and not colorable. There was a high probability that the life tenant would survive until the sum paid by the defendant, with interest at 6 per cent, would exceed the amount which the defendant was to receive out of the estate.

Scheffler v. Minneapolis & St. L. R. Co. 32 Minn. 518, 21 N. W. 711; Lincoln v. Power, 151 U. S. 436, 441, 38 L. ed. 224, 226, 14 Sup. Ct. Rep. 387; Jackson v. Edwards, 7 Paige, 386; Eastabrook v. Hapgood, 10 Mass. 313; McHenry v. Yokum, 27 Ill. 160; Schell v. Plumb, 55 N. Y. 592; Kerrigan v. Pennsylvania R. Co. 194 Pa. 98, 44 Atl. 1069; Cronkright v. Haulenbeck, 25 N. J. Eq. 513; Williams's Case, 3 Bland, Ch. 186.

Messrs. Fowler & Lesser, for respondent:

It is not necessary to show an actual vicious and corrupt intent to charge more than the legal rate of interest in order to establish usury. It is sufficient if the intent to take more interest than the statute allows is evident and that such is the result which the transaction accomplishes.

Rapelye v. Anderson, 4 Hill, 472; Fielder v. Darrin, 50 N. Y. 437.

The evidence clearly establishes the existence of gross usury on defendant's part.

Missouri, K. & T. Trust Co. v. McLachlan, 59 Minn. 468, 61 N. W. 560;

*Birdsall v. Patterson*, 51 N. Y. 43; *Quackenbos v. Sayer*, 62 N. Y. 344; *Roux v. Rothschild*, 37 Misc. 435, 75 N. Y. Supp. 763; *Horn v. Keteltas*, 46 N. Y. 600; *Susman v. Whyard*, 149 N. Y. 127, 43 N. E. 413; *Scott v. Lloyd*, 9 Pet. 418, 446, 9 L. ed. 178, 188; *Meaker v. Fiero*, 145 N. Y. 165, 39 N. E. 714; *Gilbert v. Warren*, 19 App. Div. 403, 46 N. Y. Supp. 489; *Ierwilliger v. Beecher*, 34 N. Y. S. R. 380, 11 N. Y. Supp. 634; *Babcock v. Stimmel*, 33 N. Y. S. R. 1005, 11 N. Y. Supp. 506; *Knickerbocker L. Ins. Co. v. Nelson*, 7 Abb. N. C. 170; *Dry Dock Bank v. American L. Ins. & T. Co.* 3 N. Y. 344; *East River Bank v. Hoyt*, 32 N. Y. 119; *Feldman v. McGraw*, 1 App. Div. 574, 37 N. Y. Supp. 434; *Re risael*, 192 Fed. 412.

McLaughlin, J., delivered the opinion of the court:

In 1901 the plaintiff became vested with an equal undivided one-fourth interest in remainder, amounting to at least \$43,750, in the estate of his grandfather, subject, however, to the life interest therein of his grandmother. In July, 1905, in consideration of a loan of \$9,500, he assigned to the defendant, through a third party, the sum of \$18,400, payable from his share of the estate, with interest at 6 per cent from the death of his grandmother, the event upon which the principal sum became payable. He also executed a mortgage upon certain real property belonging to the estate as further security for the payment of the amount assigned. At the time the loan was made, plaintiff's grandmother was sixty-nine years old, and upon her death defendant would have been entitled, under the assignments, to receive \$18,400 from plaintiff's share of the estate, or \$8,900 more than the amount which it had loaned to him. This action was brought to have the transaction declared usurious and void and to direct the cancellation of the assignments and mortgages. Plaintiff had a judgment for the relief demanded, which was unanimously affirmed by the appellate division, and defendant appeals to this court.

The facts involved in the subject-

matter of the litigation are quite similar to those considered by the court in *Hall v. Eagle Ins. Co.* 151 App. Div. 815, 136 N. Y. Supp. 774, affirmed in 211 N. Y. 507, 105 N. E. 1085. The defendant, apparently relying upon that authority at the trial, claimed that the assignments and mortgage were in effect, and should be adjudged to be, collateral security for the repayment of the amount loaned, with interest, as was there done. In the *Hall Case*, however, the life estate had terminated less than two years after the loan was made, and the plaintiff had tendered to the defendant prior to the commencement of the action, the amount loaned, with legal interest. This tender was pleaded in the complaint, which alleged that the instruments had been executed and were intended merely as collateral security, and judgment was demanded in the alternative, either that they be adjudged to be held by defendant as collateral security only, or that they be declared usurious and void. At the trial the plaintiff's evidence tended to show that the instruments were actually intended by the parties only as collateral security; but the trial court held there had been a valid purchase and sale of an expectant interest, and dismissed the complaint. On appeal, however, the appellate division reversed the trial court, and directed the entry of a judgment in accordance with the opinion of the court. Both parties appealed to this court, where the judgment was affirmed.

In the present case the issue raised by the pleadings was whether the transaction was usurious. This was the only issue, and there is an express finding of fact that it was not the intention or desire of the parties that the assignments and mortgage should merely secure the repayment of the amount loaned, with interest. There is, therefore, no ground for claiming, so far as this appeal is concerned, that the judgment should have followed the determination in the *Hall Case*. It

is proper to state that such claim is not now made, but the defendant insists that the facts found do not establish usury, nor entitle plaintiff to the relief granted. As the judgment of affirmance was unanimous, and no reversible errors in the admission or exclusion of evidence are claimed,

Appeal—  
question open.

the appeal presents only one question, and that is whether the facts found support the conclusions of law. *Niagara Falls v. New York C. & H. R. R. Co.* 168 N. Y. 610, 61 N. E. 185, and cases cited. That question is one of law, and in deciding it the court is

—question of  
law.

not limited to the grounds urged or adopted in the courts below. *Hirsch v. New England Nav. Co.* 200 N. Y. 263, 93 N. E. 524; *Abbott v. Easton*, 195 N. Y. 372, 88 N. E. 572.

There certainly was no specific agreement for the payment of usurious interest, since the defendant was to receive a lump sum in repayment of the loan, and whether the amount received would be greater or less than the amount loaned, with legal interest, depended, obviously, upon the length of time that the plaintiff's grandmother lived. But since an amount in excess of the loan was to be repaid in any event, we are confronted at the outset of the discussion with the question whether, where the rate of interest depends upon a contingency which *may* render it in excess of the legal rate, the agreement was usurious. It may be conceded that the English cases on the subject necessitate an affirmative answer to the question. The rule, as stated in the leading case of *Roberts v. Tre-*

mayne, *supra*, has frequently been cited, the rule has quite generally been modified to the extent of holding that if the casualty goes to the entire interest, an agreement to pay interest in excess of the legal rate, depending upon a reasonable contingency which may result in no interest at all being paid, is not necessarily usurious, even though there be an absolute agreement to repay the entire principal. 29 Am. & Eng. Enc. Law, 2d ed. 486; 39 Cyc. 952; *Potter v. Yale College*, 8 Conn. 52; *Clift v. Barrow*, 108 N. Y. 187, 15 N. E. 327. In *Clift v. Barrow*, *supra*, the plaintiff had entered into a so-called partnership agreement with a banker, under which he was to receive 10 per cent interest on all his deposits, payable from the profits of the business, no interest at all being payable unless there were profits. As surviving partner he subsequently sued a debtor of the firm, who claimed that the agreement did not constitute the plaintiff a partner, and was moreover void for usury. Upon the latter point this court said: "So long as by the terms of the instrument he was not entitled to interest, unless the profits were enough to pay it, we see no basis for submitting any question of usury to a jury." p. 194.

But if an agreement hazarding the entire interest in consideration of the possibility of receiving more than the legal rate is not necessarily usurious, there is no logical ground for refusing to apply the same principle to a case where only a part of the legal interest is hazarded. This situation arose in *Richardson v. Hughitt*, 76 N. Y. 55, 59, 32 Am. Rep. 267, where the defendant had advanced money to a partnership to be used in its business of manufacturing wagons. The loans were to be repaid with interest at 5½ per cent (7 per cent being the legal rate), and in addition the defendant was to receive a quarter of the profits realized from the sale of wagons. In answer to the claim that the agreement was usurious, the court said: "As the defendant

was only to receive less than 7 per cent interest, as a fixed and certain sum, and there is no certainty that the profits, discounts, and interest agreed upon,—5½ per cent—would exceed, or even amount to 7 per cent, it is not apparent that the contract was usurious." While the issue of usury was not directly involved in that case, the language of the court quoted is entirely in accord with the principles announced in other decisions in this state; in fact, in the present case, it is at least impliedly admitted that if the amount advanced by the defendant had been the full present value in July, 1905, of the \$18,400 payable upon the death of plaintiff's grandmother, the transaction would have been valid. It is obvious, however, even in that case, whether the defendant would actually receive more or less than the legal rate of interest would still have depended upon the length of time that plaintiff's grandmother lived.

I am of the opinion, therefore, that an agreement to pay an amount which may be more or less than the

Usury—  
lump sum—  
uncertain term  
—possibility of  
exceeding legal  
interest.

legal interest, depending upon a reasonable contingency, is not ipso facto usurious, because of

the possibility that more than the legal interest will be paid. Otherwise no valid transfer or assignment of an interest dependent upon a life estate could be made for less than the full value. Such arrangements, however, will not be upheld in any case where the purpose is to evade the statutes against usury, no matter what form the

—assignment of  
interest in  
remainder.

transaction may take. Meaker v. Fiero, 145 N. Y.

165, 39 N. E. 714; Quackenbos v. Sayer, 62 N. Y. 344; Birdsall v. Patterson, 51 N. Y. 43. The question in each case is, and necessarily must be, whether the agreement be fair and reasonable, or a mere device to evade the Usury Statutes. This was recognized in the opinion delivered by Presiding Justice Ingraham in

the Hall Case, supra, in which he said: "What we have to find in the transaction is the intention of the parties. . . . It was early recognized by the courts that if the form of the contract were to be controlling, the statute against usury would be substantially unenforceable, and thus it was made the duty of the court in each case presented to examine into the substance of the transaction between the parties, and determine whether the intent which pervaded it was one which violated the statute." p. 826.

In the case now before us there is no finding of fact that the assignments and mortgage were made as a device for the payment of interest beyond the legal rate, or that the parties had any intention of violating the Usury Statutes. The court found only that, under the American Experience Tables of Mortality, plaintiff's grandmother, at the time the loan was made, had an expectancy of life of 8.48 years, and under the Carlisle Tables of 9.44 years; that under the Carlisle Tables, in July, 1905, the present worth of \$18,400 at 6 per cent, subject to the life estate of plaintiff's grandmother, was \$11,470.19; that as the plaintiff received only \$9,500, he, therefore, received \$1,970.19 less than he should have received; and as a conclusion of law, that the transaction was a loan under which the plaintiff was to repay the defendant more than the loan, "and the maximum interest thereon, and is, therefore, usurious, and null and void."

There is no finding as to the actual expectancy of life of plaintiff's grandmother, nor that the parties knew when the loan was made what her expectancy was under the tables referred to; neither is there a finding that they intended to provide for the payment of interest in excess of the legal rate. But it is suggested that the first conclusion of law, to the effect that the transaction was a loan of \$9,500 by the defendant to the plaintiff under an arrangement by which he was to re-

pay the full amount of the loan, "and the maximum interest thereon, and is, therefore, usurious, and null and void," may be treated as a finding of fact. A similar contention was made and rejected in *Alcock v. Davitt*, 179 N. Y. 9, 71 N. E. 264. While a conclusion of law that a given transaction was usurious might, under some circumstances, be treated as a finding of fact, I do

**Appraisal—finding of fact.**

not think it can be so treated here. It is not denominated a finding of fact, but a conclusion of law, and from the way in which it is stated, I think it was intended to be a conclusion of law, predicated solely upon the proposition that because the defendant, in purchasing or making the loan upon an expectant interest, paid somewhat less than the present value of that interest, calculated at 6 per cent according to the Carlisle Tables of Mortality, it was guilty of usury and must forfeit the entire amount. As was said by Judge Cullen in *Alcock v. Davitt*, *supra*: "It seems to us that this action presented for determination a very simple question, purely one of fact . . . ; that the question has not been decided by the trial court as one of fact; and that, in the absence of any reasonably clear determination of the facts on which the rights of the parties wholly depend, we should not be astute in searching through the report of the referee for some pretext for upholding the judgment." p. 13.

The tables of mortality are at best only slight evidence of the expectancy of life of any particular person, to be considered in connection with proof of his health, constitution, habits, and mode of living. *Schell v. Plumb*, 55 N. Y. 592. Such tables show only the average length of life among the classes whose lives are taken into consideration in preparing the tables. There are several tables which differ quite widely, and it goes without saying that in any

**Evidence—mortality tables.**

given case the habits and manner of living of the individual may be totally different from those of the persons considered in preparing the tables. *Williams's Case*, 3 Bland, Ch. 186; *Scribner, Dower*, 2d ed. pp. 663-686. No one would contend that the expectancy of life of a chronic invalid, afflicted with a disease for which there is no known cure, would equal the expectancy given in any table of mortality; and any agreement for the payment of interest in a lump sum, calculated at the legal rate for the expectancy of such an individual under any table of mortality, would be clearly usurious. If that be so, then the converse must necessarily be true, and it cannot be said that an agreement is invariably usurious because an amount somewhat in excess of the interest calculated according to some table of mortality is to be paid. In such cases the intention of the parties must control and must necessarily be determined.

**Usury—lump sum—mortality tables.**

**—exceeding mortality table rate.**

So here the question is, Did the parties intend to evade the Usury Statutes of the state? or was the interest payable so large that, in view of all the circumstances, an intent to provide for the payment of interest beyond the legal rate will necessarily be imputed to them? *Fiedler v. Darrin*, 50 N. Y. 437. The court did find, as a fact, that over nine years after the loan was made, plaintiff's grandmother was still living. The amount payable, therefore, was not so large that it would have exceeded the legal rate if she lived a comparatively short time beyond her expectancy under the Carlisle Tables. Did the parties, in arranging the loan, intend that the defendant should receive more than the legal rate of interest on the amount loaned? The answer to the question must necessarily depend upon their intent. That was a question of fact, as to which no finding has been made. As already indicated, the finding on the sub-

ject is that, according to the more favorable of the two tables of mortality mentioned, the expectancy of the life tenant was 9.44 years, and that the then present value of \$18,400 at 6 per cent, payable on her death, was nearly \$2,000 more than the amount advanced. That finding

—concrete case.

was not a finding that her expectancy was 9.44 years, but merely that there was some evidence of it. It was by no means equivalent to a finding of usurious intent.

It, therefore, appears that upon the crucial question of fact in the case—was the transaction usurious

Appeal—  
absence of  
finding—  
effect.

—no finding has been made and the judgment cannot be allowed to stand.

Dougherty v. Lion F. Ins. Co. 183 N. Y. 302, 76 N. E. 4; Miller v. New York & N. S. R. Co. 183 N. Y. 123, 75 N. E. 1111; Alcock v. Davitt, supra.

In Dougherty v. Lion F. Ins. Co. supra, it was held, and the rule is as applicable here as it was there, that where the court, upon the trial of an action, instead of finding either way upon the crucial question of

fact in the case, simply found the evidence as given by the witnesses upon that question, and then drew a conclusion of law which was unsupported by any finding of fact, the judgment entered thereon must be reversed.

In reaching the foregoing conclusion there is no intention of lessening the protection which the Usury Statutes were designed to afford. All that is here decided is that every loan or payment of less than the full present value, calculated according to a mortality table, for a remainder interest, is not ipso facto usurious and void. Whether usurious depends upon the intent of the parties, to be determined from all the facts and circumstances in each case. Such question has not here been determined, and the defendant is entitled to have it determined before compelled to forfeit the amount which it loaned to the plaintiff.

For the reasons given the judgment appealed from should be reversed and a new trial ordered, with costs to abide event.

Hiscock, Ch. J., Collin, Cuddeback, Hogan, Pound, and Andrews, JJ., concur.

## ANNOTATION.

### Fixed interest charge for uncertain term as usury.

#### General principles.

An agreement to pay an amount which may be more or less than the legal interest for an uncertain period of time, depending on a reasonable contingency, is not ipso facto usurious, because of the possibility that more than the legal interest will be paid. Parker v. Coburn (1865) 10 Allen (Mass.) 82; Brown v. Robinson (1918) 224 N. Y. 301, 120 N. E. 694, reversing (1916) 173 App. Div. 583, 160 N. Y. Supp. 287. And see the reported case (HARTLEY v. EAGLE INS. Co. ante, 1379). Otherwise no valid transfer or assignment of an interest dependent on a life estate could be made for less than the full value. See

the reported case (HARTLEY v. EAGLE INS. Co.).

So, a loan or payment of less than the full present value, calculated according to a mortality table, for a remainder interest, is not ipso facto usurious and void. Brown v. Robinson (N. Y.) supra. And see the reported case (HARTLEY v. EAGLE INS. Co.).

The question in each case is, and necessarily must be, whether the agreement is fair and reasonable, or is a mere device to evade the usury statutes. Brown v. Robinson (N. Y.) supra; Hall v. Eagle Ins. Co. (1912) 151 App. Div. 815, 136 N. Y. Supp. 774, affirmed in (1914) 211 N. Y. 507, 105

N. E. 1085. And see the reported case (*HARTLEY v. EAGLE INS. CO.*).

Such arrangements, however, will not be upheld in any case where the purpose is to evade the statutes against usury, no matter what form the transaction may take. See the reported case (*HARTLEY v. EAGLE INS. CO.*). And see *Hall v. Eagle Ins. Co.* (N. Y.) *supra*.

"Post obit agreements, or bonds, are those given by a borrower of money, by which he undertakes to pay a large sum, exceeding the legal rate of interest, on or after the death of a person from whom he has expectations, in case of surviving him. This character of agreements is not always void. They are so when it is shown to the courts that the contracts are inequitable or unconscientious. When advantage has been taken of the weakness, necessity, or ignorance of another, or such extraordinary disparity exists between the sum advanced and the sum to be received, as clearly appears to be contrary to good conscience, the courts will declare the agreement fraudulent and void, as being against the policy of the law. They partake generally of the nature of a wager, and contain no principle by which the value of the chances may be calculated, so as to enable the court to ascertain whether they are reasonable or unconscionable. But when it is apparent from the intrinsic nature and subject of the bargain itself, that it is such as no man in his senses, not under delusion, would make on the one hand, and as no honest and fair man would accept, on the other, the agreement will be declared inequitable and unconscientious. If this does not appear from the contract itself, it must be proved; and when proved, the court will still allow a recovery by the lender, and give him relief, by directing judgment for so much money as shall be equal to the principal received by the borrower, and interest. . . . Such contracts are not per se nullities." *Crawford v. Russell* (1872) 62 Barb. (N. Y.) 92.

It is recognized by the courts that, if the form of the contract is to be controlling, the statute against usury

would be substantially unenforceable, and thus it was made the duty of the court in each case presented, to examine into the substance of the transaction between the parties, and determine whether the intent which pervaded it was one which violated the statute. *Hall v. Eagle Ins. Co.* (N. Y.) *supra*.

The intent to take usurious interest involves such a purpose on the part of the borrower as well as on the part of the lender. Such an intent, when consummated, draws after it not only civil penalties by way of forfeiture, but constitutes a crime; and before holding that a person has been guilty of such offense, it should be clearly and decisively proved and found, and not be left to inference and implication. *Brown v. Robinson* (1918) 224 N. Y. 301, 120 N. E. 694, reversing (1916) 173 App. Div. 583, 160 N. Y. Supp. 287.

Where, however, it appears that the intention is to evade the Usury Statute, and that the contract is a mere cloak or contrivance for that purpose, the contract is held to be void. *Hall v. Eagle Ins. Co.* (1912) 151 App. Div. 815, 136 N. Y. Supp. 774, affirmed in (1914) 211 N. Y. 507, 105 N. E. 1085; *Leavitt v. Enos* (1913) 155 App. Div. 584, 140 N. Y. Supp. 862; *Hagaman v. Reinach* (1915) 48 Misc. 206, 96 N. Y. Supp. 719; *Mansfield v. Ogle* (1855) 7 De G. M. & G. 181, 44 Eng. Reprint, 71, 1 Jur. N. S. 603, 24 L. J. Ch. N. S. 450, 3 Week. Rep. 557.

In determining whether an agreement to take an amount which may be more or less than the legal interest, when the length of time is uncertain because it depends on the expectancy of life of a third person, the tables of mortality are at best only slight evidence of the expectancy of life of any particular person, to be considered in connection with proof of his health, constitution, habits, and mode of living. Such tables show only the average length of life among the classes whose lives are taken into consideration in preparing the tables. There are several tables which differ widely, and in any given case the habits may be totally different from those of

the persons considered in preparing the tables.\* No one would contend that the expectancy of life of a chronic invalid, afflicted with a disease for which there is no known cure, would equal the expectancy given in any table of mortality; and any agreement for the payment of interest in a lump sum, calculated at the legal rate for the expectancy of such an individual, under any table of mortality, would be clearly usurious. If that be so, then the converse must necessarily be true, and it cannot be said that an agreement is invariably usurious because an amount somewhat in excess of the interest, calculated according to some table of mortality, is to be paid. In such cases the intention of the parties must control and must necessarily be determined. See the reported case (*HARTLEY v. EAGLE INS. CO.* ante, 1379), quoted with approval in *Brown v. Robinson* (1918) 224 N. Y. 301, 120 N. E. 694, reversing (1916) 173 App. Div. 583, 160 N. Y. Supp. 287.

#### Illustrations.

In the reported case (*HARTLEY v. EAGLE INS. CO.*), the question is: Did the parties intend to evade the Usury Statute of the state, or was the interest payable so large that, in view of all the circumstances, an intent to provide for the payment of interest beyond the legal rate would necessarily be imputed to them? In that case, it appears that the plaintiff became vested with an undivided one-fourth interest in remainder, amounting to at least \$43,750, in the estate of his grandfather, subject, however, to the life interest therein of his grandmother. In consideration of a loan of \$9,500, he assigned to the defendant, through a third person, the sum of \$18,400, payable from his share of the estate, with interest at 6 per cent from the death of his grandmother, the event on which the principal sum became payable. He also executed a mortgage on certain real property belonging to the estate as further security for the payment of the amount assigned. At the time the loan was made, the plaintiff's grandmother was sixty-nine years old, and on her death, the defendant would have

been entitled, under the assignments, to receive \$18,400 from the plaintiff's share of the estate, or \$8,900 more than the amount which it had loaned to him. The action was brought to have the transaction declared usurious and void; and to direct the cancellation of the assignments and mortgage. There was an express finding of fact that it was not the intention or desire of the parties that the assignments and mortgage should merely secure the repayment of the amount loaned, with interest, but there was no finding of fact that the assignments and mortgage were made as a devise for the payment of interest beyond the legal rate, or that the parties had any intention of violating the Usury Statutes. The court states that there certainly was no specific agreement for the payment of usurious interest, since the defendant was to receive a lump sum in repayment of the loan, and whether the amount received would be greater or less than the amount loaned, with legal interest, depended obviously on the length of time the plaintiff's grandmother lived. The trial court found only that, under one mortality table, the plaintiff's grandmother, at the time the loan was made, had an expectancy of life of 8.48 years, and under another table of 9.44 years; that under the latter tables, at the time of the loan, the present worth of \$18,400 at 6 per cent, subject to the life estate of the plaintiff's grandmother, was \$11,470.19; that as the plaintiff received only \$9,500, he, therefore, received \$1,970.19 less than he should have received; and, as a conclusion of law, that the transaction was a loan, under which the plaintiff was to repay the defendant more than the loan "and the maximum interest thereon, and is, therefore, usurious and null and void." There was no finding as to the actual expectancy of life of the plaintiff's grandmother, nor that the parties knew, when the loan was made, what her expectancy was under the tables referred to; neither was there a finding that they intended to provide for the payment of interest in excess of the legal rate. The trial court did



find as a fact, however, that over nine years after the loan was made, the plaintiff's grandmother was still living, so that the amount payable, therefore, was not so large that it would have exceeded the legal rate if she lived a comparatively short time beyond her expectancy under the mortality tables. The court holds that the answer to the question whether the parties, in arranging the loan, intended that the defendant should receive more than the legal rate of interest on the amount loaned, depends on their intent, a question of fact on which no finding had been made. The finding that, according to the two tables of mortality mentioned, the expectancy of the life tenant was 9.44 years, and that the then present value of \$18,400 at 6 per cent, payable on her death, was nearly \$2,000 more than the amount advanced, was not, the court holds, a finding that her expectancy was 9.44 years, but merely that there was some evidence of it; and was by no means equivalent to a finding of usurious interest. This question not having been determined, and the defendant being entitled to have it determined before being compelled to forfeit the amount which it loaned to the plaintiff, the court holds that the judgment cannot stand.

In *Brown v. Robinson* (1918) 224 N. Y. 801, 120 N. E. 694, reversing (1916) 173 App. Div. 583, 160 N. Y. Supp. 287, it appeared that a testatrix created two trusts by her will for the benefit of her son, the payment of the principal of which to him was in each case contingent. Under the first trust he was to receive the principal of the fund when he reached the age of twenty-five years. By the provisions of the second trust he was to receive the principal on the double contingency that he survived his father and reached the age of twenty-five years. A short time after he became of age, the son made application to an English corporation, chartered to do insurance business and also to loan money on and purchase expectancies, to advance him moneys. The result was that the company paid to him the sum of \$70,000, in addition to certain

sums retained by it as premiums for insurance on his life and 5 per cent for apprehended expenses in connection with the transfers, and took from him two transfers of parts of his contingent interest under the first trust created by his mother's will, aggregating \$96,250. The company also advanced to him the sum of \$17,350, exclusive of insurance premiums and 5 per cent for apprehended expenses, as in the preceding case, and took from him a transfer of part of his contingency interest under the second trust created by his mother's will, amounting to \$45,400; and also advanced him the sum of \$12,650, exclusive of insurance premiums and 5 per cent for apprehended transfers, and took an assignment of another part of his contingent interest in the second trust, amounting to \$40,000. The son and his wife also executed a mortgage on the former's interest in his mother's real estate, in which he had a contingent interest, to secure the payment of the sums transferred as aforesaid. In each case the instrument executed by the son and his wife was in form an absolute sale and transfer of his interest in his mother's estate to the extent stated. There was no personal obligation of any kind on his part, except the covenant that at the time when each of the instruments was executed the property held by the trustees for his contingent benefit in each trust consisted of real and personal property having "a clear market value . . . over and above all encumbrances," of \$140,000. In the case of the last transfer, the son also retained the right, within six months after reaching the age of twenty-five years, provided that his father was still living, "to repurchase said sum of \$40,000 hereby assigned," on payment "of the sum of \$20,240, with interest thereon" from the date when the son attained his majority to the date of payment. A holding that the transactions were usurious was reversed, there being no direct proof or finding of usurious intent.

In *Hall v. Eagle Ins. Co.* (1912) 151 App. Div. 815, 136 N. Y. Supp. 774, affirmed in (1914) 211 N. Y. 507, 105

N. E. 1085, it appeared that a testator gave all his estate to his executors for the use and benefit of his wife during her life, or so long as she remained his widow, and, after her decease or remarriage, to his children on their attaining the age of twenty-one years. There was no power of sale in the will, and the remainder vested absolutely, and was not subject to be divested. At the time of the transactions in question, the plaintiff, a son of the testator, was about twenty-four years of age, while the testator's widow was upwards of sixty-three years of age and still unmarried, and the share of the plaintiff in the estate of his father, an equal undivided one sixth thereof, was valued at \$70,000. Being in need of money, there was paid to him by the defendant for his present use the sum of \$15,500, whereupon by an indenture, he granted, bargained, sold, assigned, conveyed, transferred, and set over unto the defendant out of the total property, interest, legacy, or distributive share which he had or should be entitled to receive on the termination of his mother's prior estate, the net or clear sum of \$34,000, and he constituted the defendant his true and lawful attorney to demand, sue for, and receive the amount thereby assigned. And he secured the payment of this sum of money to the defendant by his bond, with a sufficient surety, and his mortgage on the real property of which he owned a remainder and over which the trustees had no power of control, except to collect the income during the life of the life beneficiary. By these agreements, as the court construed them, there was a loan of \$15,500, and there was to be paid from the plaintiff's property, that sum and the sum of \$19,000 more when the loan became payable. The loan became payable not at a fixed time, but on the death of the plaintiff's mother, a woman then over sixty-three years of age. The interest on \$15,500 at 6 per cent per annum was \$930 a year, and the payment of this \$34,500 to the defendant would have to be postponed for over twenty years, the court stated, for the loan to earn \$19,000 as in-

terest at 6 per cent. It was proved and seems to have been conceded that the expectation of life of the plaintiff's mother was about thirteen years. The complaint alleged that these indentures and instruments were made, executed, and delivered by the plaintiff to the defendant, to be held by it only as security for the purpose of securing payment to the defendant of the sum of \$15,500, with interest thereon to the date of payment, and that it was understood and agreed between the parties that the instruments were made, executed, and delivered only as such security, and not as any absolute assignment, transfer, or conveyance of any definite property, interest, legacy, or distributive share of the plaintiff in his father's estate. The complaint then alleged that, on the death of the mother about two years later, the plaintiff duly tendered to the defendant the sum of \$15,500 with interest at 6 per cent from the date of the loan, but that the defendant declined the offer. The complaint then stated that the plaintiff demanded judgment in the alternative, either that the judgment declare that the loan of \$15,500 was made as a result of a usurious and void contract, and that it be adjudged and decreed to be invalid, or that the alleged indenture or instrument of assignment, transfer, or conveyance might be declared and adjudged to have been and to be a mortgage, and that it and also the alleged indenture of mortgage were given only as collateral security for the payment of the indebtedness of \$15,500, with legal interest thereon; that the defendant be directed to receive and accept that sum of money with legal interest thereon as ascertained; and that the instruments be canceled. The intention of the parties being a necessary finding in the transaction, the court held that, if this were treated as an actual transfer of \$34,500, it was clearly the intention of the defendant to exact from the plaintiff in his necessitous condition a contract by which the defendant could receive for its loan, interest at a rate exceeding 6 per cent, in contravention of the Usury Statute (General Business Law,

§§ 370 et seq.; 19 McKinney, Consol. Laws, pp. 207 et seq.). But the court held that, treating this, however, as an advance by the defendant of the sum of \$15,500 at the time of the execution of these instruments, and without any express agreement as to the rate of interest, the law would imply that the defendant would have the right to interest on the amount loaned or advanced at the rate of 6 per cent per annum.

In *Leavitt v. Enos* (1913) 155 App. Div. 584, 140 N. Y. Supp. 862, it appeared that an agreement was made between the executors of an estate and a distributee of that estate, whereby the latter should be paid the sum of \$55,000. There was a delay in the payment of that sum to the distributee, and he applied to another for an advance thereon. The assignment arranged for purported to sell, assign, and transfer, and set over to the plaintiff any and all claims which the distributee then had in and to the estate referred to, to the amount of \$7,500. Reference was made to the agreement by the executors to pay the distributee the sum of \$55,000. It was further provided that, if the sum of \$7,500 was not paid out of the agreed sum of \$55,000, then it should be charged against any other sum due to the distributee out of that estate, and, finally, the distributee warranted and guaranteed the repayment to the plaintiff of the sum of \$7,500. All that the distributee received was \$5,500, the difference between that sum and \$7,500 being divided between the plaintiff, her brothers and agents, and their attorney. The court held that it was perfectly clear that the transaction was a loan of money, and that the pretended assignment was a mere cloak for usury. The court stated that the transaction was very similar to, and, if anything, a little balder and less complicated than, that considered by it in *Hall v. Eagle Ins. Co.* (N. Y.) supra.

In *Stotesbury v. Huber* (1916) 237 Fed. 413, it appeared that the defendant, a resident of New York state, received from his mother on her death a vested remainder in the estate of his

grandfather, of which his mother was one of the heirs, but which estate, however, was then subject to the life interest of the grandmother, who was seventy years of age and in good health. A part of the estate of the grandfather had been paid to the defendant's mother or her administrator prior to the making of the assignment in question, but a large amount of real and personal property was still in the hands of the executors and trustees of the grandfather's estate, who were accountable to, and which property was within the jurisdiction of, the surrogate's court of Kings county. Being in need of money, after various applications for loans, the defendant finally arranged with the plaintiff, a member of a Pennsylvania partnership, to execute and deliver to him a deed or assignment, which was on its face an absolute conveyance, of a share amounting to \$55,000 of his vested remainder in his grandfather's estate, with interest from the date of the death of the life tenant and until the amount of the assigned interest should have been paid over to the assignee, in return for the sum of \$23,500. The grandmother, the life tenant, died within a little less than four years after the execution of the assignment. According to the testimony, her expectation of life on the date of the assignment was 9.18 years, according to one table of mortality, and 8.5 years according to another. It also appeared that the present value of \$50,000, based on the life of a woman seventy years old, computed according to the first table, would be \$32,241.40, and, according to the other table, \$372 more. After the death of the life tenant, the defendant offered to pay the amount advanced with interest, and asked for a reassignment on such payment, which offer was refused. The next step in the transaction was the present action, wherein the plaintiff filed a bill in equity, alleging that he had no adequate remedy at law, and sought relief to the effect that he should be declared entitled to immediate possession of \$50,000, with interest from the date of the death of the life tenant, out of the in-

terest of the defendant in the estate of his grandfather and the estate of his mother; that the executor and trustee of the defendant's grandfather's estate should be required to pay to the plaintiff the sum of \$55,000, with interest as aforesaid; and that the administrator of the estate of the defendant's mother should be directed to pay the sum of \$50,000, with interest as aforesaid, in case it should be determined that the executor of the grandfather's estate should pay the share of the mother in her father's estate to her administrator. It was held that though the contract itself was entered into in the state of Pennsylvania, it was governed by the laws of New York, where the property was located, and where only the contract was enforceable. Hence, while following the decision in *Hall v. Eagle Ins. Co.* (1912) 151 App. Div. 815, 136 N. Y. Supp. 774, affirmed in (1914) 211 N. Y. 507, 105 N. E. 1085 (set out at length, *supra*), the court stated that the present case was distinguishable from the former case in that no mortgage was given to secure the assignment or to repay the loan. The court held that, under the decision in the foregoing case, an assignment of an interest in property exceeding in value the principal and interest for the estimated life of a life tenant, on the amount given as consideration, should be deemed usurious, and to be no more than a contract of loan with security therefor, even though presented in the form of an actual sale for a fixed consideration. In applying this ruling, the court held that the instruments in the record, as well as the subsequent instruments executed by the defendant, showed his intent to treat the transaction as a sale, but yet a sale which was in effect a mortgage with illegal interest. There was no evidence of any deceit or lack of good faith on the part of the lenders, and the court held that, therefore, while it was not possible to find that in this particular instance the parties were intentionally making a usurious loan or effecting an assignment which would really cover up a usurious loan, to evade the Usury Statute (even

though the brokers originally endeavored to obtain a loan before they found that this was impossible), yet the defendant borrower, as an improvident person, was entitled to some equitable relief such as was actually granted by the court in the *Hall Case*. The court thereupon held that the assignment was unconscionable on the present facts in a court of equity, in that it exceeded a fair sum to cover the amount paid, with interest and proper allowance for profit and expenses, and denied its enforcement on the condition that the defendant should pay to the plaintiff the amount advanced, with legal interest to the date of payment, and with such profit as might be directed by the court.

In *Hagaman v. Reinach* (1915) 48 Misc. 206, 96 N. Y. Supp. 719, it appeared that the plaintiffs' assignment of their interests in an estate was given by them, and received by the defendant's testator, as security merely; firstly, for the collection charges agreed to be paid the testator; secondly, for an immediate advance of \$3,200 to one of the plaintiffs, and a further advance of \$1,000 to be made him three months later; and, thirdly, for such future advances as the defendant's testator, the assignee, might make to the plaintiffs or either of them. According to the terms of the agreement, all the advances, immediate and future, were to be repaid from the proceeds of the assignee's collections, less his agreed charges for such collection, with interest at the rate of 5 per cent per annum, the interest on the advances particularly mentioned to date from one year after the date of the agreement. The court held that, as to these two advances, or loans, for such they were, whatever name was given to them, no usury was apparent from the evidence, but that the later loans were usurious.

In *Crawford v. Russell* (1872) 62 Barb. (N. Y.) 92, it appeared that the plaintiff and the defendant entered into an agreement in the year 1846, which read substantially as follows: "That the plaintiff should do all she could to aid a marriage between said Jeremiah and said Christina, by her

influences and services, and in consideration thereof the said defendant faithfully promised and agreed with the plaintiff, in case she became the wife of the said Jeremiah Russell and outlived him, to pay said plaintiff for her services in this matter, \$2,000 in cash, and to purchase for the plaintiff a pianoforte and a gold watch for her [plaintiff's] eldest daughter 'Kate,' and to pay the expense of her education to the plaintiff." The plaintiff claimed and alleged that the said Jeremiah Russell was a widower, possessing great wealth, to the value of several hundred thousand dollars. That she, the plaintiff, did, at the request of the defendant, so aid the defendant, furnished rooms, fire, and light for said Jeremiah and the said Christina to meet from time to time, and did various services for said defendant, and gave her care, skill, diligence, and attention in aid of said marriage, at great loss and expense, and performed her part of said contract so that afterwards, and on or about the 30th day of October, 1847, the said Jeremiah Russell and the said Christina Crawford were lawfully married, and from that time lived together in great prosperity, and very pleasantly and happily for many years, and until the 30th day of September, 1867, when the said Jeremiah Russell departed this life, leaving the said defendant as his widow, for her share, a large estate amounting to about \$50,000. That although the defendant had been requested, she had not performed her part of said agreement, but had hitherto refused and still did refuse and neglect to pay the plaintiff said sum of \$2,000, and to perform her other said covenants and agreements. The court stated that the case partook somewhat of the character of a post obit agreement, in that it was for services, care, diligence, aid, and attention rendered, and expenses furnished, to be paid for by quite a large sum of money at the death of the person named. The court then said: "But the case is relieved from many odious features of post obit contracts. There was no practice of fraud or surprise in the case; no

destitute heir seduced from parental government; or anyone hazarding his future inheritance for a present pittance, to supply temporary needs. There was no improvident heir or expectant of a future estate, spending it and ruining himself before he comes to it; nor was the contract legally usurious, by statute. By it no owner of an estate to be devised was to be imposed upon in his confidence and affection, who might be thus imposed upon, and give his estate to a stranger, when he would think he was giving it to one of his blood. It was an agreement between two persons fully competent to contract; each fully understanding their own interests; and each of mature age. There was no actual fraud or imposition practised. The one was desiring aid to obtain a present relation in the marriage state, with the concomitants of social position, wealth, and happiness. The other willing to engage to assist this ambition, for a named consideration, large, certainly, if it was to be immediately enjoyed, but its payment was made subject to the contingency of success, of long delay, as well as the chance of survivorship. With the consideration of these hazards and contingencies upon the one side, and the expected advantages and enjoyments upon the other, the contract was not unreasonable. The contingencies all occurred, but only at the end of about nineteen years. If the case had depended upon this feature alone, I should think the judge erred in nonsuiting. The reasonableness of the contract would have been a question for the jury."

In *Parker v. Coburn* (1865) 10 Allen (Mass.) 82, it appeared that the plaintiff offered evidence to show that his father, six years before his death, purchased an interest in land of the plaintiff for \$1,500 in cash, and "\$500 and \$100 for interest on it" at his [the father's] decease, saying at the time that there was no probability of the interest being over \$100, as he was so old. It was held that there was no ground for the suggestion that the contract was usurious. The court held that the father did not agree to

pay more than the lawful rate of interest on so much of the purchase money as was to be paid at a future time, but to pay in addition to that part of the purchase money, a certain sum, which might or might not exceed the amount of interest if computed at the lawful rate, according to the length of life of the father after making the promise. And there was no evidence whatever, the court stated, that the transaction was intended as a cover for a loan.

In *Chesterfield v. Janssen* (1750) 1 Atk. 301, 26 Eng. Reprint, 191, 2 Ves. Sr. 125, 28 Eng. Reprint, 82, 1 Wils. 286, 95 Eng. Reprint, 621, 18 Eng. Rul. Cas. 289, it appeared that a borrower was thirty years of age, had an estate of £7,000 per annum of his own, and another large estate whereof he was tenant for life, but, having contracted debts, was very much pressed for money to pay them off. His grandmother, from whom he had very great expectations, was then seventy-eight years of age. The defendant advanced to the borrower, on the latter's application, £5,000, the borrower giving a bond to pay the defendant £10,000 within a month after the death of his grandmother, if he survived her. The grandmother died about six years and five months after the bargain, whereupon the borrower, stating his inability to pay immediately the £10,000, of his own free accord gave the defendant a bond in the penalty of £20,000 and a warrant of attorney to confess a judgment for the £10,000, which was afterwards entered. The borrower afterwards paid £2,000 in part. It was held that the contract was not usurious, as there was no certain time of payment, but the whole was at hazard; though it was stated that if this in truth had really been a borrowing of the £5,000, to be repaid with an unlawful interest at a certain day, and had only been put in this shape to avoid the statute, it would have been void. The plaintiff was relieved only against the penalty on paying what remained due to the defendant of the £10,000 and interest.

In *Mansfield v. Ogle* (1855) 7 De G. M. & G. 181, 44 Eng. Reprint, 71, 1 Jur. N. S. 603, 24 L. J. Ch. N. S. 450, 3 A.L.R.—88.

8 Week. Rep. 557, it appeared that a mortgage recited that the mortgagor was entitled to the property in fee simple, subject to the life estate of his father, and that he had occasion to borrow £2,000, which two persons named had agreed to advance on the following terms, viz., the first lender, £1,500, and the second £500, on the day of the date thereof, which sums were to be repaid to them on the death of the mortgagor's father, and as much more, viz., £1,500 more to the first lender, and £500 more to the second lender, provided the father should happen to die within five years from the date of the deed; but if he should survive that period, then that, on his death after that period, £1,500 and twice as much more should be paid to the first lender, and £500 and twice as much more to the second lender. The instrument witnessed that the mortgagor granted and released the property, subject to the life estate, to a trustee on trust, on the death of the mortgagor's father, if the same should take place within five years, to raise £3,000 and £1,000 for the first and second lenders respectively; but if the father should live beyond five years, then to raise £4,500 and £1,500 for the first and second lenders respectively. It was held that the transaction was one, substantially, of borrowing and lending on usurious terms; that the form of the instrument was merely a contrivance, an ineffectual contrivance, to evade the law by concealing or coloring the true nature of the business, and hence that the instrument was void.

*Lamego v. Gould* (1759) 2 Burr. 715, 97 Eng. Reprint, 528, was an action on the case on a special promise by a borrower, "in consideration of 2 guineas, received of" the lender, "to pay him 20 guineas, upon the decease of my present wife." The question was whether this contract was usurious, the woman, at the time of making it, being then seventy years of age. It was held that the contract was not usurious, it being a bona fide wager, not at all intended as a loan, and not a transaction which was really a usurious loan, but designed as a wager.

H. D. B.

## LENOIR CAR WORKS, Plff. in Err.,

v.

E. LEE TRINKLE, Admr., etc., of A. F. Friend, Deceased.

*United States Circuit Court of Appeals, Sixth Circuit — December 17, 1915.*

(143 C. C. A. 156, 228 Fed. 634.)

**Judgment — nunc pro tunc — death of plaintiff.**

1. Where plaintiff in a personal-injury action dies while the court has under advisement a motion for rehearing of a motion for new trial, which had been denied and judgment ordered in his favor, the court may, upon overruling the motion, enter judgment nunc pro tunc as of the date of submission of motion for rehearing.

[See note on this question beginning on page 1403.]

**Trial — motion for verdict — conflicting evidence.**

2. The court is justified in overruling a motion for directed verdict if the testimony upon the issues involved is in conflict.

**Courts — state and Federal — practice.**

3. Revivor of a personal-injury action in a Federal court in the name of

the personal representative upon death of the plaintiff is justified if authorized by the laws of the state where the court is sitting.

[See 1 R. C. L. 25.]

**Appeal — exception to charge.**

4. A general and formal exception to the charge of the trial court is futile.

[See 2 R. C. L. 96.]

**ERROR** to the District Court of the United States for the Eastern District of Tennessee (Sanford, District Judge) to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Warrington and Knappen, Circuit Judges, and Clarke, District Judge.

Mr. J. G. Johnson for plaintiff in error.

Mr. W. T. Kennerly for defendant in error.

Clarke, District Judge, delivered the opinion of the court:

In this action, A. F. Friend, in his lifetime, sued the plaintiff in error for damages for injuries which he sustained while in its employ. The injury complained of was caused by the falling of a steel car sill, about 36 feet in length, which weighed 1,800 pounds, and the cause of its falling was the breaking of one of two clevis pins by which it was supported when suspended about 4 feet from the floor, in the position required for the doing of the work upon the sill in which Friend and two other

workmen were engaged when the accident occurred.

The negligence claimed is failure on the part of the employer to exercise the care required by law to furnish a clevis pin reasonably safe for the purpose for which it was intended to be used, and failure to inspect such pin after it was put into use. The defenses relied upon at the trial were proper care on the part of the plaintiff in error in furnishing to its workmen clevis pins for the purpose for which the pin which broke was used, and assumption of risk by the plaintiff.

We are clearly satisfied that the testimony in the cause presented a conflict upon both of the issues between the parties as we have stated them, such that the trial court was abundantly justified in overruling the motion of the plaintiff in error

for a verdict in its favor when it rested its case.

The plaintiff in error claims that the trial court erred in several respects: First, in the admission of testimony designated in the amended assignment of errors. It is sufficient to say of these claims that the exceptions taken were in form such that they are wholly insufficient to present any question to this court for review. Second, error is assigned in the refusal of the court to charge the jury as requested by the plaintiff in error. The record shows that the trial court dealt with each of these requests to charge in a manner entirely satisfactory to this court, even if we should regard the form of exceptions taken as adequate to present the refusal of them for review, which is by no means clear.

After the trial court had overruled the motion of the plaintiff in error for a new trial, and on September 29, 1913, had ordered judgment entered on the verdict, on October 15, 1913, a petition was filed for a rehearing of the motion for a new trial. This petition was heard and submitted to the court about November 7, 1913, and was taken under advisement. A press of official duty rendered it impossible for the court to dispose of this petition until January 2, 1914, when it was denied. In the meantime the plaintiff died, and to the end that injustice might not be done, judgment *nunc pro tunc* was ordered entered as of November 7, 1913. This action is assigned as error, but it was clearly justified

Judgment—  
*nunc pro tunc*—  
death of  
plaintiff. by these authorities cited by the trial court when he made the order, viz.: Mitchell v. Overman, 103 U. S. 62, 26 L. ed. 369; Richardson v. Green, 130 U. S. 104, 32 L. ed. 872, 9 Sup. Ct. Rep. 443; Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551, 228 Fed. 634, 143 C. C. A. 156; Cuebas y Arredondo v. Cuebas

y Arredondo, 223 U. S. 376, 56 L. ed. 476, 32 Sup. Ct. Rep. 227. It is also claimed that error was committed in permitting revivor of the case in the name of the personal representative of the deceased plaintiff. The laws of the state of Tennessee, where this action arose, justify this action of the trial court, especially since the claim must be considered in judgment at the time the plaintiff died.

Courts—state  
and Federal—  
practice.

There are several other assignments of error, all of which we have considered; but we find them so without substantial merit that special discussion of them is neither necessary nor justified.

We think it not necessary to consider the motion of the defendant in error to dismiss this proceeding in error upon the claim that the last extension of the time for printing and filing the record was not properly allowed by the trial court, and for the assessment of a penalty upon the plaintiff in error upon the ground that this proceeding has been prosecuted merely for delay. Affirming the judgment, as we are doing, gives to the defendant in error all rights which dismissal of the petition in error would give to him, and while there is much in this record indicating a disposition on the part of counsel for the plaintiff in error to delay without just cause the final decision of the case, nevertheless, we have concluded in this instance not to impose a penalty.

The learned trial judge submitted this case to the jury in a charge so clear and comprehensive that counsel for the plaintiff in error, alert, as this record proves them to have been, in watching for possible error, saw fit to take only a general, formal, and so an entirely futile, exception to it; and he dealt with the multiplied motions, amended motions, and applications of various kinds filed by the plaintiff in error, with such patience and intelligence as to leave nothing to

Appeal—  
exception to  
charge.



be desired. Judgment affirmed, with costs.

**NOTE.**

The decision in the reported case (*LENOIR CAR WORKS v. TRINKLE*, ante, 1394), permitting the entry of a judgment nunc pro tunc as of the date of submission of a motion for rehearing of a motion for new trial, which had been denied and judgment

ordered in favor of plaintiff in a personal-injury action, the plaintiff having died while the motion for rehearing was under advisement, is in accord with cases presenting similar situations, as is shown in subdivision III. b, 3, of the note beginning at page 1411, upon the general subject of the power to enter judgment nunc pro tunc after death of party.

**RE ESTATE OF E. S. PILLSBURY, Deceased.**

**ERNEST SARGENT PILLSBURY, Jr., et al., Appts.,**

**v.**

**TITLE INSURANCE & TRUST COMPANY, Admr., etc., of E. S. Pillsbury, Deceased, Resp't.**

*California Supreme Court (In Banc) — June 13, 1917.*

(175 Cal. 454, 166 Pac. 11.)

**Judgment — rendition nunc pro tunc — death of party.**

1. The power of the court to enter a judgment nunc pro tunc after the death of defendant in a malpractice case which had been taken under advisement before death, although no verdict had been rendered or decision given, is not defeated by a statute providing that if any person die after a verdict or decision upon an issue of fact, and before judgment, the court may nevertheless render judgment thereon.

[See note on this question beginning on page 1403.]

**Insurance — waiver of right to proceeds of policy.**

2. The benefit of statutes exempting the proceeds of life insurance from execution, and permitting them to be set aside for the benefit of minor children of insured, may be waived.

[See 11 R. C. L. 539 et seq.]

**Guardian and ward — failure to apply for life insurance — dereliction.**

3. The guardian of a minor who, after the death of his parents leaving life insurance which might be set aside to him as exempt from execution, is adopted by a stranger before an administrator is appointed on his parents' estate, is not derelict in failing to apply to have the insurance set apart to the minor, where, under the statute, such application can only be made upon return of the inventory or thereafter.

**Parent and child — effect of adoption on ownership.**

4. The adoption of a child after the

death of its parents does not affect its status as the heir of such parents.

[See 1 R. C. L. 614.]

**— effect of adoption on status of insurance.**

5. Upon adoption of a child it ceases to be of the family of its parents.

[See 1 R. C. L. 611.]

**Evidence — presumption — interest of minors.**

6. It will be presumed that in passing a decree allowing the adoption of infants the court acted for their best interest.

**Judgment — void decree of adoption.**

7. A decree of adoption procured and entered in fraud of the rights of the minor adopted will be vacated upon proper bill for that purpose.

[See 1 R. C. L. 624 et seq.]

**Parent and child — effect of adoption on right to life insurance.**

8. The adoption by strangers of children of one leaving life insurance deprives them of the benefit of stat-

utory provisions exempting life insurance from execution and permitting it to be set aside for the use of surviving children of the deceased.

**Physician and surgeon — basis of action for malpractice.**

9. An action for malpractice sounds in tort, and may have its basis either in a wilful injury, an injury occasioned by negligence, or in the doing of that which is forbidden by positive law.

[See 21 R. C. L. 380, 400.]

**Executor and administrator — liability for failure to appeal.**

10. An administrator cannot be charged with liability for failing to appeal from a judgment against his intestate or to attempt to compromise the judgment, in the absence of any showing that an appeal would have been successful, or would have resulted in anything other than the imposition of additional and useless expense against the estate.

[See 11 R. C. L. 258-260.]

**APPEAL** by petitioners from a decree of the Superior Court for Los Angeles County denying a petition to set aside as exempt property certain proceeds from life insurance, and from an order denying exceptions to the final account of the administrator, and from the decree of final distribution. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William A. Nunlist, William C. Crittenden, and W. M. Simmons for appellants.

Messrs. Lee C. Gates, Clarence L. Variel, Edmund W. Pugh, O'Melveny, Stevens, & Millikin, and Walter K. Tuller for respondent.

Henshaw, J., delivered the opinion of the court:

E. S. Pillsbury died intestate in an automobile accident, in which also his wife was killed. He survived her and left surviving him three minor children, the eldest about the age of fourteen years. His life was insured, the face values of his seven policies amounting to twenty-seven thousand dollars. They were all payable to his wife, and, in the event of her predecease, then to his executors, administrators, or assigns. The proceeds of these policies, therefore, fell into his estate, and upon them his estate realized over twenty-four thousand dollars, which passed into the hands of its administrator.

A. C. Pillsbury, a brother of the deceased, applied for letters of administration on September 14, 1911, and his application was denied on October 6, 1911. On that date, however, A. C. Pillsbury and his wife were appointed guardians of the persons of the minor children of deceased, and the Title Insurance & Trust Company, the respondent

herein, was appointed guardian of their estates. Then on November 13, 1911, these minors were legally adopted by A. C. Pillsbury at Oakland, in the county of Alameda, state of California. Thereafter, and on the 24th day of November, 1911, letters of administration in the above-entitled estate were issued to the Title Insurance & Trust Company. This was the first and only appointment of an administrator. On December 28, 1912, this administrator filed its first and final account of its administration, which final account showed disbursements of a large part of the moneys derived from the insurance policies in payment of the approved claims of creditors. On September 25, 1913, A. C. Pillsbury and his wife, as guardians of these minors, filed amended objections and exceptions to this account, and on the same date filed an amended petition asking that the life insurance money collected by the administrator be set apart to the minors as property exempt from execution. This, after hearing in which testimony was taken, the court in probate refused to do, and this appeal has followed.

Appellants' first contention is that by force of our statutes this insurance money was set aside to the minor children of deceased; that the administrator, whose duty it was to

its parents by blood is superseded. The duties of a child cannot be owed to two fathers at the same time." No considerations of conceived hardship upon the minors can operate to modify the legal effect of this changed status. If it be said that by virtue of their adoption, they being in their helpless minorities and unable to exercise any independent judgment in the matter of the proceedings, they were wronged, it must be answered that by virtue of their tender infancy they are, in an especial sense, wards of the court in equity, and it must be presumed

**Evidence—  
presumption—  
interest of  
minors.**

that in its adoption decree that court acted for the best interests of the minors. Of course, if a case shall arise where such a decree was procured and entered in fraud of the minors' rights, equity will grant its relief by a vacation of that decree,

**Judgment—  
void decree of  
adoption.**

upon proper bill for that purpose. But such is not the case here presented, and it must be con-

**Parent and  
child—effect of  
adoption on  
right to life  
insurance.**

cluded that the minors at the time of this application were not of the family of the deceased, but were of the family of the adopting parents.

There remains to be considered their rights as heirs of the deceased, which rights, as we have said, stand unaffected. Herein it is contended that one payment which the administrator admittedly made was without warrant of law, and that consequently the amount of that payment must be treated as money still in the estate. It appears that the deceased who, in his lifetime, was a physician and surgeon, had been sued for damages for malpractice. He filed an answer and made a motion for a change of venue, which was denied. He did not appeal from this order of denial and the time for appeal had expired before his death. He had waived trial by jury, he had accepted notice of the trial, he had made an ineffectual attempt

to secure counsel in Inyo county to represent him, and, failing in this, neither put in an appearance at the time of the trial, nor was he there represented. The trial was had and concluded two days before his death. Ignorant of that death, the trial court entered its judgment against deceased two days after his death. Several months thereafter, and being advised of the death, the court, upon motion of plaintiff in the action, and against the opposition of this respondent, entered the same judgment nunc pro tunc as of the day of the submission of the cause for determination. From this judgment so entered respondent took no appeal, and, the amount of the judgment having been presented as a claim against the estate, and having been approved by respondent and by the court in probate, was paid in due course of administration. The amount of this claim was \$9,018.32. The action resulting in this judgment, as has been said, was for malpractice. It was to recover damages sustained by plaintiff's wife for injuries inflicted upon her while she was the patient of the deceased. An action for malpractice may have its basis either in a wilful injury, an

**Physician and  
surgeon—basis  
of action for  
malpractice.**

injury occasioned by negligence, or, finally, in the doing of that which is forbidden by positive law. But in every instance the action sounds in tort. *Abbott v. Mayfield*, 8 Kan. App. 387, 56 Pac. 327; *Rodgers v. Kline*, 56 Miss. 808, 31 Am. Rep. 389; *Tucker v. Gillette*, 22 Ohio C. C. 664, 12 Ohio C. D. 401; *Boor v. Lowrey*, 103 Ind. 472, 53 Am. Rep. 519, 3 N. E. 151.

The question presented, then, is, Under the facts shown, did the right of the plaintiff in his damage suit to have the judgment entered after the death of the wrongdoer survive?

Under the maxim, "Actus curiæ neminem gravabit," courts of law and courts of equity from very early times exercised the power of entering judgments and orders nunc pro

tunc in order that the rights of the litigant, who was himself not at fault, should not be impaired or lost. As a specific application of this maxim, it is stated in Bacon's Abridgment, title "Abatement F:": "If the plaintiff or defendant die whilst the court are considering of their judgment, or after a special verdict or special case and pending the time for argument or for advising thereon . . . they will permit the judgment to be entered up as of the term in which it regularly might have been." This power, it has been declared in this state, is inherent in the courts, and elsewhere it has been questioned whether it was within the power of the legislature to deprive the courts of it, making, as it does, so manifestly for justice. *Fox v. Hale & N. Silver Min. Co.* 108 Cal. 478, 41 Pac. 328. Where the suitor is not at fault, the determinative consideration moving the court is whether or not the action, at the death of the party, was ready for the rendition of final judgment. *Freeman*, Judgm. § 59. And, says this court in *Fox v. Hale & N. Silver Min. Co.* supra: "A nunc pro tunc order should be granted or refused as justice may require, in view of the circumstances of the particular case." Our only statute bearing upon the question is § 669 of the Code of Civil Procedure, which declares as follows: "If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate." Appellants' first contention upon this proposition is that here is shown a limitation upon the power of our courts thus to enter nunc pro tunc judgments, and that limitation is that a verdict must have been rendered or a decision given, or the court is powerless to enter judgment. But in *Fox v. Hale & N. Silver Min. Co.* supra, this section

was construed and the construction put upon it is wholly antagonistic to appellants' view. It is there said that the section "does not, however, do away with the rule that authorizes the court to direct that its decision, so far as the same shall be necessary to protect the rights of the parties, shall be entered nunc pro tunc, as of a day anterior to the death of the party." The principle, as has been said, is founded upon the plainest considerations of justice. In an action ex delicto, which unquestionably before trial dies with the wrongdoer, it is the more important that the principle should be invoked than in cases where the right of action survives, and the worst that can happen to the surviving litigant is a retrial, or a change of forum. So, it will be found, without citing specific instances, that the trend of legislation is to broaden even the common-law rule, and to provide that the right of action shall survive in cases ex delicto if the defendant has appeared or has been served with process; while a brief consideration of the adjudged cases will show that nowhere is the principle enunciated denied application because the action is in tort. The quotation from Bacon's Abridgment, supra, it will be noticed, does not do so, and specifically declares that the party shall have relief if his adversary die "whilst the courts are considering of their judgment," which was precisely the situation here presented. Our own cases do not draw the distinction contended for, but state the principle broadly, as always elsewhere it is stated, and upon this precise question the supreme court of Connecticut has thus declared itself: "But it is needless to multiply cases; for it is conceded that this is law with respect to all cases which survive, and in which the executor may enter. But it is contended that the practice does not extend to cases of tort which do not survive. We find no such distinction made in the books. On the contrary, the gen-

Judgment—  
rendition nunc  
pro tunc—  
death of party.

eral principle is laid down without such a limitation; and certainly we should not feel disposed to introduce such a limitation, as we do not think it founded in reason. On the contrary, we find that in cases which were of a character that they would not survive, this practice has been adopted." *Brown v. Wheeler*, 18 Conn. 199. In *Perry v. Wilson*, 7 Mass. 393, where the action was *ex delicto* and the court took the case under advisement, the defendant having died before decision or judgment, a *nunc pro tunc* judgment was entered, the court saying that "they would always take care that no party should suffer by their delay." In *Hocks v. Sprangers*, 113 Wis. 143, 89 N. W. 117, the action being *ex delicto* for slander, the court applied the principle, declaring: "The foundation principle upon which the power rests is that no one should be allowed to lose the legitimate fruits of litigation to which he is a party by mere delay in the administration of the law, whether that delay be caused by the act of the court alone, or by the act of the party against whom relief is sought, or of his counsel." In *Dawson v. Waldheim*, 89 Mo. App. 245, the action was *ex delicto*, and the circuit court rendered a judgment after the death of the defendant, and then, as here, entered a *nunc pro tunc* judgment upon being advised of the death. The court declared that "we . . . uphold the action of the circuit court on the broad ground that a court may, in the exercise of its common-law power, as a general rule, when the state of the record or the minutes kept by the court or clerk show that a suitor was entitled to a particular judgment, but that the judgment was not entered at the term when it should or might have been entered, at a subsequent term, cause the proper judgment to be entered, to relate back to the term when it should have been entered, provided the delay was not occasioned by the party applying." And finally, in *Mitchell v. Overman*, 103 U. S. 64, 26 L. ed. 369, it is said: "We con-

tent ourselves with saying that the rule established by the general concurrence of the American and English courts is that, where the delay in rendering a judgment or a decree arises from the act of the court,—that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties,—the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up. . . . A *nunc pro tunc* order should be granted or refused, as justice may require in view of the circumstances of the particular case."

Wherefore, it is concluded that the judgment entered against respondent's intestate was a valid judgment.

It is finally urged that respondent was remiss, and therefore should be held to the amount of the judgment, in having failed to appeal from it or to seek a compromise of it. No showing is made that an appeal, if prosecuted, would have been successful, or would have resulted in anything other than the imposition of additional and useless expense against and on the estate, and we are cited to no law, and know of none, which makes it the duty of any trustee to seek to compel a creditor to accept less than his just demand.

Executor and administrator—liability for failure to appeal.

A subsidiary contention of appellant is that the fact that these minors were adopted cannot here be considered, for the reason that the record of adoption was not formally offered and received in evidence. An examination of the transcript shows this contention to be absolutely without merit. The papers were not only actually offered, but actually read in evidence.

Wherefore, the decree appealed from is affirmed.

Shaw, J., Sloss, J., Melvin, J., and Angellotti, Ch. J., concur.

# ANNOTATION.

## Power to enter judgment nunc pro tunc after death of party.

- I. Introductory, 1408.
- II. General requisites:
  - a. Condition of cause, 1405.
  - b. Delay by the court as essential, 1407.
- III. Status of cause at death:
  - a. In general, 1408.
  - b. After verdict:
    1. In general, 1408.
    2. Death of one of several plaintiffs or defendants, 1410.
    3. Death of sole plaintiff, 1411.
    4. Death of sole defendant, 1411.
    5. Time as of which entry is made, 1412.
  - c. After trial or hearing by the court:
    1. In general, 1413.
    2. Equity cases, 1414.
    3. Time as of which entry is made, 1414.
  - d. After assessment of damages, 1415.

### I. Introductory.

At common law the courts had power to enter judgment nunc pro tunc after the death of a party where the failure to enter judgment in his lifetime was due to the court or its officer.

By the Statute 17 Car. II. chap. 8, § 1, it was provided: "That in all actions personal, real or mixt, the death of either party between the verdict and the judgment, shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict." This statute was for a limited period, but was made perpetual by 1 Jac. II. chap. 17, § 5. It has been re-enacted in substance in a number of the states of the Union.

The power of the court to enter judgment nunc pro tunc in case of death where the delay is due to the court is one at common law, and is not dependent upon statute. *Mitchell v. Overman* (1881) 103 U. S. 62, 26 L. ed. 369 (see also *Rose's Notes* to this case); *Teneick v. Flagg* (1860) 29 N. J. L. 25; *Ryghtmyre v. Durham*

### III.—continued.

- e. After rendering of decision, but before entry of judgment, 1415.
- f. Pending appeal or writ of error:
  1. In general, 1416.
  2. After submission:
    - (a) In general, 1418.
    - (b) Death of respondent before affirmance, 1420.
    - (c) Death of respondent before reversal, 1420.
    - (d) Death of appellant before affirmance, 1420.
    - (e) Death of appellant before reversal, 1420.
    - (f) Time as of which entered, 1421.
- IV. Divorce:
  - a. In general, 1421.
  - b. After rendition, 1422.
  - c. After submission on appeal, 1422.
- V. Other actions which do not survive, 1423.
- VI. Particular statutes, 1425.
- VII. Miscellaneous, 1425.

(1834) 12 Wend. (N. Y.) 245; *Spalding v. Congdon* (1836) 18 Wend. (N. Y.) 543; *Crawford v. Wilson* (1848) 4 Barb. (N. Y.) 504; *Griffith v. Ogle* (1806) 1 Binn. (Pa.) 172; *Wood v. Boyle* (1896) 177 Pa. 620, 52 Am. St. Rep. 747, 35 Atl. 853; *Crispe v. Barwick* (1670) 1 Sid. 462, 82 Eng. Reprint, 1218, 1 Vent. 90, 86 Eng. Reprint, 63; *Trelawny v. Winchester* (1757) 1 Burr. 219, 97 Eng. Reprint, 281; *Bridges v. Smyth* (1831) 8 Bing. 29, 131 Eng. Reprint, 311, 1 Moore & S. 93, 1 Dowl. P. C. 242, 1 L. J. C. P. N. S. 33; *Key v. Goodwin* (1832) 1 Moore & S. (Eng.) 620; *Blewett v. Tregonning* (1836) 4 Ad. & El. 1002, 111 Eng. Reprint, 1060; *Green v. Cobden* (1837) 4 Scott (Eng.) 486; *Heathcote v. Wing* (1855) 11 Exch. 355, 156 Eng. Reprint, 868, 3 C. L. R. 1110, 25 L. J. Exch. N. S. 23; *Moor v. Roberts* (1858) 3 C. B. N. S. 830, 140 Eng. Reprint, 970; *Neil v. McMillan* (1868) 27 U. C. Q. B. 257.

In *Isley's Case* (1589) 1 Leon. 187, 74 Eng. Reprint, 172, where, pending decision on a motion for a stay of

judgment after verdict, one of the plaintiffs died, Coke, J., stated that judgment might have relation to the time of the *postea*, when he was alive, but the judgment was stayed, as against the evidence.

"The power of the court to enter judgment *nunc pro tunc* does not in any respect depend upon Stat. 17 Car. II. chap. 8. It is a power at common law, and by the ancient practice of the court, to prevent an unjust prejudice to the suitor by the delay unavoidably arising from the act of court, and has been uniformly exercised, unless the delay is imputable to the laches of the party applying. The effect of the judgment, when entered, may depend on the Statute 17 Car. II. chap. 8; but the power to enter it does not." *Evans v. Rees* (1840) 12 Ad. & El. 167, 113 Eng. Reprint, 774.

The Statute of 17 Car. II. chap. 8, "recognizes, but does not attempt a substitute for, the common-law power immemorially asserted by courts, to give judgments to take effect from a date prior to their rendition, and to operate as if they had been given at that time. Sometimes the power is exercised under the statute, and sometimes independently of it." *Fitzgerald v. Stewart* (1866) 53 Pa. 343.

In *Bridges v. Smyth* (1831) 8 Bing. 29, 131 Eng. Reprint, 311, 1 Moore & S. 93, 1 Dowl. P. C. 242, 1 L. J. C. P. N. S. 33, it was held that the rule established by 17 Car. II. of signing judgment within two terms after the death of a party does not apply to a case where parties are hung up by act of law, as there the common law applies and judgment is entered *nunc pro tunc*. In that case there was a verdict for the plaintiff and a reference as to the amount of damages to an arbitrator, who made his award in the lifetime of the defendant, who moved to reduce the amount of damages, and died pending the motion. It does not appear how the motion was decided.

In *Key v. Goodwin* (1832) 1 Moore & S. (Eng.) 620, the defendant had a verdict, and a motion for a new trial was suspended by the court, awaiting the decision in another action. The de-

fendant died before judgment, which was entered for him more than two years after the verdict, on the ground that where the proceedings have been stayed by the act of the court itself, the party shall not thereby be prejudiced.

"At common law the death of either a sole plaintiff or defendant, in any case, abated the suit; yet if, after verdict, either party died in vacation, judgment could be entered that vacation as of the preceding term, and it would be a good judgment, as of that preceding term. The death of the party did not abate the suit in any such sense as to render the court powerless to enter a judgment to take effect from a day prior to the death." *Fitzgerald v. Stewart* (Pa.) *supra*.

The theory is that the delay of the court ought not to prejudice the parties ("*Actus curiæ nemini gravabit*"). *Crispe v. Barwick* (1670) 1 Sid. 462, 82 Eng. Reprint, 1218, 1 Vent. 90, 86 Eng. Reprint, 63; *Farnel v. Tipper* (1662) Latch, 92, 82 Eng. Reprint, 290; *Craven v. Hanley* (1738) Barnes, 255, 94 Eng. Reprint, 902; *Evans v. Rees* (1840) 12 Ad. & El. 167, 113 Eng. Reprint, 774, 4 Perry & D. 36, 9 L. J. Q. B. N. S. 317, *supra*; *Key v. Goodwin* (Eng.) *supra*; *Neil v. McMillan* (1868) 27 U. C. Q. B. 257; *Valparaiso v. Chester* (1911) 176 Ind. 636, 96 N. E. 765; *Perry v. Wilson* (1811) 7 Mass. 393; *Den v. Tomlin* (1840) 18 N. J. L. 14, 35 Am. Dec. 525; *Ryghtmyre v. Durham* (1834) 12 Wend. (N. Y.) 245; *Arthur v. Schriever* (1891) 28 Jones & S. (N. Y.) 59, 16 N. Y. Supp. 610. Also cases generally throughout this note.

It seems that the power of the courts to enter *nunc pro tunc* orders and judgments is discretionary. *Dial v. Holter* (1856) 6 Ohio St. 228; *Tapley v. Goodwell* (1877) 122 Mass. 176; *Diefendorf v. House* (1854) 9 How. Pr. (N. Y.) 243.

Under the early practice it seems that if a party died after a continuance, judgment could not be entered *nunc pro tunc*. Thus in *Farnel v. Tipper* (1662) Latch, 92, 82 Eng. Reprint, 290, it was held that the defendant being dead, judgment might be

entered for him nunc pro tunc unless a continuance had been entered. So in *Crispe v. Berwick* (1668) 1 Vent. 90, 83 Eng. Reprint, 63, 1 Sid. 462, 82 Eng. Reprint, 1218, where, after trial, one of the plaintiffs died during the time taken by the court to consider, judgment for the plaintiff was entered as if given on the return of the postea, "there being no continuance." In *Taylor v. Matthews* (1716) 10 Mod. 325, 88 Eng. Reprint, 748, it is stated that "if, pending the consideration of the court, the plaintiff die, judgment may be entered without entering the continuances; and then it will have relation to the day in bank. A continuance is nothing but a 'curia advisare vult.'" But in *Blackall v. Heal* (1696) 1 Comyns, Rep. 12, 92 Eng. Reprint, 933, where one of the plaintiffs died after verdict, the court refused to enter the judgment nunc pro tunc, Holt, Ch. J., stating that "here is a continuance by the curia advisare vult over to this term, and therefore judgment shall not be entered before."

It has been held that a judgment by confession cannot be entered nunc pro tunc after the death of the defendant. Thus, in *Bennett v. Davis* (1824) 3 Cow. (N. Y.) 68, where a bond and warrant were executed April 10, the declaration was entitled of February term, and the placita was of the same term, one of the defendants died April 14th. It was held to be irregular to enter judgment in the May term as of the February term, as the power conferred by the warrant of attorney was revoked by the death, and the proceedings were set aside. In *Oades v. Woodward* (1698) 1 Salk. 87, 91 Eng. Reprint, 82, it was held that though judgment by confession upon warrant of attorney may be entered in vacation as of the preceding term, where the defendant died in vacation, it may not be so entered except before the essoin day of the next term. Similarly in *Nichols v. Chapman* (1832) 9 Wend. (N. Y.) 452, it was held that if the defendant died during a term, judgment on confession may be entered in the term or the vacation after it, relating back to the first day of the

term, the court stating that it may not be entered after such vacation.

## II. General requisites.

### a. Condition of cause.

To enable a judgment to be entered nunc pro tunc after a party has died, the cause at the time of such death must be ripe for judgment. If it is not then in such condition, judgment nunc pro tunc cannot be entered. *Wilkins v. Cauty* (1842) 6 Jur. (Eng.) 807, 1 Dowl. N. S. 855, 11 L. J. Q. B. N. S. 191; *McReynolds v. Brown* (1905) 121 Ill. App. 261; *Thomson v. Dudley* (1837) 3 Edw. Ch. (N. Y.) 137; *Hazard v. Durant* (1883) 14 R. I. 25; *Perkins v. Dunlavy* (1883) 62 Tex. 241.

Thus, where, on January 21, by consent, an order was entered to stay proceedings on payment of debt and costs March 1, with liberty then to enter judgment if the payment was not then made, and the plaintiff died on February 12, his executors were not allowed to enter judgment as of January 21. *Wilkins v. Cauty* (Eng.) supra.

Where, in a foreclosure suit after bill taken pro confesso and reference to compute amount, the mortgagor died while the case was on the calendar upon the master's report, it was held that no decree could be had nunc pro tunc, but the suit must be revived. *Thomson v. Dudley* (1837) 3 Edw. Ch. (N. Y.) 137, supra. Compare *Young v. Ridenbaugh* (1875) 3 Dill. 239, Fed. Cas. No. 18,173, infra, III. e.

"To fix the liability of a defendant in an action which does not survive, so that it may be enforced after death against his administrators, the claim should have ripened into a final judgment for a certain ascertained amount, and not be in such a condition that he may appear and partially defeat the demand. Resisting a judgment for the amount of damages claimed is a part of the defense to all such suits, and this can take place upon a writ of inquiry." *Perkins v. Dunlavy* (1884) 61 Tex. 241, supra.

So it is error in an equity suit to enter judgment for fees of the solicitor and receiver against a party who died



before the evidence as to those fees had been taken. *McReynolds v. Brown* (1905) 121 Ill. App. 261, *supra*.

In a case where further evidence was necessary the court said that a judgment *nunc pro tunc* "on account of death is proper only where a party dies after hearing, while the case is under advisement, or after the case has proceeded so far that judgment can be entered, if not as a merely formal act, at least without the need of further inquiry on evidence into matters of fact involved in the controversy." *Hazard v. Durant* (1883) 14 R. I. 25, *supra*.

In this connection reference may be made to *Cuebas y Arredondo v. Cuebas y Arredondo* (1912) 223 U. S. 376, 56 L. ed. 476, 32 Sup. Ct. Rep. 277, where, at the time of the death of a defaulted defendant in an equity case, against whom the bill had been taken *pro confesso*, the court had no jurisdiction, and the complainant later sought to give the court jurisdiction by amending his bill, striking out the living defendant, it was held that a decree could not be entered *nunc pro tunc* against the dead defendant.

The cases upon *nunc pro tunc* entries, after death, of preliminary orders or judgments, are not consistent.

It has been held, on the one hand, that the court will not make a *nunc pro tunc* entry which is not a final matter. Thus, where, on demurrer to a declaration, judgment was rendered for the plaintiff, with leave to the defendant to amend on payment of costs, the plaintiff was not permitted to enter judgment as of the first day of the term of submission, where the defendant died during that term, as the rule permitting the entry of judgments *nunc pro tunc* ought to be limited to final judgments. *North v. Pepper* (1839) 20 Wend. (N. Y.) 677. So, where the plaintiff died after argument, but before decision of his motion to strike out the answer, it was held that an order could not be entered striking out the answer as of the day of argument, as this was not a final matter. *Reed v. Butler* (1860) 11 Abb. Pr. (N. Y.) 128.

But, on the other hand, where com-

plainant in partition died after argument on his motion to strike out the cross bill of one of the defendants, the order striking out the cross bill was made *nunc pro tunc* as of the day of submission. *Clark v. Van Cleef* (1908) 75 N. J. Eq. 152, 71 Atl. 260. See also *Lachenmeyer v. Lachenmeyer* (1883) 65 How. Pr. (N. Y.) 422, *infra*, IV. b; *Bell v. Bell* (1913) 182 Ill. App. 497, *infra*, IV. c. And in *Bank of State v. Kennerly* (1832) 37 S. C. L. (3 Rich.) 195, where the nature of the action does not appear, an order for judgment had been made for want of an appearance, but no interlocutory judgment had been entered up when the defendant died, and leave was granted the plaintiff to enter up an interlocutory judgment *nunc pro tunc*.

It has been held that judgment *nunc pro tunc* could not be entered where a sole defendant (in ejectment) died after the case had been submitted to referees. *Kissam v. Hamilton* (1860) 20 How. Pr. (N. Y.) 369, *infra*, II. b. But the rule is ordinarily otherwise where, after verdict, there has been a reference to arbitration. *Miller v. Spurrs* (1883) 2 Moore & S. (Eng.) 730, *infra*, II. b, and *Heathcote v. Wing* (1855) 11 Exch. 355, 156 Eng. Reprint, 868, 3 C. L. R. 1110, 25 L. J. Exch. N. S. 23, *infra*, II. b.

There are a few cases where judgment after death has been entered *nunc pro tunc* which, at the time of death, were not ripe for judgment.

In *Emery v. Parrott* (1871) 107 Mass. 95, the court in an equity case held that one of the defendants "having died since the case was fully argued and an interlocutory decree made upon the merits, and the case referred to a master to state the account, and . . . his surviving partner having been fully heard before the master and before the court on exceptions to his report, a final decree for the plaintiffs should be entered *nunc pro tunc* as of the date of that interlocutory decree." The court said of this case in *Hazard v. Durant* (1883) 14 R. I. 25: "The decision goes further than any other decision with which we are acquainted and is not supported by the cases cited as authority for it."

Where, on appeal by defendants from a decree in chancery, the appellate court made a decision modifying the decree and directing an account to be stated by a master in a certain manner, taking testimony, and one of the defendants died after such decision, but before the final decision, judgment was ordered as of the date of the first decision. *Brodie v. Watkins* (1876) 31 Ark. 319.

See also *Webber v. Webber* (1880) 83 N. C. 280, *infra*, IV. a, and *Kinney v. Tri-State Teleph. Co.* (1918) — *Tex. Civ. App.* —, 201 S. W. 1180, *infra*, IV. a.

*b. Delay by the court as essential.*

The theory in such cases is that the common-law power is limited to delays by the court or its officer. It has been considered, however, where, after verdict for the defendants, they moved for an extra allowance, but before the decision granting it one of them died, that judgment was properly entered nunc pro tunc as of the date of verdict and of the motion, the court pointing out that the right to costs followed the verdict, and that the defendants were not to suffer through the court's delay. *Arthur v. Schriever* (1891) 28 Jones & S. (N. Y.) 59, 16 N. Y. Supp. 610.

The court will not enter judgment nunc pro tunc where the failure to enter it in time was due to the delay of the party desiring to enter the judgment. *Fowler v. Whadcock* (1741) Barnes, 262, 94 Eng. Reprint, 906; *Lawrence v. Hodgson* (1827) 1 Younge & J. 368, 148 Eng. Reprint, 713; *Lanman v. Audley* (1837) 2 Mees. & W. 535, 150 Eng. Reprint, 870, 5 Dowl. P. C. 596, 6 L. J. Exch. N. S. 136; *Vaughan v. Wilson* (1837) 4 Bing. N. C. 116, 132 Eng. Reprint, 733; *Doe ex dem. Taylor v. Crisp* (1839) 7 Dowl. P. C. (Eng.) 584; *Wilkes v. Perks* (1843) 5 Mann. & G. 376, 134 Eng. Reprint, 609, 6 Scott, N. R. 42, 12 L. J. C. P. N. S. 145, 7 Jur. 68; *Fishmongers' Co. v. Robertson* (1849) 3 C. B. 970, 136 Eng. Reprint, 389, 4 Dowl. & L. 656, 16 L. J. C. P. N. S. 118; *Freeman v. Tranah* (1852) 12 C. B. 406, 138 Eng. Reprint, 964, 21 L. J. C. P. N. S.

214, 16 Jur. 1141; *Tynan v. Weinhard* (1894) 153 IH. 598, 38 N. E. 1014; *Tuomy v. Dunn* (1879) 77 N. Y. 515; *Ogden v. Lee* (1847) 3 How. Pr. (N. Y.) 153; *Kissam v. Hamilton* (1860) 20 How. Pr. (N. Y.) 369; *Diefendorf v. House* (1854) 9 How. Pr. (N. Y.) 243 (obiter); *Jobe v. Kitchen* (1894) 22 Pa. Dist. R. 841.

Probably we are to understand that this rule was the reason of the somewhat obscure decisions in *Hodges v. Templer* (1704) 6 Mod. 191, 87 Eng. Reprint, 945; *Copley v. Day* (1812) 4 Taunt. 703, 128 Eng. Reprint, 506; *Dowbiggin v. Harrison* (1830) 10 Barn. & C. 480, 109 Eng. Reprint, 529.

The court refused to allow the plaintiff to enter judgment nunc pro tunc where the plaintiff applied to sign judgment on the day after the time to plead expired, but upon the officer expressing doubt as to whether the time had expired, he forbore to sign judgment, and that day the defendant died. *Wilkes v. Perks* (1843) 5 Mann. & G. 376, 134 Eng. Reprint, 609, 6 Scott, N. R. 42, 12 L. J. C. P. N. S. 145, 7 Jur. 68, *supra*.

Where an action was brought on a judgment recovered in the King's bench, and after judgment the defendant brought a writ of error and obtained a stay, and the plaintiff died before the affirmance, the court refused to permit judgment of affirmance to be entered nunc pro tunc, considering that the plaintiff had not pursued the simplest remedy. *Bates v. Lockwood* (1787) 1 T. R. 637, 99 Eng. Reprint, 1294.

Where, by stipulation, proceedings were stayed to await the decision of another cause between the parties, and after such decision in favor of the defendant he died after notice of argument, the court held that the delay was that of the parties by reason of that stipulation, and refused leave to enter judgment for the defendant nunc pro tunc. *Ogden v. Lee* (1847) 3 How. Pr. (N. Y.) 153.

But delay of the plaintiff in moving for judgment on a verdict until the death of the defendant pending a motion for new trial will not defeat the right to judgment on the verdict nunc

pro tunc, where the motion was made three days after the verdict, and notice that it would be made was given when the verdict was returned. *Holker v. Kelley* (1892) 130 Ind. 356, 15 L.R.A. 622, 30 N. E. 304.

It has been held that delay by referees was not delay by the court. Thus, where a sole defendant in ejectment died after the issues had been submitted to referees, the later report of the referees in his favor could not be filed and judgment entered nunc pro tunc, as the action abated on the death of the defendant, the same as if death had occurred before verdict, the delay of the referees not being that of the court. *Kissam v. Hamilton* (1860) 20 How. Pr. (N. Y.) 369.

But, on the other hand, in *Heathcote v. Wing* (1855) 11 Exch. 355, 156 Eng. Reprint, 868, 3 C. L. R. 1110, 25 L. J. Exch. N. S. 23, where there had been a reference to an arbitrator, it was said that "the delay of the arbitrator might fairly be considered as the delay of the court." In that case a verdict was taken for the plaintiff at the spring assizes, subject to a reference to arbitration, and the plaintiff died before the arbitrator's decision, which was made on the last day of Michaelmas term, and it was held that the plaintiff's executrix was in time when she applied in Easter term, under 17 Car. II. to enter judgment as of the term after the verdict.

And where a verdict was taken in Hilary term for the plaintiff by consent, subject to the award of an arbitrator, who made his award after Trinity term, the defendant having died meantime, on motion made in Michaelmas term, judgment was entered as of Trinity term, the award being considered as the verdict for the purposes of the Statute of 17 Car. II. chap. 8. *Miller v. Spurrs* (1833) 2 Moore & S. (Eng.) 730.

### III. Status of cause at death.

#### a. In general.

As already stated, the cause must be ripe for judgment.

In *Jennings v. Ashley* (1843) 5 Ark. 128, it was held that judgment cannot be entered nunc pro tunc against a

party who dies before a verdict, and that this was forbidden by the Arkansas statute. Compare *Webber v. Webber* (1880) 83 N. C. 280. In *Bunker v. Green* (1868) 48 Ill. 243, where a plaintiff had a verdict, but died thereafter before judgment, pending a motion for a new trial, judgment was entered for him nunc pro tunc as of eight days before the verdict; it was held that while it may have been irregular to enter a judgment without reviving the suit, and to enter it before the verdict, that this was not such an error as to require a reversal, as by the statute the judgment did not become a lien until the last day of the term.

#### b. After verdict.

##### 1. In general.

If a party dies after verdict, where the act or delay of the court suspended the entry of judgment, the court may order judgment to be entered nunc pro tunc.

*United States*.—*LENOIR CAR WORKS v. TRINKLE* (reported herewith) ante, 1394.

*Connecticut*.—*Collins v. Prentice* (1843) 15 Conn. 423; *Brown v. Wheeler* (1846) 18 Conn. 199.

*Illinois*.—*Linn v. Brecher* (1899) 90 Ill. App. 6.

*Indiana*.—*Hilker v. Kelley* (1892) 130 Ind. 356, 15 L.R.A. 622, 30 N. E. 304; *Valparaiso v. Chester* (1911) 176 Ind. 636, 96 N. E. 765.

*Maine*.—*Goddard v. Bolster* (1830) 6 Me. 427, 20 Am. Dec. 320.

*Massachusetts*.—*Currier v. Lowell* (1835) 16 Pick. 170; *Terry v. Briggs* (1853) 12 Cush. 319; *Kelley v. Riley* (1871) 106 Mass. 339, 8 Am. Rep. 336; *Tanley v. Martin* (1874) 116 Mass. 275; *Cowley v. McLaughlin* (1884) 137 Mass. 221.

*New Hampshire*.—*Blaisdell v. Harris* (1872) 52 N. H. 191.

*New Jersey*.—*Den v. Tomlin* (1840) 18 N. J. L. 14, 35 Am. Dec. 525; *Tenick v. Flagge* (1860) 29 N. J. L. 25.

*New York*.—*Mackay v. Rhinelander* (1800) 1 Johns. Cas. 408; *Ryghtmyre v. Durham* (1834) 12 Wend. 245; *Crawford v. Wilson* (1848) 4 Bar.

504; *Gurney v. Parks* (1845) 1 How. Pr. 140; *Arthur v. Schriever* (1891) 28 Jones & S. 59, 16 N. Y. Supp. 610.

**Pennsylvania.**—*Griffith v. Ogle* (1806) 1 Binn. 172; *Fitzgerald v. Stewart* (1866) 53 Pa. 343; *Wood v. Boyle* (1896) 177 Pa. 620, 55 Am. St. Rep. 747, 30 Atl. 853.

**England.**—*Crispe v. Barwick* (1670) 1 Sid. 462, 82 Eng. Reprint, 1218, 1 Vent. 90, 86 Eng. Reprint, 63; *Craven v. Hanley* (1738) Barnes, 255, 94 Eng. Reprint, 902; *Astley v. Reynolds* (1731) 2 Strange, 916, 93 Eng. Reprint, 939; *Trelawny v. Winchester* (1757) 1 Burr. 219, 97 Eng. Reprint, 281, 1 Ld. Kenyon, 256, 96 Eng. Reprint, 985; *Tooker v. Beaufort* (1757) 1 Burr. 146, 97 Eng. Reprint, 238; *Toulmin v. Anderson* (1808) 1 Taunt. 385, 127 Eng. Reprint, 883; *Bridges v. Smyth* (1831) 8 Bing. 29, 131 Eng. Reprint, 311, 1 Moore & S. 93, 1 Dowl. P. C. 242, 1 L. J. C. P. N. S. 33; *Key v. Goodwin* (1832) 1 Moore & S. 620; *Blewett v. Tregonning* (1836) 4 Ad. & El. 1002, 111 Eng. Reprint, 1060; *Green v. Cobden* (1837) 4 Scott, 486; *Evans v. Rees* (1840) 12 Ad. & El. 167, 113 Eng. Reprint, 774, 4 Perry & D. 36, 9 L. J. Q. B. N. S. 317; *Abingto v. Lipscomb* (1841) 11 L. J. Q. B. N. S. 15; *Harrison v. Heathorn* (1843) 1 Dowl. & L. 529, 6 Scott, N. R. 794, 6 Mann. & G. 81, 134 Eng. Reprint, 817; *Miles v. Bough* (1845) 15 L. J. Q. B. N. S. 30; *Miles v. Williams* (1846) 9 Q. B. 47, 115 Eng. Reprint, 1193, 16 L. J. Q. B. N. S. 56, 11 Jur. 36; *Moor v. Roberts* (1858) 3 C. B. N. S. 830, 140 Eng. Reprint, 970; *Seymour v. Greenwood* (1861) 30 L. J. Exch. N. S. 189.

**Canada.**—*Davy v. Cameron* (1857) 15 U. C. Q. B. 175; *Neil v. McMillan* (1868) 27 U. C. Q. B. 257.

The practice was also recognized in *Griffiths v. Williams* (1830) 1 Crompt. & J. 47, 148 Eng. Reprint, 1329; *Clark & L. Invest. Co. v. Rich* (1908) 81 Neb. 321, 15 L.R.A.(N.S.) 682, 115 N. W. 1084; *Springsted v. Jayne* (1825) 4 Cow. (N. Y.) 423; *Beard v. Hall* (1878) 79 N. C. 506.

The same principle was applied in *Dial v. Holter* (1856) 6 Ohio St. 228, where, after verdict and judgment against him in an action of slander,

3 A.L.R.—89.

the defendant died in the same term, pending motions for a new trial and in arrest, and it was held that the court, on overruling the motions, properly entered judgment for the plaintiff nunc pro tunc, as of the term of verdict. The court said: "By filing motions for a new trial and in arrest, within the rules of the court, he superseded the judgment, though not the verdict, until the court should make a disposition of them."

"If either party died after a special verdict, and pending the time taken for argument or advisement thereon, or on a motion in arrest of judgment, or for new trial, judgment could be entered at common law after his death as of the term in which the postea was returnable, or judgment would otherwise have been given nunc pro tunc, that the delay arising from the act of the court might not turn to the prejudice of the party." *Fitzgerald v. Stewart* (1866) 53 Pa. 343.

Thus, the court will order the judgment entered nunc pro tunc where a party dies after a verdict, pending a motion to set aside the verdict. *Toulmin v. Anderson* (1808) 1 Taunt. 385, 127 Eng. Reprint, 883; *Harrison v. Heathorn* (1843) 1 Dowl. & L. 529, 6 Scott, N. R. 794, 6 Mann. & G. 81, 134 Eng. Reprint, 817; *Moor v. Roberts* (1858) 3 C. B. N. S. 830, 140 Eng. Reprint, 970; *Seymour v. Greenwood* (1861) 30 L. J. Exch. N. S. (Eng.) 189; *Blaisdell v. Harris* (1872) 52 N. H. 191.

Or pending a motion to reduce the amount. *Bridges v. Smyth* (1831) 8 Bing. 29, 131 Eng. Reprint, 311, 1 Moore & S. 93, 1 Dowl. P. C. 242, 1 L. J. C. P. N. S. 33.

Or pending a motion for a nonsuit. *Abington v. Lipscomb* (1841) 11 L. J. Q. B. N. S. (Eng.) 15.

Or pending a motion in arrest of judgment. *Crispe v. Barwick* (1670) 1 Sid. 462, 82 Eng. Reprint, 1218, 1 Vent. 90, 86 Eng. Reprint, 63; *Craven v. Hanley* (1738) Barnes, 255, 94 Eng. Reprint, 902; *Brown v. Wheeler* (1846) 18 Conn. 199.

Or pending a motion for a new trial.

**United States.**—LENOIR CAR WORKS v. TRINKLE (reported herewith) ante, 1394.

**Connecticut.**—Collins v. Prentice (1843) 15 Conn. 423.

**Illinois.**—Linn v. Brecher (1899) 90 Ill. App. 6.

**Indiana.**—Hilker v. Kelley (1892) 130 Ind. 356, 15 L.R.A. 622, 30 N. E. 304; Valparaíso v. Chester (1911) 176 Ind. 636, 96 N. E. 765.

**Massachusetts.**—Currier v. Lowell (1835) 16 Pick. 170; Terry v. Briggs (1853) 12 Cush. 319; Cowley v. McLaughlin (1884) 137 Mass. 221.

**New Jersey.**—Den v. Tomlin (1840) 18 N. J. L. 14, 35 Am. Dec. 525; Ten-eick v. Flagg (1860) 29 N. J. L. 25.

**New York.**—Mackay v. Rhineland (1800) 1 Johns. Cas. 408; Ryghtmyre v. Durham (1834) 12 Wend. 245; Crawford v. Wilson (1848) 4 Barb. 504; Gurney v. Parks (1845) 1 How. Pr. 140.

**Pennsylvania.**—Fitzgerald v. Stewart (1866) 53 Pa. 343.

**England.**—Tooker v. Beaufort (1757) 1 Burr. 146, 97 Eng. Reprint, 238; Key v. Goodwin (1834) 1 Moore & S. 620; Evans v. Rees (1840) 12 Ad. & El. 167, 113 Eng. Reprint, 774, 4 Perry & D. 36, 9 L. J. Q. B. N. S. 317.

**Canada.**—Neil v. McMillan (1868) 27 U. C. Q. B. 257.

So, where a party dies after verdict, pending the decision upon issues of law (Miles v. Bough (1845) 15 L. J. Q. B. N. S. (Eng.) 30; Miles v. Williams (1846) 9 Q. B. 47, 115 Eng. Reprint, 1193, 16 L. J. Q. B. N. S. 56, 11 Jur. 36), or pending the decision on exceptions generally (Lewis v. Soper (1857) 44 Me. 72; Kelley v. Riley (1871) 106 Mass. 339, 8 Am. Rep. 336; Tapley v. Martin (1874) 116 Mass. 275).

Plaintiff had a verdict, and after the decision in his favor on a motion in arrest, and pending argument upon issues of law, the plaintiff died and judgment was entered for the plaintiff as of the term in which the motion in arrest was decided. Miles v. Bough (Eng.) supra.

So, judgment may be entered nunc pro tunc where a party dies before judgment, after a special verdict, or

a verdict subject to the opinion of the court. Astley v. Reynolds (1731) 2 Strange, 916, 93 Eng. Reprint, 939; Trelawny v. Winchester (1757) 1 Burr. 219, 97 Eng. Reprint, 281, 1 Ld. Kenyon, 256, 96 Eng. Reprint, 985; Green v. Cobden (1837) 4 Scott, (Eng.) 486; Goddard v. Bolster (1830) 6 Me. 627, 20 Am. Dec. 320.

For illustrations of cases where there were motions both in arrest and for a new trial, see Griffith v. Ogle (1806) 1 Binn. (Pa.) 172; Wood v. Boyle (1896) 177 Pa. 620, 55 Am. St. Rep. 747, 30 Atl. 853. See also Dial v. Holter (1855) 6 Ohio St. 228, supra.

After verdict in the spring on several issues against the defendant and on one for him, the plaintiff moved for judgment notwithstanding the verdict on the last issue, and the defendant moved for a new trial in case the plaintiff's motion was granted, and died the following year, the plaintiff's motion being subsequently granted and the defendant's denied. Judgment was entered for the plaintiff as of the term after verdict. Blewett v. Tregonning (1836) 4 Ad. & El. 1002, 111 Eng. Reprint, 1060.

A motion for an extra allowance has been considered as coming within the same principle. Thus, where, after verdict for the defendants, they moved for an extra allowance, but before the decision granting it one of them died, judgment was properly entered nunc pro tunc as of the date of verdict and of the motion, the court pointing out that the right to costs followed the verdict, and that the defendants were not to suffer through the court's delay. Arthur v. Schriever (1891) 28 Jones & S. 59, 16 N. Y. Supp. 610.

## 2. Death of one of several plaintiffs or defendants.

Some of the cases applying the rule have been where the party dying was one of the plaintiffs who had a verdict, and judgment was later entered on the verdict for all the plaintiffs nunc pro tunc. Crispe v. Barwick (1670) 1 Sid. 462, 82 Eng. Reprint, 1218, 1 Vent. 90, 86 Eng. Reprint, 63.

So, where the party dying was one of the defendants, judgment was later entered for the plaintiffs on the verdict nunc pro tunc. *Harrison v. Heathorn* (1843) 1 Dowl. & L. 529, 6 Scott, N. R. 794, 6 Mann. & G. 81, 134 Eng. Reprint, 817; *Ryghtmyre v. Durham* (1834) 12 Wend. (N. Y.) 245.

Where, in an action of "tort," after a verdict for all the defendants, one of them died pending a motion for a new trial, or denying the motion as to her, the court properly directed judgment for her as of the term of trial. *Cowley v. McLaughlin* (1884) 137 Mass. 221 (where the motion for a new trial was granted as to one of the surviving defendants).

For a case of death of one of the defendants after a verdict for them, pending their motion for an extra allowance, see *Arthur v. Schriever* (1891) 28 Jones & S. 59, 16 N. Y. Supp. 610, *supra*, III. b, 1.

### 3. Death of sole plaintiff.

The rule applies in case a sole plaintiff dies after verdict for him which is sustained.

**United States.**—*LENOIR CAR WORKS v. TRINKLE* (reported herewith) ante, 1394.

**Connecticut.**—*Brown v. Wheeler* (1846) 19 Conn. 199.

**Maine.**—*Goddard v. Bolster* (1830) 6 Me. 427, 20 Am. Dec. 320.

**Massachusetts.**—*Currier v. Lowell* (1835) 16 Pick. 170.

**New Jersey.**—*Teneick v. Flagg* (1860) 29 N. J. L. 15.

**New York.**—*Mackay v. Rhineland-er* (1800) 1 Johns. Cas. 408; *Crawford v. Wilson* (1848) 4 Barb. 504.

**Pennsylvania.**—*Griffith v. Ogle* (1806) 1 Binn. 172; *Fitzgerald v. Stewart* (1866) 53 Pa. 343; *Wood v. Boyle* (1896) 177 Pa. 620, 55 Am. St. Rep. 747, 33 Atl. 853.

**England.**—*Miles v. Bough* (1845) 15 L. J. Q. B. N. S. 30; *Miles v. Williams* (1846) 9 Q. B. 47, 115 Eng. Reprint, 1193, 16 L. J. Q. B. N. S. 56, 11 Jur. 36; *Seymour v. Greenwood* (1861) 30 L. J. Exch. N. S. 189.

**Canada.**—*Davy v. Cameron* (1857) 15 U. C. Q. B. 175; *Neil v. McMillan* (1868) 27 U. C. Q. B. 257.

Where, after special verdict, and during argument, the plaintiff died, judgment was entered for the plaintiff (about a year later) as of the term on which the postea was returnable. *Trelawny v. Winchester* (1757) 1 Burr. 219, 97 Eng. Reprint, 281, 1 Ld. Kenyon, 256, 96 Eng. Reprint, 985.

In *Spencer v. Peake* (1884) 73 Ga. 803, where it does not appear what was the cause of the delay, where there was a verdict in behalf of an administrator on his application to resign his trust, but he died before judgment, judgment was entered on the verdict nunc pro tunc.

If the plaintiff dies after a verdict for him which is later set aside, judgment may be entered for the defendant nunc pro tunc. *Abington v. Lipscomb* (1841) 11 L. J. Q. B. N. S. (Eng.) 15; *Moor v. Roberts* (1858) 3 C. B. N. S. 830, 140 Eng. Reprint, 970.

Thus, a plaintiff having died after a verdict for him, pending a motion for a nonsuit which was afterward granted, judgment was entered for the defendant as of the term of the verdict. *Abington v. Lipscomb* (Eng.) *supra*.

A verdict was found for the plaintiff at the sittings after Trinity term, 1857; in Michaelmas term, a rule nisi was obtained to enter a verdict for the defendants; this rule was made absolute to enter a nonsuit, in Hilary term, 1858. The plaintiff having died in December, 1857, the court in January, 1859, allowed judgment to be entered nunc pro tunc as of Michaelmas term, 1857. *Moor v. Roberts* (Eng.) *supra*.

So, where, after a nonsuit, the plaintiff died pending his motion for a new trial, judgment for the defendant was entered as of the next term after nonsuit, though more than two terms had elapsed before judgment. *Spalding v. Congdon* (1836) 18 Wend. (N. Y.) 548.

### 4. Death of sole defendant.

The rule also applies in case a sole defendant dies after a verdict for the plaintiff which is sustained.

Connecticut.—Collins v. Prentice (1843) 15 Conn. 423.

Illinois.—Linn v. Brecher (1900) 90 Ill. App. 6.

Indiana.—Hilker v. Kelley (1892) 130 Ind. 356, 15 L.R.A. 622, 30 N. E. 304; Valparaiso v. Chester (1911) 176 Ind. 636, 96 N. E. 765.

Maine.—Lewis v. Soper (1857) 44 Me. 72.

Massachusetts.—Terry v. Briggs (1853) 12 Cush. 319; Kelley v. Riley (1871) 106 Mass. 339, 8 Am. Rep. 336; Tapley v. Martin (1874) 116 Mass. 275.

New Hampshire.—Blaisdell v. Harris (1872) 52 N. H. 191.

New Jersey.—Den v. Tomlin (1840) 18 N. J. L. 14, 35 Am. Dec. 525.

England.—Astley v. Reynolds (1731) 2 Strange, 916, 93 Eng. Reprint, 939; Tooker v. Beaufort (1757) 1 Burr. 146, 97 Eng. Reprint, 238; Green v. Cobden (1837) 4 Scott, 486.

So, if the defendant dies pending his motion to set aside the verdict, on the motion being granted, judgment may be entered for the defendant nunc pro tunc. Thus, where, on such a motion, judgment of nonsuit was given, the defendant's representatives were held entitled, upon application to the court, to enter up the judgment as of the term next after the trial, that they might get the costs of the nonsuit. Toulmin v. Anderson (1808) 1 Taunt. 385, 127 Eng. Reprint, 883.

Where the defendant dies after verdict for him, pending the plaintiff's motion for a new trial, on the motion being denied, judgment may be entered for the defendant nunc pro tunc. Key v. Goodwin (1832) 1 Moore & S. (Eng.) 620; Gurney v. Parks (1845) 1 How. Pr. (N. Y.) 140.

Where the defendant had a verdict and died thereafter before the first day of the next term wherein the plaintiff moved for a new trial, and the court took time to consider, and, owing to this and other matters not fairly attributable to laches, judgment was not entered within two terms after verdict, it was held that judgment might be entered for the defendant nunc pro tunc, as of the second term after verdict. Evans v.

Rees (1840) 12 Ad. & El. 167, 113 Eng. Reprint, 774, 4 Perry & D. 36, 9 L. J. Q. B. N. S. 817.

##### 5. Time as of which entry is made.

Entry nunc pro tunc is usually made as of the time or term of verdict. Collins v. Prentice (1843) 15 Conn. 423; Linn v. Brecher (1900) 90 Ill. App. 6; Cowley v. McLaughlin (1884) 137 Mass. 221; Blaisdell v. Harris (1872) 52 N. H. 191; Arthur v. Schriever (1891) 28 Jones & S. 59, 16 N. Y. Supp. 610; Dial v. Holter (1856) 6 Ohio St. 228; Crispe v. Barwick (1670) 1 Sid. 462, 82 Eng. Reprint, 1218, 1 Vent. 90, 86 Eng. Reprint, 63; Abington v. Lipscomb (1841) 11 L. J. Q. B. N. S. (Eng.) 15.

Sometimes, however, under the early practice it was entered as of the next term after verdict. Tooker v. Beaufort (1757) 1 Burr. 146, 97 Eng. Reprint, 238; Toulmin v. Anderson (1808) 1 Taunt. 385, 127 Eng. Reprint, 883; Blewett v. Tregonning (1836) 4 Ad. & El. 1002, 111 Eng. Reprint, 1060; Mackay v. Rhinelander (1800) 1 Johns. Cas. (N. Y.) 408; Ryghtmyre v. Durham (1834) 12 Wend. (N. Y.) 245; Gurney v. Parks (1845) 1 How. Pr. (N. Y.) 140. See also Moor v. Roberts (1858) 3 C. B. N. S. 830, 140 Eng. Reprint, 970, 27 L. J. C. P. N. S. 161, 4 Jur. N. S. 241, 6 Week. Rep. 297, *supra*, III. b, 3.

Or, as it is sometimes expressed, as of the term when the *postea* was returnable. Trelawny v. Winchester (1757) 1 Burr. 219, 97 Eng. Reprint, 281, 1 Ld. Kenyon, 256, 96 Eng. Reprint, 985; Den v. Tomlin (1840) 18 N. J. L. 14, 35 Am. Dec. 525; Teneick v. Flagg (1860) 29 N. J. L. 25.

In Spalding v. Congdon (1836) 18 Wend. (N. Y.) 543, it was ordered to be entered as of the next term after a nonsuit.

It has also been entered as of the second term after verdict. Evans v. Rees (Eng.) *supra*. And as of the term of argument. Harrison v. Heathorn (1843) 1 Dowl. & L. 529, 6 Scott, N. R. 794, 6 Mann. & G. 81, 134 Eng. Reprint, 817.

Where, pending a motion for a new trial in a negligence case, after ver-

dict for the plaintiff, he died, it was held that judgment was properly entered for him nunc pro tunc as of the time of submission of the motion. *LENOIR CAR WORKS V. TRINKLE* (reported herewith) ante, 1894.

c. *After trial or hearing by the court.*

1. *In general.*

The same rule applies that judgment may be entered nunc pro tunc where there has been a hearing or trial of fact or law by the court, and a party dies after such trial or hearing, but before the decision. *Citizens' Bank v. Brooks* (1884) 23 Blatchf. 137, 23 Fed. 21; *Merchants Loan & T. Co. v. Egan* (1908) 143 Ill. App. 572; *Perry v. Wilson* (1811) 7 Mass. 393; *Webber v. Stanton* (1864) 1 Mich. N. P. 97 (obiter); *Hess v. Cole* (1851) 23 N. J. L. 116; *RE PILLSBURY* (reported herewith) ante, 1896; *Re Jarrett* (1884) 42 Ohio St. 199; *Stilwell v. Smith* (1907) 219 Pa. 36, 67 Atl. 910. See also, as recognizing the rule, *Mannix v. Elder* (1885) 1 Ohio C. D. 36.

It is stated in 2 Fowler, Exch. Pr. (Eng.) 169, that in *Jones v. Le David*, Hil. T. 1791, "where a cause was finally heard, and the court took time to consider of their judgment, and in the meanwhile the party plaintiff died, the court gave judgment nunc pro tunc, and ordered that their decree should have relation to, and be entered upon, the day that the cause was finally heard; and in this decree the plaintiff had relief."

Where the plaintiff in a state court died while the case in that court was held under advisement, it was held that the state court properly entered a decree for the plaintiff as of the last day of the term at which it was submitted. *Mitchell v. Overman* (1881) 103 U. S. 62, 26 L. ed. 369, where the court does not comment on the fact that the case was submitted with a stipulation that the decree was to be rendered as of the term of trial and submission (see also *Rose's Notes* to this case).

In *Mitchell v. Schoonover* (1888) 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867, where it was held that it was

not necessary to enter judgment nunc pro tunc against the defendant, who died the day judgment was entered, the court said: "At the time the demurrer was overruled the plaintiff was then entitled to a judgment according to the prayer of his complaint. His cause of action stood admitted upon the record, and it was the duty of the court to enter judgment against the defendant according to the facts as they were alleged in the complaint. If, while the cause is in this condition, the defendant dies, the plaintiff is not to lose the fruits of his litigation, and if necessary, it is the duty of the court to enter judgment nunc pro tunc as of the previous term, or, under our practice, an earlier day in that term."

When in trustee process a trustee has answered, and the cause is continued, and the trustee dies before judgment is rendered, judgment may be rendered against the trustee, as of the term when he answered. *Hall v. Harvey* (1824) 3 N. H. 61.

Where, in a foreign attachment, the trustee had disclosed, but not sufficiently, and refused to submit to a further examination ordered to be had before a justice of the peace, and died before the next term, as did also the principal debtor, who was in default, judgment was entered against both as of the preceding term. *Patterson v. Buckminster* (1817) 14 Mass. 144.

Where, pending a motion to set aside a report of a referee in favor of the plaintiff, he died, it was stated that the ordinary practice would have allowed judgment for the plaintiff nunc pro tunc; but it was held that the particular court had no such power under the wording of the Constitution, as it was about to go out of existence. *Smith v. Miller* (1847) 3 How. Pr. (N. Y.) 132.

But where a sole defendant in ejectment died after the issues had been submitted to referees, it was held that the later report of the referees in his favor could not be filed and judgment entered nunc pro tunc, as the action abated on the death of the defendant, the same as if death had



occurred before verdict; the delay of the referee was not that of the court. *Kissam v. Hamilton* (1860) 20 How. Pr. (N. Y.) 369.

## 2. Equity cases.

So, in equity cases the same general rule applies where a party dies after submission, but before judgment, that judgment may be entered *nunc pro tunc*.

**United States.**—*Sharon v. Terry* (1888) 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 354.

**Iowa.**—*Flock v. Wyatt* (1878) 49 Iowa, 466.

**Michigan.**—*Gunderman v. Gunnison* (1878) 39 Mich. 313.

**New Jersey.**—*Burnham v. Dalling* (1863) 16 N. J. Eq. 310; *Molineaux v. Reynolds* (1896) 55 N. J. Eq. 187, 36 Atl. 276 (obiter).

**New York.**—*Campbell v. Mesier* (1819) 4 Johns. Ch. 334, 8 Am. Dec. 570; *Ehle v. Moyer* (1852) 8 How. Pr. 244.

**Pennsylvania.**—*Schaeffer v. Coldren* (1912) 237 Pa. 77, 85 Atl. 98, Ann. Cas. 1914B, 175.

**England.**—*Turner v. London & S. W. R. Co.* (1874) L. R. 17 Eq. 561, 43 L. J. Ch. N. S. 430; *Ecroyd v. Coulthard* [1897] 2 Ch. 554, 66 L. J. Ch. N. S. 751, 77 L. T. N. S. 357, 46 Week. Rep. 119, 61 J. P. 791.

**Canada.**—*Snell v. Brickles* (1913) 9 D. L. R. 840, 4 Ont. Week. N. 707, 24 Ont. Week. Rep. 28, reversed on other grounds in (1913) 12 D. L. R. 753, 4 Ont. Week. N. 951, 28 Ont. L. Rep. 358.

In *Collinson v. Lister* (1855) 20 Beav. 355, 52 Eng. Reprint, 639, more fully reported in a note in *Turner v. London & S. W. R. Co.* (1874) L. R. 17 Eq. (Eng.) 568, it was held that the decree would be dated on the date of argument, where a party had died before the decision.

It is irregular in partition, when one of the defendants has died after submission of the cause, to enter a decree against such defendant as of a date after his death; in such case judgment must be entered as of a date prior to his death. *Flock v. Wyatt* (1878) 49 Iowa, 466.

Where complainant in partition died after argument on his motion to strike out the cross bill of one of the defendants, the order striking out the cross bill was made *nunc pro tunc* as of the day of submission. *Clark v. Van Cleef* (1908) 75 N. J. Eq. 152, 71 Atl. 260.

Where the cestui que trust of the complainant died after argument, and before the decision by which the suit was determined, the court ordered the decree to be entered *nunc pro tunc* as of the time of the argument. *Wood v. Keyes* (1837) 6 Paige (N. Y.) 478.

But where a dowress died after argument on a bill for dower, and before decision the chancellor went out of office, the court declined to permit a decree to be entered *nunc pro tunc*, merely for the purpose of determining costs. *Johnson v. Thomas* (1831) 2 Paige (N. Y.) 377.

## Contra.

Where, after submission of an equity case to set aside a deed, but before the decision, the principal defendant dies, judgment against him after his death is error, although dated while he was living, as in such case there is no authority to enter a decree except as of the exact date when rendered, the court considering that the heirs of the decedent were entitled to a day in court. *Powe v. McLeod* (1884) 76 Ala. 418.

## 3. Time as of which entry is made.

Entry is usually made as of the time of submission.

**United States.**—*Citizen's Bank v. Brooks* (1884) 23 Blatchf. 137, 23 Fed. 21; *Sharon v. Terry* (1888) 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 354, affirmed in (1889) 131 U. S. 40, 33 L. ed. 94, 9 Sup. Ct. Rep. 705.

**Michigan.**—*Webber v. Stanton* (1864) 1 Mich. N. P. 97 (obiter); *Gunderman v. Gunnison* (1878) 39 Mich. 313.

**New Jersey.**—*Burnham v. Dalling* (1863) 16 N. J. Eq. 310.

**New York.**—*Campbell v. Mesier* (1819) 4 Johns. Ch. 334, 8 Am. Dec. 570; *Ehle v. Moyer* (1852) 8 How. Pr. 244.

**Ohio.**—*Re Jarrett* (1884) 42 Ohio St. 199.

**Pennsylvania.**—*Stilwell v. Smith* (1907) 219 Pa. 36, 67 Atl. 910; *Schaeffer v. Coldren* (1912) 237 Pa. 77, 85 Atl. 98, Ann. Cas. 1914B, 175.

**England.**—*Jones v. Le David* (1791) 2 Fowler, Exch. Pr. 169.

**Canada.**—*Snell v. Brickles* (1913) 9 D. L. R. 840, 4 Ont. Week. N. 707, 24 Ont. Week. Rep. 28, reversed on other grounds in (1913) 12 D. L. R. 753, 4 Ont. Week. N. 951, 28 Ont. L. Rep. 358.

Sometimes it is ordered as of the term of submission. *Hess v. Cole* (1850) 23 N. J. L. 116. Or as of the last day of the term of submission. *Mitchell v. Overman* (1880) 103 U. S. 62, 26 L. ed. 369 (see also *Rose's Notes* to this case).

*d. After assessment of damages.*

Where a party dies after assessment of damages, but before entry of judgment, judgment may be entered nunc pro tunc. *Lure v. Rest* (1711) 10 Mod. (Eng.) 30, 88 Eng. Reprint, 611; *Wilkins v. Wainwright* (1899) 173 Mass. 212, 53 N. E. 397.

Thus, where, after writ of inquiry executed, but before entry of judgment, which was delayed by act of the court, the plaintiff died, the court apparently granted a motion to enter judgment "as of two or three terms ago." *Lure v. Rest* (Eng.) *supra*.

So, where, in a case tried by a court without a jury, damages in tort have been assessed before the death of the defendant, and nothing remains but to dispose of a motion for a new trial, judgment may be entered for the plaintiff nunc pro tunc. *Wilkins v. Wainwright* (Mass.) *supra*.

But it has been held that a decree cannot be entered nunc pro tunc in foreclosure when the mortgagor dies while the case is on the calendar upon the report of the master to whom it had been referred to compute the amount. *Thomas v. Dudley* (1837) 3 Edw. Ch. (N. Y.) 137.

In *Ireland v. Champneys* (1813) 4 Taunt. 884, 128 Eng. Reprint, 580, where, after interlocutory judgment in libel, and assessment of damages

against the defendant, the plaintiff died before final judgment, it was held that judgment could not be entered under 17 Car. II. as the suit had abated by the plaintiff's death. But see the comment on this case in *Kramer v. Waymark* (1866) L. R. 1 Exch. (Eng.) 241, 4 Hurlst. & C. 427, 35 L. J. Exch. N. S. 148, 12 Jur. N. S. 395, 14 L. T. N. S. 368, 14 Week. Rep. 659, *infra*, V.

*e. After rendering of decision, but before entry of judgment.*

Where the death of a party occurs after the decision, but before the formal entry of judgment, the court in a proper case may order the judgment to be entered nunc pro tunc. *Norwich v. Berry* (1769) 4 Burr. 2277, 98 Eng. Reprint, 187; *Glass v. Glass* (1854) 24 Ala. 468; *Reid v. Morton* (1886) 119 Ill. 118, 6 N. E. 414; *Chester v. Graves* (1914) 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678; *Reynolds v. Adams* (1911) 90 Neb. 343, 133 N. W. 401; *Fulton v. Fulton* (1880) 8 Abb. N. C. (N. Y.) 210; *Murray v. Cooper* (1820) 6 Serg. & R. (Pa.) 126; *Re Lindsay* (1895) 25 Pittsb. L. J. N. S. (Pa.) 406.

In *Chester v. Graves* (1914) 159 Ky. 244, 166 S. W. 998, Ann. Cas. 1915D, 678, the court said: "From the earliest times courts of law and equity have possessed and exercised the power of making entries of judgments and decrees nunc pro tunc in cases where such entries are necessary to prevent injustice to suitors. . . . Such power does not depend upon any statute, but it is inherent in the courts. . . . One of the classes of cases in which judgments may be entered nunc pro tunc is where the former judgment has been pronounced by the court, but not entered of record by reason of some accident or mistake, or through the neglect or omission or misprision of the clerk. In such a case the court rendering the judgment has the power to order the judgment so rendered to be entered nunc pro tunc, provided there be satisfactory evidence, not only of the rendition, but of the terms of the judgment."

Often the failure to enter judgment in such case is due to the omission or mistake of the court officer. *Glass v. Glass* (1854) 24 Ala. 468; *Chester v. Graves* (Ky.) *supra*; *Reynolds v. Adams* (1911) 90 Neb. 343, 133 N. W. 401; *Murray v. Cooper* (1820) 6 Serg. & R. (Pa.) 126.

Thus, where, after a decision for the plaintiff, the prothonotary omitted to enter the judgment, and the defendant died, it was held that eight years after the decision, judgment was properly entered *nunc pro tunc* as of the term of decision. *Murray v. Cooper* (Pa.) *supra*.

Sometimes the decision is placed on the ground that the omission was due to the court's delay, as in *Re Lindsay* (1895) 25 Pittsb. L. J. N. S. (Pa.) 406, where a surviving partner offered to purchase the interest of his deceased partner in the firm at a price named, subject to the "approval" of the orphans' court, and the matter was submitted to the orphans' court, verbally approved, and instructions given to draw a decree in accordance therewith. Such decree was accordingly drawn and presented for signature, but signing was delayed by reason of the absence of the president judge who had heard the matter. In the meantime, the survivor died. It was held that the decree would be made *nunc pro tunc*, as the delay of the court would not be permitted to prejudice the interests of the parties.

And in general, when such an entry is reasonable, the court may order it.

Thus, in *Norwich v. Berry* (1769) 4 Burr. 2277, 98 Eng. Reprint, 187, judgment for the defendant on demurrer was entered as of the term when it was pronounced, some eighteen months before, where he died after that term, the court thinking it reasonable to do so.

So, where a guardian's sale was approved by an indorsement by the judge on the report of sale, it was held proper, on behalf of the purchasers, to enter a formal order of approval *nunc pro tunc*, though after the death of the guardian, as a cor-

rection of the records. *Reid v. Morton* (1886) 119 Ill. 118, 6 N. E. 414.

So, where the master reported, there being no contest, that a bankrupt was entitled to his discharge, and the next day the bankrupt died, an order of discharge was properly entered as of the day of the report. *Young v. Ridenbaugh* (1875) 3 Dill. 239, Fed. Cas. No. 18,173.

In *Fulton v. Fulton* (1880) 8 Abb. N. C. (N. Y.) 210, after an oral direction for judgment for the plaintiff in an action to recover the value of her dower interest, she died within a few days, having consented to take a gross sum in lieu of dower, and it was held proper that the decision and judgment be signed and entered *nunc pro tunc*.

But in *Franklin v. Merida* (1875) 50 Cal. 289, where a judgment rendered in the lifetime of the plaintiff was not recorded until after his death, it was held to be unnecessary and erroneous to order the record amended as if the judgment were entered *nunc pro tunc*, where the rights of the plaintiff and his successor did not require such an amendment.

In *Re Cook* (1888) 77 Cal. 220, 1 L.R.A. 567, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, it was held that a decree of divorce rendered by the court in the lifetime of the plaintiff takes effect from its rendition, although the clerk fails to enter it; and that its entry *nunc pro tunc* after the plaintiff's death is immaterial. And on a further appeal the court declined to consider the *nunc pro tunc* decree as void. *Re Cook* (1890) 83 Cal. 415, 23 Pac. 392.

See also *Lachenmeyer v. Lachenmeyer* (1888) 65 How. Pr. (N. Y.) 422, *infra*, IV. c.

#### *1. Pending appeal or writ of error.*

##### *1. In general.*

There are comparatively few cases upon the power to enter a judgment of the appellate court *nunc pro tunc* where a party has died before the hearing of an appeal or writ of error.

In *Borer v. Chapman* (1886) 119 U. S. 587, 30 L. ed. 532, 7 Sup. Ct. Rep. 342, a personal judgment entered

against defendant, sued as executor, having been reversed by the Supreme Court after the latter's death, upon application of his personal representative, who had been substituted as plaintiff in error, upon the ground that it should have been rendered *de bonis testatoris*, and the cause having been remanded to the circuit court with instructions to take further proceedings in conformity with the opinion, it was held that the circuit court properly entered judgment *de bonis testatoris nunc pro tunc* as of a time prior to the defendant's death.

Where the complainant appealed from a part of the decree and died before the hearing, but, the fact of his death being unknown to the counsel, the cause was afterwards heard and decided by the chancellor upon the appeal, modifying the decree, it was held that the decree upon the appeal might be entered *nunc pro tunc*, as of a day previous to the death of the complainant, and after the entering of the appeal, but without prejudice to the rights of the parties. *Vroom v. Ditmas* (1886) 5 Paige (N. Y.) 528.

In *Bemus v. Beekman* (1829) 3 Wend. (N. Y.) 667, where one of the parties to a writ of error died "since the joinder in error," it was held that the judgment in error would be directed to be entered *nunc pro tunc* as of a time previous to his death.

Compare a decision in a case where the party had not pursued the simplest remedy. *Bates v. Lockwood* (1787) 1 T. R. 637, 99 Eng. Reprint, 1294, *supra*, II. b.

Where the plaintiff brought error from a nonsuit in trespass *quare clausum fregit*, and died "pending the writ of error," and it was held that the plaintiff was entitled to a verdict, judgment was entered *nunc pro tunc* as of a term when he was alive. *King v. Dunn* (1839) 21 Wend. (N. Y.) 253.

In *Miller v. Gunn* (1852) 7 How. Pr. (N. Y.) 159, where, after perfecting an appeal from a judgment against him in slander, the defendant died before argument, the court directed judgment of affirmance to be entered as of a day previous to his death. In

granting a motion by his personal representatives to continue the action in their names, so that they might, if they chose, take a further appeal, the court said: "The objection that there was no necessity for this motion, so far as the pending appeal was concerned, was well founded. The case is analogous to the writ of error at common law, where, if error had not been assigned, the writ abated by the death of the plaintiff in error; but if the death happened after error assigned, the cause proceeded. In such case, the court of review directed judgment to be entered upon its decision as of a day anterior to the death of the party. So in this very case, since this motion was made, the appeal has been argued at a general term of this court, and the judgment affirmed. The court directed the judgment upon such affirmance to be entered as of a day previous to the death of the defendant."

In affirming a judgment in trustee process in favor of the alleged trustee, where it was suggested that the principal debtor had deceased since the judgment below, the court said: "It is the common practice to affirm or reverse the judgment *nunc pro tunc* in such case." *Adams v. Newell* (1836) 8 Vt. 190.

In *Snow v. Carpenter* (1881) 54 Vt. 17, where one of the appellants died after argument, but before the decision, and there seems to have been no *nunc pro tunc* entry, the court cites *Adams v. Newell* (Vt.) *supra*, as authority for the statement that "in case one of the parties dies after judgment in the county court, and before hearing in the supreme court, the practice is to affirm or reverse the judgment *nunc pro tunc*."

When a judgment for a plaintiff in a personal action has been erroneously set aside, and a subsequent final judgment against him is brought up by writ of error, pending which he dies, the Supreme Court will affirm the judgment in his favor *nunc pro tunc* as of the date when it was rendered. *Coughlin v. District of Columbia* (1882) 106 U. S. 7, 27 L. ed. 74,

1 Sup. Ct. Rep. 37 (see also Rose's Notes to this case).

Where, on an appeal from a decree for the defendant in an equity case, the decision was for the plaintiff, and it appeared that the defendant had died during the term in which the case was argued and decided, judgment was entered as of the first day of that term. *Bank of United States v. Weisiger* (1829) 2 Pet. (U. S.) 481, 7 L. ed. 492 (see also Rose's Notes to this case).

But where the plaintiff died after judgment in his favor, but before the term of the appellate court to which an appeal had been taken, the court stated (there having been an opinion for affirmance) that if the death had occurred after submission, judgment might have been entered *nunc pro tunc*; but that there was no day as of which a judgment could be entered in the appellate court in the life of the party. *Lea v. Gauze* (1843) 26 N. C. (4 Ired. L.) 9.

#### **Before rehearing.**

Where, on an appeal from a judgment for the plaintiff in an action of slander, the judgment was reversed, and shortly thereafter the appellant died, the appellate court, on a later rehearing, reduced the verdict by an amount sufficient to free it from the errors of the trial, and directed judgment to be entered as of the time of the original reversal. *Hocks v. Sprangers* (1902) 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113.

A decree *nunc pro tunc* is properly entered on rehearing in lieu of the former decree, which is set aside because a fact was overlooked, when the petitioner has died since the original submission, but before the first decision. *New Orleans v. Warner* (1899) 176 U. S. 92, 44 L. ed. 385, 20 Sup. Ct. Rep. 280.

#### **2. After submission.**

##### **(a) In general.**

Where a party dies after submission of an appeal or writ of error to the appellate court, but before decision, judgment on the appeal may be entered *nunc pro tunc*.

**United States.**—*Clay v. Smith* (1830) 3 Pet. 411, 7 L. ed. 723 (see also Rose's Notes to this case); *Richardson v. Green* (1888) 130 U. S. 104, 32 L. ed. 872, 9 Sup. Ct. Rep. 443; *Louisville & N. R. Co. v. Behlmer* (1899) 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; *Bell v. Bell* (1901) 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551.

**Arkansas.**—*Pool v. Loomis* (1843) 5 Ark. 110; *Strickland v. Strickland* (1906) 80 Ark. 451, 97 S. W. 659.

**California.**—*Black v. Shaw* (1862) 20 Cal. 68; *Savings & L. Soc. v. Gibb* (1863) 21 Cal. 609; *Holloway v. Galliac* (1874) 49 Cal. 149; *Ede v. Cuneo* (1898) — Cal. —, 55 Pac. 772; *Re Dolbeer* (1906) 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795.

**Georgia.**—*Macon v. Dasher* (1892) 90 Ga. 195, 16 S. E. 75; *Pritchett v. Bartow County* (1894) 94 Ga. 731, 20 S. E. 256.

**Illinois.**—*Danforth v. Danforth* (1884) 111 Ill. 236; *Seymour v. O. S. Richardson Fueling Co.* (1903) 205 Ill. 77, 68 N. E. 716; *Peters v. Harris* (1910) 245 Ill. 419, 92 N. E. 281; *Leonard v. Springer* (1912) 174 Ill. App. 516; *Kuechle v. Springer* (1913) 177 Ill. App. 616.

**Missouri.**—*Central Sav. Bank v. Shine* (1871) 48 Mo. 456, 8 Am. Rep. 112; *Sargent v. St. Louis & S. F. R. Co.* (1893) 114 Mo. 348, 19 L.R.A. 460, 21 S. W. 823; *Mead v. Mead* (1876) 1 Mo. App. 247.

**New Jersey.**—*Tallman v. Wallack* (1896) — N. J. —, 41 Atl. 677.

**New York.**—*Beach v. Gregory* (1856) 3 Abb. Pr. 78, affirming (1855) 2 Abb. Pr. 203; *Miller v. Gunn* (1852) 7 How. Pr. 159.

**North Carolina.**—*Lea v. Gauze* (1843) 26 N. C. (4 Ired. L.) 9 (obiter).

**Oklahoma.**—*Goldsborough v. Hewitt* (1910) 26 Okla. 859, 110 Pac. 906.

**Tennessee.**—*McLean v. State* (1873) 8 Heisk. 22.

**Vermont.**—*Adams v. Newell* (1836) 8 Vt. 190.

**Washington.**—*Case v. San Juan County* (1910) 59 Wash. 222, 109 Pac. 809.

**Wisconsin.**—*Wilson v. Chippewa*

Valley Electric R. Co. (1908) 135 Wis. 18, 114 N. W. 462, 115 N. W. 330.

England.—Cumber v. Wane (1721) 1 Strange, 426, 93 Eng. Reprint, 613.

Canada.—Gunn v. Harper (1902) 3 Ont. L. Rep. 693; Young v. Gravenhurst (1911) 24 Ont. L. Rep. 467, Ann. Cas. 1912B, 812; Bryce v. Canadian P. R. Co. (1908) 13 B. C. 446.

The same principle was asserted in Boyes v. Masters (1911) 28 Okla. 409, 38 L.R.A.(N.S.) 576, 114 Pac. 712.

Where the defendant brought error from a judgment granting partial relief to the plaintiff, and the plaintiff alleged cross error, in reversing the judgment on the cross error the court directed judgment to be entered as of the date of submission, the defendant in error having died since that time. Peters v. Harris (1910) 245 Ill. 419, 92 N. E. 281.

Where one of the plaintiffs died after argument on appeal from judgments against the defendants in an action for personal injuries, and from a cause other than the injuries, the court, in reducing the amount, ordered that its judgment should be entered as of the date when argument was concluded. Young v. Gravenhurst (1911) 24 Ont. L. Rep. 467, Ann. Cas. 1912B, 812.

On an appeal from a judgment for the defendant in an action for damages due to a collision of vessels, where the appellants stated that if the appeal were allowed they would not bring any more evidence as to the amount of compensation, the court, in reversing the judgment, assessed the damages, and, *inter alia*, awarded damages to one of the plaintiffs suing for himself, and also damages to him "suing as administrator of his wife, deceased," to be apportioned between himself and his mother-in-law in a stated proportion. On it appearing that such plaintiff had died after argument of the appeal, but before judgment, judgment was antedated as of the last day of argument. Bryce v. Canadian P. R. Co. (1908) 13 B. C. 446.

The appellate court has power to amend an order of reversal by changing its date to a date prior to the death

of a party, which occurred after submission, but before decision. Carter v. Beckwith' (1880) 82 N. Y. 83; Re Beckwith (1882) 87 N. Y. 503.

Where, after argument of an appeal by a purchaser in partition from an order requiring him to complete, one of the plaintiffs died, the order of affirmance was properly entered *nunc pro tunc* as of a day prior to the death. Bergen v. Wyckoff (1881) 84 N. Y. 659.

In Birmingham R. Light & P. Co. v. Cunningham (1904) 141 Ala. 470, 37 So. 689, where the plaintiff died pending an appeal from a judgment in his favor, it was held that the judgment of affirmance had effect as of the time of submission.

In Wallace v. Wallace (1912) 150 Ky. 33, 150 S. W. 18, where appellee died after submission, but before the affirmance, it was held that the judgment related back to the date of submission, and that it was therefore unnecessary to enter the judgment *nunc pro tunc*.

In Goggin v. Cord (1885) 7 Ky. L. Rep. 39, it was held that the Kentucky court of appeals "has power to render judgment against an appellee who is dead if he was alive when the cause was submitted, and this power does not depend upon the judgment showing that it is entered as of a day prior to the death."

Where, after a writ of error in a chancery suit had been sued out by the complainant from the decision of the supreme court of Arkansas to the Supreme Court of the United States, and, before the decision of that court, one of the original defendants died, upon the filing of the mandate of the United States Supreme Court, reversing the judgment, the Arkansas supreme court considered the case to be the same as if the death had occurred after submission to the Arkansas supreme court, and before its decision, and therefore ordered judgment to be entered *nunc pro tunc* as of a day prior to the death, and subsequent to the submission of the cause. Cunningham v. Ashley (1852) 13 Ark. 653.

In Aultman v. Utsey (1891) 35 S.

C. 596, 14 S. E. 289, 351, in denying a motion to set aside a judgment of affirmance where the appellant had died after submission and before decision, the court said: "It seems to us that the true rule to be deduced from the case of *Keep v. Leckie* (1854) 42 S. C. L. (8 Rich.) 164, is, that where a party dies after a final hearing of his cause, and before the actual rendition of the judgment, such judgment may be entered nunc pro tunc, as of the first day of the term at which the final hearing was had, notwithstanding the death of the party during the time taken by the court for deliberation, and before the final conclusion has been announced. This rule seems to have been recognized and acted upon from the earliest times."

*(b) Death of respondent before affirmance.*

The rule applies where the party dying is the defendant in error or respondent, and there is an affirmance on the appeal. *Travelers' Protective Asso. v. Brazington* (1919) — Ind. App. —, 123 N. E. 221; *Wilson v. Chipewa Valley Electric R. Co.* (1908) 135 Wis. 18, 114 N. W. 462, 115 N. W. 330. So where one of the respondents dies and there is an affirmance. *Tallman v. Wallack* (1896) — N. J. —, 41 Atl. 677. So where one of the successful plaintiffs dies, and the court, on appeal, reduces the amount of damages. *Young v. Gravenhurst* (1911) 24 Ont. L. Rep. 467, Ann. Cas. 1912B, 812.

In affirming a judgment in trustee process in favor of the alleged trustee where it was suggested that the principal debtor had deceased since the judgment below, the court said: "It is the common practice to affirm or reverse the judgment nunc pro tunc in such case." *Adams v. Newell* (1836) 8 Vt. 190.

It may be noted that where the respondent died on the day of the decision of affirmance, judgment was entered nunc pro tunc as of that date. *Peetsch v. Quinn* (1893) 6 Misc. 52, 26 N. Y. Supp. 729, but the judgment was reversed on further appeal (1894) 7 Misc. 6, 27 N. Y. Supp. 323.

*(c) Death of respondent before reversal.*

So where the defendant in error or respondent dies after submission, but before decision, a judgment of reversal may be entered nunc pro tunc. *Louisville & N. R. Co. v. Behlmer* (1899) 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; *Pool v. Loomis* (1843) 5 Ark. 110; *Savings & L. Soc. v. Gibb* (1863) 21 Cal. 609; *Holloway v. Galliac* (1874) 49 Cal. 149; *Macon v. Dasher* (1892) 90 Ga. 195, 16 S. E. 75; *Sargent v. St. Louis & S. F. R. Co.* (1893) 114 Mo. 348, 19 L.R.A. 460, 21 S. W. 823; *Goldsborough v. Hewitt* (1910) 26 Okla. 859, 110 Pac. 906.

*(d) Death of appellant before affirmance.*

So, where the plaintiff in error or appellant dies after submission, but before decision, a judgment of affirmance may be entered nunc pro tunc. *Cumber v. Wane* (1721) 1 Strange, 426, 93 Eng. Reprint, 613; *Black v. Shaw* (1862) 20 Cal. 68; *Ede v. Cuneo* (1898) — Cal. —, 55 Pac. 772; *Re Dolbeer* (1906) 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795; *Leonard v. Springer* (1912) 174 Ill. App. 516; *Kuechle v. Springer* (1913) 177 Ill. App. 616; *Miller v. Gunn* (1852) 7 How. Pr. (N. Y.) 159; *Gunn v. Harper* (1902) 3 Ont. L. Rep. 693.

So in like case where one of the appellants dies. *Beach v. Gregory* (1856) 3 Abb. Pr. (N. Y.) 78, affirming (1855) 2 Abb. Pr. 203.

In *McLean v. State* (1873) 8 Heisk. (Tenn.) 22, the court, in affirming a judgment in part after the death of one of the appellants who had died since the argument, gave leave to enter the judgment of affirmance as of the term of argument; but it seems that the state waived the right.

*(e) Death of appellant before reversal.*

So, where the plaintiff in error or appellant dies after submission, but before decision, judgment of reversal may be entered nunc pro tunc. *Clay v. Smith* (1830) 3 Pet. 411, 7 L. ed. 723 (see also *Rose's Notes to this case*); *Pritchett v. Bartow County* (1894) 94 Ga. 731, 20 S. E. 256; *Seymour v. O. S. Richardson Fueling Co.* (1903) 205 Ill. 77, 68 N. E. 716; *Con-*

tral Sav. Bank v. Shine (1871) 48 Mo. 456, 8 Am. Rep. 112.

So, where one of the successful appellants dies. *Case v. San Juan County* (1910) 59 Wash. 222. See also *Bryce v. Canadian P. R. Co.* (1908) 13 B. C. 446, *supra*, III. f, 2 (a).

(f) *Time as of which entered.*

The usual practice is to enter the judgment as of the term or time of submission.

**United States.**—*Richardson v. Green* (1888) 130 U. S. 104, 32 L. ed. 872, 9 Sup. Ct. Rep. 443 (see also *Rose's Notes to this case*); *Louisville & N. R. Co. v. Behlmer* (1899) 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209.

**Alabama.**—*Powe v. McLeod* (1884) 76 Ala. 418 (obiter).

**Arkansas.**—*Strickland v. Strickland* (1906) 80 Ark. 451, 97 S. W. 659.

**California.**—*Holloway v. Galliac* (1874) 49 Cal. 149; *Re Dolbeer* (1906) 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795.

**Georgia.**—*Macon v. Dasher* (1892) 90 Ga. 195, 16 S. E. 75; *Pritchett v. Bartow County* (1894) 94 Ga. 731, 20 S. E. 256.

**Illinois.**—*Danforth v. Danforth* (1884) 111 Ill. 236; *Seymour v. Richardson Fueling Co.* (1903) 205 Ill. 77, 68 N. E. 716; *Peters v. Harris* (1910) 245 Ill. 419, 92 N. E. 281.

**Missouri.**—*Sargent v. St. Louis & S. F. R. Co.* (1893) 114 Mo. 348, 19 L.R.A. 460, 21 S. W. 823; *Mead v. Mead* (1876) 1 Mo. App. 247.

**New Jersey.**—*Tallman v. Wallack* (1896) — N. J. —, 41 Atl. 677.

**Oklahoma.**—*Goldsborough v. Hewitt* (1910) 26 Okla. 859, 110 Pac. 906.

**Tennessee.**—*McLean v. State* (1873) 8 Heisk. 22.

**Washington.**—*Case v. San Juan County* (1910) 59 Wash. 222, 109 Pac. 809.

**Wisconsin.**—*Wilson v. Chippewa Valley Electric R. Co.* (1908) 135 Wis. 18, 114 N. W. 462, 115 N. W. 330.

**Canada.**—*Gunn v. Harper* (1902) 3 Ont. L. Rep. 693; *Young v. Gravenhurst* (1911) 24 Ont. L. Rep. 467, Ann. Cas. 1912B, 812; *Bryce v. Canadian P. R. Co.* (1908) 13 B. C. 446.

Sometimes, however, it is ordered to be entered as of some time or term when the party dying was alive. *Pool v. Loomis* (1848) 5 Ark. 110; *Black v. Shaw* (1862) 20 Cal. 68; *Savings & L. Soc. v. Gibb* (1863) 21 Cal. 609; *Ede v. Cuneo* (1898) — Cal. —, 55 Pac. 772; *Leonard v. Springer* (1912) 174 Ill. App. 516; *Kuechle v. Springer* (1913) 177 Ill. App. 616; *Miller v. Gunn* (1852) 7 How. Pr. (N. Y.) 159; *Beach v. Gregory* (1856) 3 Abb. Pr. (N. Y.) 78, affirming (1855) 2 Abb. Pr. 203. See also *Cunningham v. Ashley* (1852) 13 Ark. 653, *supra*, III. f, 2 (a).

In *Clay v. Smith* (1830) 3 Pet. (U. S.) 411, 7 L. ed. 723 (see also *Rose's Notes to this case*), the plaintiff in error having died while the cause was held under advisement, judgment in his favor was entered as of the first day of the term.

IV. *Divorce.*

a. *In general.*

Where a party to a divorce suit dies before the rendition of a decree, none can be entered nunc pro tunc. *Wilson v. Wilson* (1889) 73 Mich. 620, 41 N. W. 817; *Young v. Young* (1901) 165 Mo. 624, 88 Am. St. Rep. 440, 65 S. W. 1016; *Re Crandall* (1909) 196 N. Y. 127, 134 Am. St. Rep. 830, 89 N. E. 578, 17 Ann. Cas. 874.

Thus, where complainant in divorce died after submission, it was error to enter a decree for him nunc pro tunc. *Wilson v. Wilson* (Mich.) *supra*.

So, there can be no entry of a decree nunc pro tunc when a party dies after hearing in a divorce case, and there is no written evidence of a decision before the death. *Young v. Young* (Mo.) *supra*, so holding as to the law of California.

So, where the plaintiff dies after interlocutory judgment of divorce in his favor, final judgment cannot thereafter be entered nunc pro tunc. *Re Crandall* (N. Y.) *supra*.

In *Stanhope v. Stanhope* (1886) L. R. 11 Prob. Div. (Eng.) 103, 55 L. J. Prob. N. S. 36, 54 L. T. N. S. 906, 34 Week. Rep. 446, 50 J. P. 276, holding, where the plaintiff in divorce had obtained a decree nisi, but died before



the time for making it absolute, that the suit ended with the death of the plaintiff, and that no judgment could be entered, Fry, J., stated that the court had no power to declare that the marriage was dissolved at an earlier date.

In *Swan v. Harrison* (1865) 2 Coldw. (Tenn.) 534, it was held that no decree of divorce could be entered against a husband nunc pro tunc where he died after the case had been submitted to referees.

There are at least two cases contrary to the general rule. Thus, where the plaintiff in divorce died during the trial, but before the retirement of the jury, judgment was ordered upon the verdict for the plaintiff as of the term when rendered, on the theory that all proceedings are treated as if they took place on the first day of the term. *Webber v. Webber* (1880) 83 N. C. 280.

In *Kinney v. Tri-State Teleph. Co.* (1918) — Tex. Civ. App. —, 201 S. W. 1180, it was held that a final decree of divorce entered after the death of the complainant, who had obtained an interlocutory decree, was valid. It is stated in the opinion that it was claimed that the final decree, "having been entered nunc pro tunc, reverted back to the interlocutory decree in point of time," but the language of the final decree does not state that it was made nunc pro tunc.

#### *b. After rendition.*

It has been held that a decree of divorce rendered in the lifetime of both parties, entered nunc pro tunc after the death of one of them, is not void. Thus in *Re Cook* (1888) 77 Cal. 220, 1 L.R.A. 567, 11 Am. St. Rep. 267, 17 Pac. 923, 19 Pac. 431, it was held that a judgment of divorce rendered by the court in the lifetime of the plaintiff takes effect from its rendition although the clerk failed to enter it, and its entry nunc pro tunc after the plaintiff's death was immaterial. And on a further appeal the court declined to consider the nunc pro tunc decree as void. (1890) 83 Cal. 415, 23 Pac. 392.

In *Lachenmayer v. Lachenmayer* (1883) 65 How. Pr. (N. Y.) 422, the

defendant in a separation case moved to vacate an order of arrest, which was denied, and his appeal was dismissed with costs, and one day after the plaintiff's attorney received the remittitur of dismissal the plaintiff died. It was held that an order might be entered as of the day the attorney received the remittitur.

#### *c. After submission on appeal.*

If a party to a divorce suit dies after submission of writ of error or of an appeal from the judgment, judgment on the appeal may be entered nunc pro tunc as of the date of submission. *Bell v. Bell* (1900) 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; *Strickland v. Strickland* (1906) 80 Ark. 451, 97 S. W. 659; *Danforth v. Danforth* (1884) 111 Ill. 236; *Mead v. Mead* (1876) 1 Mo. App. 247.

Thus where, after submission on appeal from a judgment of divorce in favor of the wife, the plaintiff, the defendant died, judgment of affirmance was entered as of the day of submission. *Mead v. Mead* (Mo.) *supra*.

So, a judgment of the United States Supreme Court affirming on error a judgment of the court below for a divorce and for alimony and costs, rendered after appearance and answer of the husband, may be entered nunc pro tunc as of the date of argument, where the husband has died since the argument of the cause. *Bell v. Bell* (U. S.) *supra*. The court observed that if there had been no more than a decree of divorce, the writ of error would have abated; but the judgment below was not only for divorce, but for a large sum of alimony and for costs; and the wife's rights in respect of the alimony and costs should not be affected by delay in entering judgment.

So, where there was a judgment for divorce in favor of the husband, and he died after submission on appeal, the court reversed the judgment as of the date of submission. *Strickland v. Strickland* (1906) 80 Ark. 451, 97 S. W. 659; *Danforth v. Danforth* (1884) 111 Ill. 236.

It seems to have been held in the

briefly reported case of *Bell v. Bell* (1913) 182 Ill. App. 497, that where a defendant in divorce died after submission of an appeal from an order allowing temporary alimony, but before decision, the order of affirmance might be entered nunc pro tunc as of a date prior to his death.

*V. Other actions which do not survive.*

Where a party dies after a verdict in an action which does not survive, judgment may be entered nunc pro tunc as if the action survived.

**Connecticut.**—*Collins v. Prentice* (1843) 15 Conn. 423; *Brown v. Wheeler* (1846) 18 Conn. 199.

**Indiana.**—*Hilker v. Kelley* (1892) 130 Ind. 356, 15 L.R.A. 622, 30 N. E. 304; *Valparaiso v. Chester* (1911) 176 Ind. 636, 96 N. E. 765.

**Maine.**—*Goddard v. Bolster* (1830) 6 Me. 427, 20 Am. Dec. 320.

**Massachusetts.**—*Currier v. Lowell* (1835) 16 Pick. 170; *Kelley v. Riley* (1871) 106 Mass. 339, 8 Am. Rep. 336; *Wilkins v. Wainwright* (1899) 173 Mass. 212, 53 N. E. 397.

**New York.**—*Crawford v. Wilson* (1848) 4 Barb. 504.

**Pennsylvania.**—*Griffith v. Ogle* (1886) 1 Binn. 172; *Fitzgerald v. Stewart* (1866) 53 Pa. 343; *Wood v. Boyle* (1896) 177 Pa. 620, 55 Am. St. Rep. 747, 35 Atl. 853.

**England.**—*Seymour v. Greenwood* (1861) 30 L. J. Exch. N. S. 189.

See also to the same general effect, *Dial v. Holter* (1856) 6 Ohio St. 228, *supra*, III. b, 1.

In *Kelley v. Riley* (1871) 106 Mass. 339, 8 Am. Rep. 336, the court said: "As a matter of practice, at common law, as well as under the provisions of Gen. Stat. chap. 133, § 7, and chap. 115, § 14, judgment will be entered on the verdict on motion, as of a preceding day or term of the court, whenever an action, continued or postponed for the purpose of obtaining a disposition thereof, which may relieve a dissatisfied party from a verdict, would otherwise fail by the death of a party to it."

The rule applies where the party dying is the plaintiff, whose verdict is sustained.

**Connecticut.**—*Collins v. Prentice* (1843) 15 Conn. 423; *Brown v. Wheeler* (1846) 18 Conn. 199.

**Indiana.**—*Valparaiso v. Chester* (1911) 176 Ind. 636, 96 N. E. 765.

**Maine.**—*Goddard v. Bolster* (1830) 6 Me. 427, 20 Am. Dec. 320.

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**New York.**—*Crawford v. Wilson* (1848) 4 Barb. 504.

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**England.**—*Seymour v. Greenwood* (1861) 30 L. J. Exch. N. S. 189.

So, where the defendant dies after verdict against him, which is sustained. *Hilker v. Kelley* (1892) 130 Ind. 356, 15 L.R.A. 622, 30 N. E. 304; *Kelley v. Riley* (1871) 106 Mass. 339, 8 Am. Rep. 336.

So, where damages in tort have been assessed before the death of the defendant in a case tried by the court without a jury, and nothing remains but to dispose of a motion for a new trial, judgment may be entered for the plaintiff nunc pro tunc. *Wilkins v. Wainwright* (1899) 173 Mass. 212, 53 N. E. 397.

So, where the action is tried by the court without a jury, and the defendant dies after submission, judgment for the plaintiff may be entered nunc pro tunc. *RE PILLSBURY* (reported herewith) ante, 1396; *Perry v. Wilson* (1811) 7 Mass. 393.

But where, in an action which did not survive, the court had quashed the citation and denied a motion for judgment by default against the defendant, who afterwards died, it was held that the court had no power to enter judgment nunc pro tunc for the plaintiff, on the ground that the former decisions were erroneous. *Perkins v. Dunlavy* (1884) 61 Tex. 241.

And where an infant plaintiff in negligence suffered a nonsuit, and the court stayed execution to enable him to move for a new trial, and, pending the stay, he died, the court declined to permit the defendant to enter judgment nunc pro tunc in order

to tax the costs against the next friend. *Hemming v. Batchelor* (1875) L. R. 10 Exch. (Eng.) 54, 33 L. T. N. S. 16, 44 L. J. Exch. N. S. 54, 23 Week. Rep. 398.

Counsel may stipulate as a condition of granting a motion for adjournment made by the defendant in an action which does not survive, "that in case of the death of the plaintiff herein before final judgment and determination of this action, that the alleged cause of action shall survive, and any verdict and judgment therein be regarded as if rendered in the lifetime of the plaintiff," and the court may enforce such a stipulation. *Cox v. New York C. & H. R. R. Co.* (1875) 63 N. Y. 414.

And where, after a verdict for the plaintiff in a breach of promise case, she died pending a motion for a new trial, and before it was discussed, the court, in denying the motion, intimated that if they should grant a new trial, they might do so on condition that the verdict be entered as of the time of the first trial. *Griffiths v. Williams* (1830) 1 Crompt. & J. 47, 148 Eng. Reprint, 1329.

While beyond the scope of this note, the *Ireland*, *Palmer*, and *Kramer* Cases, *infra*, may be referred to in this connection. In *Ireland v. Champneys* (1813) 4 Taunt. 884, 128 Eng. Reprint, 884, where, after an interlocutory judgment in libel and assessment of damages against the defendant, the plaintiff died before final judgment, it was held that judgment could not be entered under Stat. 17 Car. II., as the suit had abated by the plaintiff's death. But in *Palmer v. Cohen* (1831) 2 Barn. & Ad. 966, 109 Eng. Reprint, 1402, it was held that judgment may be entered under the Statute 17 Car. II. for the plaintiff in libel, who dies after verdict. And in *Kramer v. Waymark* (1866) L. R. 1 Exch. (Eng.) 241, 4 Hurlst. & C. 427, 35 L. J. Exch. N. S. 148, 12 Jur. N. S. 395, 14 L. T. N. S. 368, 14 Week. Rep. 659, where the plaintiff died after recovering a verdict in a negligence case, it was held that judgment was properly entered for him within the time specified in 17 Car. II. and 15 &

16 Vict. chap. 76, the latter statute being, if anything, broader than the former, and including all actions. *Martin, B.*, said: "I am unable to account for the construction put upon the statute of Charles in *Ireland v. Champneys* (Eng.) *supra*, but in *Palmer v. Cohen* (Eng.) *supra*, the same point arose again, and the court of Queen's bench decided, as I think rightly, that the words of that statute are express and admit of no doubt."

#### Pending appeals.

When a judgment for a plaintiff in a personal action has been erroneously set aside, and a subsequent final judgment against him is brought up by writ of error, pending which he dies, the Supreme Court will affirm the judgment in his favor *nunc pro tunc* as of the date when it was reversed. *Coughlin v. District of Columbia* (1882) 106 U. S. 7, 27 L. ed. 74, 1 Sup. Ct. Rep. 37 (see also *Rose's Notes* to this case).

Where the defendant died pending his appeal from a judgment in an action of slander, but before argument, judgment of affirmance was entered as of a day previous to such death. See *Miller v. Gunn* (1852) 7 How. Pr. (N. Y.) 159.

Where, on an appeal from a judgment for the plaintiff in an action of slander, the judgment was reversed, and shortly thereafter the appellant died, the appellate court, on rehearing, reduced the verdict by an amount sufficient to free it from the errors of the trial, and directed judgment to be entered as of the time of the original reversal. *Hocks v. Sprangers* (1902) 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113.

But judgment cannot be rendered *nunc pro tunc* to prevent the abatement of the writ of error by the death of the accused, after submission of his writ of error to review a judgment of conviction and sentence to imprisonment. *O'Sullivan v. People* (1892) 144 Ill. 604, 20 L.R.A. 143, 32 N. E. 192.

Where the plaintiff appealed from a judgment against him in malicious prosecution, and one of the defend-

ants died after submission on the appeal, judgment of reversal was entered as of the term of submission, which is the general rule laid down by the Indiana statute. *Lockenour v. Sides* (1877) 57 Ind. 360, 26 Am. Rep. 58. For other cases under the Indiana statute, see *Knox v. Golding* (1910) 46 Ind. App. 634, 91 N. E. 857, 92 N. E. 986; *Steiert v. Coulter* (1913) 54 Ind. App. 643, 102 N. E. 113, 103 N. E. 117, 4 N. C. C. A. 561.

*VI. Particular statutes.*

In Indiana it was a good while ago provided by statute that where a party dies after submission on appeal, but before decision, judgment shall be rendered as of the term at which the submission was made. *Gas Light & Coke Co. v. New Albany* (1894) 139 Ind. 660, 39 N. E. 462. For other decisions under the statute, see *Lockenour v. Sides* (1877) 57 Ind. 360, 26 Am. Rep. 58; *Jeffries v. Lamb* (1880) 73 Ind. 202; *State ex rel. Stuart v. Schmidt* (1904) 163 Ind. 699, 71 N. E. 654; *Decker v. Yohe* (1913) 179 Ind. 243, 100 N. E. 756; *Willard v. Albertson* (1899) 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403; *Willard v. Albertson* (1899) 23 Ind. App. 166, 53 N. E. 1078, 54 N. E. 446; *United States Health & Acci. Ins. Co. v. Clark* (1908) 41 Ind. App. 345, 83 S. E. 560; *Knox v. Golding* (1910) 46 Ind. App. 634, 91 N. E. 857, 92 N. E. 986; *Barton v. Barton* (1913) 52 Ind. App. 537, 100 N. E. 870; *Steiert v. Coulter* (1913) 54 Ind. App. 643, 102 N. E. 113, 103 N. E. 117, 4 N. C. C. A. 561; *Ashwell v. Miller* (1913) 54 Ind. App. 381, 103 N. E. 87; *Coffin v. Pfau* (1915) 61 Ind. App. 384, 112 N. E. 21, 117 N. E. 869; *Essig v. Porter* (1916) — Ind. App. —, 112 N. E. 1005; *Keller v. Cox* (1918) — Ind. App. —, 118 N. E. 543.

In *Fox v. Hale & N. Silver Min. Co.* (1895) 108 Cal. 478, 41 Pac. 328, referred to in the opinion in *RE PILLSBURY* (reported herewith) ante, 1396, the cause was finally submitted May 3; the court on May 26 filed its written opinion and directed counsel to prepare findings and a decree in accordance therewith; and on June 2, one of the defendants died, whereup-

on findings and judgment against him were ordered as of May 26. On appeal this judgment was set aside, and it was ordered that while the findings of fact and conclusions of law should be filed as of a date before the death, that the judgment should be entered as of the date of the judgment against the codefendants of the deceased, the court considering this the proper practice, in view of § 669 of Cal. Code Civ. Proc. quoted in *RE PILLSBURY*.

Where one of the defendants died after verdict for the plaintiff pending exceptions, and the stay was vacated so far as to enable the plaintiff to enter judgment nunc pro tunc as of the date of the verdict, the court held that the entry nunc pro tunc was immaterial, as the matter was controlled by statute, saying: "The Code (§ 763) provides that if a party dies after verdict and before final judgment, the court must enter final judgment in the name of the original parties; and § 1210 provides that when judgment is entered in such a case, a memorandum of the party's death must be entered with the judgment, in the judgment book, indorsed on the judgment roll, and noted on the margin of the docket of the judgment; and that such a judgment does not become a lien upon the real property or chattels real of the decedent, but establishes a debt to be paid in the course of administration. The latter section was complied with in this case, and the two sections were authority for the judgment entered as against the deceased defendant. The fact that the judgment was entered nunc pro tunc as of the date of the verdict, rather than as of the date of entry, harmed no one connected with his estate, as it could in any event be paid only in the course of administration." *Long v. Stafford* (1886) 103 N. Y. 274, 8 N. E. 522.

*VII. Miscellaneous.*

In *Smith v. Miller* (1847) 3 How. Pr. (N. Y.) 132, it was held that where a new supreme court was created, the old supreme court being vested with power to "hear and de-

termine" suits ready for hearing or decision on a certain day, the last-mentioned court had no power to order a judgment entered nunc pro tunc, where a party had died before that day.

Where there is no written evidence of an alleged proceeding in court in which some of the alleged parties are deceased, a judgment cannot be entered nunc pro tunc in such an alleged proceeding. *Tynan v. Weinhard* (1894) 153 Ill. 598, 38 N. E. 1014.

In *Dowbiggin v. Harrison* (1830) 10 Barn. & C. 480, 109 Eng. Reprint, 529, where there had been a nonsuit, the trial was in December, 1827, the defendant died January 5, 1828, and no proceedings were had till October, 1828, when an application was made to tax costs. The court said that the Statute 17 Car. II. chap. 8, "does not apply to cases of nonsuit. Moreover, the defendant died before the day in banc, so that, if the court could allow judgment to be entered nunc pro tunc, it would still be of a term after his death."

It may be noted that where a ver-

dict was returned for the plaintiff December 31, in an action for a personal injury, and she died January 3d, before the entry of judgment, it was considered that the entry of judgment nunc pro tunc was not warranted and was immaterial; but the court affirmed such judgment on the ground that the defendant had lost its opportunity to object. *Wilcox v. International Harvester Co.* (1917) 278 Ill. 465, 116 N. E. 151.

In *New Orleans v. Gaines* (New Orleans v. Whitney) (1890) 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428, it was said that a judgment rendered after a defendant's death, without the plaintiff's fault, is not void, but that the irregularity or error may be cured by entering it nunc pro tunc as of a date prior to such defendant's death.

In *Dawson v. Waldheim* (1901) 89 Mo. App. 245, referred to in *RE PILLSBURY* (reported herewith) ante, 1396, there was no death, and the case appears from an earlier appeal (1899; 80 Mo. App. 52) to have been an action on contract, and not an action ex delicto.  
B. B. B.

J. L. ROBINSON, Appt.,

v.

INDIANA & ARKANSAS LUMBER & MANUFACTURING COMPANY.

*Arkansas Supreme Court — April 16, 1917.*

(128 Ark. 550, 194 S. W. 870.)

**Tax — land purchased for nonpayment of taxes — exemption.**

1. Land purchased by a levee district for nonpayment of taxes assessed by it is held by it in its governmental capacity, and is within a constitutional provision exempting from taxation public property used exclusively for public purposes, and such land is, therefore, not subject to state and county taxation.

[See note on this question beginning on page 1439.]

— exemption — retrospective effect.

2. A constitutional exemption from taxation will not be given a retrospective effect unless an intention that it shall have such an effect is clearly expressed.

— property held in governmental capacity.

3. An exemption from taxation of public property used exclusively for public purposes applies to property held by a municipal corporation in the exercise of its functions as a governmental agency, but not to that which is held in its proprietary capacity.

**APPEAL** by plaintiff from a decree of the Chancery Court for Crittenden County dismissing the complaint in an action brought to quiet title to certain wild and unoccupied land. *Reversed.*

Statement by Hart, J.:

J. L. Robinson instituted this action in the chancery court against the Indiana & Arkansas Lumber & Manufacturing Company to quiet the title to certain wild and unoccupied lands in Crittenden county, Arkansas. The Lumber Company defended on the ground that it had acquired title by the payment of taxes for seven years under the Act of March 18, 1899, and that the plaintiff had been guilty of laches in bringing his suit.

The material facts are as follows: The lands in controversy were originally owned by Robert C. Brinkley. He died in 1878, and by the terms of his will the lands became the property of his children. The board of directors of the St. Francis levee district instituted an action in the chancery court under our statute to enforce the collection of delinquent levee taxes for the year 1898. The whole of the northeast quarter of section 6, township 4 north, range 7 east, containing 409 acres, in Crittenden county, Arkansas, was sold under the decree, and the levee district became the purchaser at its own sale. On September 11, 1899, the levee district conveyed to the defendant along with 20,000 acres of other lands, lots 15, 16, 17, and 18 of the northeast quarter of said section 6, for the sum of \$1 per acre. On the 17th day of February, 1916, the devisees under the will of R. C. Brinkley executed a quitclaim deed to the defendant for these lots, as well as the lots herein sued for. On the 6th day of October, 1915, the levee district executed a deed to plaintiff to lots 1, 2, 7, 8, 9, and 10 of the northeast quarter of said section 6, containing 249.19 acres, and on the 22d day of December, 1915, plaintiff instituted this action against the defendant to quiet his title to said lots. The lots in controversy have greatly increased in value since they were purchased by the levee district at its sale for levee

taxes. It was shown by the defendant that a purchaser at a tax sale for the taxes of 1887, which is conceded to be void, executed to it a warranty deed to said lots. It was also shown by the defendant that it had paid the taxes on said lands for seven years under the Act of March 18, 1899, and that the lands have always been wild and unoccupied, and have never been in the actual possession of anyone.

The court held that the plaintiff was barred of relief by reason of the payment of taxes by the defendant for more than seven years under color of title, and a decree was entered dismissing the plaintiff's complaint for want of equity. The plaintiff has appealed.

Mr. R. C. Brown, for appellant:

The lands of the St. Francis levee district are not only exempt from taxation, but are also immune from other rules which apply to individuals, including the Statute of Limitations, as regards all of its functions of a governmental nature.

Carson v. St. Francis Levee Dist. 59 Ark. 513, 27 S. W. 590; St. Francis Levee Dist. v. Fleming, 93 Ark. 490, 125 S. W. 132, 659; St. Louis, I. M. & S. R. Co. v. Levee Dist. 103 Ark. 127, 145 S. W. 892; Altheimer v. Plum Bayou Levee Dist. 79 Ark. 234, 95 S. W. 140; Goyer Co. v. Williamson, 107 Ark. 189, 154 S. W. 525; Board of Improvement v. Moreland, 94 Ark. 380, 127 S. W. 469, 21 Ann. Cas. 957; Boone County v. Keck, 31 Ark. 387; Miller v. Henry, 105 Ark. 261, 150 S. W. 700, Ann. Cas. 1914D, 754; Gustaveson v. Dwyer, 78 Wash. 336, 139 Pac. 194, affirmed on rehearing in 83 Wash. 303, 145 Pac. 458; Memphis v. Looney, 9 Baxt. 130; Eastern State Hospital v. Graves (Eastern State Hospital v. Winston) 105 Va. 151, 3 L.R.A.(N.S.) 746, 52 S. E. 837, 8 Ann. Cas. 701; Plummer v. School Dist. 90 Ark. 236, 134 Am. St. Rep. 28, 118 S. W. 1011, 17 Ann. Cas. 508; Eureka Stone Co. v. First Christian Church, 86 Ark. 212, 126 Am. St. Rep. 1088, 110 S. W. 1042; Comanche County v. Burks, — Tex. Civ. App. —, 166 S. W. 470; Burr v. Boston, 208 Mass. 537, 84 L.R.A.(N.S.) 143, 95 N.

E. 208; *Penick v. Foster*, 129 Ga. 217, 12 L.R.A. (N.S.) 1160, 58 S. E. 773, 12 Ann. Cas. 346.

The lands of the district were in no event subject to taxation until the year 1913, if at all.

*State v. County Ct.* 19 Ark. 360; *McGehee v. Mathis*, 21 Ark. 40, 4 Wall. 143, 18 L. ed. 314; *Crafts v. Ray*, 22 R. I. 179, 49 L.R.A. 604, 46 Atl. 1043; *Kentucky Electric Co. v. Buechel*, 146 Ky. 660, 38 L.R.A. (N.S.) 907, 143 S. W. 58, Ann. Cas. 1913C, 714; *Aplin v. University of Michigan*, 83 Mich. 467, 10 L.R.A. 377, 47 N. W. 440; *Widows' & Orphans' Home v. Com.* 126 Ky. 386, 16 L.R.A. (N.S.) 829, 103 S. W. 354; *Vanderbilt University v. Cheney*, 116 Tenn. 260, 94 S. W. 90; *Book Agents v. Hinton*, 92 Tenn. 188, 19 L.R.A. 289, 21 S. W. 321; *Webster City v. Wright County*, 144 Iowa, 502, 24 L.R.A. (N.S.) 1205, 123 N. W. 193; *Richmond County Academy v. Augusta*, 90 Ga. 634, 20 L.R.A. 151, 17 S. E. 61; *Com. ex rel. Albritton v. Lebanon Waterworks* (Com. ex rel. *Albritton v. Rubel*) 130 Ky. 61, 20 L.R.A. (N.S.) 224, 112 S. W. 1128; *Foster v. Duluth*, 120 Minn. 484, 48 L.R.A. (N.S.) 707, 140 N. W. 129; *Hot Springs School Dist. v. Sisters of Mercy*, 84 Ark. 497, 106 S. W. 954.

Messrs. Daggett & Daggett for appellee.

Hart, J., delivered the opinion of the court:

The correctness of the decision of the chancellor depends upon whether or not the lands in controversy in this case were subject to taxation for county and state taxes after they were purchased by the levee district at its own sale for levee taxes. Article 16, § 5, of the Constitution of 1874, provides that all property subject to taxation shall be taxed according to its value, provided that the following property shall be exempt from taxation: Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity.

Section 6 provides that all laws exempting property from taxation

other than is provided in this Constitution shall be void.

It is insisted by both parties that this question has already been decided in their favor by a previous decision in this court. Counsel for the defendant rely upon the case of *Bonner v. St. Francis Levee Dist.* 77 Ark. 519, 92 S. W. 1124. There the court said that the lands in controversy continued subject to taxation after they were acquired by the St. Francis levee district. The levee district had purchased the lands in that case on the 24th day of January, 1898, for unpaid levee taxes, and on the second Monday in June, 1898, Bonner purchased the same land at a sale for state and county taxes. There the assessment had been completed, and the state and county taxes had become a fixed lien on the lands before their purchase by the levee district, and the court simply meant to hold that a change in the use of the property after the state and county taxes had become a lien did not release the land from liability for such taxes. The reason is that to so hold would be to give a retrospective effect to the section of the Constitution above referred to. An exemption from taxes created by the Constitution will not be given a retrospective effect unless an intention that it shall have such an effect is clearly expressed, and it is apparent that the section of our Constitution relating to this subject was not intended to operate retrospectively. *Philadelphia v. Pennsylvania Co.* 6 Ann. Cas. 437, and case note, 214 Pa. 138, 63 Atl. 420. So it will be readily seen that the Bonner Case is not an authority for the position taken by counsel for the defendant.

Counsel for plaintiff rely on the case of *Miller v. Henry*, 105 Ark. 261, 150 S. W. 700, Ann. Cas. 1914D, 754. There the court, at the end of an opinion which was devoted almost exclusively to other propositions, said the lands which had been bought in by the St. Francis levee district at a sale for levee taxes

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effect.

were not subject to taxation while in the hands of the levee district, but no reason was given for such holding.

We now propose to take up the question and decide it anew, for the reason that it is now earnestly insisted that such a holding is in direct conflict with the holding of this court in *School Dist. v. Howe*, 62 Ark. 481, 37 S. W. 717, and *Brodie v. Fitzgerald*, 57 Ark. 445, 22 S. W. 29.

The St. Francis levee district is a quasi corporation to which is delegated certain powers as a governmental agency. *Carson v. St. Francis Levee Dist.* 59 Ark. 513, 27 S. W. 590, and *St. Francis Levee Dist. v. Fleming*, 93 Ark. 490, 125 S. W. 132, 659. The correctness of the chancellor's holding depends upon whether the lands were acquired by the levee district in its proprietary capacity, or in the exercise of its functions as a governmental agency. In the

former case the  
—property held in governmental capacity.

lands would not be exempt, and in the latter they would be exempt, from taxation. This distinction, we think, had been recognized in our previous decisions relating to the question.

In the case of *Brodie v. Fitzgerald*, 57 Ark. 445, 22 S. W. 29, the court held that the hospital buildings, grounds, and materials, under our Constitution, were exempt from taxation, but that the property leased or rented was not exempt, though the revenues were applied solely to the subject of the public charity. The reason is that under our Constitution it is only when the property itself is actually and directly used for public charity that the law exempts it from taxation.

In the later case of *Hot Springs School Dist. v. Sisters of Mercy*, 84 Ark. 497, 106 S. W. 954, we held that a hospital building, with the grounds connected therewith, which was used in the operation of a public charity, was not excluded from constitutional exemption from taxation merely because patients who were able to do so paid for the at-

tention and medicine which they received, if the profits derived therefrom were put back into the operation of the public charity. There was a mixed use, so to speak, of the property, but the dominant purpose was the operation of the hospital as a public charity, and the receiving of pay patients was merely incidental to the main purpose. So we held the property was still actually and directly used for public charity, and that the Constitution exempted it from taxation.

In the case of *School Dist. v. Howe*, 62 Ark. 481, 37 S. W. 717, a portion of the military reservation at Fort Smith was donated by act of Congress to the city of Fort Smith to be held in trust for the use of the free public schools of the city. The act provided that within ten years the land should be laid off into lots, and that the lots be sold at public sale, and that the proceeds should be paid to the treasurer of the school board to be used for school purposes. Afterward our legislature passed an act providing that the school district of Fort Smith be empowered and required to become a purchaser at said sale, and own, lease, control, and sell the same. The property involved in that suit was acquired by the school district by purchase under the act. Most of the property consisted of unimproved city lots, but some of the lots had buildings upon them and were rented. The court in its opinion recognized that the property did not contain any school buildings, or libraries and grounds used exclusively for school purposes, within the meaning of article 16, § 5, of our Constitution, and proceeded to a discussion of the question of whether it was public property used exclusively for public purposes within the meaning of that section of the Constitution.

The court said that to justify it in holding that the property was exempt there must be found in the Constitution itself, provision for its exemption. The court further said that it was conceded that land was



public property, but the question of its exemption from taxation was not determined alone by its character as public property, but also by the nature of its use. After a thorough discussion of the question, the court correctly held that the property was not exempt from taxation under our Constitution, because it was held by the school district solely for sale or rent, and for the sale for profit, and was not, in the meaning of the Constitution used exclusively for public purposes, and was, therefore, subject to taxation. The construction is in accord with the almost unanimous holding of the courts of last resort of other states, having a provision of the Constitution similar to our own. The reason for so holding is clearly stated in a quotation by the supreme court of Ohio in *Benjamin Rose Institute v. Myers*, 92 Ohio St. 252, L.R.A.1916D, 1170, 110 N. E. 924, from *Academy of Richmond County v. Bohler*, 80 Ga. 159, 7 S. E. 633, as follows: "Property used to produce income to be expended in charity is too remote from the ultimate charitable object to be exempt. If property is allowed to be used as taxed property, it also is to be taxed. If it competes, in the common business and occupations of life, with the property of other owners, it must bear the tax which theirs bears."

There is a material difference between the use of property exclusively for public purposes, and renting it out and then applying the proceeds arising therefrom to the public use. The property, under our Constitution, must be actually occupied or made use of for a public purpose, and our court has recognized the difference between the actual use of the property and the use of the income. So it will be seen that, in our own cases last referred to, the property itself was not directly occupied or made use of for public purposes, but only the income derived therefrom, and for this reason the court held that the

property was not exempt from taxation under our Constitution.

In the present case the facts are essentially different. The St. Francis levee district was created for the purpose of constructing and maintaining a levee along the Mississippi river, on the eastern border of our state. To accomplish the purpose of its organization it was given the power of eminent domain and of taxation for levee purposes. The district was given the power to institute a suit to enforce the collection of delinquent levee taxes, and to buy in the lands at a sale therefor when no one else offered to bid thereat, and then to again sell the land so acquired and to devote the proceeds to the use for which the levee taxes were intended. The lands in controversy were acquired by the levee district at a sale for levee taxes and were held by the levee district until it could dispose of them. Thus it will be seen that the levee district acquired the land in the exercise of its governmental functions, and, during the interval between its purchase and resale on the lands, they were not subject to taxation. If the property should be taxed while so held by the levee district, new taxes must be levied to meet this tax. It is absolutely essential that taxes should be levied in order to carry out the purpose for which the levee district was organized, and if the property, which the levee district, to protect itself, purchased at a levee tax sale, was subject to state and county taxes while in its hands, the property owners of the levee district would have to pay additional taxes. The levee district only held the lands that it acquired at levee tax sale until it was practical to dispose of them again. They were not held for any purpose of gain or as income-producing property. When sold, the proceeds took the place of the levee taxes, for the enforcement of which and the expenses incident thereto, they were sold, and in this

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way we think the lands were directly and immediately used exclusively for public purposes, within the meaning of the Constitution, and were not subject to taxation.

Moreover, Judge Cooley says that exemption from taxation of property which belongs to the state and its agencies, which is held by them for governmental purposes, rests upon implication. He said that to levy taxes upon such property would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. 1 Cooley, Taxn. 3d ed. pp. 263 and 264; Re Hamilton, 148 N. Y. 310, 42 N. E. 717.

Having held that the property is

exempt from taxation, the defense of the defendant necessarily passes out of the case.

It follows that the decree will be reversed, and the cause will be remanded with directions to grant the prayer of the complaint.

Petition for rehearing denied.

#### NOTE.

The reported case (ROBINSON v. INDIANA & A. LUMBER & MFG. Co. ante, 1426) extends the principle of immunity of public property from taxation to lands purchased by a levee district for nonpayment of taxes, and held until it could dispose of them. The general subject of taxation of property owned by a public body, but not devoted to public use, is discussed in the annotation beginning at page 1439.

### JOHNSON CITY, Appt., v.

J. W. WEEKS et al.

*Tennessee Supreme Court — September Term, 1915.*

(133 Tenn. 277, 180 S. W. 327.)

#### Tax — exemption — water pipe line.

1. The supplying by a municipal corporation through its own mains, of water from its surplus to a national soldiers' home adjacent to its limits, is within a constitutional provision excepting from taxation property held by cities and towns and used exclusively for public or corporate purposes, so as to relieve the main through which the water is carried from taxation.

[See note on this question beginning on page 1439.]

#### Definition — adjacent territory.

2. The term, "adjacent territory," in a statute permitting a municipal corporation to own and operate a system of waterworks for such city and adjacent territory, means the suburbs of the city not within the limits of another municipality.

[See 19 R. C. L. 790.]

#### Municipal corporation — what is — soldiers' home.

3. A home for disabled soldiers administered by the Federal government through the medium of an incorporated entity is not a municipal corporation.

[See 19 R. C. L. 691.]

APPEAL by complainant from a decree of the Chancery Court for Washington County (Haynes, Chancellor) in favor of defendants in a suit to enjoin them from assessing and collecting taxes for county purposes upon a water pipe line owned by the city. *Reversed.*

The facts are stated in the opinion of the court.

Mr. George C. Sells for appellant.

Mr. J. Stanley Barlow, for appellee Weeks:

The line of pipe leading from the corporate limits of the city of Johnson City to the Soldiers' Home is subject to taxation by the county and state.

Knoxville v. Park City, 130 Tenn. 626, L.R.A.1915D, 1103, 172 S. W. 286; Clarksville v. Montgomery County, — Tenn. —, 62 S. W. 34; Ward Seminary v. Nashville, 129 Tenn. 412, 167 S. W. 113; South Pasadena v. Pasadena Land & Water Co. 152 Cal. 579, 93 Pac. 490; Stiles v. Newport, 76 Vt. 154, 56 Atl. 662; Com. v. Covington, 128 Ky. 36, 14 L.R.A.(N.S.) 1214, 107 S. W. 231; Nashville v. Smith, 86 Tenn. 213, 6 S. W. 273, s. c. 88 Tenn. 464, 7 L.R.A. 469, 12 S. W. 924.

Williams, J., delivered the opinion of the court:

The bill of complaint was filed by the city of Johnson City, a municipal corporation, to enjoin the officials of Washington county from assessing and collecting taxes for county purposes upon a water pipe line, owned by the city, that extends from its corporation boundary line to the south gate of the National Home for Disabled Volunteer Soldiers, an institution occupying a park of several hundred acres, partly within and for the most part without the corporate limits.

In the bill it is alleged that the city installed this pipe line for the purpose of disposing of surplus water, not needed or used by the city or its inhabitants, as a supply for the members of the Home adequate to their needs; that the Home has about one thousand five hundred members, a number of whom are citizens of Johnson City; that it is to the interest of the city that such a supply be furnished, as otherwise the water supply of the Home was inadequate and unwholesome, thereby endangering the members and the residents of the city; that the only recourse of the Home for an adequate supply is from the municipal plant; that the rentals collected from that institution are used within the limits of Johnson City for municipal purposes, in extending

and improving complainant's water system.

It is alleged that the levy would be void as being on property of complainant that is not subject to taxation, and the bill was filed to have the right of the complainant city and of the county determined.

A demurrer was filed by the county officials, which was sustained by the chancellor, who conceived that, while the pipe line was properly in use for a corporate proprietary purpose, it was not used for a public purpose within the meaning of our Constitution and Revenue Act.

The Constitution, art. 2, § 28, provides: "All property . . . shall be taxed, but the legislature may except such as may be held by . . . cities or towns, and used exclusively for public or corporation purposes."

The Revenue Act undertakes to exempt from taxation all property of cities or towns "that is used exclusively for public or municipal purposes."

The city of Johnson City was authorized to lay a pipe line to supply the National Home for Disabled Volunteer Soldiers, lying beyond its corporate limits, under the grant of power contained in Acts 1909, chap. 121, to "own and operate a system of waterworks for said city and adjacent territory." Omaha Water Co. v. Omaha, 89 C. C. A. 205, 162 Fed. 225, 15 Ann. Cas. 498, and same case, 218 U. S. 180, 48 L.R.A. (N.S.) 1084, 54 L. ed. 991, 30 Sup. Ct. Rep. 615.

The last phrase, "adjacent territory," we take to mean its suburbs not within the limits of another municipality.

Definition—  
adjacent  
territory.

The National Home for Disabled Volunteer Soldiers is but a charity of the national government, administered through the medium of an incorporated entity. Overholser v. National Home, 68 Ohio St. 236, 62 L.R.A. 936, 96 Am. St. Rep. 658, 67 N. E. 487; Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453; Lyle v. National Home (C. C.) 170 Fed. 846.

That institution is in no sense a municipal corporation, but stands in the same plight as  
**Municipal corporation—what is—soldiers' home.** does an institution administered as an agency of the state government, such, for example, as the state normal school located near the same city.

The question to be solved, therefore, is: If a municipality lay a water line from its corporate limits to such an institution, or construct a lighting line for the purpose of supplying water or light (as the case may be) from its plant for such an institution, located in territory adjacent to the corporate boundary, is such line subject to taxation (or to be treated as unexempt) in behalf of the county in which such fragment of line lies?

We had thought that the argument of this court in the case of *Knoxville v. Park City*, 130 Tenn. 626, L.R.A.1915D, 1103, 172 S. W. 286, fairly demonstrated a negative answer; but the counsel of the county of Washington relies upon that case as one announcing a doctrine to the contrary.

In that case the following language was used: "The court of appeals of Kentucky, in the later case of *Com. v. Covington*, 128 Ky. 36, 14 L.R.A.(N.S.) 1214, 107 S. W. 231, held that the fact that water was furnished, for compensation, to inhabitants of its suburbs, without its or any corporate limits, does not alter the public purpose or use of its water system so as to make it subject to taxation. But the court took care to distinguish the case it had in hand from the one we have under investigation, saying: 'We do not mean that a city may enter upon the business of maintaining a waterworks system for other cities or towns, but only that the fact that it incidentally furnishes water to a considerable number of persons in proximity to the city, without injury to the rights of the city, does not alter the public character or use of the property or make it subject to taxation.' The ruling in *Com. v.*

*Covington*, supra, is in harmony with the decision of many courts to the effect that the fact that water is furnished to inhabitants of unincorporated suburbs is a mere incident to, and not destructive of, the public use."

Later on in the opinion in *Knoxville v. Park City*, the case of *Smith v. Nashville*, 88 Tenn. 464, 7 L.R.A. 469, 12 S. W. 924, was referred to as drawing the same distinction between a furnishing of water to inhabitants of unincorporated suburbs, and a furnishing by one city to another and distinct municipality, by means of a physical plant owned by the former in the boundaries of the latter.

The argument and the holding in the case of *Knoxville v. Park City* was that the public character of the property there involved was lost because *Knoxville* could not serve, even incidentally, its own corporate public purpose by means of a water system owned by it in *Park City*; that all public municipal powers and purposes exercisable in the borders of the latter city were by legislative act devolved on the municipality of *Park City*; and that "what is the primary public purpose of *Park City* may not be an incidental public purpose of *Knoxville*."

In *Perth Amboy v. Barker*, 74 N. J. L. 127, 65 Atl. 201, Mr. Justice Pitney delivering the opinion, it was held that the right of a city to exemption from taxation as to property, "when used for public purposes," was not lost by the fact that sales of surplus water were made to parties outside the territorial limits of the city. It was there said: "The sales of water outside of *Perth Amboy* are merely incidental to the general public purposes for which the waterworks were established and are being maintained and operated by that city. . . . In our view, such use of the surplus water does not take away the right of *Perth Amboy* to exemption from taxation upon the property that is used primarily and principally for the public purposes of that city.

See *State, Newark, Prosecutor, v. Verona Twp.* 59 N. J. L. 94, 34 Atl. 1060."

See also *Henderson v. Young*, 119 Ky. 224, 83 S. W. 583; *Simson v. Parker*, 190 N. Y. 19, 82 N. E. 732; *Re Orillia*, 7 Ont. L. Rep. 389; 4 McQuillin, Mun. Corp. 3858.

If we resort, as we did in the case of *Knoxville v. Park City*, to the law of eminent domain to aid in ascertaining by analogy the import of the phrase, "public purpose," we find the rule there to be that if a city disposes or purposes to dispose of surplus water for such an outside use, that fact does not deprive it of the right to resort to condemnation, nor make the condemnation one for other than a public purpose. *State, Slingerland, Prosecutor, v. Newark*, 54 N. J. L. 62, 23 Atl. 129; *Spaulding v. Lowell*, 23 Pick. 71; *Re New York*, 99 N. Y. 569, 2 N. E. 642; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173, and note in 21 L.R.A.(N.S.) 538, 543.

As will be noted, the ruling is rested upon the principle that such use is but incidental to the primary use, which is public in character.

The rule is based on consideration of convenience, but convenience that approaches near to necessity. Fringing the boundaries of a city or town, there is nearly always a population that is dependent for advantages of water and light on the initiative and enterprise of the city or town of which it comes so near to being an integral part. Left alone, such a population has not the cohesiveness or the civic strength required to procure such a service for itself. That it should have a supply of water, in order, for example, to the prevention of sickness and epidemics, is a matter of concern to the near-by urban population as well as to itself. It is not a far reach that such a service by the city should be covered by a power thus incidentally public in character, when that

public purpose is not delegated to another municipality.

We are unable to appreciate the force of any reasoning which would concede the existence of such a power in a municipality to serve a considerable number of the homes of individuals in the immediate suburbs of a city through its own pipe lines, which is apparently admitted by the appellee county, and yet deny the existence of the power, with a like consequent immunity, in respect of such a supply when furnished by the municipality to an institution that is a public charity, merely because in the same are assembled in barracks and in masses on a government reservation, the wards of the Federal government. These men, because of advanced age and service in the Army and Navy, would seem to be peculiarly subject to the ravages of disease, and in such need of a supply of water from a city's surplus as to be a matter of solicitude to the inhabitants of the city itself.

The decree of the court below is reversed, and the cause remanded for further proceedings.

#### NOTE.

The reported case (*JOHNSON CITY v. WEEKS*, ante, 1431), holding that a water main through which a municipal corporation supplies surplus water to a charitable institution adjacent to its limits is not subject to taxation, presents one aspect of the general subject discussed in the annotation beginning at page 1439, as to "taxation of property owned by public body, but not devoted to public use." The specific phase of the subject presented by the question whether a constitutional or statutory exemption, which is limited to property devoted to public use, embraces property which produces an income incident to public use, is discussed at page 1445 of that note.

Tax-exemption  
-water pipe  
line.

TOWN OF HAMDEN  
v.  
CITY OF NEW HAVEN.

*Connecticut Supreme Court of Errors—June 1, 1917.*

(91 Conn. 589, 101 Atl. 11.)

**Tax — abandonment of public use — effect.**

1. Real estate purchased by a municipal corporation for public use, to which it was not devoted, is taxable to the municipality, where devotion of it to public use is no longer contemplated, under a statute exempting from taxation all property held by municipal corporations for public use.

[See note on this question beginning on page 1489.]

**— exemption — property of municipality.**

2. A statute exempting from taxation all property held by municipal corporations for public use applies to property located within the limits of other municipalities.

**— poor farm — benefit to public.**

3. Property owned and used by municipal corporations for a poor farm is within a statute exempting from taxation property held by municipalities for public use, although there is no benefit accruing to the public from the use to which the land is put.

**Poor — provision for — governmental purposes.**

4. The prevention of any person from suffering for the necessities of life is a legitimate exercise of governmental power.

[See 21 R. C. L. 701.]

**Municipal corporation — authority — implication.**

5. Authority to operate a poor farm is impliedly conferred upon a municipal corporation by empowering it to employ and discharge a manager for such farm.

**Poor — statutory duty to care for — how performed.**

6. The duty of caring for the poor, imposed by statute upon municipal corporations, may be performed in any reasonable way and by the use of every reasonable means.

[See 21 R. C. L. 708.]

**— town farm — reasonableness.**

7. A town farm is a reasonable way and means for furnishing support for the poor of the town.

**— sale of products — effect.**

8. The public character of a poor farm is not changed by the fact that the municipality sells some of the surplus products of the farm.

**— quantity of land which may be purchased.**

9. The extent of the land which a municipal corporation may purchase for a poor farm is not confined to present immediate needs, but it may make reasonable provision for future requirements.

**Tax — exemption — land held for use of poor farm.**

10. Land necessary for pasturage for a poor farm, and for growing crops for inmates of the poorhouse, and stock kept upon the farm is held for public use and is free from taxation in the hands of the municipality.

**— express taxation — implied exemption.**

11. Express statutory provision that real estate owned by a town for almshouse and farm shall not be exempt from taxation for school purposes is a plain indication that such property shall not be taxed for any other purpose.

**— assessment in wrong name — effect.**

12. Where, by statute, real estate must be set by the assessors in the list of the person in whose name the title thereof stands on the land records, an assessment of land owned by and standing in the name of a city of a certain name against a town of the same name is void.

CROSS APPEALS from a judgment of the Court of Common Pleas for New Haven County in favor of plaintiff, in part, in an action brought to recover taxes assessed on three certain pieces of real estate; defendant appealing from so much of the judgment as held it liable for taxes on the second piece of land; and plaintiff appealing from so much as held the first and third pieces of land exempt from taxation. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles Kleiner and Henry H. Townshend, for defendant:

There was no error in holding that defendant was not liable for taxes on said first and third pieces of land.

*West Hartford v. Water Comrs.* 44 Conn. 368; *Dill. Mun. Corp.* § 1398; *New London v. Perkins*, 87 Conn. 233, 87 Atl. 724; *Van Brocklin v. Anderson* (*Van Brocklin v. Tennessee*) 117 U. S. 171, 29 L. ed. 852, 6 Sup. Ct. Rep. 670; *Buckley v. Osburn*, 8 Ohio, 180; *Worcester County v. Worcester*, 116 Mass. 193, 17 Am. Rep. 159; *Public Schools v. Taylor*, 30 N. J. Eq. 618; *Public Schools v. Trenton*, 30 N. J. Eq. 681; *Somerville v. Waltham*, 170 Mass. 160, 48 N. E. 1092; *Rochester v. Rush*, 80 N. Y. 302; *People ex rel. New York v. Board of Assessors*, 111 N. Y. 505, 2 L.R.A. 148, 19 N. E. 90; *State, Camden County, Prosecutor, v. Collins*, 60 N. J. L. 369, 37 Atl. 623; 37 Cyc. 874; *Water Comrs. v. Bloomfield*, 84 Conn. 522, 80 Atl. 794; *Milford Water Co. v. Hopkinton*, 192 Mass. 491, 78 N. E. 451; *Burr v. Boston*, 208 Mass. 537, 34 L.R.A. (N.S.) 143, 95 N. E. 208; *Newport v. Unity*, 68 N. H. 587, 73 Am. St. Rep. 626, 44 Atl. 704.

Defendant was rightfully performing a public duty in conducting a town farm or almshouse.

2 *Dill. Mun. Corp.* 4th ed. § 574; *State, Camden County, Prosecutor, v. Collins*, 60 N. J. L. 367, 37 Atl. 623; *State, Newark, Prosecutor, v. Verona Twp.* 59 N. J. L. 94, 34 Atl. 1060; *State, Water Comrs. Prosecutor, v. Gaffney*, 34 N. J. L. 131; *State, Hackettstown, Prosecutor, v. Conover*, 63 N. J. L. 191, 42 Atl. 838.

The third or Martino piece was not properly assessed.

*Hellman v. Burritt*, 62 Conn. 438, 26 Atl. 473; *Meyer v. Trubee*, 59 Conn. 422, 22 Atl. 424.

There was error in holding that the second piece of land was not exempt from taxation.

*State, Water Comrs. Prosecutors, v. Gaffney*, 34 N. J. L. 131; *People ex rel. Hollock v. Purdy*, 72 Misc. 122, 130 N. Y. Supp. 1077; *Colorado Springs v.*

*Fremont County*, 36 Colo. 231, 84 Pac. 1113.

Mr. Charles F. Clarke for plaintiff.

Wheeler, J., delivered the opinion of the court:

The town of Hamden sues to recover for taxes assessed on three pieces of real estate located in Hamden, just over the dividing line between New Haven and Hamden, and adjacent to the Springside farm, which, in connection with the Springside Home, is owned and operated as a town poorhouse and farm for paupers belonging to the town of New Haven.

The first piece, called the Merchant piece, was purchased April 1st, 1885, by the town of New Haven, and ever since has been used in connection with Springside farm for the purpose of pasturage, and was reasonably necessary for that purpose. The third, or Martino piece, was purchased in 1903, by the city of New Haven, and has ever since been used for pasturage and for growing crops for the use of the inmates of the poorhouse, and for stock kept on the farm, and it was reasonably necessary for those purposes. The second, or Thomas piece, was purchased in 1892, by the town of New Haven, for the purpose of providing a water supply for the poorhouse and farm, but, this purpose proving impracticable, it was abandoned, and for twenty years this piece has not been used for any purpose, and has remained rocky woodland covered with scrub oaks.

The city of New Haven, by consolidation with the town of New Haven, became vested with the town's property prior to December 7th, 1897, and liable for all debts which were enforceable against the town.

All of the products raised on the

farm were consumed upon the farm, except a small quantity of hay which was used by the department of public works of the city. Some of the live stock raised, in excess of the needs of the farm, was sold. Upon the farm was conducted a piggery, supported by the city of New Haven and maintained for the purpose of consuming the garbage collected in the city. The products of the piggery amounted to \$18,000 annually, and about two thirds of these were consumed by the inmates of the poorhouse and one third sold in the market.

The defendant claims that all of these pieces of land were exempt from taxation, because used for public purposes only. The plaintiff claims that none of these pieces were exempt, because their use was not for a public purpose, and could be of no benefit to the town of Hamden, and in effect would compel Hamden to share the support of New Haven's paupers. The trial court held that the first, or Merchant piece, and the third, or Martino piece, were exempt from taxation, and that the second, or Thomas piece, was not exempt.

General Statutes, § 2315, as construed by our court in *West Hartford v. Water Comrs.* 44 Conn. 360, 368, exempts from taxation all property held by municipalities for public use. And this rule obtains, although the property belonging to

**Tax-exemption  
—property of  
municipality.**

one town is located in another town which claimed the right to tax it. In either case the property will be exempt when it is used for, or employed in, a public use. The devotion of the property to a public use is the sole ground of the exemption. *Ibid.*; *New London v. Perkins*, 87 Conn. 229, 233, 87 Atl. 724.

Counsel for the town of Hamden advance the theory that the principle behind an exemption from taxation of the property of one town located in another town is a benefit

accruing to the public from the public use to which the land is put, and that the absence of such benefit removes the foundation for such exemption. With us, this theory has never had a foothold. The main reliance of the plaintiff is upon the case of *Newport v. Unity*, 68 N. H. 587, 593, 73 Am. St. Rep. 626, 44 Atl. 704. The point decided related to the statute of New Hampshire. The argument of the opinion supports the principle contended for, but the court expressly notes that our decision in *West Hartford v. Water Comrs.* holds that the property is exempt from taxation, "because it is used for public purposes."

**—poor farm—  
benefit to  
public.**

This is the principle of our decisions and it conflicts directly with the New Hampshire doctrine.

The plaintiff's appeal is to be decided by ascertaining whether the uses of the Merchant and Martino pieces were for a public purpose. Our statutes providing for the care of the poor were framed in the humane purpose "to prevent, as far as possible, any person, under any circumstances, from suffering for the necessities of life." Gen. Stat. §§ 2476-2492. The charter of New Haven (13 Special Laws, p. 447), § 202, fulfils a similar purpose. Beyond question, this is a public purpose and a legitimate exercise of governmental power.

**Poor-provision  
for-governmental  
purposes.**

The statute, § 2490, expressly authorizes the maintenance of poorhouses for the poor, and the charter of New Haven expressly makes all statutory provisions concerning town poorhouses applicable to the city of New Haven. The town of Hamden contends that New Haven is without authority to own or operate a town farm, and that such operation is consequently not for a public purpose. Assuming that this question is open for consideration in a proceeding to collect a tax, we find ample warrant in the provision of the charter (13 Special Laws, p. 448) § 204: "Said board shall have



power to employ and discharge a manager of Spring-side farm and home," etc. Here is an implied author-

**Municipal corporation—authority—implication.**

ity to maintain this farm. Town farms have been operated in connection with our poorhouses from an early day. The inmates of the poorhouses have worked upon these for the production of food for themselves. This not only gave the inmates healthy work, but it helped make them self-supporting and thus far relieved the town of its burden

**Poor—statutory duty to care for—how performed.**

of support. To provide food for the poor in this way is as much a public purpose as to provide shelter in the poorhouse. The duty of caring for the poor, imposed by our statute upon our towns, may be performed in every reasonable way and by the use of every reasonable means. The town farm is a reasonable way and means of furnishing support for the poor.

The sale of some of the produce of the farm and of the products of the piggery were incidents to the

**—sale of products—effect.**

main purpose, the support of the poor. The town and city were not intent on conducting a business for profit. They were merely disposing of their surplus production. What was sold in no way changed the public purpose of the undertaking. Its sale made production cheaper, and enabled the farm to be more thoroughly cultivated and used than it would otherwise have been. The extent of the land which the town might purchase for a farm is not to be confined to

**—quantity of land which may be purchased.**

present immediate needs, but may include reasonable provision for future requirements; and whatever the town may reasonably own for a farm it may cultivate, and whatever of products it raises thereon beyond its needs it may dispose of. *White v. Stamford*, 37 Conn. 578; *State, Camden County,*

*Prosecutor, v. Collins*, 60 N. J. L. 367, 37 Atl. 623.

The use of the Merchant and Martino pieces, as a part of the farm for pasturage, was necessary for pasturage for the farm, and the use of the rest of the Martino piece for growing crops for the inmates of the poorhouse, and for the stock kept upon the poor farm, is found to have been reasonably necessary for these purposes. This finding settles the question of their public use.

**Tax—exemption—land held for use of poor farm.**

We cannot anticipate disaster to the towns, as the plaintiff does, by such withdrawal of property from taxation. Experience has shown that the property owned by one town and located in another town and devoted to a public use is limited. If it were otherwise, the general assembly could, and no doubt would, restrict such ownership; and if, in any instance, the exempt property unreasonably reduced the area of property available for taxation, no doubt the general assembly would correct the public injustice. And so, too, the character of the public use might lead the law-making power to expressly provide for the taxation of land subject to this use in another town. Chapter 247 of the Public Acts of 1907, p. 856, is an instance where land in one town, devoted to sewage disposal for a municipality, is made taxable in the town of its location. For one purpose, only, have we expressly subjected any town almshouse and farm to taxation. General Statutes, § 2416, provides: "When any school district having within its boundaries any town almshouse and farm, shall impose any tax for the purpose of building or repairing its schoolhouse, said real estate owned by said town shall not be exempt from such taxation." The express limitation of taxation of any town almshouse and farm for one purpose is a plain indication that it is not taxable for any other purpose. No statutory indication of an intent to

**—express taxation—implied exemption.**

tax land devoted to the public uses of a town poorhouse and farm appearing, the ordinary rule of tax exemption is to be applied. The Merchant and Martino pieces are within the rule of exemption.

The taxes upon the Martino piece are not collectable for another reason. This property was transferred directly to the city of New Haven; it was never owned by the town of New Haven. These were independent municipal entities. The taxes sought to be recovered were assessed in the name of the town of New Haven. Real estate must be "set by the assessors in the list of the party in whose name the title" thereof stood "on the land records." Gen. Stat. § 2299. The assessment against the town of New Haven of land owned by the city of New Haven was void. *Hellman v. Burritt*, 62 Conn. 438, 26 Atl. 473; *Meyer v. Trubee*, 59 Conn. 422, 22 Atl. 424.

The defendant appeals from the judgment for taxes accrued upon the second, or Thomas piece. This piece

was purchased for a public purpose, but this purpose was soon abandoned, and, so far as the record shows, the city of New Haven has never contemplated any past, present, or future use of this piece. "For more than twenty years," the finding recites, "prior to the bringing of this action, said second piece of land had not been used for any purpose by said Springside Home, or Springside farm, or by the city and town of New Haven." Since the abandonment of the purpose for which it was purchased, this piece of land has not been devoted to a public use, nor during any of the years covered by the taxes, the recovery of which is sought, did the city have or contemplate its devotion to a public use. The trial court was clearly right in holding that this piece was not exempt from taxation during this period.

There is no error on either appeal.

In this opinion the other judges concur.

## ANNOTATION.

### Taxation of property owned by public body but not devoted to public use.

- I. Introductory, 1439.
- II. Unqualified exemption of publicly owned property, 1440.
- III. Exemption limited to property devoted to public use:
  - a. Property held as adjunct to public service, 1442.
  - b. Property producing income:
    1. Income incident to public use, 1445.

#### I. Introductory.

As a general rule property owned by a public body is held to be exempt from taxation as a matter of public policy, or by specific constitutional or statutory provisions, but in order to entitle it to the exemption it must be devoted to uses public in their nature. This note is intended to discuss those cases wherein it appears that, though the property is owned by a public body, the question arises whether the failure

#### III. b—continued.

2. Income independent of public use, 1449.
3. Public and private use intermingled, 1453.
- IV. Property held in trust, 1454.
- V. Property leased to individual, 1454.

to put it to a public use, or the fact that though it is used in part for public purposes it is incidentally used for other purposes, such as producing revenue, etc., deprives it of its public character to such an extent as to render it liable to taxation. Cases dealing with the right of one municipality to tax the property of another located within its borders are excluded, except where the decision as to the right to levy the tax is based on the use to

which the property is put, and not on its location.

*II. Unqualified exemption of publicly owned property.*

Property owned by the state or subordinate municipal bodies is expressly exempted from taxation by constitutional provision or statutory enactment in many jurisdictions, and in some of these jurisdictions it is held that, where the exemption is express and unqualified, no tax can be levied against it regardless of the use to which it is put.

**California.**—*San Francisco v. McGovern* (1915) 28 Cal. App. 491, 152 Pac. 980; *Webster v. University of California* (1912) 163 Cal. 705, 126 Pac. 974.

**Colorado.**—*Colorado Springs v. Fremont County* (1906) 36 Colo. 231, 84 Pac. 1113.

**Georgia.**—*Academy of Richmond County v. Bohler* (1887) 80 Ga. 163, 7 S. E. 633; *Academy of Richmond County v. Augusta* (1892) 90 Ga. 634, 20 L.R.A. 151, 17 S. E. 61; *Walden v. Whigham* (1904) 120 Ga. 646, 48 S. E. 159.

**Kansas.**—*Sumner County v. Wellington* (1903) 66 Kan. 590, 60 L.R.A. 850, 97 Am. St. Rep. 396, 72 Pac. 216.

**Maryland.**—*Anne Arundel County v. Annapolis* (1915) 126 Md. 445, 95 Atl. 40.

**Nebraska.**—*Omaha v. Douglas County* (1914) 96 Neb. 865, 148 N. W. 938.

**Utah.**—*Springville v. Johnson* (1894) 10 Utah, 351, 37 Pac. 577.

**Virginia.**—*Black v. Sherwood* (1888) 84 Va. 906, 6 S. E. 484.

**Canada.**—*Re Orillia* (1904) 7 Ont. L. Rep. 389.

In *Sumner County v. Wellington* (Kan.) supra, it was held that a waterworks plant owned and operated by a city was exempt from taxation under a constitutional provision exempting all property owned by a municipality. In that case it was said: "The statute makes public ownership of property the ground of immunity from taxation, and as the plant in question is absolutely owned by the city it is strictly within the terms of that ex-

emption. . . . If use, rather than ownership, were applied as the test to the right of exemption, the result would be the same. The fact that in establishing and carrying on a system of waterworks the city furnishes water to citizens and consumers for rental charges does not make it a mere business enterprise, nor does it affect the exemption. *West Hartford v. Water Comrs.* (1876) 44 Conn. 360. The earnings derived from the water furnished for domestic use and to consumers is, as we have seen, paid into the city treasury and used in carrying on the city government, and thus inures to the benefit of the people of the municipality."

Likewise in *Anne Arundel County v. Annapolis* (Md.) supra, it was held that a municipally owned waterworks plant, located in a county, was not subject to taxation under the Maryland Code, exempting property belonging to any incorporated city or town from taxation.

In *San Francisco v. McGovern* (Cal.) supra, it was held that a municipal waterworks plant was exempt under a constitutional exemption from taxation of such property "as may belong to" a municipality, the manner of its use being immaterial.

Similarly, in *Colorado Springs v. Fremont County* (Colo.) supra, it was held that, under a constitutional exemption from taxation of the "property of" a municipality, lands held to secure water rights were exempt.

So, it has been held that under a constitutional provision exempting the property of a municipal corporation from taxation, without qualification, a waterworks plant owned by a city could not be taxed, and the fact that it was a source of revenue to the city was immaterial. *Omaha v. Douglas County* (Neb.) supra, wherein it was said: "Under the Constitution of this state rightful ownership of property by municipal corporations, such as the city of Omaha, is all that is required or necessary to extend to such property complete exemption and immunity from assessment and taxation."

In the case of *Re Orillia* (Ont.) supra, it was held that under an act ex-

empting from taxation "property belonging to any county or local municipality," a municipally owned electric plant could not be subjected to taxation. And this was true even though the municipality derived some revenue from the plant. On this point it was said: "If the enterprise pays anything beyond expenses,—an unusual result, I am inclined to think,—the profit must go in relief of the general taxpayer; if the reverse, and a loss is made, the general taxpayer must pay. This being so, it is obvious that for the local municipality to impose a tax upon its property within the municipality would result simply in taking the money out of one pocket to put it into another."

Property held by school trustees, really as agents of the state, which was only used as a means of income, was held in *Academy of Richmond County v. Augusta* (1892) 90 Ga. 634, 20 L.R.A. 151, 17 S. E. 61, to be exempt from taxation under the statute (Ga. Code, § 598) which declared that "all public property" should be exempt from taxation, as the constitutional provision on the subject, excluding property "used for purposes of private or corporate profit or income," did not apply to public property.

Likewise, in *Webster v. University of California* (1912) 163 Cal. 705, 126 Pac. 974, it was held that, under a constitutional exemption of such property "as may belong to" the state, a mortgage to the regents of the State University was exempt.

In *Walden v. Whigham* (1904) 120 Ga. 646, 48 S. E. 159, it was held that a building and a stock of liquors owned by a municipality and operated as a dispensary were public property, and under the statute exempting "all public property" it could not be taxed, even though it was used for the purpose of producing income.

In *Springville v. Johnson* (1894) 10 Utah, 351, 37 Pac. 577, it was held that property consisting of 900 acres, bought in by a city for taxes and used for pasturage, was exempt from taxation under a statute providing that all property situated in the territory was taxable, "except that owned by this

territory, or any county, city, or school district." Construing this provision the court said: "The exemption from taxation of the property of cities is so clear and expressive that there would seem to be no room for doubt, or necessity of resorting to any rule of construction. The exemption is absolute, and depends upon no condition but ownership by the city."

In *Black v. Sherwood* (1888) 84 Va. 906, 6 S. E. 484, it was held that, under a constitutional provision exempting from taxation "all real estate belonging to any county, city, or town," the land owned by a city and county as a landing for a municipal ferry was not subject to taxation, and that a statute providing that no property, though publicly owned, should be exempt from taxation when used for any private purpose or profit, did not apply to the municipally owned property exempted by the plain language of the Constitution:

However, in at least one jurisdiction, it has been held that although the Constitution or statute in express terms exempts state or municipally owned property from taxation, it will be implied that the intention was to exempt such property only when devoted to a public use. *Atlantic & N. C. R. Co. v. Carteret County* (1876) 75 N. C. 474, wherein it appeared that a tax was levied on the interest of the state in a railroad. Holding that the constitutional exemption did not apply to property of the state held for business purposes, the court said: "Although this language is general, yet we do not think it was intended to embrace this case. The capitol is not taxed, because the state would be paying out money just to receive it back again, less the expense of handling it. And if taxed for local purposes it would to that extent embarrass the state government. Nor is it any hardship upon the locality to have the property exempt, as the advantages from it are supposed to compensate for the exemption. And, as with the capitol, so with other state property. But where the state steps down from her sovereignty and embarks with individuals in business enterprises, the same considerations do

not prevail. The state does not engage in such enterprises for the benefit of the state as a state, but for the benefit of individuals or communities—at least, this is generally so—and if the state gets no taxes she may get nothing. Suppose, for illustration, that the plaintiff should declare no dividends and consume the whole earnings in current expenses. In that case the state, as a state, would never derive anything from the road except the taxes. At any rate, we do not think the exemption in the Constitution embraces the interest of the state in business enterprises, but applies to the property of the state held for state purposes.”

For cases determining whether property held by a public body as trustee, or lessor, is exempt from taxation under unqualified exemption provisions, see *infra*, IV. and V.

### *III. Exemption limited to property devoted to public use.*

#### *a. Property held as adjunct to public service.*

As a general rule, property held by a municipality in connection with property used for a public purpose, but in excess of the amount required for proper conduct of such purpose, and not actually so used, is not within tax exemption provisions exempting property used for public purposes. *West Hartford v. Water Comrs.* (1877) 44 Conn. 360; *Norwalk v. New Canaan* (1911) 85 Conn. 119, 81 Atl. 1027; *Essex County v. Salem* (1890) 158 Mass. 141, 26 N. E. 431; *Traverse City v. East Bay Twp.* (1916) 190 Mich. 327, 157 N. W. 85; *Perth Amboy v. Barker* (1906) 74 N. J. L. 127, 65 Atl. 201; *Clark v. Sprague* (1906) 113 App. Div. 645, 99 N. Y. Supp. 304.

Thus, where a city had also acquired a tract of 960 acres of land, in addition to that actually to be used for its electric power plant, to be held solely for use in case of future needs, it was held that it was not exempt under the statute exempting lands used for public purposes.

*Traverse City v. East Bay Twp.* (1916) 190 Mich. 327, 157 N. W. 85, wherein it was said: “There remains,

however, for determination the question whether this large tract of land, purchased and owned by the plaintiff for the purpose of ultimate development as an adjunct to its plant located in the township of Blair, is exempt from taxation under the statute quoted above, which provides for the exemption of all lands owned by a city ‘used for public purposes.’ Can it be said in any proper sense, and within the meaning of the language of the statute, that these lands belonging to the plaintiff in the defendant township are ‘used for public purposes?’ The evidence above set forth distinctly negatives this proposition. The lands not only are not used for any public purpose, but they are not used for any purpose. They lie in a state of nature, and no attempt has, to the present time, been made to utilize them for the development of power, which is the only use of value that can be made of them. . . . We are of opinion that the use which warrants the exemption mentioned in the statute is a present use, and not an indefinite prospective use.”

Similarly, where it appeared that, in addition to 10 acres of land held and actually used for the purpose of supplying water to a city, there had been purchased a tract of 100 acres for the purpose of extending the system, but which had not been so used, it was held that this additional land was not exempt from taxation, under a statute exempting land held for “public purposes.” *Perth Amboy v. Barker* (1906) 74 N. J. L. 127, 65 Atl. 201.

In *Clark v. Sprague* (1906) 113 App. Div. 645, 99 N. Y. Supp. 306, it was held that land held by a municipality and not used for public purposes was subject to taxation, even though it was originally conveyed to the city for such purposes. In this case it appeared that the city had acquired the lands in connection with certain contemplated public improvements, but had held the land for thirty years without so using it. Holding the land liable for taxation as not coming within the statutory exemption of lands held for “public purposes,” the court said: “If

the lands in question were held by the city of Brooklyn for a public purpose, it may be assumed that the assessments (except, possibly, such as were for public improvements), the tax sale thereunder, and the deed pursuant thereto, were void; but no case has been called to our attention holding that real property owned by municipal corporations, and not held for public purposes, could not be taxed under the tax laws then existing; on the contrary, every case which held that lands so owned were not taxable proceeded upon the distinct theory that the lands were held for public purposes. . . .

Certainly, if a municipality is to be considered a private individual in respect to its ownership of lands not held for public use, no reason can be suggested for saying that it was not the intention of the legislature to include such lands in a general statement, providing in effect that all lands should be liable to taxation, except such as the statute exempted, especially when it is considered that taxes were levied for other than municipal purposes. It is not suggested that the lands in question were held for a public purpose, even assuming that they were originally conveyed to the city for such purpose. It appears by the statutes referred to supra, which respectively authorized and ratified the agreement pursuant to which the conveyance was made, that the transaction had to do with a public improvement, but the city could not, by holding the land for thirty years afterwards, insist that it should continue exempt from taxation as being held for a public use."

In *West Hartford v. Water Comrs.* (1877) 44 Conn. 360, it was held that land held by water commissioners in excess of the needs of the public service was not exempt from taxation. The court said: "The commissioners purchased the whole of certain tracts of which a part only was necessary for their purpose, for the reason that they could thus obtain the whole for a less price than a part, and they now hold 140½ acres, valued at \$2,000, thus bought. Practically this land was a gift to the city. We cannot deny them

the privilege of accepting it and turning it to their profit. But they cannot ask, and we cannot concede, the right thus unnecessarily to enlarge the municipal exemption and extend it over land which they did not buy, and have never expected to use, for the public good. They are under no obligation to hold it, and so long as they do they should pay the taxes assessed upon it."

Likewise, in *Norwalk v. New Canaan* (1911) 85 Conn. 119, 81 Atl. 1027, it was held that land owned by one municipality, but located in another, and not used for reservoir purposes as was other land owned by the foreign municipality, is not exempt from taxation by the town in which it is situated.

In *HAMDEN v. NEW HAVEN* (reported herewith) ante, 1435, it held that land purchased for use in connection with a poor farm, but not so used for a period of more than twenty years, was subject to taxation.

In *Essex County v. Salem* (1890) 153 Mass. 141, 26 N. E. 431, the facts were stated by the court as follows: "The evidence shows that the real estate on which the tax has been assessed was purchased by the county of Essex with the intention of some time using it for enlarging the jail and jail grounds in Salem, but that it has not been actually appropriated to this purpose, and whether it will ever be so appropriated is uncertain, and the intention to appropriate it to any public use, if any exists, is indefinite, and dependent upon events which may or may not occur." It was held that while property of a county was exempt from taxation when devoted to public uses, this rule would not apply to property acquired by the county with the intention of putting it to a public use at some future date, but which had not been put to such use when the tax was levied.

But, although the entire amount of land bought by a city for the development of an electric power plant was not directly used for such purpose, it has been held that where it was reasonably necessary for the practical operation of the plant it partook of the public use of the whole, and therefore

was exempt from taxation. *Traverse City v. Blair* (1916) 190 Mich. 313, 157 N. W. 81, Ann. Cas. 1918E, 81, wherein the court set out the facts and its ruling as follows: "It is contended that this property is not all used for public purposes, because it appears that the dam, buildings, and mill pond occupy but about 15 acres of the 60-acre tract. It is shown that the Boardman river, upon which the plant is located, runs irregularly through the whole 60 acres, the dam and power house being on the lower 20, with the pond extending upstream to the farther limits of the upper 40, affecting to a greater or less extent the entire tract through which it meanders. The property was purchased for and devoted to an hydraulic development, the dam of which raised the water upon and necessarily affected the character of the property for the entire length of the river within its limits. Aside from its use for water power the value of the property is relatively small. Without the ownership and control of a sufficient shore acreage along the river beyond the land actually covered by water, such a development would not be practicable.

Under the circumstances shown, the subdivisions acquired by plaintiff cannot be considered unnecessary or excessive for the protection and successful operation of the plant, but can fairly be regarded as an essential part of it, devoted to and used for public purposes."

In *State v. Water Comrs. Prosecutors, v. Gaffney* (1870) 34 N. J. L. 181, the court, construing a special statute exempting lands held by Jersey City "for purposes connected with the works for supplying said city with water," held that land purchased for use in connection with the city's waterworks was exempt, although not in actual use for such purpose, if held in good faith and reasonably necessary to meet the growing demand for water. On this point it was said: "The land was not held for speculation, or to meet a remote, contingent expectation of necessary use, or for a mere incidental convenience. . . . It is true that the property was not in actual use when the assessment was made, but

there was then no indication of any abandonment of the purpose to use it for a reservoir; on the contrary, it is clear that it was held for that necessary purpose, and without being used for any other."

Similarly, in *Clinton County v. Lock Haven* (1904) 29 Pa. Co. Ct. 641, it was held that property owned by a municipality, necessary and essential to operate properly its waterworks, to protect the purity of the water, and to prevent contamination, though consisting of 2,000 acres, was used for a public purpose and exempt from taxation.

In *People ex rel. Hollock v. Purdy* (1911) 72 Misc. 122, 130 N. Y. Supp. 1077, the court, construing a statute which exempted from taxation the property held by a municipality for a "public use," held that property acquired by the city by condemnation for rapid transit purposes was not subject to taxation, although not so used, having become unnecessary. In that case it was said: "Where the right of eminent domain is exercised, all that the law requires is that the property taken shall be dedicated to public purposes, and, once ownership of the municipality attaches, the public character attaches during all the time it shall possess it. The mere fact that the property condemned was afterwards found to be unnecessary does not, it seems to me, alter the rule. . . . While it cannot be said that property so obtained is held by the municipality for governmental purposes, it nevertheless belongs to the public, impressed with a trust for its benefit. So that, even if the lands in question were condemned for a specific purpose, and it was later ascertained that it could not be used in whole or in part for the object originally intended, it still remained public property, even though a private ownership is claimed for it. . . . The distinction sought to be drawn between the two separate holdings, at least for taxable purposes, partakes more of the shadow than of the substance; and the logic that would exempt the one class and tax the other, without resultant benefit to the public, must fail of its own feebleness. Some text-writers hold that the private prop-

erty of a city is in fact subject to taxation by itself, and authorities may be found to sustain such view. I do not think that the conclusions so reached can be upheld. . . . Property of a municipality is not subject to taxation, whether it be employed for public uses or held in a proprietary capacity in trust for the public."

*b. Property producing income.*

*1. Income incident to public use.*

Whether the fact that a state or municipality derives an income from property held by it deprives it of its public nature to such an extent as to take it out of the exemption from taxation generally given to state or municipally owned property when devoted to public use necessarily depends on the character of the property and the manner in which the profit or income is earned. As a general rule it may be said that where the primary and principal use to which the property is put is public, the mere fact that an income is incidentally derived from it does not affect its character as property devoted to a public use.

**Kentucky.** — *Frankfort v. Com.* (1906) 29 Ky. L. Rep. 699, 94 S. W. 648; *Com. v. Newport & C. Bridge Co.* (1907) 32 Ky. L. Rep. 196, 105 S. W. 378; *Com. ex rel. Albritton v. Lebanon Waterworks* (Com. ex rel. Albritton v. Rubel) (1908) 130 Ky. 61, 20 L.R.A. (N.S.) 224, 112 S. W. 1128; *Com. v. Covington* (1908) 128 Ky. 36, 14 L.R.A. (N.S.) 1214, 107 S. W. 281; *Com. v. Newport* (1908) 32 Ky. L. Rep. 820, 107 S. W. 232; *Covington v. Highlands* (1908) 33 Ky. L. Rep. 323, 110 S. W. 338; *Ryan v. Louisville* (1909) 133 Ky. 714, 118 S. W. 992; *Com. v. Louisville* (1909) 133 Ky. 845, 119 S. W. 161.

**Maine.**—*Augusta v. Augusta Water Dist.* (1906) 101 Me. 148, 63 Atl. 663.

**Massachusetts.**—*Wayland v. Middlesex County* (1855) 4 Gray, 500.

**Michigan.**—*Traverse City v. Blair* (1916) 190 Mich. 313, 157 N. W. 81, Ann. Cas. 1918E, 81.

**New Jersey.**—*Perth Amboy v. Barker* (1906) 74 N. J. L. 127, 65 Atl. 201.

**New York.**—*People ex rel. New York v. Board of Assessors* (1888)

111 N. Y. 505, 2 L.R.A. 148, 19 N. E. 90.

**Ohio.**—*Toledo v. Yeager* (1894) 8 Ohio C. C. 318, 6 Ohio C. D. 273; *Toledo v. Hosler* (1896) 54 Ohio St. 418, 43 N. E. 583.

**Pennsylvania.** — *Reading v. Berks County* (1903) 22 Pa. Super. Ct. 383; *Allegheny Twp. v. Altoona* (1899) 23 Pa. Co. Ct. 381; *Carlisle School Dist. v. Carlisle* (1901) 11 Pa. Dist. R. 294.

**Tennessee.** — *Nashville v. Bank of Tennessee* (1851) 1 Swan, 269; *Nashville v. Smith* (1887) 86 Tenn. 213, 6 S. W. 273; *Smith v. Nashville* (1889) 88 Tenn. 464, 7 L.R.A. 469, 12 S. W. 924; *Clarksville v. Montgomery County* (1901) — Tenn. —, 62 S. W. 33.

**Texas.**—*Galveston Wharf Co. v. Galveston* (1884) 63 Tex. 14.

**Vermont.**—*Stiles v. Newport* (1904) 76 Vt. 154, 56 Atl. 662.

The rule was stated as follows in *Traverse City v. Blair* (1916) 190 Mich. 313, 157 N. W. 81, Ann. Cas. 1918E, 81: "While in distinguishing the purely governmental powers of a municipality from its authorized business activities in supplying itself and its inhabitants with a certain class of utilities and conveniences for which, in places of concentrated population, there is a general need, and which it is recognized under present conditions of civilization public welfare demands, the latter are sometimes referred to as private business enterprises, perhaps because such wants may be and sometimes are supplied for profit by private parties; yet in the final analysis they are in no true sense private business or private property when operated and owned for public benefit by a municipality, under constitutional or statutory authority. No question of private gain or private support is involved. The benefits, whether in direct profits or in protection of health, property, or life, accrue to and all losses fall upon the public generally. The only underlying support for all such public business activities is taxation, and taxation can only be for public purposes. . . . That, after supplying its own direct municipal needs, the city furnished light or power to private parties, and



received a revenue therefrom, in no way detracts from the municipal or public purpose for which such authorized public utility was owned and operated. Neither is it of importance whether the enterprise was in itself profitable or unprofitable; it remained public property, owned and operated as an authorized public utility for municipal purposes and the general welfare, dependent for its credit and existence upon public support by taxation to whatever extent its necessities required."

Accordingly it has been held that a municipally owned lighting plant was not subject to taxation because of the fact that in the operation of the plant the city incidentally derived a revenue therefrom. *Frankfort v. Com.* (Ky.) *Traverse City v. Blair* (Mich.); *Toledo v. Yeager* (Ohio) *supra*.

In *Traverse City v. Blair* (Mich.) *supra*, it was held that the fact that 70 per cent of the income of a municipally owned electric light plant was derived from sales to private individuals did not affect its character as property devoted to a public use, and therefore it was not liable to taxation.

Similarly, in *Toledo v. Yeager* (Ohio) *supra*, it was held that the pipes, fixtures, etc., of a plant used to supply natural gas to the inhabitants of a city were property used exclusively for public purposes, under a constitutional provision exempting such property from taxation, and the fact that revenue was received from the sale of the gas was immaterial.

But where a village has no authority under its charter to sell electricity to its inhabitants, it has been held that the use of its plant for that purpose is not such a public use as to bring it within the exemption. *Swanton v. Highgate* (1908) 81 Vt. 152, 16 L.R.A. (N.S.) 867, 69 Atl. 667, wherein the court distinguished *Stiles v. Newport* (1904) 76 Vt. 154, 56 Atl. 662, on the ground that in that case it appeared that the village was authorized by its charter to furnish its inhabitants with water for domestic and other purposes.

Likewise, it has been held that the fact that a city derived a revenue from

the rental of ferry property did not affect the public nature of the use of the property, and therefore it was exempt from taxation. *People ex rel. New York v. Board of Assessors* (1888) 111 N. Y. 505, 2 L.R.A. 148, 19 N. E. 90.

In *New London v. Perkins* (1913) 87 Conn. 229, 87 Atl. 724, it was held that a municipal ferry franchise was not taxable where the municipality operated the ferry through a lessee and derived its revenue from the rental.

In *Galveston Wharf Co. v. Galveston* (1884) 63 Tex. 14, it was held that the one-third interest of a city in a wharf was not taxable, because within a constitutional exemption of taxation used for public purposes, and the fact that a revenue was received therefrom was immaterial.

To the same effect, see *Com. v. Louisville* (1909) 133 Ky. 845, 119 S. W. 161.

It has been held that the fact that revenue was derived from a municipally owned toll bridge did not deprive the property of its character as public property devoted to a public use. *Com. v. Newport & C. Bridge Co.* (1907) 32 Ky. L. Rep. 196, 105 S. W. 378.

Likewise it has been held that the fact that a public market was a source of revenue to a municipality did not change its character as property "used for public purposes," within the meaning of the constitutional provision exempting such property from taxation. *Carlisle School Dist. v. Carlisle* (1901) 11 Pa. Dist. R. 294, wherein it was said: "From an early period the public markets of Pennsylvania have been established and controlled by the municipalities in which they are located, and they have been deemed to be a necessity. The fact that they incidentally yield a revenue in the form of tolls, or stall rents, is not material to the question at issue."

In *Louisville v. Com.* (1864) 1 Duv. (Ky.) 295, 85 Am. Dec. 624, decided before the enactment of statutory or constitutional exemptions of municipally owned property, wherein it was held that, while a city was not subject to taxation on property used for carrying on its municipal government,

market houses, fire engines, and halls were not thus held, and therefore were subject to taxation.

It has been held that a waterworks system owned and operated by a municipality is public property devoted to a public use, and as such entitled to exemption from taxation, and the fact that it is also a source of revenue does not affect its character.

**Kentucky.** — *Com. v. Covington* (1908) 128 Ky. 36, 14 L.R.A.(N.S.) 1214, 107 S. W. 231; *Com. v. Newport* (1908) 32 Ky. L. Rep. 820, 107 S. W. 232; *Covington v. Highlands* (1908) 33 Ky. L. Rep. 323, 110 S. W. 338; *Ryan v. Louisville* (1909) 133 Ky. 714, 118 S. W. 992.

**Maine.**—*Augusta v. Augusta Water Dist.* (1906) 101 Me. 148, 63 Atl. 663.

**Massachusetts.**—*Wayland v. Middlesex County* (1855) 4 Gray, 500.

**New Jersey.**—*Perth Amboy v. Barker* (1906) 74 N. J. L. 127, 65 Atl. 201.

**Ohio.**—*Toledo v. Hosler* (1896) 54 Ohio St. 418, 43 N. E. 583.

**Pennsylvania.** — *Reading v. Berks County* (1903) 22 Pa. Super. Ct. 373; *Allegheny Twp. v. Altoona* (1899) 23 Pa. Co. Ct. 381.

**Tennessee.** — *Nashville v. Smith* (1887) 86 Tenn. 213, 6 S. W. 273; *Smith v. Nashville* (1890) 88 Tenn. 464, 7 L.R.A. 469, 12 S. W. 924; *Clarks-ville v. Montgomery County* (1901) — Tenn. —, 62 S. W. 33.

**Vermont.**—*Stiles v. Newport* (1904) 76 Vt. 154, 56 Atl. 662.

In *Smith v. Nashville* (1889) 88 Tenn. 464, 7 L.R.A. 469, 12 S. W. 924, the court said: "It can make no difference whether the water be furnished the inhabitants as a gratuity or for a recompense, the sum raised in the latter case being reasonable and applied for legitimate purposes. So raising a fund to help defray the expenses of operating the waterworks and to keep down the interest on the city's indebtedness, incurred in the construction thereof, is no more engaging in business for gain and profit than would be the assessment and collection of taxes for that or any other legitimate object. To the extent that money is realized by sales of water (if it be so termed), the necessity of laying taxes

in the usual way is diminished. If the water were furnished free of charge, then the expense of operating the works and meeting the interest on the debt would have to be met by an increased tax assessment."

In *Perth Amboy v. Barker* (1906) 74 N. J. L. 127, 65 Atl. 201, it was said: "The sales of water outside of Perth Amboy are merely incidental to the general public purposes for which the waterworks were established and are being maintained and operated by that city. If the sales to outside parties are not authorized by law, the state may complain through the attorney general; but in our view such use of the surplus water does not take away the right of Perth Amboy to exemption from taxation upon the property that is used primarily and principally for the public purposes of that city."

But under the earlier tax laws of New Jersey an exemption from taxation was extended to "the property of the counties, townships, cities, and boroughs of this state," and this exemption was held to be independent of the use to which the property was devoted. *State, Newark, Prosecutor, v. Verona Twp.* (1896) 59 N. J. L. 94, 34 Atl. 1060; *State, Camden County, Prosecutor, v. Collins* (1897) 60 N. J. L. 367, 37 Atl. 623; *State, Newark, Prosecutor, v. Belleville Twp.* (1897) 61 N. J. L. 456, 39 Atl. 658; *State, Hackettstown, Prosecutor, v. Conover* (1899) 63 N. J. L. 191, 42 Atl. 838.

In *Newport v. Unity* (1896) 68 N. H. 587, 73 Am. St. Rep. 626, 44 Atl. 704, the rule was recognized that a waterworks plant owned by a municipal corporation was property used for public purposes, under a statute exempting such property when owned by a municipality. The decision in this case, however, turned on the right of a municipality to tax the property of another municipality within its borders.

Similarly, it has been held that a sinking fund created to meet the bonded indebtedness of a city, incurred for the purchase of a waterworks system, was none the less public property used for public purposes, because of the fact that it had been invested

in dividend-paying stocks. *Com. ex rel. Albritton v. Lebanon Waterworks* (Com. ex rel. *Albritton v. Rubel*) (1908) 130 Ky. 61, 20 L.R.A.(N.S.) 224, 112 S. W. 1128.

In *Miller v. Fitchburg* (1901) 180 Mass. 32, 61 N. E. 277, it was held that where a city acquired property for the purpose of maintaining a city water supply, and entered into an agreement whereby, in consideration of the release of damages by certain mill owners, the city agreed to maintain a reservoir for their use, except under certain circumstances arising from emergencies, it could not be said that the city received any "revenue in the nature of rent," within the meaning of a statute making property owned by a city for waterworks liable to taxation, if any revenue in the nature of rent were received therefrom.

But it has been held that although a city acquired all the corporate stock of a water company, that did not make the corporate property public property, and that, while the shares of stock were exempt under the constitutional provision, the corporate property itself was not exempt until it had actually been conveyed to the city. *Bell v. Louisville* (1908) 32 Ky. L. Rep. 699, 106 S. W. 862. This case was distinguished in *Ryan v. Louisville* (1909) 133 Ky. 714, 118 S. W. 992, *supra*, on the ground that before the decision in that case the city had acquired title to the actual property by valid transfer.

While a city may receive an income from the sale of water, etc., to its inhabitants, or even to those living outside the limits of the city, but adjacent thereto, without losing the constitutional and statutory exemption from taxation, of property devoted to public use, it has been held that supplying other cities and towns with water is engaging in business, and not a use of its property for a public use, and, therefore, that to the extent so used the property is taxable. *Knoxville v. Park City* (1914) 130 Tenn. 626, L.R.A. 1915D, 1103, 172 S. W. 286; *Stiles v. Newport* (1904) 76 Vt. 154, 56 Atl. 662; *Swanton v. Highgate* (1908) 81

Vt. 152, 16 L.R.A.(N.S.) 867, 69 Atl. 667.

In *Knoxville v. Park City* (Tenn.) *supra*, it was said: "It is difficult to conceive how the city of Knoxville has any public or corporate purpose to serve within the corporate limits of Park City. All municipal purposes therein are those of Park City, created by legislative act to exercise them. The furnishing of a water supply for itself and its inhabitants is its municipal purpose, and cannot be Knoxville's. Nor may it logically be conceived that the city of Knoxville serves even incidentally its own corporate public purpose by means of the Park City system. What is the primary 'public purpose' of Park City may not be an incidental 'public purpose' of Knoxville. The legislature will be taken to have intentionally lodged the full power and duty in that regard in its local governmental representative, Park City."

In *Stiles v. Newport* (1904) 76 Vt. 154, 56 Atl. 662, the court, holding that where a city built a branch line of its waterworks to another village, and supplied it with water, it was not devoting its waterworks to a public use, said: "The village of Newport owes no municipal duty to the village of West Derby or its inhabitants, and has no municipal interest there. Its sale of water to that village and its inhabitants is for the revenue obtainable thereby, independent of any connection with municipal duty or interest. Although disposed of for the same purposes, the sale cannot be regarded as a public use, because of this want of municipal relation. . . . Here the village of Newport has built and installed a branch outside its corporate limits, which is devoted wholly to the needs of another village, and can never be made available for its own municipal service; and the question is whether the property so created and circumstanced shall be treated as serving an incidental, and therefore a public, use. It might not be easy to frame a safe and acceptable definition of an incidental use; but we think it may safely be said that the supplying of the municipal and domestic needs of

another municipality, through a complete system of distributing pipes and hydrants created for that purpose, is not such a use. The plaintiff has assessed the hydrants located in Derby, and we hold that they are taxable."

Likewise, in *Swanton v. Highgate* (Vt.) supra, it was held that the supplying of one village by another with electricity was not such a public use of its property as to entitle it to the exemption.

But in *West Hartford v. Water Comrs.* (1877) 44 Conn. 360, it was held that the property of a municipal water plant was not deprived of its exemption by the fact that water was sold at a profit to an adjacent municipality. The court said: "The board of water commissioners, with the approbation of the city, sells the water which has been stored in West Hartford to consumers both in that town and in Hartford, preferring that method of raising money for interest and expenses to the imposition of a tax, and at the time of the submission thus collected a greater sum than the annual interest and expenses. West Hartford urges that by reason of this fact Hartford has ceased to be in this matter a municipality holding property for the public good, and has descended to the level of a pecuniary corporation using property for profit, and has thus placed itself within reach of taxation. But this, again, is rather in seeming than in reality. The legislature sanctioned this method of raising money at the time when it declared the undertaking to be one for the public good. Besides, the fact that the rents at the present time are sufficient to pay the annual charges may be only a fortunate occurrence; this state of things may not continue. And the town remains liable to taxation for annual deficiencies, and for the ultimate payment of the principal expended in the purchase of the land and construction of the works."

In *JOHNSON CITY v. WEEKS* (reported herewith) ante, 1431, it was held that the fact that a city supplied water to a soldiers' home lying partly within and partly without the city limits did not alter the nature of its waterworks

as public property devoted to a public use, within the meaning of the constitutional and statutory provisions exempting property so used from taxation. The opinion states succinctly and forcibly the reasoning by which the decision is justified.

In *Nashville v. Bank of Tennessee* (1851) 1 Swan (Tenn.) 269, it was held that the Bank of Tennessee, being owned by the state, was a public corporation, and therefore its property was not subject to taxation by a city, although the bank was a source of revenue to the state.

In *HAMDEN v. NEW HAVEN* (reported herewith) ante, 1435, it is held that the fact that an income was derived from the sale of produce raised on a city poor farm did not change its character as public property devoted to public use.

## 2. *Income independent of public use.*

When an income or profit is derived from municipally owned property, not as an incident to its use as a public agency, but from its use primarily and principally for the purpose of producing revenue, it cannot be said to be devoted to public use, and is, therefore, subject to taxation. *School Dist. v. Howe* (1896) 62 Ark. 481, 37 S. W. 717; *People ex rel. Davis v. Chicago* (1888) 124 Ill. 636, 17 N. E. 56; *Sanitary Dist. v. Hanberg* (1907) 226 Ill. 480, 80 N. E. 1012; *Sanitary Dist. v. Gifford* (1913) 257 Ill. 424, 100 N. E. 953; *Mitchellville v. Board of Supervisors* (1884) 64 Iowa, 554, 21 N. W. 31; *Wayland v. Middlesex County* (1855) 4 Gray (Mass.) 500; *Essex County v. Salem* (1890) 153 Mass. 141, 26 N. E. 431; *State, Newark, Prosecutor, v. Clinton Twp.* (1887) 49 N. J. L. 370, 8 Atl. 296; *Swanton v. Highgate* (1908) 81 Vt. 152, 16 L.R.A.(N.S.) 867, 69 Atl. 667.

Thus, in *Swanton v. Highgate* (Vt.) supra, wherein it appeared that on the water-power property acquired by a village for the generation of electricity there were situated a gristmill and a lumber mill, which could not be used in connection with its lighting plant, but from which the village derived an income in the shape of rentals, it was

held that these mills were not exempt from taxation as property devoted to public use.

Holding that property acquired by a county for the purpose of enlarging a jail yard, but which had not been so used, but on the contrary was rented out to private parties for the purpose of raising income, was not exempt from taxation, the court in *Essex County v. Salem* (1890) 153 Mass. 141, 26 N. E. 431, said: "If the property is used exclusively for private purposes, and is a source of income to the county, in the benefits of which the other towns share, it is certainly just that out of the income derived from that property there should be paid to the city of Salem such charges as are paid on other similar property, to enable the city to perform its municipal duties, on the proper performance of which the safety and value of such property in some degree depend. Although a county has different and somewhat more limited powers than a town or city, yet it is a municipal corporation capable of being sued, and has power by taxation to raise money to discharge its obligations. We are of opinion that, in the absence of any express exemption of the property of counties from taxation, an exemption can be implied only when the property is actually appropriated to public uses. This is the principle which underlies all our decisions in cases analogous to the present, and we see no ground on which it ought to be extended to the property of a county actually devoted to private uses which are not incidental to the performance of public duties, particularly when income is derived from the property in the same manner as from similar property belonging to private persons."

Similarly, it has been held that, where a city purchased 100 acres of land with a view to using 5 acres of it for a cemetery, it could not claim exemption from taxation on the balance, which it used for farming purposes in order to produce revenue. *State, Newark, Prosecutor, v. Clinton Twp.* (1887) 49 N. J. L. 370, 8 Atl. 296, wherein it was said: "There is no

doubt that public property, whether belonging to a state, a county, a city, a township, or a borough, used for a purpose germane to the objects for which the municipality was created, is not taxable. But to be entitled to exemption from tax, the property must be used for such purpose. If a city purchase a farm of 100 acres, situated in another municipality, on which are a dwelling house and buildings necessary to carry on the farming business, for the purpose of obtaining 5 acres thereof to be used for a graveyard, and use the ninety-five acres so as to derive profit therefrom, either through lease or by cultivation, the whole property will not be exempt from taxation, because the whole is not used for public purposes, or in fulfilment of a public trust. It would manifestly be unjust to withdraw the whole property from assessment, and deprive the municipality in which it is situated from the proportion of tax it should pay."

In Illinois all property owned by municipal corporations is subject to taxation, unless specifically exempted by statute. *Re Swigert* (1887) 123 Ill. 267, 14 N. E. 32; *Sanitary Dist v. Martin* (1898) 173 Ill. 243, 64 Am. St. Rep. 110, 50 N. E. 201; *Sanitary Dist. v. Hanberg* (1907) 226 Ill. 480, 80 N. E. 1012. Accordingly it has been held that a toll bridge owned by a city and situated outside the city limits was not exempt from taxation, as, under the Illinois Constitution (Const. 1870, § 3, art. 9), only such public property as might be exempted by statute was exempt, and as no statute had been passed exempting toll bridges it was liable to taxation. *Re Swigert* (Ill.) supra. In *Sanitary Dist. v. Martin* supra, it was held that lands owned by a sanitary district were neither "public lands," nor were they "used exclusively for public purposes" within the meaning of those terms as used in the statute exempting public lands from taxation, and as there was no other statute by which they were exempted they were properly taxed. In *People ex rel. Davis v. Chicago* (1888) 124 Ill. 636, 17 N. E. 56, it appeared that certain lands owned by a city had been taken in part payment of corporate

funds embezzled by a public officer. It was insisted that the lands represented the funds, and as the latter were not taxable the lands were not. Holding that as the lands were not used for any public purpose, but were leased by the city for a profit, and had not been exempted by statute, they were taxable, the court said: "The difficulty with the position of appellee is that the legislature has nowhere provided that a city or incorporated town may acquire a large tract of land and hold it for years free from taxation. There is a necessity for exempting from taxation the public buildings of a city, and the grounds upon which they stand, not exceeding 10 acres; but why a large tract of land located remote from the city should be held by a city free from the burdens of taxation for years, it may be difficult to understand.

. . . It is also suggested that the funds embezzled by the city treasurer were not, and would not be, subject to taxation had they remained in the treasury, and as these lands represent the embezzled funds, they are also exempt. But the funds which were in the treasurer's hands were not placed there to remain as a permanent fund. These funds were raised to be paid out to defray the expenses of the city, and of course it was not a fund liable to taxation; but if a city had the power to accumulate a large fund, and hold it from year to year in its treasury, or keep it at interest, no reason is perceived why such fund might not be taxed. These lands have been held for a number of years. It is not claimed that they are now, or ever will be, needed for any municipal use of the city. On the other hand, they are held for profit,—for the annual increase in price,—and we perceive no reason why the city should not pay taxes where lands are so held, in like manner as an individual who purchases and holds lands as an investment."

In *Mitchellville v. Board of Supervisors* (1884) 64 Iowa, 554, 21 N. W. 31, it was held that, although the income derived from land owned by a city was devoted to a public use, the land itself was not, but, being used for profit, came within the qualifying

clause of the statute exempting from taxation property of a town when "not held for pecuniary profit." In this case it was said: "To be exempt, the property in question in this case must be devoted entirely to public use, and not held for pecuniary profit. Now it appears that the property is not devoted to public use, but an income is derived therefrom. The condition of the trust imposed by the donor is that the property itself shall not be devoted to public use, but the profit arising therefrom shall be. It is, therefore, obvious that a pecuniary profit is derived from the property. It is, therefore, not exempt. It is true, the profits are devoted to public use, but the statute does not, because of this fact, provide that the property is exempt from taxation."

Likewise, in *Sanitary Dist. v. Gifford* (1913) 257 Ill. 424, 100 N. E. 953, it was held that a water-power electric plant belonging to a sanitary district, but not used in connection with sanitation, and from which the district derived large profits, was not devoted to a public use, and was, therefore, subject to taxation in the absence of a statute specifically exempting it.

In *Sanitary Dist. v. Hanberg* (Ill.) supra, it was held that lands owned by a sanitary district and leased for a profit could not be said to be used for a public purpose, and were, therefore, liable to taxation.

In *Wayland v. Middlesex County* (1855) 4 Gray (Mass.) 500, though not directly involved, the court recognized the rule, and said that, if land taken in connection with the establishment of a municipal waterworks system was valuable for and used for purposes other and distinct from those of the aqueduct, the property so used would be liable to taxation to the extent of such use.

In *Cornelius v. State* (1914) 40 Okla. 733, 140 Pac. 1187, it was held that a mortgage given to secure a loan from the state school fund was the property of the state, and as such exempt from taxation under the constitutional provision exempting "all property used exclusively for schools . . . and all property of this state."

In *School Dist. v. Howe* (1896) 62 Ark. 481, 37 S. W. 717, it appeared that land had been donated by the United States to a municipality for school purposes, and was held by a school district for sale or rent, the proceeds of the sale or rental to be used for school purposes. It was held that it was not exempt as "public property used exclusively for public purposes." In that case it was said: "It seems clear that the intention was to exempt only that public property which in itself directly subserved some public purpose by actual use, as distinguished from property belonging to the public, but not used by it, and from which a benefit accrues to the public, not by the immediate use thereof by the public, but indirectly, through selling or renting the same to private parties."

But in *ROBINSON v. INDIANA & A. LUMBER & MFG. CO.* (reported herewith) ante, 1426, it was held that lands which a levee district bid in at a sale by it to enforce delinquent levee taxes, and was holding until it could dispose of them, were not subject to taxation, the court saying: "The levee district only held the lands that it acquired at levee tax sale until it was practical to dispose of them again. They were not held for any purpose of gain or as income-producing property. When sold, the proceeds took the place of the levee taxes, for the enforcement of which and the expenses incident thereto they were sold, and in this way we think the lands were directly and immediately used exclusively for public purposes within the meaning of the Constitution, and were not subject to taxation."

In *Gibson v. Howe* (1873) 37 Iowa, 168, it was held that lands purchased by a city at a sale, under a judgment formerly obtained by the city against a defaulting officer, and not held for rent or profit, but in order to reimburse itself, were held for a public use, and were exempt from taxation. The court said on this point: "The property of a county, 'when devoted entirely to the public use, and not held for pecuniary profit, is exempt from taxation.' Rev. § 711. The land in question was not acquired for pecuniary profit, but to secure a debt due the county. It was

not purchased or held to rent, or for its probable increase in value. It was acquired and held that the just amount due the county from a defaulting officer might be realized. This was the object to which it was devoted, and was, undoubtedly, a public use. It was not, therefore, taxable."

It has been held that indemnity swamp lands owned by a county, not being held for "pecuniary profit," were exempt from taxation. *Callahan v. Wayne County* (1887) 73 Iowa, 709, 36 N. W. 654.

Under a constitutional provision empowering the legislature to tax property owned by a municipality when not used for municipal purposes, it has been held to be necessary in order to levy a tax on such property, that an act should have been passed providing for its taxation, as the constitutional provision was not self-executing. *New Castle v. Lawrence County* (1892) 2 Pa. Dist. R. 95, wherein it was said: "If the municipality undertakes to acquire and hold more property than is used or necessary for municipal purposes, the state might interfere, but that right on the part of the state does not affect the question of the right of the taxing authority to assess taxes against such real property. The power to assess taxes is inherent in the state, but, in the absence of a constitutional provision, the legislature must designate what property is subject to taxation and the manner of levying and collecting taxes. Prior to the adoption of the Constitution of 1874 the property in question was not subject to taxation. Under the provision of art. 9, § 1, of the Constitution of 1874, the legislature has the power to tax property held by a municipality, but not used for municipal purposes. These provisions, however, do not execute themselves, and the legislature has not passed any law bringing municipal property, or property held by a municipality, within the scope of the authority of the assessor or collector of taxes. Even if we were to concede that property held by the city, but not for municipal purposes, was subject to taxation, it might be a valid objection

in the present case that the taxes are assessed against what is and what is not used for municipal purposes as a whole, and there is no statutory provision for making an apportionment."

For cases determining the effect of a lease of publicly owned property, aside from the fact that it produces revenue, as depriving it of the exemption from taxation, see *infra*, V.

### *3. Public and private use intermingled.*

Where a village constructed a village hall to be used as a public hall, police-court room, assessor's office, lockup, etc., which when not in actual use for these purposes was leased for lectures and other public entertainments, the income so derived being used to assist in defraying the annual corporate expenses, it was held that the use to which the property was put was primarily public, the so-called private use being only incidental, and not such as to deprive the property of its exemption from taxation. *Camden v. Camden Village Corp.* (1885) 77 Me. 530, 1 Atl. 689, wherein it was said: "From a careful examination of the facts in the case, and in view of the public nature of this corporation, and the purposes for which it was created, we are led to no other conclusion than that this building, authorized by legislative sanction, is owned by the corporation for public uses, rather than in its 'social or commercial capacity.' The letting of those parts of the building which are not in actual use by the corporation are incidental and subsidiary to the objects for which it was created, and do not take away its character as a public building, or render it liable to taxation by the town, as it would be were this a private corporation, and its building erected for private purposes. Many city and town halls in this state are so constructed that when not in use for strictly municipal purposes they may be let for any proper use. Such fitting up and letting for hire are the incidents, and not the primary objects, of such public buildings."

However, the contrary view has been taken in *Columbia v. Tindal* (1894) 43 S. C. 547, 22 S. E. 341, wherein it was

held that that part of a city hall not used for municipal purposes was not exempt from taxation, under the constitutional provision exempting city halls when "owned and used exclusively for public purposes," but that, since that part of the building used exclusively for municipal purposes was exempt from taxation, the tax collector would be enjoined from selling the building for taxes on that part not exempt.

And it has been held that where the Constitution provided that the legislature might exempt public property, "used exclusively for any public purpose," the legislature was without power to pass a tax law exempting town halls notwithstanding that some part thereof might be leased for profit. *Scott Co. v. Athens* (1894) 1 Ohio S. & C. P. Dec. 84. In this case it appeared that the greater part of a town hall erected by a village was leased to others,—a library, postoffice, barber shop, and office of justice of the peace on the first floor, and a hall on the second floor. In holding the property subject to taxation, the court said: "The fact, then, that the rents are paid into the treasury of the municipality does not constitute the renting of the rooms for a public purpose, within the meaning of the Constitution, creating exemptions of property used exclusively for public purposes, and the attempted exemption was beyond the legislative power, and the Act of May 21, 1894, is, in that respect, unconstitutional. Manifestly, it was not the intention of those forming the Constitution to create exemptions from taxation upon property that was used for business purposes, and in competition with the business of individuals engaged in private business. The amended exemption cannot be sustained, either by authority or by reason."

Where the use to which property owned by a municipality was put was partly public and partly private, with no way of ascertaining how much was put to either use, it has been held that the whole was taxable. *Swanton v. Highgate* (1908) 81 Vt. 152, 16 L.R.A. (N.S.) 867, 69 Atl. 667, wherein it was said: "For the plaintiff created the



situation, and thereby rendered it impossible for the defendant to apportion the property between the uses, and it had to tax all if it taxed any, and the plaintiff cannot say, as it does, that because more was taxed than was put to private use, the tax is void, for that would be allowing it to take advantage of its own wrong."

#### *IV. Property held in trust.*

Lands held by a city in trust, the income to be devoted to the upkeep and improvement of its public parks, have been held not to be subject to taxation. *Burr v. Boston* (1911) 208 Mass. 537, 34 L.R.A.(N.S.) 143, 95 N. E. 208, wherein it was said: "In the case at bar the property was held by the city in trust to apply the income thereof to the maintenance and improvement of its common and parks. This is a valid public charitable trust. *Re Bartlett* (1895) 163 Mass. 514, 40 N. E. 899. It supplies funds for a purpose which otherwise must be provided for by taxation, and so far tends to lighten the public burdens. This is strictly a public use."

But in *Mitchellville v. Board of Supervisors* (1884) 64 Iowa, 554, 21 N. W. 31, it was said that land devised to a town in trust, the income from which was used for the improvement of a public park, did not come within the term, "devoted entirely to public use," as used in a tax exemption statute, but did come within the qualifying clause, "held for pecuniary profit," as used in the statute, and was subject to taxation.

So, in *St. Louis v. Wenneker* (1898) 145 Mo. 230, 68 Am. St. Rep. 561, 47 S. W. 105, it was held that property held by the city of St. Louis as trustee under a will, for the purpose of aiding emigrants on their way west for bona fide purposes of settlement, was not property owned by a city within the meaning of a constitutional provision exempting "the property of . . . municipal corporations" from taxation. In this case it was said: "We think that the property of a county or city exempted from taxation by the constitutional provisions hereinbefore quoted is that of which such

county or city is the beneficial owner, which is held by it 'for its own use,' and not merely in trust. It does not include that in which the only interest of the municipality is as trustee. We therefore hold that this real estate is not exempt from taxation."

Similarly, it has been held that land given to a city to be held in trust and used as a park for the benefit of the owners of the lots adjacent thereto, who should have a voice in its management, was subject to taxation, the court saying that a city could not hold property in trust for the benefit of private persons so as to relieve it from taxation. *McChesney v. People* (1881) 99 Ill. 216.

In *People ex rel. Scott v. Ricketts* (1911) 248 Ill. 428, 94 N. E. 71, it was held that land dedicated to a city to be held in trust as a park and tennis court for the benefit of the residents of the section in which it was located was private in its nature, and as such subject to taxation.

#### *V. Property leased to individual.*

In some jurisdictions it is held that public lands leased to individuals are subject to taxation, the theory being that the tax is levied against the lessee, and not against the municipality or governing body. *Ex parte Gaines* (1892) 56 Ark. 227, 19 S. W. 602; *State, Morris Canal & Bkg. Co., Prosecutor, v. Haight* (1873) 36 N. J. L. 471; *Bentley v. Barton* (1884) 41 Ohio St. 410; *Zumstein v. Consolidated Coal & Min. Co.* (1896) 54 Ohio St. 264, 43 N. E. 329; *Cincinnati v. Lewis* (1902) 66 Ohio St. 49, 63 N. E. 588; *Norfolk v. J. W. Perry Co.* (1908) 108 Va. 28, 35 L.R.A.(N.S.) 167, 128 Am. St. Rep. 940, 61 S. E. 867; *Scragg v. London* (1870) 28 U. C. Q. B. 457; *Re Canadian P. Land Co.* (1903) 5 Ont. L. Rep. 717, reversing in part (1902) 4 Ont. L. Rep. 134.

In *Norfolk v. J. W. Perry Co.* (1908) 108 Va. 28, 35 L.R.A.(N.S.) 167, 128 Am. St. Rep. 940, 61 S. E. 867, it was held that under a lease of municipal property for a period of ninety-nine years, renewable forever, which provided that the lessee should pay all "public taxes," the city could levy

and collect taxes against the land and the buildings thereon, as under such a lease the lessee was the virtual owner of the property, aside from the specific covenant to pay taxes.

So, it has been said that lands of the United States on the Hot Springs reservation, which has been leased to individuals for the operation of bath-houses thereon, were subject to state taxation, the tax being deemed to be on the interest of the lessee, and not on the property of the government. *Ex parte Gaines* (Ark.) *supra*, wherein the court called attention to a subsequent act of Congress (Act March 3, 1891), specifically permitting taxation of leased lands on the reservation in question.

In *Bentley v. Barton* (1884) 41 Ohio St. 410, it was held that lands vested by the United States in the state, to be used exclusively for school purposes, were subject to taxation after lease for ninety-nine years, renewable forever, as the property of the lessee, under a statute providing that lands belonging to the state or a municipality, when leased for a term exceeding fourteen years, should be subject to taxation as the property of the lessee.

In *Zumstein v. Consolidated Coal & Min. Co.* (1896) 54 Ohio St. 264, 43 N. E. 829, it was held that, under the statute, the fee in wharf property belonging to a municipality, when leased for more than fourteen years, was not subject to taxation, but the interest of the lessee was taxable.

In *Cincinnati v. Lewis* (1902) 66 Ohio St. 49, 63 N. E. 588, it was held that land owned by a municipality and rented from year to year was subject to taxation, as not being within the constitutional provision exempting from taxation lands owned by a city when "used exclusively for any public purpose." The decision in this case was based on the construction of the term, "public use," and no mention was made of the statute subjecting lands owned by a city to taxation, when rented for a longer period than fourteen years.

In *State, Morris Canal & Bkg. Co., Prosecutor, v. Haight* (1873) 36 N. J. L. 471, it was held that where a statute

leasing lands of the state to a corporation provided that the exemption from taxation in the original charter of the company should not apply to the lands conveyed by the act, they were subject to taxation.

In *Scragg v. London* (1870) 28 U. C. Q. B. 457, it was held that land owned by a municipality, but leased to a private individual, was liable to taxation by the municipality.

In the case of *Re Canadian P. Land Co.* (1903) 5 Ont. L. Rep. 717, reversing in part (1902) 4 Ont. L. Rep. 134, it was held that where it is shown that in all leases by a city there was customarily embodied a covenant of the tenant to pay taxes, the mere fact that an informal agreement to lease city property made no mention of taxes did not prevent the insertion of such a covenant when the formal lease was executed. In this case it was said: "A covenant to pay taxes is a usual covenant in a lease of land forming part of the municipal property. Therefore, in settling the lease in question, the city is entitled to have a covenant to that effect inserted, unless it is made to appear that, by reason of the circumstances or of the terms of the agreement, the Canadian Pacific Railway Company is relieved from the ordinary obligation of a tenant or lessee of city property, to pay the taxes imposed upon it."

The leasehold interest of a tenant, renting lands owned by the state, has been held to be subject to taxation, and liable to be seized under execution and sold. *La Salle County Mfg. Co. v. Ottawa* (1855) 16 Ill. 418.

In *Carrington v. People* (1902) 195 Ill. 484, 63 N. E. 163, it was held that a leasehold interest in canal lands was subject to taxation.

Likewise, it has been held that the leasehold interest in lands held for school purposes is taxable. *Street v. Columbus* (1898) 75 Miss. 822, 23 So. 773; *State ex rel. Sioux County v. Tucker* (1893) 38 Neb. 56, 56 N. W. 718.

In *Moeller v. Gormley* (1906) 44 Wash. 465, 87 Pac. 507, construing a constitutional provision exempting from taxation the property of the state

without qualification, the court, in holding that the leasehold interest of property leased by the state was subject to taxation, said: "When a lease is given by the state to an individual or private corporation, the lessee thereby obtains for his or its private use certain rights and privileges in, to, and upon such real estate. These rights and privileges constitute private property, over which the lessee has, and may exercise, absolute dominion and ownership within the limitations of his or its lease. Why, as such property, it should not be subject to the general rule of taxation, we conceive of no reason."

But in *San Pedro, L. A. & S. L. R. Co. v. Los Angeles* (1914) 167 Cal. 425, 52 L.R.A.(N.S.) 991, 139 Pac. 1071, it was held that a leasehold interest in tidelands, or submerged lands belonging to the state, was not taxable under a provision exempting property which "belongs to" the state.

Under a constitutional provision exempting from taxation "property devoted to the exclusive use and benefit of the public," it has been held in Texas that neither lands held by counties for school purposes and leased to individuals, nor the leasehold interest, are subject to taxation. *Daugherty v. Thompson* (1888) 71 Tex. 192, 9 S. W. 99; *Davis v. Burnett* (1890) 77 Tex. 3, 13 S. W. 613; *Continental Land & Cattle Co. v. Board* (1891) 80 Tex. 489, 16 S. W. 312.

As was said in *Daugherty v. Thompson* (Tex.) supra: "County school lands, when leased to raise an available school fund, are as exclusively devoted to the use and benefit of the public as would they be if covered with schoolhouses; and the Constitution forbids the taxation of the means through which such lands may be made to yield a revenue, without sale, as fully as does it forbid the taxation of the lands. Forbidding the taxation of the lands, it forbids the taxation of an estate less than the fee, whether imposed on the county or its lessee."

In *Trammell v. Fought* (1889) 74 Tex. 557, 12 S. W. 317, it was held that school lands held under lease from the state with the reservation of the right

in the state to sell such lands at any time, and thereby terminate the lease, were not subject to taxation under the provision of a statute making subject to taxation, public lands "held under a lease for a term of three years or more."

In *Taylor v. Robinson* (1888) 72 Tex. 364, 10 S. W. 245, it was held that where, in pursuance to the provision of a contract for the construction of a state capitol, certain lands were leased to the contractor pending the time when he should be entitled to them in fee as payment on his contract, they were not subject to taxation under the provision of a statute taxing lands "held under a contract for the purchase thereof, belonging to the state."

It has been held that under a provision of a statute requiring that lands of the commonwealth, when leased for business purposes, be taxed by the city, a lessee of state lands, required by a city to pay a tax on such lands, could recover the amount so paid from the state, unless he was prohibited from so doing by the terms of his contract. The court based its ruling on the rule that, where a lease is silent as to taxes, the landlord must pay them. *Boston Molasses Co. v. Com.* (1907) 193 Mass. 387, 79 N. E. 827.

But where the lands were held by a person under a bond for deed from the commonwealth, it was held that the possessor was not a lessee, and the provision requiring the taxation of certain lands of the commonwealth when leased for business purposes did not apply. *Corcoran v. Boston* (1907) 193 Mass. 586, 79 N. E. 829.

Under a statute creating a board of water commissioners for a city, and providing that "the property of the board . . . shall be exempt from all taxes," property formerly used by the board for water purposes, but afterwards leased to a dry dock company, has been held to be exempt from taxation. *Water Comrs. v. Auditor General* (1898) 115 Mich. 546, 73 N. W. 801, wherein it was said: "The language creating the exemption is in itself broad enough to cover the property in question. The provision relating to exemption from taxation is im-

mediately followed by the exemption of the property from legal process, indicating that the same class of property was in the mind of the legislature; and when it is considered that the board is, in the same section, given power to lease property owned by it, and that no limitation is placed upon the exemption, the conclusion is irresistible that the exemption is broad enough in terms to cover the property in question."

In *People ex rel. International Nav. Co. v. Barker* (1897) 153 N. Y. 98, 47 N. E. 46, affirming (1897) 15 App. Div. 628, 44 N. Y. Supp. 1126, it was held that where, by the terms of a lease of municipal property, it was required that a shed be erected on the premises, and provided that when erected it should become the property of the city, the shed, being municipal property, was exempt. M. B.

T. T. DALLAS, Plff. in Err.,  
v.  
STATE OF FLORIDA.

*Florida Supreme Court — August 15, 1918.*

(— Fla. —, 79 So. 690.)

**Appeal — instructions — presumption of chastity.**

1. In a prosecution for having carnal intercourse with an unmarried woman under the age of eighteen years, of previous chaste character, it is reversible error for the court to charge that, "as to the previous chaste character of the prosecuting witness, the law presumes that every unmarried female is of chaste character until she has been shown to be otherwise."

[See note on this question beginning on page 1462.]

**Rape — statutory — chastity.**

2. In a prosecution for having carnal intercourse with an unmarried woman under the age of eighteen years, of previous chaste character, the previous chaste character of the prosecutrix is a material element of the offense to be alleged and proved.

[See 22 R. C. L. 1190, 1191.]

**Evidence — character of prosecutrix.**

3. When the state has met the requirement of proving the previous chaste character of the prosecutrix, it is competent for the defendant to introduce evidence that the prosecutrix, prior to the alleged acts of carnal intercourse with the defendant, had associated with persons of low morals, conducted herself in a free and intimate manner with men, or permitted them to take liberties with her.

[See 22 R. C. L. 1208, 1209.]

**Appeal — question not in bill of exceptions.**

4. A question to a witness which

is in the assignment of errors, but not in the bill of exceptions, cannot be considered on appeal, except so far as may be necessary for advice for another trial.

[See 2 R. C. L. 133, 134.]

**Evidence — prosecution for rape — lack of chastity.**

5. Upon prosecution for rape, where prosecutrix has testified to her previous chaste character, evidence is admissible tending to show lack of chastity, or as affecting her character for chastity.

[See 22 R. C. L. 1211.]

**— contradiction of prosecutrix.**

6. Where prosecutrix in rape has offered evidence of chastity and that she did not keep company with other men, a letter from her inviting a man to come to see her is admissible in contradiction.

[See 22 R. C. L. 1211.]

**ERROR** to the Criminal Court of Record for Hillsborough County (Graham, J.) to review a judgment convicting defendant of statutory rape. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Aronzo Wilder, for plaintiff in error:

It was error for the court to charge that, "as to the previous chaste character of the prosecuting witness, the law presumes that every unmarried female is of chaste character until she has been shown to be otherwise."

McNair v. State, 61 Fla. 35, 55 So. 401; 1 Jones, Ev. ¶ 101, 101a, 102; 1 Greenl. Ev. ¶ 35; West v. State, 1 Wis. 209; State v. Kelly, 245 Mo. 489, 43 L.R.A. (N.S.) 476, 150 S. W. 1057; State v. Holter, 32 S. D. 43, 46 L.R.A. (N.S.) 376, 142 N. W. 657, Ann. Cas. 1916A, 193; 25 Am. & Eng. Enc. Law, 2d ed. 236; McArthur v. State, 59 Ark. 628, 27 S. W. 628; Polk v. State, 40 Ark. 482, 48 Am. Rep. 17; Walton v. State, 71 Ark. 398, 75 S. W. 1; State v. Hill, 91 Mo. 423, 4 S. W. 121; State v. McCaskey, 104 Mo. 644, 16 S. W. 511; State v. Eckler, 106 Mo. 585, 27 Am. St. Rep. 372, 17 S. W. 814; People v. Wallace, 109 Cal. 611, 42 Pac. 159; People v. O'Brien, 130 Cal. 1, 62 Pac. 297; People v. Krusick, 93 Cal. 74, 28 Pac. 794; Marshall v. Territory, 2 Okla. Crim. Rep. 136, 101 Pac. 139; State v. Meister, 60 Or. 469, 120 Pac. 406; Com. v. Whittaker, 131 Mass. 224; Zabriskie v. State, 43 N. J. L. 640, 39 Am. Rep. 610; State v. Carron, 87 Am. Dec. 401, and note, 18 Iowa, 372; Oliver v. Com. 101 Pa. 215, 47 Am. Rep. 704; State v. Wenz, 41 Minn. 196, 42 N. W. 933; State v. Lockerby, 50 Minn. 363, 36 Am. St. Rep. 656, 52 N. W. 958, 9 Am. Crim. Rep. 617; State v. Pruess, 112 Minn. 108, 127 N. W. 438; State v. Norton, 100 N. C. 443, 6 Am. St. Rep. 613, 6 S. E. 238; Harvey v. Territory, 11 Okla. 156, 65 Pac. 837.

On a prosecution for seduction, evidence that prosecutrix, before the alleged seduction, knowingly associated with men of bad character, is admissible as bearing on the question of her chaste character.

State v. Bige, 112 Iowa, 433, 84 N. W. 518; Creighton v. State, 41 Tex. Crim. Rep. 101, 51 S. W. 910.

Messrs. Van C. Swearingen, Attorney General, and W. W. Trammell, Assistant Attorney General, for the State:

The previous chastity of the prosecutrix will be presumed.

Kerr v. United States, 7 Ind. Terr.

486, 104 S. W. 809; McTyler v. State, 91 Ga. 254, 18 S. E. 140; Smith v. State, 118 Ala. 117, 24 So. 55; Woodard v. State, 5 Ga. App. 447, 63 S. E. 573; State v. Holter, 32 S. D. 43, 46 L.R.A. (N.S.) 376, 142 N. W. 657, Ann. Cas. 1916A, 193; Crozier v. People, 1 Park. Crim. Rep. 453; State v. Kelly, 43 L.R.A. (N.S.) 476, note.

Browne, Ch. J., delivered the opinion of the court:

The plaintiff in error was convicted of the charge of having carnal intercourse with an unmarried female, under the age of eighteen years, of previous chaste character.

The last assignment of error, based upon the court's denial of the defendant's motion for a new trial, raises the question of the sufficiency of the testimony to support the verdict. It was established that she was unmarried. The woman testified to the carnal intercourse, and her mother testified that the defendant admitted it. All this the defendant denied. The testimony as to her age was not very clear, but as the jury were satisfied with it, and there was some competent evidence as to the carnal intercourse and to her being under eighteen years of age, we will not disturb the verdict because of the insufficiency of the evidence on these points.

The evidence of her previous chaste character we will discuss with other assignments.

The sixth, seventh, eighth, and ninth assignments of error relate to the refusal of the trial judge to permit the defendant to introduce testimony to prove acts on the part of the prosecuting witness that would tend to show lack of chastity.

The questions which form the basis of the sixth and seventh assignments were too broad, and objections to them were properly sustained. The questions which form the basis of the eighth and ninth assignments were: "Q. Have you

ever seen this girl in any act of familiarity with any man in the last six months?" "Q. Have you seen this girl, Sallie France, sitting in the lap of any man during February or March of this year?"

The last question is in the assignment of errors, but is not in the bill of exceptions, and therefore it cannot be considered by this court, except as indicating what should be done on another trial if this evidence should be offered.

The prosecutrix testified to her previous chaste character, and the testimony sought to be adduced by these questions was proper as tending to show a lack of chastity on her part, or as affecting her character for chastity.

Where, as in this case, the previous chaste character of the prosecutrix is a material fact to be proved beyond a reasonable doubt, it is proper for defendant, when the state has met the requirement, to introduce evidence that the prosecutrix had, prior to the alleged act of carnal

intercourse with the defendant, associated with persons of low morals, conducted herself in a free and intimate manner with men, or permitted them to take liberties with her. *State v. Bige*, 112 Iowa, 433, 84 N. W. 518; *Creighton v. State*, 41 Tex. Crim. Rep. 101, 51 S. W. 910.

In *Safford v. People*, 1 Park. Crim. Rep. 474, the court said: "But I think the defense is not confined to cases of actual incontinency, but may prevail upon the ground of reputation alone, and that if the jury find the female really had the reputation of being unchaste, the case is not within the statute. The use of the word 'character' is important in this respect, and in such case she does not come within the class described in the act,

although illicit intercourse, in fact, cannot be proved."

The first, fourteenth, fifteenth, and sixteenth assignments of error raise substantially the same question, the propriety of this charge: "The court instructs you, as to the previous chaste character of the prosecuting witness, that the law presumes that every unmarried female is of chaste character until she has been shown to be otherwise."

The defendant was charged with violating chap. 6974 of the Acts of 1915. This act was amendatory of § 3521 of the Gen. Stat. and the only change in the law was the insertion of the words, "of previous chaste character."

We cannot be unmindful of the fact that, from the time this statute was first enacted until the amendment of 1915, the words, "of previous chaste character," were not part of the law; and, when the legislature inserted these words, they made the previous chaste character of the prosecutrix one of the essential elements of the crime. These are: (1) Carnal intercourse; (2) the female must have been unmarried at the time of the carnal intercourse; (3) she must be of previous chaste character; (4) she must have been under the age of eighteen years at the time of the carnal intercourse.

It is necessary to allege and prove each of these elements beyond a reasonable doubt, but the instruction complained of assumes the existence of one of the material elements of the offense, and relieves the prosecution of the necessity of furnishing any proof thereof.

The only cases cited by the state in support of the soundness of the instruction, where the language of the statutes are the same or of similar import to ours, are from Georgia and New York.

The case from the last-named state is that of *Crozier v. People*, 1 Park. Crim. Rep. 453, the second

Appeal—  
question not in  
bill of  
exceptions.

Evidence—  
prosecution for  
rape—lack of  
chastity.

Rape—  
statutory—  
chastity.

Evidence—  
character of  
prosecutrix.

Appeal—  
instructions—  
presumption of  
chastity.

headnote to which is as follows: "By 'previous chaste character' the statute means personal chastity—actual character—not reputation. In the absence of proof such chastity will be presumed. But the presumption may be overcome by specific acts of lewdness, proved affirmatively on the part of the defendant."

A note by the reporter, however, calls attention to the fact that "from other cases reported in this volume, it will be seen there are differences of opinion upon the last two propositions. See *People v. Alger*, 1 Park. Crim. Rep. 333, and *People v. Safford*, supra."

And an examination of these cases lessens the effect of the *Crozier* Case.

In a discussion of this question in *State v. Holter*, 32 S. D. 43, 46 L.R.A.(N.S.) 376, 142 N. W. 657, Ann. Cas. 1916A, 193, the court said this about the New York decisions: "Our attention has not been called to any case decided by the court of appeals of New York that turned upon the precise question involved in this case. *Kenyon v. People*, 26 N. Y. 204, 84 Am. Dec. 177, cited by the state, does not support the contention of respondent. It appears from an examination of the opinion of the court in that case that the prosecutrix testified to her being of previous chaste character, and *Balcom, J.*, in his concurring opinion, said it was proper for the state to show this fact."

In those states that hold that in this class of cases the previous chastity of a prosecutrix will be presumed, and no proof is necessary to establish it, the statutes are silent about her previous chastity, and we are not called upon to approve or disapprove of the rule in those cases, as our statute makes the previous chaste character of the prosecutrix a material element of the offense. As has been well said, the rule of the presumption of the chastity of an unmarried woman is a shield of the accused, and not the sword of the prosecution. Thus,

where a woman stands charged with an offense where her chastity is challenged, the law humanely presumes her to be chaste. It is but a corollary of the presumption of her innocence.

It is a shield to protect her when she is on trial, and not a sword to be used to destroy the greater presumption of innocence which protects a man from a charge made by a woman scorned, or who, having shared with him the enjoyment of their lascivious conduct, seeks from revenge or other motives, to bring down on him the penalty of the law, which, but for her own uncontrolled passion, he would not have violated.

What has been said by some courts about an unchaste female in our country being a comparatively rare exception is no doubt true where the population is composed largely of the Caucasian race, but we would blind ourselves to actual conditions if we adopted this rule, where another race that is largely unmoral constitutes an appreciable part of the population. As was said by Mr. Justice Woods in *Ferguson v. State*, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66: "The presumptions of law spring from and rest upon the general knowledge and universal experience of mankind."

The great weight of the authorities, both in number and force, is against the correctness of the instruction complained of.

In *West v. State*, 1 Wis. 209, the court said:

"The previous chaste character of the female is one of the most essential elements of the offense; made so by the express words of the statute, in conformity with the suggestions of sound reason. A prostitute may be the subject of rape, but not of seduction. It is the chastity of the female which the statute is designed to protect. The pre-existence of that chastity is a *sine qua non* to the commission of the crime. That is the subject of legal guardianship, provided by this section. It is a substantive matter necessary to be averred and proved.

"If the prosecutrix were to change places, and were she indicted for lascivious conduct, then, indeed, the legal presumption would come to her aid, and her chastity would be presumed. But when the state accuses one of its citizens with the violation of the chastity of another of its citizens by seduction, the law presumes the accused to be innocent of the entire offense until the contrary appears. The state cannot be permitted to presume the immediate pre-existence of that chastity, with the destruction of which the defendant is charged. One act of illicit intercourse affords no presumption that another has not preceded it."

In *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610, the court said:

"That good repute of the female is a constituent of the crime charged, and that it is an indispensable allegation in the indictment, is not denied. To constitute guilt it is necessary that this good repute should exist; in the absence of it, the statutory crime has not been committed. If all the other facts are proved, still the defendant must be adjudged to be innocent, unless the good repute is proved, or unless, in the absence of proof, it is presumed as a fact in the case.

"Such presumption, it is manifest, would destroy the presumption of innocence, which is ever present as a protection to the accused, and substitute for it the presumption of guilt.

"A woman who comes into court with a bastard child in her arms is not a representative of her sex; happily she represents a very insignificant portion of it. The fact that she has sacrificed that virtue which was her glittering crown casts such a shadow upon her that, in the most charitable view of the case, it should be left without presumption either way, to be determined by competent evidence what her prior repute has been. Her immoral conduct, unless mitigating circumstances are shown, classes

her with the vicious and disreputable, and, as to her, negatives the presumption of purity so universally accorded to her sex. The question is not whether the vast majority of females are of good repute, but whether in this case it shall be presumed as a fact against the defendant that the woman with whom the crime is alleged to have been committed, and who carries with her the evidence of her shame, is of good repute. The rule, if well founded, must be of universal application, and involves the broad proposition that, of the entire class of women who bear illegitimate children, it must be presumed that every one who may prefer a charge of this kind is of good repute for chastity. It will be more reasonable to reverse the presumption."

In *Marshall v. Territory*, 2 Okla. Crim. Rep. 136, 101 Pac. 139, the court said: "The law, upon the one hand, presumes the defendant innocent until guilt is established by evidence to that degree of certainty reaching beyond a reasonable doubt. On the other hand, the law presumes that every female is chaste and virtuous until the contrary is established, or there is evidence sufficient to create a reasonable doubt upon this issue. There are cases and authorities holding, on each side of the proposition, that in such cases the presumption of chastity prevails over the presumption of innocence. From an examination of the cases the true rule will be found to be, the cases where the law presumes the female is of chaste and virtuous character are those that refer to general reputation and general repute of such female; how she is held in the community where she resides. In such cases the chastity of the female is not an element of the crime investigated. Wherever character is an element of the crime,—that is, where the statutory definition of the crime involves chastity, wherein the act constituting the offense must have been concerning a female having previous chaste and virtuous char-



acter,—the law will not presume such character to exist. The burden is upon the state to establish, beyond a reasonable doubt, each material allegation in the indictment, and each material element of the crime charged, one of which is that the female was of previous chaste and virtuous character. To hold otherwise would be to hold that the defendant should prove his innocence."

In *State v. Kelly*, 245 Mo. 489, 43 L.R.A. (N.S.) 476, 150 S. W. 1057, the court said: "But in criminal prosecutions the presumption of chastity logically yields to the presumption of defendant's innocence, when the two directly conflict, as in this case. It is suggested there can be no such thing as conflicting presumptions, and, hence the conclusion that the presumption of chastity disappears because of its conflict with the presumption of innocence is unsound. Whether this theory is logical when applied to presumptions arising from facts proved by the evidence in a given case, it is unnecessary to inquire, since the presumption of chastity does not arise on this record in that fashion. Whether the presumption of innocence be called merely the reason for the rule requiring proof of guilt beyond a reasonable doubt, or be held to be, of itself, substantive evidence in defendant's favor, it cannot long survive, if general inferences and presumptions not arising out of the facts proved by the evidence in the case are permitted to overthrow it. Whatever may be theoretically true as to the possibility of a conflict of presumptions, the jury's perplexity, when confronted in this case

with instructions embodying both the presumption of innocence and that of chastity, and their unavailing effort to secure an explanation as to which presumption took precedence, evidences the possibility of a practical conflict productive of confusion and injustice. The instruction complained of should not have been given."

We might cite many authorities in support of this proposition, but it would serve no useful purpose. It is quite clear that the court erred in giving the charge as to the presumption of the chastity of the prosecutrix.

The eleventh assignment is predicated upon the refusal of the trial judge to allow the defendant to introduce a letter written by the prosecutrix to one Wilson, in which she explained why she could not spend the day somewhere; appealing to him to come and see her when he left the other woman; that she was going to look for him, and he had better not disappoint her, because she would be lonely. This letter tended to show that she was familiar with other men, and to contradict the testimony of herself and her mother that she did not go out, or keep company with any other man. It was part of the evidence sought to be introduced by the defendant, which was rejected by the court, as bearing on her chaste character, and should have been admitted.

*Evidence—  
contradiction  
of prosecutrix.*

The judgment is reversed.

Taylor, Whitfield, and Ellis, JJ., concur.

West, J., concurs in the result.

### ANNOTATION.

#### Presumption and burden of proof as to chastity under statutes making chastity an ingredient of rape.

Under statutes defining rape and making "previous chaste character" of the female an element of the offense, it has been held, in accordance with the decision in the reported case,

and in line with cases involving other sexual offenses, such as seduction, of which chastity is an element (*DALLAS v. STATE*, ante, 1457), that the state must affirmatively prove as a part of

its *prima facie* case the previous chastity of the prosecutrix; that no obligation rests upon the defendant to introduce evidence showing want of chastity of the prosecutrix until the state has made out a *prima facie* case of previous chastity on her part; that in the absence of evidence by either party on the question of the previous chastity of the prosecutrix there should be an acquittal.

Thus, in *DALLAS v. STATE*, a prosecution for having carnal intercourse with an unmarried female under eighteen years of age, the statute makes the previous chaste character of the prosecutrix one of the essential elements of the crime; and it is held reversible error to charge that the law presumes the previous chaste character of the prosecutrix.

So, it is held in *State v. Kelly* (1912) 245 Mo. 489, 43 L.R.A.(N.S.) 476, 150 S. W. 1057, that the state must prove chastity, and cannot rely on a presumption of it, in a prosecution under a statute making carnal knowledge of an unmarried female of previous chaste character, between certain ages, rape. In holding erroneous an instruction "that the law presumes that every woman is of chaste character until the contrary appears," the court observed that "on the question whether the presumption of chastity obtains in a case of this kind, and relieves the state of the necessity of bringing forward, in the first instance, evidence of the previous chaste character of the prosecutrix, the decisions in other jurisdictions are not in accord. This court has heretofore indicated (citing *State v. McMahon* (1911) 234 Mo. 611, 137 S. W. 872; *State v. McCaskey* (1891) 104 Mo. 647, 16 S. W. 511; *State v. Hill* (1886) 91 Mo. 427, 4 S. W. 121) its view that the previous chastity of the prosecutrix is an element of the offense, under our statute, which must be both charged and proved. Those text-writers and encyclopedists who have expressed an opinion agree this is the sounder and more logical rule (citing *Bishop, Statutory Crimes*, § 648; 1 *Bishop, New Crim. Proc.* § 1106; 4 *Wigmore, Ev.* § 2528; 25 *Am.*

& *Eng. Enc. Law*, 240); and an examination of the cases tends only to confirm the accuracy of this conclusion. It is undoubtedly true that the practical universality of chastity among women justly gives rise, in most circumstances, to a presumption of chastity on the part of an individual member of the sex; but in criminal prosecutions the presumption of chastity logically yields to the presumption of defendant's innocence, when the two directly conflict, as in this case. It is suggested there can be no such thing as conflicting presumptions, and hence the conclusion that the presumption of chastity disappears because of its conflict with the presumption of innocence is unsound. Whether this theory is logical when applied to presumptions arising from facts proved by the evidence in a given case, it is unnecessary to inquire, since the presumption of chastity does not arise on this record in that fashion. Whether the presumption of innocence be called merely the reason for the rule requiring proof of guilt beyond a reasonable doubt, or be held to be, of itself, substantive evidence in defendant's favor, it cannot long survive, if general inferences and presumptions, not arising out of the facts proved by the evidence in the case, are permitted to overthrow it. Whatever may be theoretically true as to the possibility of a conflict of presumptions, the jury's perplexity, when confronted in this case with instructions embodying both the presumption of innocence and that of chastity, and their unavailing effort to secure an explanation as to which presumption took precedence, evidences the possibility of a practical conflict, productive of confusion and injustice. The instruction complained of should not have been given.

In *State v. Cook* (1918) — Mo. —, 207 S. W. 831, also holding that the chastity of prosecutrix in statutory rape is not to be presumed, but must be proved by the state in the first instance, the court observed that "in many jurisdictions the view is taken that the previous chaste character of

the female carnally known is to be presumed, and that no affirmative proof of this fact is required;" but in view of the plain language of the "statute, considered in connection with the universally entertained presumption of defendant's innocence, such a rule is not even respectable nonsense."

In a prosecution for carnally knowing a female of previous chaste character, the court in *State v. Volz* (1916) 269 Mo. 194, 190 S. W. 307, with respect to an instruction that there is no presumption that prosecutrix was of chaste character prior to the date of the alleged offense, observed that in the case of *State v. Kelly* (1912) 245 Mo. 489, 43 L.R.A. (N.S.) 476, 150 S. W. 1057, *supra*, it was held to be error to instruct the jury, in a case of this character, that the law presumes that every woman is of chaste character until the contrary appears. This, upon the theory, not that such a presumption did not in fact ordinarily exist, but upon the theory that chastity of the prosecutrix was, under the statute, a fact to be both charged and proved, and that such an instruction would, therefore, relieve the state of its duty to "bring forward, in the first instance, evidence of the previously chaste character of the prosecutrix." The court then goes on to say that the instruction offered in the case at bar (*State v. Volz* (Mo.) *supra*) was correct as a purely abstract principle of law, so far as it has to do with the question of the burden of proof in the case; but yet we do not think the court erred in refusing to give the same, but, on the other hand, think it very properly refused to so instruct. This, because: (1) The jury were clearly told by other instructions that the law presumed defendant's innocence, and that the burden was upon the state to prove the defendant's guilt beyond a reasonable doubt, and the fact of previous chaste character was specifically mentioned as one of the facts to be found by the jury before finding a verdict of guilty; (2) the giving of such an instruction on a purely technical phase of the case would have a

tendency to mislead the jury into believing that there would likely be a presumption that the prosecutrix was unchaste prior to the alleged offense."

So, in *Marshall v. Territory* (1909) 2 Okla. Crim. Rep. 136, 101 Pac. 139, the prosecution was required to prove that the female was of previous chaste and virtuous character, that being made by statute an element of the rape charged. The court stated: "The law upon the one hand presumes the defendant innocent until guilt is established by evidence, to that degree of certainty reaching beyond a reasonable doubt. On the other hand, the law presumes that every female is chaste and virtuous until the contrary is established, or there is evidence sufficient to create a reasonable doubt upon this issue. There are cases and authorities holding on each side of the proposition that, in such cases, the presumption of chastity prevails over the presumption of innocence. From an examination of the cases the true rule will be found to be, the cases where the law presumes the female is of chaste and virtuous character are those that refer to general reputation and general repute of such female; how she is held in the community where she resides. In such cases the chastity of the female is not an element of the crime investigated. Wherever character is an element of the crime, that is, where the statutory definition of the crime involved chastity, wherein the act constituting the offense must have been concerning a female having a previous chaste and virtuous character,—the law will not presume such character to exist. The burden is upon the state to establish beyond a reasonable doubt each material allegation in the indictment, and each material element of the crime charged, one of which is that the female was of previous chaste and virtuous character. To hold otherwise would be to hold that the defendant should prove his innocence."

In *State v. De Witt* (1905) 186 Mo. 61, 84 S. W. 956, a prosecution for having had carnal knowledge of a female of previous chaste character, a special verdict omitting the essential finding

of the previous chaste character of the prosecutrix was held insufficient to sustain the judgment. The statute in this case made it a felony for any person over the age of sixteen years to have carnal knowledge of any unmarried female of previous chaste character, between the ages of fourteen and eighteen years of age.

But in *Diffey v. State* (1913) 10 Okla. Crim. Rep. 190, 135 Pac. 942, in answer to the contention that prosecutrix in rape was not shown to have been of previous chaste and virtuous character, the court said: "The law presumes that a female is chaste and virtuous, and this presumption authorizes the jury to assume at the outset that the prosecutrix was chaste and virtuous. If any evidence is introduced tending to show a want of previous chaste and virtuous character, then the state is required to establish the previous chaste and virtuous character of the prosecutrix beyond a reasonable doubt."

In *Com. v. Allen* (1890) 135 Pa. 483, 19 Atl. 957, a prosecution for rape, the court said: "There was no need for the commonwealth to prove her to be of good repute until her character had been attacked. The law presumes it to be good. If it was not, that was a matter of defense. We think this is

the proper construction of the Act of May 19, 1887 (P. L. 128), the proviso of which is as follows: 'That upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen years if the jury shall find that such woman child was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of the felonious rape and convicted of fornication only.'" A man who seeks to escape conviction for an offense of this nature upon the ground that the female child he has abused is not of good repute must show it. The law will not help him out with presumptions. See also, to the same effect, under the same statute, *Com. v. Howe* (1908) 35 Pa. Super. Ct. 554, same case on other appeals in (1909) 38 Pa. Super. Ct. 208, and (1910) 42 Pa. Super. Ct. 136.

The decision in *Rodgers v. State* (1916) 111 Mass. 781, 72 So. 198, a case of statutory rape, the statute on which the indictment was based expressly declares that "it shall be presumed that the female was previously of chaste character, and the burden shall be upon the defendant to show that she was not." J. D. C.

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OLIVER P. BROWN, Admr., etc., of William M. Brown, Deceased,  
v.

WILFRED WINTERBOTTOM et al. (No. 15,698.)

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SUPERIOR SAVINGS & TRUST COMPANY

v.

SAME et al. (No. 15,706.)

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WILFRED WINTERBOTTOM

v.

SUPERIOR SAVINGS & TRUST COMPANY et al. (No. 15,723.)

*Ohio Supreme Court — April 30, 1918.*

(98 Ohio St. 127, 120 N. E. 292.)

**Receiver — negligence — priority of claim.**

1. Where the mortgagee, in applying for a receiver, asks also for power

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Headnotes by the COURT.

to manage and operate the property, he thereby not only invokes the authorization with its incidental risks, but impliedly agrees that damages resulting from the receiver's negligence in operation shall take priority over the mortgage lien and be paid from the corpus of the property, if current earnings or other assets are insufficient.

[See note on this question beginning on page 1470.]

— expenses.

2. Expenses of a receiver, such as damages resulting from the negligence of himself or his employees, are part of the operative expenses of the road, and in proper cases are chargeable to the corpus.

[See 23 R. C. L. 106.]

— intervention — claim.

8. Where such receiver has been ap-

pointed in foreclosure proceedings and such operative expenses incurred, the person injured may intervene in the foreclosure suit before final distribution of the proceeds, and apply for an order postponing distribution pending the determination of his claim.

[See 20 R. C. L. 684.]

CERTIFICATION by the Court of Appeals for Cuyahoga County for determination by the Supreme Court, of questions arising upon the affirmance and reversal of judgments of the Court of Common Pleas, sustaining demurrers to intervening petitions, in a suit to foreclose a mortgage and for the appointment of a receiver. *Reversed.*

Statement by Jones, J.:

The Superior Savings & Trust Company, as trustee for bondholders, held a mortgage upon property which included an eight-story building on the corner of Euclid avenue and Fifty-ninth street in Cleveland, Ohio. Oliver P. Brown, as administrator, held a mortgage upon the same premises, subject to the priority of the trust mortgage. On March 31, 1916, the trustee for the bondholders brought suit in the court of common pleas of Cuyahoga county for the foreclosure of its mortgage, and on the same day applied for a receivership of the property. In that suit, on April 29, 1916, Oliver P. Brown, administrator, filed his answer and cross petition, seeking an accounting for the amount due and for foreclosure of his mortgage lien.

The trust mortgage contained a provision that, upon default, the trustee was entitled to take possession of the premises and manage the same, and, in the event of foreclosure, to apply for and obtain a receiver for the property. Under its mortgage covenant the trustee had taken possession of the property on February 6, 1914, pending the appointment of a receiver. The peti-

tion of the trustee asked the court that a receiver be appointed "to manage and conserve the property." Thereafter proceedings were had in the foreclosure suit, resulting in a decree on May 17, 1916, ordering the sale of the property and a distribution of the proceeds: First, to the payment of costs of suit, taxes, and assessments against the property; second, to the trust company, as prior mortgagee, the sum of about seventy-seven thousand dollars; third, to Brown, administrator, upon his mortgage, the sum of about one hundred eighty-seven thousand dollars. The property was sold on August 4, 1916, to the second mortgagee, and realized the sum of \$133,000, an amount which was insufficient to pay the mortgage liens. It is further disclosed by the record that the receiver was carrying liability insurance to protect him against liability for injuries and damages resulting from the operation of the elevator, and that under such policies he was to be reimbursed on account of any money which he might pay out in satisfaction of any judgments secured against him.

Pertinent to the issues here are the following facts as disclosed by the record: On July 3, 1916, Win-

terbottom was injured by falling into the elevator shaft of the building, which injury, he claimed, was caused by the negligence of the receiver who had control of and was operating the same. On the 25th day of July, 1916, Winterbottom applied to the court of common pleas, in the foreclosure suit, for permission to sue the receiver, and asked that the receiver hold the funds which might come into his hands for the payment of any judgment he might secure. This authority was granted by the court on that day; and the court also ordered that the receiver be required to hold the funds in his hands to the further determination of the court. Thereupon, on the same day, Winterbottom filed his suit for damages against the receiver. On August 2, 1916, Winterbottom filed his motion to vacate the order of distribution made on May 17, 1916, and on August 3, 1916, served notice that his motion would be heard on the next day. On August 8, 1916, the same day that the sale of the premises was confirmed by the court, Winterbottom filed in the original foreclosure suit a petition styled "Petition for Intervention and for Vacation and Modification of Decree"—the decree of May 17, 1916. Just before this, as a precautionary measure, he also filed an independent suit in equity, seeking the same relief. Both of these petitions contained the facts as herein set forth, and both were demurred to by the parties affected. The common pleas court sustained the demurrers in both cases. Proceedings in error were thereupon taken to the court of appeals, and that court affirmed the action of the court of common pleas in sustaining the demurrer to the intervention pleading in the original foreclosure action, but reversed the common pleas court in the independent equitable action, holding that Winterbottom's petition not only stated a cause of action, but that his independent equitable suit was the proper method of procedure.

On motion to certify the cases, this court sustained the motion of both parties to certify the cases here for review.

Messrs. Price, Alburn, Crum & Alburn, for Trust Company, and Cook, McGowan, & Foote, for Brown:

Winterbottom is not entitled to the relief after judgment prayed for in his petition.

Van Camp v. McCulley, 89 Ohio St. 8, 104 N. E. 1004.

The decree cannot now be modified so as to divest long-existing prior liens, and place ahead of them a claim for damages against the receiver.

Hanna v. State Trust Co. 30 L.R.A. 201, 16 C. C. A. 586, 36 U. S. App. 61, 70 Fed. 2; Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co. 68 Fed. 623; Farmers' Loan & T. Co. v. Grape Creek Coal Co. 16 L.R.A. 603, 50 Fed. 481; Hooper v. Central Trust Co. 81 Md. 559, 29 L.R.A. 262, 32 Atl. 505; Hotchkiss v. Makeel, 87 Ill. App. 623; Moore v. Donahoo, 133 C. C. A. 171, 217 Fed. 177; Finance Co. v. Trenton & N. B. R. Co. 189 Fed. 282; Hand v. Savannah & C. R. Co. 17 S. C. 219; International Trust Co. v. United Coal Co. 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; Makeel v. Hotchkiss, 190 Ill. 315, 83 Am. St. Rep. 131, 60 N. E. 524.

Messrs. Alden, Knapp, & Magee, Boyd, Cannon, & Brooks, and Benjamin B. Wickham, for Winterbottom:

A receiver is liable for his negligent acts, resulting in injury to third person. This liability is not personal, but official, unless he has been guilty of some personal wrong or tort.

Murphy v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; 5 Thomp. Corp. § 7151.

A damage claim is an operating expense of the receivership.

34 Cyc. 354; Bartlett v. Cicero Light, Heat & P. Co. 177 Ill. 68, 42 L.R.A. 715, 69 Am. St. Rep. 206, 52 N. E. 339; Green v. Coast Line R. Co. 97 Ga. 15, 33 L.R.A. 806, 54 Am. St. Rep. 379, 24 S. E. 814; Shedd v. Seefeld, 120 Am. St. Rep. 282, note.

The mortgagee consents, or at least is estopped to deny, that the court and its receiver have the same right to charge on the corpus, and at the expense of the mortgagee, the debts and claims of the receiver, just as if express consent thereto had been given in the first instance.

People's Nat. Bank v. Virginia Textile Co. 104 Va. 34, 51 S. E. 155, 7 Ann.

Cas. 583; *Knickerbocker v. McKindley Coal & Min. Co.* 172 Ill. 535, 64 Am. St. Rep. 54, 50 N. E. 330; *Bartlett v. Cicero Light, Heat & P. Co.* 177 Ill. 68, 42 L.R.A. 715, 69 Am. St. Rep. 206, 52 N. E. 339; *Makeel v. Hotchkiss*, 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524; *Ellis v. Vernon Ice, Light & Water Co.* 86 Tex. 109, 23 S. W. 858; *Thornton v. Highland Ave. & Belt R. Co.* 94 Ala. 353, 10 So. 442; *Highland Ave. & Belt R. Co. v. Thornton*, 105 Ala. 225, 16 So. 699; *American Pig Iron Storage Warrant Co. v. German*, 126 Ala. 194, 85 Am. St. Rep. 21, 28 So. 603; *Blythe v. Gibbons*, 141 Ind. 332, 35 N. E. 557; *Grainger v. Old Kentucky Paper Co.* 105 Ky. 683, 49 S. W. 477; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809; *Cake v. Mohun*, 164 U. S. 311, 41 L. ed. 447, 17 Sup. Ct. Rep. 100; *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 52 L. ed. 528, 28 Sup. Ct. Rep. 406, 13 Ann. Cas. 1155; *Reinhart v. Augusta Min. & Invest. Co.* 36 C. C. A. 541, 94 Fed. 901; *St. Louis Southwestern R. Co. v. Holbrook*, 19 C. C. A. 385, 41 U. S. App. 33, 73 Fed. 112.

Jones, J., delivered the opinion of the court:

In his effort to have the *nisi prius* court hold the proceeds of the mortgaged property until the determination of his unadjudicated claim for damages for personal injuries, Winterbottom adopted the precautionary measures of filing his petition of intervention in the original foreclosure action and of bringing an independent action in equity seeking the same relief. The questions here involved are presented in two aspects: First, whether or not the corpus of real estate encumbered by mortgage liens may be subordinated to a claim for damages against the receiver of that property, resulting from his control and operation thereof; second, what effect, if any, the action of a lienholder has, when he procures a receivership not only for the purpose of conservation and custody of the property, but also for its control and business management.

The law in relation to the receivership of railways has gradually developed until it is now uniformly

held that receivers of that class of corporations may incur obligations of the character here involved, which must be paid out of the current earnings of the corporation, and, in lieu of any deficiency therein, out of the corpus of the property itself. But, even in receiverships of that character, Mr. Justice Brewer, in the frequently cited case of *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 98, 34 L. ed. 379, 383, 10 Sup. Ct. Rep. 953, said: "It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens." Receiver—  
expenses.

And it is held, as to railway liens, that current operating expenses of a railroad, including damages for personal injuries, may be preferred over the railway mortgage liens. This legal principle is attributed to the fact that these great corporations not only assume to derive their franchises and public functions from the state, but are of such character as to be affected by public interest to an extent that their operation may be required in proper cases, notwithstanding the objections of stockholders and mortgagees, and irrespective of the question whether the latter may have been notified at the time of the original appointment of the receiver. But does the same rule apply to corporations of a private character, which are not affected with such public interest? This feature was clearly recognized by the Justice of the United States Supreme Court who rendered the opinion in the case of *Wood v. Guarantee Trust & S. D. Co.* 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. Rep. 131, when, in speaking of the case of *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, he said: "The case lays great emphasis on the consideration that a railroad is a peculiar

property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

Since rendition of the opinion in the latter case, the lower courts of Federal jurisdiction have uniformly held that the principles that apply to railway corporations involving the subordination of vested liens do not apply to individuals and private corporations, where no such public interest attaches. *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* (C. C.) 16 L.R.A. 603, 50 Fed. 481; *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* (C. C.) 68 Fed. 623, and *Hanna v. State Trust Co.* 30 L.R.A. 201, 16 C. C. A. 586, 70 Fed. 2.

This principle has also been adopted by the state courts generally, which have had the question under consideration. *Hooper v. Central Trust Co.* 81 Md. 559, 591, 29 L.R.A. 262, 32 Atl. 505; *International Trust Co. v. United Coal Co.* 27 Colo. 246, 254, 83 Am. St. Rep. 59, 60 Pac. 621; *Hotchkiss v. Makeel, Receiver*, 87 Ill. App. 623, affirmed in 190 Ill. 311, 83 Am. St. Rep. 131, 60 N. E. 524; *Raht v. Attrill*, 106 N. Y. 423, 436, 60 Am. Rep. 456, 13 N. E. 282.

The rule is generally recognized that the cost of the custody and preservation of the property in the hands of the court, as well as the taxes, are, of course, payable out of the corpus of the realty encumbered, either in the case of individuals or private corporations, and are considered part of the expenses and costs of suit. In such cases, when the liens were incurred and accepted by the mortgagees, such costs were impliedly assented to when the mortgages were taken. Further, with relation to railway mortgage liens, when the lienholder obtained that class of security he did so with knowledge of the fact that he was acquiring it upon quasi public corporate property, which might be op-

erated under the sanction of the court. This principle, however, does not affect the vested rights existing between mortgages and individuals or corporations of a private nature. If it did, then any claimant of an insolvent concern, or a partner upon dissolution of partnership, could, on his own motion, divest the security without consent of the lienholder, and possibly without any financial risk to himself.

However, there is another phase to this case which is controlling. The record discloses that the trustee of the bondholders, at the time it filed its petition for foreclosure, affirmatively asked for a receiver, and that on its motion one was appointed, not only to conserve, but to manage, the property. If the receiver was authorized to manage this property as a going concern, it was at the instance ~~negligence~~ and on the motion ~~priority of claim.~~ of the mortgage

lienholder. In his operation of the property, it develops from the record, damage ensued by reason of that operation. This damage, when adjudicated, being incidental to the management, became part of the expense of the administration by the court. It does not now lie in the mouth of the lienee, who secured this operation by its express request, to deny the resultant expense accruing therefrom. While the rule of extending protection to mortgagees obtains in ordinary cases, it does not apply where personal injuries have been sustained because of the negligence of a receiver whom the lienee had expressly demanded, for the business management of the property. We think this principle is amply supported by reported cases in state and Federal jurisdictions. *People's Nat. Bank v. Virginia Textile Co.* 104 Va. 34, 51 S. E. 155, 7 Ann. Cas. 583; *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.* 103 N. Y. 245, 8 N. E. 488; *St. Louis Southwestern R. Co. v. Holbrook*, 19 C. C. A. 385, 41 U. S. App. 33, 73 Fed. 112; *Doe v. Northwestern Coal & Transp. Co.* (C. C.) 78



Fed. 62; *Kneeland v. American Loan & T. Co.* supra.

Any equitable consideration existing in this case between the mortgagees, or between them and the fund procured from liability insurance, need not now be determined. These questions are left to the consideration of the court of first instance. All that is necessary for us to do at this time is to decide whether Winterbottom's pleading stated a cause of action which required the court to hold the proceeds arising from the sale of property until the determination of his suit for personal injuries. We hold that this right exists, and the sole remaining question is: What was his mode of procedure?

As disclosed by the record, Winterbottom not only filed his motion, and his petition for intervention, vacation, and modification of decree in the foreclosure suit, but also, just prior to filing the intervention petition, filed an independent suit in equity, seeking the vacation and modification of the decree of distribution made at the term just preceding. The pleading for intervention in the foreclosure

—intervention  
—claim.

suit was the proper method of procedure, since full and adequate relief could be obtained in that action. The property, or the proceeds therefrom, will be in the hands of the court, together with all the parties interested in the distribution of the proceeds after sale. By its order of May 17, 1916, the court decreed that the costs of suit should first be paid. While this expense of operation cannot technically be termed costs, still it is a part of the administration expense of the court. "Damages for injuries to persons or property dur-

ing the receivership, caused by the torts of the receiver's agents and employees, are classed as a part of the operating expense of the corporation." 34 Cyc. 354. While the order of distribution may have been an adjudication of the existing rights between the parties, it in no wise affected this expense of the court which accrued after that order. It cannot be claimed that if the expense had been an ordinary administration expense of the receiver, the court would not have had inherent power to protect itself by the payment of the receiver's indebtedness. 34 Cyc. 307. While the petition for intervention was filed at a succeeding term of the court, it was filed at a time when the court still had charge of the property, and before final distribution of the proceeds arising from its sale. This sale was not confirmed until August 8, 1916. Prior to that time, to wit, on July 25, 1916, the receiver and the court were not only advised that this claim existed, but that the same was being prosecuted in a court of law, under an order of court in the foreclosure suit authorizing such action.

In cases Nos. 15,698 and 15,706 the judgment of the Court of Appeals, reversing that of the common pleas in the independent equity suit, is reversed, and that of the Common Pleas Court affirmed.

In case No. 15,723 the judgments of the Court of Appeals and the Common Pleas Court are reversed and the case remanded to the Court of Common Pleas, with instructions to overrule the demurrer to the petition for intervention.

Nichols, Ch. J., and Wanamaker, Matthias, Johnson, and Donahue, JJ., concur.

## ANNOTATION.

### Priority of claims for damages from operation of railroad during receivership.

Damages from the operation of a railroad in the hands of a receiver are generally held a charge on the earn-

ings of the road, as operating expenses. *Cowdrey v. Galveston, H. & H. R. Co.* (1877) 93 U. S. 352, 23 L.

ed. 950; *Farmers' Loan & T. Co. v. Northern P. R. Co.* (1896) 74 Fed. 431; *Meyer Rubber Co. v. Georgetown & W. R. Co.* (1909) 174 Fed. 731, affirmed in (1910) 101 C. C. A. 84, 177 Fed. 870; *Klein v. Jewett* (1875) 26 N. J. Eq. 474, 5 Am. Neg. Cas. 1; *Kain v. Smith* (1880) 80 N. Y. 458; *Ex parte Brown* (1880) 15 S. C. 518.

Thus, in *Cowdrey v. Galveston, H. & H. R. Co.* (U. S.) *supra*, it was held that the earnings of a railroad in the hands of a receiver were chargeable with the value of goods lost in transportation, and with damages done to property during his management. The court said: "The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind, as well as the expenses incurred in their behalf, were paid."

So, in *Klein v. Jewett* (1875) 26 N. J. Eq. 474, 5 Am. Neg. Cas. 1, it was held that a claim for personal injuries, inflicted while a railroad was under the control of a receiver, might be properly included in the expenses incurred in operating the road, and should be paid out of the current earnings of the road, together with the taxed cost of the proceedings to recover damages therefor.

And where a receiver had income received from the operation of the road under the control of the court, it was held, in *Ex parte Brown* (S. C.) *supra*, that claims for personal injuries should be paid from such funds, in the absence of any personal fault making the receiver personally liable, though there were mortgage bonds constituting a lien on the property, which had not been and could not be paid in full.

And, in *Farmers' Loan & T. Co. v. Northern P. R. Co.* (1896) 74 Fed. 431, the court, in discussing the right to a lien for damages in the operation of the road before the receivership, said: "Such claims for injuries occurring under the receiver's own management are paid, it is true, in preference to the mortgage debt, not

for the reason of their preferential nature, nor because of any superior equity in their favor over claims for damages which arose before the receiver was appointed, but because they are liabilities which were incurred by the receiver in the course of his own operation of the road, and are payable by him as other expenses of the management."

Damages to employees are a part of the operating expenses of a railroad in the hands of a receiver, and should be paid as such. *Meyer Rubber Co. v. Georgetown & W. R. Co.* (1909) 174 Fed. 731, affirmed in (1910) 101 C. C. A. 84, 177 Fed. 870.

Damages for injury to the person, whether passenger or employee, and for loss of goods in course of transportation or otherwise, are chargeable upon, and payable out of, the fund in court, the same as other expenses of administration. *Kain v. Smith* (1880) 80 N. Y. 458.

In support of this view, see also *Cross v. Evans* (1898) 29 C. C. A. 523, 52 U. S. App. 720, 86 Fed. 1; *Mobile & O. R. Co. v. Davis* (1884) 62 Miss. 271; *Robinson v. New York & S. I. Electric Co.* (1904) 99 App. Div. 509, 91 N. Y. Supp. 153; *Ryan v. Hays* (1884) 62 Tex. 42; *Texas P. R. Co. v. Johnson* (1890) 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463; *Houston & T. C. R. Co. v. Crawford* (1895) 88 Tex. 277, 28 L.R.A. 761, 53 Am. St. Rep. 752, 31 S. W. 176; *Holman v. Galveston, H. & S. A. R. Co.* (1896) 14 Tex. Civ. App. 503, 37 S. W. 464, cited *infra*.

On the other hand, in *Davenport v. Alabama & C. R. Co.* (1875) 2 Woods, 519, Fed. Cas. No. 3,588, a judgment for personal injuries was denied priority over a mortgage as a part of the expense of executing the trust, with respect either to the earnings of the road or the proceeds of a sale. The receiver was appointed to take possession of the property, complete the road, procure rolling stock, etc., and the order created a prior lien for money raised or advanced "for the purposes aforesaid," and provided that any fund so raised or received from any other source, which might not be employed for these purposes or al-

lowed for the services of the receiver, should be paid into court for the use of the bondholders. The court said: "The receivers of the court were merely appointed to act instead of the president and directors, except so far as the orders of the court otherwise direct, and the liability stands on the same footing as if it had been created by the president and directors, unless a higher right can be assigned to it under the orders of the court. The object of appointing a receiver is to take care of the property for those entitled to it, and he has no powers except such as are conferred upon him." This language is criticized in *Ex parte Brown* (1880) 15 S. C. 518, cited *supra*, where the court said: "The receivership is the transfer of the property to a new owner, who begins his work cut off from the past, with new duties and new obligations. The court could order a sale at once, and let new and absolute owners take the property and assume their proper liabilities to third parties. If, instead of doing this, a receiver is appointed, he represents, technically, the interest of an insolvent corporation, but technically and substantially the interests of creditors, who ought not to be allowed to enjoy the franchises and property of the corporation without its responsibilities."

Under a statute providing, relative to railroads in the hands of a receiver and manager, for the prior payment of the working expenses and other proper outgoings, it was held in *Re Wraxham, H. & C. Q. R. Co.* [1900] 2 Ch. (Eng.) 436, 69 L. J. Ch. N. S. 671, 83 L. T. N. S. 49, that a judgment for damages to property, caused by the railway company's failure to keep its plant in repair, was not entitled to such priority.

Claims of this character are also generally accorded priority against the property itself, and its proceeds, where there has been a diversion of current income from the payment of operating expenses, as in the case of the investment of such income in improvements on the property. *Mobile & O. R. Co. v. Davis* (1884) 62 Miss. 271; *Ryan v. Hays* (1884) 62 Tex. 42;

*Texas P. R. Co. v. Johnson* (1890) 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463; *Texas P. R. Co. v. Overheiser* (1890) 76 Tex. 437, 13 S. W. 468; *Texas P. R. Co. v. Griffin* (1890) 76 Tex. 441, 13 S. W. 471; *Texas & P. R. Co. v. Geiger* (1890) 79 Tex. 13, 15 S. W. 214; *Texas & P. R. Co. v. Miller* (1890) 79 Tex. 78, 11 L.R.A. 395, 23 Am. St. Rep. 308, 15 S. W. 264, 6 Am. Neg. Cas. 592; *Texas & P. R. Co. v. Comstock* (1892) 88 Tex. 537, 18 S. W. 946, 10 Am. Neg. Cas. 260; *Holman v. Galveston, H. & S. A. R. Co.* (1896) 14 Tex. Civ. App. 503, 37 S. W. 464.

Thus, in *Mobile & O. R. Co. v. Davis* (Miss.) *supra*, by agreement between a railroad company and its bondholders, a receiver appointed in a foreclosure suit was discharged, and surrendered the property to the company, which executed a new deed of trust. A passenger injured during the operation of the road by the receiver brought suit, alleging that part of the property turned over to the company by the receiver was paid for by the receiver out of earnings. The court said that the road in the hands of the receiver was chargeable with the expenses of operating the road, and injuries to persons or property were included in such expenses; that property purchased and paid for out of the income of the road while in the hands of the receiver was liable in equity, when the rights of third parties had not intervened, for the satisfaction of claims incurred in operating the road, and that it was not competent for the receiver, or the court under which he acted, to divert or invest the earnings in property for the railroad company, and then deliver the property to that company free from claims which were a charge on the earnings, without the holders of such claims having an opportunity to enforce them.

So, in *Ryan v. Hays* (1884) 62 Tex. 42, it was held that a claim for personal injuries, received while a railroad was operated by a receiver, was entitled to payment out of the current receipts, and that, if the current receipts were used for the betterment of the mortgaged property, then the

injured person was entitled to payment out of the proceeds of the sale of such property, to the extent, so far as necessary, that the current expenses were so diverted. So, where the property was sold to bondholders and resold to the company, and, without any payment of the purchase price, the receiver was discharged, and the company's stockholders voted to assume all debts and liabilities of the receiver, it was held that the company was liable if any property in the receiver's hands would have been liable.

A claim for damages, caused by injuries inflicted through the negligence of a receiver while he is operating a railway, is entitled to payment out of current receipts, and if such earnings be invested in betterments which, without sale, are returned to the company with its other property at the close of the receivership, the company receives the property charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings. *Texas P. R. Co. v. Johnson*, followed in the following cases: *Texas P. R. Co. v. Overheiser*; *Texas P. R. Co. v. Griffin*; *Texas & P. R. Co. v. Geiger*; *Texas & P. R. Co. v. Miller*; *Texas & P. R. Co. v. Comstock*, and *Holman v. Galveston, H. & S. A. R. Co. (Tex.) supra*.

Where a railroad is in the hands of a receiver, claims arising out of the operation of the road by the receiver, whether in contract or for tort, have a right to payment out of the revenue accruing from the operation of the road, superior to the lien of prior mortgages or other debts; and where the receiver continued operating the road after its sale, and invested the earnings in betterments which, therefore, were not included in the sale price, the purchaser, to the extent of such betterments, was liable for damages for personal injuries sustained during the operation of the road by the receiver. *Houston & T. C. R. Co. v. Crawford (1895) 88 Tex. 277, 28 L.R.A. 761, 53 Am. St. Rep. 752, 31 S. W. 176*.

But where the injury occurred subsequent to the sale, the injured person

had no claim upon the earnings accruing prior to the sale, and no use of such earnings would be a diversion of a fund to which he was entitled. And, moreover, if the improvements were made before the conveyance, the purchase of the property included the improvements, and the purchasers were not liable, as they received no benefit from the improvements; and plaintiff should, therefore, have alleged and proved that the improvements were made after the sale and conveyance, by the application of earnings arising subsequent to the sale. *Crawford v. Houston & T. C. R. Co. (1895) 89 Tex. 89, 33 S. W. 534*.

So, where damages to a shipment of cattle were sustained after such sale, there could be no recovery without pleading and proof that there were earnings after the sale, and while the road remained in the hands of the receiver. *Holman v. Galveston, H. & S. A. R. Co. (1896) 14 Tex. Civ. App. 503, 37 S. W. 464*.

But in *Houston & T. C. R. Co. v. Bath (1897) 17 Tex. Civ. App. 707, 44 S. W. 595*, it was held that the receiver, in holding and operating such road after such sale and its confirmation, and after the court had ordered its delivery to the purchaser, was acting at the instance and for the benefit of the purchaser, so that the purchaser was liable for lost shipments, irrespective of any betterments or improvements.

In a few cases, claims of this character have been enforced against the corpus of the property in the hands of a purchaser, because of a purchase subject to liabilities of the receiver. *St. Louis Southwestern R. Co. v. Holbrook (1896) 19 C. C. A. 385, 41 U. S. App. 33, 73 Fed. 112*; *Central Trust Co. v. Denver & R. G. R. Co. (1899) 38 C. C. A. 143, 97 Fed. 239*, writ of certiorari denied in *176 U. S. 683, 44 L. ed. 638*.

Thus, in *St. Louis Southwestern R. Co. v. Holbrook (Fed.) supra*, where the property was sold under a foreclosure decree, subject to all claims and demands against the receivers incurred in the operation of the road, a judgment for personal injuries inflicted in the operation of the road

by the receiver was held a charge on the property. The court said: "When mortgage creditors ask a court of equity to take possession of such property and operate it, they consent to have all the liabilities resulting from such operation take precedence of their prior contract liens, which they are seeking by the proceedings to enforce. . . . As such business must be done from the nature of the case, more or less of such liability must be incurred. It is a necessary part of the running expenses of all railroads, and while such roads are being operated by the mortgage creditors, or by the court in their interest and at their instance, such running expenses must take precedence of their mortgage liens."

So, where a road which had been operated by a receiver was sold under foreclosure, subject to the payment by the purchaser of all liabilities incurred by the receiver, damages sustained by another road in a collision with one of the receiver's trains were allowed against the receiver, in *Central Trust Co. v. Denver & R. G. R. Co.* (Fed.) *supra*. The court said that such damages were classed as operating expenses of the railroad, under the receivership.

But where the state brought a quo warranto suit to forfeit a railroad company's charter, and a receiver was appointed, who continued the operation of the road for the use of the company pending the suit, it was held in *Foreman v. Central Trust Co.* (1896) 18 C. C. A. 321, 30 U. S. App. 658, 71 Fed. 776, that a decree vacating the appointment and providing for the return of the property to the company, chargeable with all proper expenses and liabilities incurred by the receiver in operating the road, and a further order that charges on the property in the hands of the receiver were thereby made a lien on the property, did not have the effect of giving a lien on the property, prior to the lien of a mortgage, to a passenger injured while the receiver was operating the road and subsequently recovering judgment for such injury.

Some of the cases take the broad

ground that a deficiency of income is in itself sufficient to entitle claims of this character to payment out of the corpus. *Union Trust Co. v. Illinois Midland R. Co.* (1886) 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809; *Cross v. Evans* (1898) 29 C. C. A. 523, 52 U. S. App. 720, 86 Fed. 1; *Anderson v. Condict* (1899) 35 C. C. A. 335, 93 Fed. 349; *South Carolina & G. R. Co. v. Carolina, C. G. & C. R. Co.* (1899) 93 Fed. 543; *Robinson v. New York & S. I. Electric Co.* (1904) 99 App. Div. 509, 91 N. Y. Supp. 153; *BROWN v. WINTERBOTTOM* (reported herewith) ante, 1465; *St. Louis Union Trust Co. v. Texas Southern R. Co.* (1910) 59 Tex. Civ. App. 157, 126 S. W. 296.

Thus, in *Cross v. Evans* (1898) 29 C. C. A. 523, 52 U. S. App. 720, 86 Fed. 1, it is said that damages accruing during the time the railroad property is in the hands of a receiver have been held to be part of the operating expenses, and payable out of the income, if there is any, and if not, they must come out of the corpus of the property.

And in *Robinson v. New York & S. I. Electric Co.* (1904) 99 App. Div. 509, 91 N. Y. Supp. 153, the court, after stating that the rule is established by authority that damages for injuries to person or property during the receivership, caused by the torts of the receiver's agents and employees, are classed as operating expenses, and are accorded the same priority of payment as balances of other necessary expenses of the receivership, says that such claims are paid out of the net income, if any, if that is sufficient; but, in the event of a deficiency, they will be paid out of the corpus. It is further said that such claims, therefore, have priority over mortgage debts, or other debts, existing when the action was brought in which the receiver was appointed.

And in *Union Trust Co. v. Illinois Midland R. Co.* (U. S.) *supra*, where it was conceded that certain debts incurred by a receiver, including items under the head of "damages," were so incurred, but it was claimed that they were entitled to priority only out of income, the court said: "Of course such items are payable out of the in-

come, if any, before the corpus can be resorted to; but that may be resorted to when the items are proper ones to be allowed for operating expenses."

So, where receiver's certificates were made a first lien on the property of a railroad company and its proceeds and upon all net income derived from the operation of the road after the payment of operating expenses and costs of administration, it was held in *Anderson v. Condict* (1899) 35 C. C. A. 335, 93 Fed. 349, that, in the absence of sufficient income, operating expenses and costs of administration were to be paid out of the corpus. And that a claim for personal injuries sustained during the operation of the road by the receiver, though not strictly a cost of operation, was an expense incurred in and by reason of the operation, and, as such, entitled to priority over the receiver's certificates and the rights of a purchaser who had purchased subject to claims superior, in equity, to the receiver's certificates and to the mortgage, and subject to all current liabilities of the receiver which should thereafter be adjudged superior to the mortgage and certificates. The court said: "Here, at the request of the trustee, the court assumed, and, with the knowledge and acquiescence of the holders of the receiver's certificates, continued the operation of the railway. They subjected their securities to the expense of operation,—the trustee, by its affirmative act in praying the court to take possession and operate the railway; the holders of the certificates by the provision of the order authorizing the issuance of the certificates, and which was expressed upon their face, making them subject to the payment of operating expenses and the cost of administration. For that purpose, and to that extent, these parties were vicariously in the possession and operation of the railway through the court as their representative. All liabilities of the receiver were imposed upon the corpus of the property, failing income, as certainly as a mortgagee would be personally liable if he possessed and operated the railway."

So, where a railroad company, op-

erating the road of another company under an agreement with its receiver that the operating road should be held harmless and not be accountable for any accident or damages to persons or property, sued to have claims for such damages paid from the proceeds of a sale of the road, the court held in *South Carolina & G. R. Co. v. Carolina, C. G. & C. R. Co.* (1899) 93 Fed. 543, that if such damages were due to mere carelessness or negligence of the company's servants, and not to recklessness or gross carelessness, they constituted operating expenses, and the operating road was entitled to be reimbursed. The court said that, if the receiver had undertaken to operate the road himself, any damages recovered against him on account of the negligence of his servants would have been treated as operating expenses, and ordered paid in priority to the claims of bondholders.

It was likewise held in *St. Louis Union Trust Co. v. Texas Southern R. Co.* (1910) 59 Tex. Civ. App. 157, 126 S. W. 296, that the court had power, as regarded indebtedness incurred by a receiver as necessary operating expenses of the railway, where the income proved insufficient to satisfy such indebtedness, to direct payment of the residue out of the proceeds of a sale before a distribution was made to creditors and lienholders; but that such a right to be so paid arose from the order of the court, and not by operation of law independent of such order. It further held that damages for injuries to persons or property caused by torts of the receiver's servants were entitled to be classed as operating expenses; and that, where concentration charges prepaid by shippers were used by the receiver in the operation of the road, the court had power and was warranted in classifying the demands therefor as charges of the receivership. In this case the judgment of foreclosure placed operating expenses in the first class to be paid, and certain labor and materialmen's liens in following classes. The property not having been sold for want of bidders, receiver's certificates were issued to pay the labor and mate-

rialmen's liens, pursuant to an order which, the court held, preserved the order of priority given by the judgment; and it was accordingly held that operating expenses were entitled to priority over such certificates.

In the reported case (*BROWN v. WINTERBOTTOM*, ante, 1465), it is said to be the law of railway receiverships that claims of the character under consideration must be paid out of the current earnings of the corporation, and, in case of any deficiency therein, out of the corpus of the property itself, and that current operating expenses of a railroad, including damages for personal injuries, may be preferred over the railroad mortgage lien.

There is a holding to the contrary in *Hand v. Savannah & C. R. Co.* (1881) 17 S. C. 219, where it is held that where the road was operated at a loss, and there was no income from which to pay claims incurred by the receiver and a claim for damages to animals from the operation of the road, they would not be ordered paid from the corpus to the prejudice of bondholders. The court says: "As the mortgagor himself could not contract debts to displace liens upon the

corpus, it is not clearly perceived how the court can give that effect to debts contracted by the receiver, who has nothing whatever to do with the finances of the company except the money which arises from the 'income,' possibly the court might do so in an extraordinary case where it clearly appeared that the debt was contracted at the instance of the mortgagees and for their benefit, but not in an ordinary case of excess of expenditures over income, without express authority to contract debts upon the faith of the property."

As this note is limited to claims for damages from the operation of the railroad during the receivership, it does not embrace claims arising prior to the receivership; but a case close to the border line is that of *Crawford v. Seattle, R. & S. F. R. Co.* (1917) 97 Wash. 651, 167 Pac. 44. In that case a claim for personal injuries sustained prior to the receivership, but while the road was being operated by representatives of the bondholders, was denied priority over an earlier mortgage. The court apparently ignored the fact that bondholders were operating the road. A. McT.

## STATE OF MINNESOTA EX REL. J. A. A. BURNQUIST et al.

v.

DISTRICT COURT OF THE STATE OF MINNESOTA in and for the County of Ramsey, et al.

*Minnesota Supreme Court — August 9, 1918.*

(— Minn. —, 168 N. W. 634.)

### Prohibition — injunction against enforcing liquor laws.

1. In an action to enjoin the several members of the Minnesota Public Safety Commission (created by chapter 261, Laws 1917 [Gen. Stat. Supp. 1917, §§ 117-10 to 117-19]), the village president and sheriff from enforcing the orders of the Commission in closing a licensed saloon, the court, upon ex parte application, granted a temporary restraining order. The relator Burnquist, as governor of the state, ordered the adjutant general, the relator Rhinow, to close the saloon with the military force of the state. The order was carried out; and relators were cited to show cause why they should not be punished for contempt. It is held:

That the trial court is without jurisdiction to proceed against the relator

(— *Minn.* —, 168 N. W. 634.)

Burnquist, since it appears that, in closing the saloon, he was in good faith discharging a constitutional duty, placed upon him as governor, to take care that a duly enacted law was faithfully executed.

[See note on this question beginning on page 1484.]

— contempt proceedings — state officer.

2. That the same is true with reference to the relator Rhinow, since, as adjutant general, he was a proper agency in the hands of the governor to aid in discharging his said duty.

[See 22 R. C. L. 490.]

**Judgment — effect — restraining order.**

3. The issuance of a temporary restraining order upon an ex parte application to prevent the Public Safety Commission from closing a saloon cannot be considered an adjudication up-

on the validity of the orders of the Commission, nor a determination upon the extent or limitation of the powers of that body.

[See 14 R. C. L. 314.]

**Courts — control over executive officers.**

4. The judicial department will not by mandamus or injunction coerce, direct, or control the executive state officers in the discharge of any constitutional executive duty involving the exercise of judgment and discretion.

[See 6 R. C. L. 151; 7 R. C. L. 1048; 12 R. C. L. 1008; 18 R. C. L. 196.]

**APPLICATION** for a writ of prohibition to compel respondents to show cause why the writ should not issue, directing them to refrain from proceeding as for contempt against relators. *Writ issued.*

The facts are stated in the opinion of the court.

Messrs. Clifford L. Hilton, Attorney General, James E. Markham, Assistant Attorney General, William A. Lancaster, and David F. Simpson, for relators:

The governor is not subject to contempt process.

*People ex rel. Broderick v. Morton*, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60.

The courts have no jurisdiction over the acts of a governor, whether done and performed by him as governor or as an ex officio member of a state board; and this, too, whether the act in question is an executive or governmental one or purely ministerial.

*Huidekoper v. Hadley*, 40 L.R.A. (N.S.) 505, 100 C. C. A. 395, 177 Fed. 1; *High, Extr. Leg. Rem.* 3d ed. § 120; *People ex rel. Sutherland v. Governor*, 29 Mich. 320, 18 Am. Rep. 89; *State ex rel. Robb v. Stone*, 120 Mo. 428, 23 L.R.A. 194, 41 Am. St. Rep. 705, 25 S. W. 376; *Rice v. Governor (Rice v. Draper)* 207 Mass. 577, 32 L.R.A. (N.S.) 355, 93 N. E. 821; *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200; *Hovey v. State*, 127 Ind. 599, 11 L.R.A. 763, 22 Am. St. Rep. 663, 27 N. E. 175; *State, Gledhill, Prosecutor, v. Governor*, 25 N. J. L. 331; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437; *Frost v. Thomas*, 26 Colo. 222, 77 Am. St. Rep. 259, 56 Pac.

899; *Hartranft's Appeal*, 85 Pa. 433, 27 Am. Rep. 667; *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791; *Guthrie v. Hall*, 1 Okla. 454, 34 Pac. 380.

Prohibition is the appropriate remedy.

*Burke v. Superior Ct.* 7 Cal. App. 178, 93 Pac. 1058; *Gordan v. Buckles*, 92 Cal. 481, 28 Pac. 490; *Ruggles v. Superior Ct.* 103 Cal. 125, 37 Pac. 211; *People ex rel. Pierce v. Carrington*, 5 Utah, 531, 17 Pac. 735; *State ex rel. Oudin v. Superior Ct.* 31 Wash. 481, 71 Pac. 1095; *State ex rel. Atty. Gen. v. Circuit Ct.* 97 Wis. 1, 38 L.R.A. 554, 65 Am. St. Rep. 90, 72 N. W. 193; *Re Ayres*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

Mr. Ambrose Tighe also for relators.

Messrs. P. J. McLaughlin and F. M. Catlin, for respondents:

The Commission was without authority to make or enforce or cause to be enforced the orders complained of.

*Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Schaezlein v. Cabaniss*, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; *Noel v. People*, 187



Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Baltimore v. Rad-  
ecke*, 49 Md. 217, 33 Am. Rep. 239;  
*Dowling v. Lancashire Ins. Co.* 92 Wis.  
63, 31 L.R.A. 112, 65 N. W. 738; 1 Dill.  
Mun. Corp. 3d ed. § 89; *Ravenna v.*  
*Pennsylvania Co.* 45 Ohio St. 118, 12  
N. E. 445; *Cooley*, Const. Lim. 233-  
234; *Tiedeman*, Mun. Corp. 110; *St.*  
*Paul v. Laidler*, 2 Minn. 190, Gil. 159,  
72 Am. Dec. 89; *St. Paul v. Traeger*,  
25 Minn. 248, 33 Am. Rep. 462; *State*  
*ex rel. Farnsworth v. Municipal Ct.*  
32 Minn. 329, 20 N. W. 243; *St. Paul*  
*v. Gilfillan*, 36 Minn. 298, 31 N. W. 49;  
*State v. Hammond*, 40 Minn. 43, 41 N.  
W. 243; *State v. Johnson*, 41 Minn. 111,  
42 N. W. 786; *Crowley v. Christensen*,  
137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct.  
Rep. 13; *Noel v. People*, 187 Ill. 587,  
52 L.R.A. 287, 79 Am. St. Rep. 238, 58  
N. E. 616; *People ex rel. Tyroler v.*  
*Warden*, 157 N. Y. 115, 43 L.R.A. 264,  
68 Am. St. Rep. 763, 51 N. E. 1006;  
*People v. Marx*, 99 N. Y. 377, 52 Am.  
Rep. 34, 2 N. E. 29; *New York Sanitary*  
*Utilization Co. v. Health Dept.* 61 App.  
Div. 106, 70 N. Y. 510; *State ex rel.*  
*Railroad & W. Commission v. Chicago*,  
*M. & St. P. R. Co.* 38 Minn. 281, 37  
N. W. 782; *United States v. Grimaud*,  
220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct.  
Rep. 480; *Crawfordsville v. Braden*,  
130 Ind. 149, 14 L.R.A. 268, 30 Am.  
St. Rep. 214, 28 N. E. 849.

The court had jurisdiction to try and determine the issues presented, and the writ of prohibition was not the proper remedy.

*State ex rel. Townsend v. Ward*, 70 Minn. 58, 72 N. W. 825; *Dayton v. Payne*, 13 Minn. 493, Gil. 454; *State ex rel. Jonason v. Crosby*, 92 Minn. 176, 99 N. W. 636; *State ex rel. St. Paul & D. R. Co. v. Young*, 44 Minn. 76, 46 N. W. 204; *State ex rel. Berryhill v. Cory*, 35 Minn. 178, 28 N. W. 217; *State ex rel. Eau Claire Dells Improv. Co. v. District Ct.* 26 Minn. 233, 2 N. W. 698; *Secombe v. Kittelson*, 29 Minn. 555, 12 N. W. 519; *State ex rel. Larson v. District Ct.* 77 Minn. 405, 80 N. W. 355.

The acts of the relators were subject to the control of the courts.

22 Cyc. 879-881; *Chamberlain v. Sibley*, 4 Minn. 309, Gil. 228; *Ex parte Young*, 209 U. S. 142, 156, 52 L. ed. 721, 728, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623; 22 Cyc. 882; *Louisville & N. R. Co. v. Railroad Commis-*

*sion (Louisville & N. R. Co. v. Burr)* 63 Fla. 491, 44 L.R.A. (N.S.) 189, 58 So. 543; *Hatfield v. Graham*, 73 W. Va. 759, L.R.A. 1915A, 175, 81 S. E. 533, Ann. Cas. 1917C, 1; *McConaughy v. Secretary of State*, 106 Minn. 415, 119 N. W. 408; *Cooke v. Iverson*, 108 Minn. 388, 52 L.R.A. (N.S.) 415, 122 N. W. 251; 12 R. C. L. 1010, § 10; *Ekern v. McGovern*, 154 Wis. 157, 46 L.R.A. (N.S.) 796, 142 N. W. 595.

*Holt, J.*, delivered the opinion of the court:

The district court of Ramsey county was ordered by this court to show cause why a writ of prohibition should not issue, directing said district court and the several judges thereof to refrain from proceeding as for contempt against the relators, the governor and the adjutant general of this state. The respondent Honorable Frederick N. Dickson makes a return in his own behalf, and in behalf of the court and the other judges thereof, except Honorable Hascal R. Brill, who returns that he is disqualified from sitting in the case.

From the petition and the return of respondent Dickson the following may be stated as the material and relevant facts: In December, 1917, and ever since William R. Carroll has had a license to vend intoxicating liquors at Blooming Prairie, a village of some 850 inhabitants in Steele county, Minnesota. It is located about 25 miles south of Owatonna, and nearly the same distance from the southern boundary of the state. No intoxicating beverages can be procured lawfully in the counties to the east, south, or west of Steele county, nor in Iowa, nor in Steele county except in Owatonna and Blooming Prairie. The business of Mr. Carroll was therefore exceedingly lucrative, although the license fee in the village was \$1,500 and three other licensed saloons were doing business there, until the Minnesota Commission of Public Safety, on December 5, 1917, by order No. 17, directed the licensed liquor dealers at Blooming Prairie to refrain from dispensing liquor except at retail, to be consumed on

the premises where dispensed, and only between the hours of 9 A. M. and 5 P. M. on week days. It appears that this order resulted after the Commission, in the fall of 1917, had caused an investigation to be made as to the effect of the liquor traffic upon the military, civil, and industrial resources of the state, and the peace and public safety of the inhabitants, and particularly the effect of the sale of intoxicating liquor in places located in the midst of large areas of "dry" territory. The liquor dealers of the village complied with the order until in June, 1918, when Carroll and two others began to dispense their goods in open defiance thereof. The Commission then issued order No. 34, directing the president of the village to forthwith close and keep closed the places of business of the offending dealers. This last order was enforced through the sheriff of Steele county. In that situation Carroll commenced an action against the members of the Commission, the president of the village, and the sheriff of the county to permanently enjoin them from closing or interfering with his business. On ex parte application, the respondent Dickson issued a temporary restraining order, June 29, 1918, requiring the defendants in the action to refrain from closing or keeping closed Carroll's place of business, and from interfering therewith, and from instituting any proceeding to enforce the orders of the Commission until further order of the court. Upon being informed of the restraining order, the sheriff, who had kept the saloons closed, withdrew; and Carroll resumed business. Thereupon, and on July 1st, relator Rhinow, the adjutant general of the state, in obedience to the order of the governor, the relator Burnquist, with the aid of the military force of the state, closed Carroll's saloon business. Carroll then obtained from Judge Dickson an order citing relators to answer for contempt, and they immediately procured this

order to show cause why a writ of prohibition should not issue.

The Minnesota Public Safety Commission, created by chapter 261, Laws 1917, consists of seven members; the governor and attorney general being ex officio members, the other five being appointed by the governor and removable at will by him. Extensive discretionary powers are given the Commission, and an appropriation of \$1,000,000 is made, to be expended as the Commission deems fit in the performance of its duty. The purpose of the law is therein declared thus: "In the event of war existing between the United States and any foreign nation, such Commission shall have power to do all acts and things not inconsistent with the Constitution or laws of the state of Minnesota or of the United States, which are necessary or proper for the public safety and for the protection of life and public property or private property of a character as in the judgment of the Commission requires protection, and shall do and perform all acts and things necessary or proper so that the military, civil and industrial resources of the state may be most efficiently applied toward maintenance of the defense of the state and nation and toward the successful prosecution of such war, and to that end it shall have all necessary power not herein specifically enumerated, and in addition thereto the following specific powers" (first part of § 3 [Gen. Stat. Supp. 1917, § 117-12]).

Among the specific powers conferred are those contained in subdivision 3 of § 3: "Said Commission shall have power and it shall be the duty of said Commission to co-operate with the military and other officers and agents of the United States government in all matters pertaining to the duties and functions of such Commission and shall aid the government of the United States in the prosecution of any such war and in relation to public safety as far as possible."

In the view we take of the mat-

ter for decision many propositions, exhaustively briefed and ably presented in the oral arguments, will not be reached. For instance, we are importuned to determine and define the powers of the Commission to make the orders mentioned, and every question relating to its powers, and what limitations, if any, there be; also, whether the governor may be controlled by injunction, or otherwise, the same as any other member of the Commission. But we think it would be improper for this court to pass upon these matters in advance of a determination by the court below; for

**Judgment—  
effect—restraining  
order.**

the issuing of the temporary restraining order, upon an ex parte application, cannot be considered an adjudication upon the validity of the orders of the Commission, nor a determination upon the extent or limitation of the powers of that body, nor even upon the extent to which the governor, in respect to official duties, may be controlled by the court. Furthermore, relators do not plant their right to the writ upon the validity of the orders referred to, nor even upon that of the law creating the Commission, but insist that, even though the orders be void and the law unconstitutional, the governor acted within the scope of his constitutional powers, and cannot be proceeded against as for contempt. We have therefore not been favored with the arguments that might well be advanced in support of the legality of orders 17 and 34, and it would be manifestly inappropriate for us to consider their legal status, unless clearly made necessary to a decision upon the application for a writ. The same is more patently true with reference to defining the powers and limitations of the Commission.

We reach the conclusion that if it clearly appears that the acts for the doing of which the governor is cited for punishment by the respondent were done in discharge of official

duties, requiring the exercise of judgment and discretion, and imposed upon him as chief executive by the Constitution, he is not amenable to punishment. In that event the respondent is without jurisdiction to entertain the contempt proceedings, and the writ of prohibition should issue.

**Prohibition—  
injunction  
against enforcing  
liquor laws.**

The early decisions of this court, in harmony with the weight of authority, are to the effect that the judicial department will not, by mandamus or injunction,

**Courts—control  
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officers.**

coerce, direct, or control the executive state officers. *Rice v. Austin*, 19 Minn. 103, Gil. 74, 18 Am. Rep. 330; *State ex rel. Mille Lacs County v. Dike*, 20 Minn. 363, Gil. 314; *St. Paul & C. R. Co. v. Brown*, 24 Minn. 517; *Western R. Co. v. De Graff*, 27 Minn. 1, 6 N. W. 341; *State ex rel. Thompson v. Whitcomb*, 28 Minn. 50, 8 N. W. 902; *State ex rel. Tuttle v. Braden*, 40 Minn. 174, 41 N. W. 817, wherein the exception suggested in *Chamberlain v. Sibley*, 4 Minn. 309, Gil. 228, was disapproved. But the later cases of *Hayne v. Metropolitan Trust Co.* 67 Minn. 245, 69 N. W. 916; *Cooke v. Iverson*, 108 Minn. 388, 52 L.R.A. (N.S.) 415, 122 N. W. 251, and *State ex rel. Kinsella v. Eberhart*, 116 Minn. 313, 39 L.R.A. (N.S.) 788, 133 N. W. 857, Ann. Cas. 1913B, 785, modify somewhat the earlier statement of the law, the *Hayne Case* holding that when private property to which the state has no claim is held in trust by a state officer, the court can compel him to turn it over to the proper party; the *Cooke Case* ruling that, "where duties purely ministerial in character are conferred upon the chief executive or any member of the executive department, as defined by our Constitution, and he refuses to act, or when he assumes to act in violation of the Constitution and laws of the state, he may be compelled to act or restrained from acting;" the *Kinsella Case* holding on certiorari to review the action of

the governor in removing an official that, when a statute invests the governor with a special quasi judicial duty, his performance thereof is subject to review by the court. Each of these cases recognizes to the full the rule that courts cannot, by any process, control or direct a head of the executive department of the state in the discharge of any constitutional executive duty involving the exercise of judgment and discretion. No judicial opinion to the contrary has been noticed. Cases need not be here cited, but a number may be found by consulting the references in 12 R. C. L. § 10, p. 1008, and the notes to State ex rel. Irvine v. Brooks, 6 L.R.A. (N.S.) 750, and Rice v. Draper, 32 L.R.A. (N.S.) 355. The authorities seem to agree that under Constitutions similar to that of this state, where all power and authority of government is vested in three distinct, co-ordinate, and independent departments,—the legislative, the executive, and the judicial,—the judicial has not the power to control, coerce, or restrain the action of the other two within the sphere allotted them by the Constitution wherein to exercise judgment and discretion. It would be unthinkable that the courts of this state should attempt to enjoin the legislature from enacting or the governor from approving a statute, no matter how glaringly unconstitutional it might appear or how highly injurious its mere enactment might be to private interests. And it would seem just as unthinkable that the chief executive of the state should be coerced either into enforcing a statute which the courts might deem he should enforce, or be subjected to punishment for enforcing one the constitutionality of which a court may doubt, but has not passed final judgment upon. Where, in a proper action or proceeding, a statute or an order of an executive or administrative commission has been finally adjudged unconstitutional or void, we entertain

no doubt that the governor of the state will recognize such decision as binding upon him, and the courts will have no occasion to ever consider the question of contempt relative to the governor's actions with reference thereto. But if, in advance of such adjudication, he may not be coerced into enforcing or not enforcing, it follows that he cannot be punished for proceeding in the manner his judgment may dictate. However, we are not to be understood to hold or to intimate that, if the governor should attempt in good faith to execute a statute adjudged invalid by a trial court, he could be subjected to punishment as for contempt.

Section 4, art. 5, of the state Constitution makes the governor commander in chief of the military forces, and provides that he may call out such forces to execute the laws, and enjoins upon him the duty to "take care that the laws be faithfully executed." To relator Burnquist, as governor, chapter 261, Laws 1917, appeared a duly enacted law; the Commission therein created, by orders duly adopted and promulgated, was attempting to perform the work demanded of it by the act. It was the governor's constitutional duty to take care that this law was faithfully executed in the manner contemplated by the legislature. To enforce these orders of the Commission the governor did the act for the doing of which the respondent now threatens to punish him. It seems clear to us that when the liquor dealers of Blooming Prairie disobeyed the orders of the Commission, the governor was confronted with the proposition whether or not the execution of chapter 261 was being defied, and, if he reached the conclusion that it was, the Constitution required him to exercise his judgment in upholding and enforcing that law by the means at his command.

But it is contended that the law may be invalid, and the orders of

the Commission, for that or for other reasons, void. The governor is justified in acting on the presumption that the statute is legally efficient, and the orders of the Commission, created by such statute and given large powers, are valid. And neither this law nor the orders referred to have, up to the present time, been adjudged invalid by any court upon a hearing had; but rather the contrary appears. See Judge Booth's opinion in *Cook v. Burnquist* (D. C.) 242 Fed. 321. The position of the President under the Federal Constitution in respect to his duty to execute the laws of Congress is precisely that of the governor under our state Constitution in respect to the laws enacted by our legislature. The same similarity exists with reference to the three distinct departments of government, and the limits wherein the one is free to act without interference from the other. In *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437, an unsuccessful attempt was made to enjoin the President from enforcing a law alleged to be unconstitutional and void, the court saying: "It will hardly be contended that Congress [courts?] can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President? The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the Presi-

dent refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate . . . from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves."

But we need not go to the full extent of the reasoning in the *Johnson Case*, nor determine the jurisdictional power of the trial court to issue the restraining order which the governor is charged with violating, although it is not amiss to observe that Carroll's action is against the individuals composing the Public Safety Commission, and not against the governor as such. It has now come to the point where, as suggested in the case quoted from, there is an attempt to assume the power and jurisdiction that may lead to punishing the governor for acts done in the discharge of an executive and political duty placed upon him by the Constitution. Ever since the time Chief Justice Marshall, in the Burr trial, had directed a subpoena duces tecum to be served upon the President, his observation has been accepted as sound law that, if the President should disobey the process because, in his opinion, the document called for should not, for political or governmental reasons, be exhibited, that official could not be punished for contempt. *Thompson v. German Valley R. Co.* 22 N. J. Eq. 111; *Hartranft's Appeal*, 85 Pa. 433, 27 Am. Rep. 667. And no

court, so far as we have been advised, has held or intimated that the chief executive of the state or nation could be made amenable to contempt proceedings for performing the duty, imposed by the Constitution, to execute a duly enacted law. The able dissenting opinion of Chief Justice Agnew in Hartranft's Appeal, supra, acknowledges this to be the law. We also conclude that Justice Marshall in Ekern v. McGovern, 154 Wis. 157, 46 L.R.A. (N.S.) 796, 142 N. W. 595, where he takes occasion, in his forceful and eloquent way, to vindicate the power of the court over the executive if the latter acts contrary to law, accepts the rule above stated, for he approves the case of *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791. A moment's reflection will make clear that a contrary rule might seriously interfere with the performance of the duties required of the chief executive. Legislative enactments frequently affect private interests injuriously. These laws may be constitutionally questionable or plainly invalid. If every individual affected may, in actions challenging their validity, ex parte obtain temporary restraining orders against their enforcement, and the governor should nevertheless deem it his duty to enforce the law, he could be subjected to contempt proceedings in the different courts where, peradventure, such restraining orders issued, the people might be wholly deprived of the services of the chief executive, or else his time so frittered away in court proceedings that none would be left for the discharge of his official duties, to say nothing of the unseemly clash between two departments of the government.

We cannot accept the contention made that relator's act in closing the offending Blooming Prairie saloon should be regarded as having been performed either as a member of the Commission, or, if the orders of the Commission be for any reason

void, as a private individual. It is plain to us that whatever relator Burnquist did in closing the saloons was in the capacity of governor, and in the endeavor to perform the duties imposed upon him as such by the Constitution and the laws; and the character of these acts, in so far as the attempt to punish him for contempt reaches, does not change because of the possible invalidity of the law, or of the orders of the Commission, promulgated under that law. It may well be that a different legal aspect of them should be taken by the court when determining their effect upon private interests; but with that we are not now concerned.

A few words should be said regarding *Cooke v. Iverson*, 108 Minn. 388, 52 L.R.A. (N.S.) 415, 122 N. W. 251, and *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, upon authority of which it is claimed that the writ prayed for should not issue. In the former it is said: "If a member of the executive department of the state is subject to the control of the judiciary . . . in purely ministerial duties, it logically follows that he is subject to such direction if he is threatening to execute an unconstitutional statute, to the irreparable injury of a party in his person or property. *Rippe v. Becker*, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331. If a statute be unconstitutional, it is as if it never had been. Rights cannot be built up under it, and, if an executive officer attempt to enforce it, his act is his individual and not his official act, and he is subject to the control of the courts as would be a private individual."—citing *Cooley*, Const. Lim. 250 [259?], and the *Young Case*.

The connection in which Chief Justice Start employed the language must be kept in view. The case involved a purely ministerial act, imposed by statute upon the state auditor; and, although the claim to injunctive relief was based upon the alleged unconstitutionality of a stat-

ute, it did not involve punishing for contempt for enforcing an unconstitutional statute in advance of its being so adjudged, nor did it relate to a duty imposed by the Constitution. And as to *Ex parte Young*, it is clear that the question before the court was not similar to the one before us; for the Federal court, in enforcing a violated restraining order against an executive state officer, is not hampered by any constitutional inhibition against interference with a co-ordinate department of government. This is well stated in *Bates v. Taylor*, 87 Tenn. 319, 3 L.R.A. 316, 11 S. W. 266.

Since the actual closing of Carroll's saloon was accomplished by the adjutant general with the military power of the state, and that power, by § 14, art. 1, of the Constitution, is subject to the civil power, the suggestion may be made that relator Rhinow can be proceeded against. We think not. Rhinow was in duty bound to carry out the order of the governor, his commander in chief. And having concluded that the governor cannot be punished under contempt proceed-

ings for what he caused to be done, it would seem to be a reasonable deduction that the agency which the law placed in his hands for accomplishing that act should likewise be immune. Otherwise the governor might be indirectly coerced by the courts in matters pertaining to his constitutional duties.

In taking leave of the case we wish to make clear that we have not passed upon the merits of the action instituted by Carroll, nor upon the validity of the orders of the Commission therein mentioned, nor upon the propriety of issuing a restraining order therein upon *ex parte* application. Our decision reaches no further than this: That, in attempting to enforce a law and the orders of a commission created by and acting under that law, the relator Burnquist was performing his constitutional duties as governor and when so doing he is not amenable to the jurisdiction of the courts in a proceeding as for contempt.

Let the writ of prohibition issue as prayed.

Prohibition—  
contempt pro-  
ceedings—  
state officers.

## ANNOTATION.

### Power to enjoin officers from enforcing liquor laws.

- I. In general, 1484.
- II. Where irreparable injury to complainant's property rights is caused by enforcement, 1485.
- III. Where injunction will prevent a multiplicity of suits, 1487.

#### *I. In general.*

The power to enjoin the enforcement of liquor laws differs but slightly from the power to enjoin the enforcement of laws generally. As a general rule, the decisions involving liquor laws turn upon principles governing the same questions in respect to other laws. Thus, it will be observed that the decision in the reported case (*STATE EX REL. BURNQUIST V. DISTRICT CT. ante*, 1476) turns upon the question of the power of the courts to punish a governor or his assistants

- IV. Where enforcement will result in loss of complainant's license, 1487.
- V. When enforcement proposed is by arrest of complainant, 1487.
- VI. Where complainant has only moral interest in the result of enforcement, 1492.

for the violation of an injunction against the enforcement of a statute alleged to be unconstitutional. Therefore, there are many cases, no doubt, involving other laws, analogous in principle to those cited herein. The slight difference already mentioned, however, makes the question in some liquor-law cases distinctive. The difference arises out of the fact that the privilege of trading in intoxicating liquor is not a property right. See IV, *infra*. So, when nothing is affected by the enforcement but the complain-

ant's right to sell liquor, he has no standing to enjoin the enforcement. But it has been held that this principle is not applicable when something in addition to a license is involved. *Evansville Brewing Asso. v. Excise Commission* (1915) 225 Fed. 204.

Since equity will not interfere to enjoin the enforcement of any law without first finding some valid reason (such as unconstitutionality or inapplicability of the statute, etc.) why it should not be enforced, the question here annotated resolves itself into one of whether or not an application for an injunction to enjoin the enforcement of the liquor law is an appropriate method of attacking or obtaining a construction of such law. If, even assuming the validity of the objection to the statute, the injunction will not lie, the court need not decide whether or not the law ought to be enforced.

So far as the reported cases go, it may be said generally that an injunction will lie to enjoin the enforcement of a liquor law where its wrongful enforcement will result in injury to complainant's property rights, for which injury he has no adequate remedy at law, so that the injury may be said to be irreparable, or where the interference of equity will prevent a multiplicity of suits. But relief will not be given where complainant has only a moral interest in the result of the enforcement, or where the enforcement will result only in his prosecution criminally, or in the mere loss of his license.

In the following cases it was either held or assumed that the court had jurisdiction, under the circumstances of the case, to issue an injunction against the enforcement of liquor laws or ordinances by officers: *Vance v. W. A. Vandercook Co.* (1897) 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *Tuchman v. Welch* (1890) 42 Fed. 548; *M. Schandler Bottling Co. v. Welch* (1890) 42 Fed. 561; *Minneapolis Brewing Co. v. McGillivray* (1900) 104 Fed. 258; *Busch v. Webb* (1903) 122 Fed. 655; *Union Distilling Co. v. Bettman* (1908) 181 Fed. 419; *Evansville Brewing Asso. v. Excise*

*Commission* (Fed.) supra; *Canon City v. Manning* (1908) 43 Colo. 144, 17 L.R.A. (N.S.) 272, 95 Pac. 537; *Union & Mechanics Club v. Atlanta* (1911) 136 Ga. 721, 71 S. E. 1060; *Wood v. Brooklyn* (1852) 14 Barb. (N. Y.) 425; *Kennedy v. Warner* (1906) 51 Misc. 362, 100 N. Y. Supp. 616; *Hall v. Dunn* (1908) 52 Or. 475, 25 L.R.A. (N.S.) 193, 97 Pac. 811; *McCullough v. Brown* (1894) 41 S. C. 220, 23 L.R.A. 410, 19 S. E. 458.

And in the following cases the courts refused, for various reasons, to enjoin the enforcement of liquor laws or ordinances:

*United States*. — *Suess v. Noble* (1887) 31 Fed. 855; *Hemsley v. Myers* (1891) 45 Fed. 283.

*Alabama*. — *Burnett v. Craig* (1857) 30 Ala. 135, 68 Am. Dec. 115 (substitute beverage); *Ex parte State ex rel. Martin* (1917) — Ala. —, 75 So. 327.

*Georgia*. — *Shellman v. Saxon* (1910) 134 Ga. 29, 27 L.R.A. (N.S.) 452, 67 S. E. 438; *Plumb v. Christie* (1898) 103 Ga. 686, 42 L.R.A. 181, 30 S. E. 759.

*Idaho*. — *Nims v. Gilmore* (1910) 17 Idaho, 609, 107 Pac. 79.

*Illinois*. — *Skakel v. Roche* (1888) 27 Ill. App. 423.

*Louisiana*. — *Marshall v. Marksville* (1906) 116 La. 746, 41 So. 57.

*Missouri*. — *State ex rel. Kenamore v. Wood* (1900) 155 Mo. 425, 48 L.R.A. 596, 56 S. W. 474.

*North Carolina*. — *Paul v. Washington* (1904) 134 N. C. 363, 65 L.R.A. 902, 47 S. E. 793.

*Oklahoma*. — *Pabst Brewing Co. v. Johnston* (1917) — Okla. —, 166 Pac. 123.

*Tennessee*. — *J. W. Kelly & Co. v. Conner* (1909) 122 Tenn. 339, 25 L.R.A. (N.S.) 201, 123 S. W. 622.

*Wisconsin*. — *Joseph Schlitz Brewing Co. v. Superior* (1903) 117 Wis. 297, 93 N. W. 1120.

## *II. Where irreparable injury to complainant's property rights is caused by enforcement.*

Where the wrongful enforcement of a liquor law will cause irreparable injury to complainant's property rights, equity will enjoin such enforcement. *Vance v. W. A. Vandercook Co.* (1897)



170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674 (and see Rose's Notes to this case); *Tuchman v. Welch* (1890) 42 Fed. 548; *Chandler Brewing Co. v. Welch* (1890) 42 Fed. 561; *Minneapolis Brewing Co. v. McGillivray* (1900) 104 Fed. 258; *Busch v. Webb* (1903) 122 Fed. 655, appeal dismissed in (1904) 194 U. S. 640, 48 L. ed. 1162, 24 Sup. Ct. Rep. 857; *Union Distilling Co. v. Bettman* (1908) 181 Fed. 419; *Evansville Brewing Asso. v. Excise Commission* (1915) 225 Fed. 204; *Canon City v. Manning* (1908) 43 Colo. 144, 17 L.R.A. (N.S.) 272, 95 Pac. 537; *Union & Mechanics Club v. Atlanta* (1911) 136 Ga. 721, 71 S. E. 1060; *State ex rel. Kenamore v. Wood* (1899) 155 Mo. 425, 48 L.R.A. 596, 56 S. W. 474 (a converse holding); *Hall v. Dunn* (1908) 52 Or. 475, 25 L.R.A. (N.S.) 193, 97 Pac. 811.

That the Federal courts have jurisdiction to restrain the enforcement of the state liquor laws by levying upon or seizing the liquor, upon the ground that the statute is in conflict with the Constitution of the United States, was assumed and the principle was acted upon in *Vance v. W. A. Vandercook Co. (U. S.) supra*. And the same principle is supported by a direct holding in *Minneapolis Brewing Co. v. McGillivray* (1900) 104 Fed. 258. The proposition seems to have been also assumed in *Busch v. Webb* (1903) 122 Fed. 655, but not acted upon for the reason that the court held the statute to be constitutional in respect to all of the parties who might have had any standing to ask for the injunction. In the same way the assumption is made but not applied in *Evansville Brewing Asso. v. Excise Commission* (1915) 225 Fed. 204.

And, after the Supreme Court has declared unconstitutional any state law that prohibits the sale, in the original package, of intoxicating liquors shipped into the state, and the United States circuit court has, on habeas corpus, discharged persons from prison who were charged with violating such laws, the Federal courts have jurisdiction to restrain by injunction state officers who persist in enforcing such laws, from arresting

and otherwise molesting citizens of the United States who merely sell intoxicating liquor in the original packages, in disregard of the provisions contained in such unconstitutional statutes. *Tuchman v. Welch* (1890) 42 Fed. 548; *M. Schandler Bottling Co. v. Welch* (1890) 42 Fed. 561. But this rule will not be applied when the proposed enforcement is merely by the arrest of complainant, and there will follow no irreparable injury. *Hemsey v. Myers* (1891) 45 Fed. 283. See same case as cited and quoted under *V. infra*.

But in the *McGillivray Case* (Fed.) *supra*, it was also directly held that the court had no such power to enjoin the state officers from commencing criminal prosecutions of the complainant for violations of the unconstitutional statute, while in the *Evansville Brewing Association Case* the court asserts that this principle will not be extended to cases in which property rights will be violated, even though the acts are done under statutes in the nature of criminal statutes. See *V. infra*.

And where the Commissioner of Internal Revenue exceeds his authority in making an order in respect to the labeling of different kinds of commodities produced by distilleries, which order, if executed, will result in great loss to a distiller by reason of labeling a large part of his output with the same label as that used on a cheaper and lower grade article, the distiller is entitled to an injunction to restrain the collector and his assistants from executing the order. *Union Distilling Co. v. Bettman* (1908) 181 Fed. 419.

Where an ordinance regulating the sales of liquor ostensibly gives power to the city to close up club rooms of societies or clubs that violate it, and to exclude the members therefrom, but provides no means whereby there can be a hearing or judicial determination of the question of guilt or innocence, and the city officials threaten to proceed summarily to close the rooms of a club and exclude its members, equity will enjoin them from enforcing the ordinance in any manner, except by some regular form of judicial pro-

cedure. *Canon City v. Manning* (1908) 43 Colo. 144, 17 L.R.A. (N.S.) 272, 95 Pac. 537.

And the court will enjoin the enforcement by the city of an ordinance by closing club rooms of a society and keeping out its members after revoking the license, where it appears that the ordinance requiring it to obtain the license and pay a fee therefor is void, as being beyond the powers of the city. *Union & Mechanics Club v. Atlanta* (1911) 136 Ga. 721, 71 S. E. 1060.

In *State ex rel. Kenamore v. Wood* (1899) 155 Mo. 425, 48 L.R.A. 596, 56 S. W. 474, it was held that the court had no jurisdiction to issue an injunction enjoining the state beer inspector from inspecting the complainant's output of beer and imposing the tax or enforcing the law as to quality of beer, on the allegation that the statute creating his office and defining his duties and powers is unconstitutional, since the facts fail to show either that the enforcement of the law will work irreparable injury to complainant's business, or that he has no adequate remedy at law. It will be observed that this case is in harmony on the law with the others here cited.

And in *M. Schandler Bottling Co. v. Welch* (1890) 42 Fed. 561, *supra*, the court said: "Without stopping here to consider whether this general rule is limited to criminal proceedings already begun in the court of criminal jurisdiction, it is sufficient to the matter in hand to say, as indicated in the quotation above made, that the rule has its exceptions. One of these is where a threatened criminal proceeding is hostile, vexatious, and unwarranted, and involves the wanton destruction of or injury to property interests of the accused; and especially so under circumstances where, if permitted to proceed, the party injured would have no adequate remedy at law for restitution." See V. *infra*, on the "general rule" here under discussion.

### III. Where injunction will prevent a multiplicity of suits.

To prevent a multiplicity of suits, it has been held that equity will en-

join, at the instance of taxpayers, the board of control from establishing a dispensary at a designated place under the Dispensary Act, on the ground that the act is unconstitutional. *McCullough v. Brown* (1894) 41 S. C. 220, 23 L.R.A. 410, 19 S. E. 458.

And see *Joseph Schlitz Brewing Co. v. Superior* (1903) 117 Wis. 297, 93 N. W. 1120, discussed under IV. *infra*.

### IV. Where enforcement will result in loss of complainant's license.

As already stated, courts have not regarded the privilege of dealing in intoxicating liquors as a property right, so, where the effect of the enforcement complained of will merely be the loss of complainant's privilege, or the refusal to renew his license, equity will refuse an injunction, and the court will not determine any question complainant seeks to raise. *Plumb v. Christie* (1898) 103 Ga. 686, 42 L.R.A. 181, 30 S. E. 759; *Nims v. Gilmore* (1910) 17 Idaho, 609, 107 Pac. 79. But see *Kennedy v. Warner and Wood v. Brooklyn* (N. Y.) *infra*.

A citizen who has been doing business under a liquor license has no standing to ask a determination of the constitutionality of the Dispensary Act on a petition for an injunction to restrain the enforcement of the act, on the ground that its enforcement results in the refusal of a new license to him, so the injunction will be refused, there being no property right existing in any person to have a liquor license issued to him. *Plumb v. Christie* (Ga.) *supra*. The question of compelling authorities to grant a license, or to otherwise enforce the liquor laws, is not within the scope of this note.

Likewise, the courts will not interfere with the prosecuting attorney's plan to prosecute the holder of a liquor license if the latter sells liquor after the enactment of a local option statute, upon the allegation that the statute has not been adopted by the voters of the county, since, if the allegation is true, that fact may be pleaded as a defense, so that the complainant has an adequate remedy at law. *Nims v. Gilmore* (1910) 17 Idaho, 609, 107 Pac. 79. And it was

also held that the holder of a liquor license has no property rights by virtue thereof, so that interference with his business by the proposed arrest is no ground for the injunction.

But it has been held that a complaint by a brewing company, alleging that it has a considerable business and a valuable warehouse used in the business, that the city threatens numerous prosecutions, under a void ordinance, of complainant's agents for violations of said ordinance in the conduct of the business, and will thus subject complainant to a multiplicity of suits, compel it to pay large sums in fines, and ruin its business, is sufficient in equity to support an injunction restraining the city from enforcing the ordinance if the court finds that the allegation as to the ordinance being void is correct. *Joseph Schlitz Brewing Co. v. Superior* (1903) 117 Wis. 297, 93 N. W. 1120. In this case, however, the court found that the ordinance was valid, and on that ground alone affirmed a decision refusing the injunction.

But it has been held that an injunction will be issued, where a local option election in favor of the "drys" is void on account of vital defects in the petition, against the state commissioner of excise and the county treasurer, restraining them from enforcing the supposed mandate, to complainant's prejudice, the complainant being the lessor of property upon which liquor was being sold, under a license, by the lessee, who had stipulated in the lease that "if it should be voted during said term (which was five years) that the traffic in liquors should not be carried on," etc., the lease might be terminated. *Kennedy v. Warner* (1906) 51 Misc. 362, 100 N. Y. Supp. 616. This holding appears to be opposed to the weight of authority upon the point, but the question of property rights in a liquor license does not seem to have been raised. It would seem that if the license has no standing, a lessor's rights depending thereon would not be in any better position than a licensee.

And practically the same position is taken in *Wood v. Brooklyn* (1852)

14 Barb. (N. Y.) 425; so perhaps the New York courts have taken a different position in this respect. The court in this case said: "The plaintiff's papers contain a copy of his license, dated on the 21st day of June, 1852, which authorizes him to keep a tavern in the 11th ward of the city of Brooklyn, for one year from its date. For this the law required him to pay, and he no doubt has paid, a compensation to the city, and he has a vested right to the privileges which it confers, so long as it remains in force. One of the privileges for which he has thus paid is to sell liquors to lodgers and travelers on Sunday. He alleges that it is valuable to him, and no doubt it is so. It is not, nor can it with propriety be made, the question, whether the exercise of the privilege is beneficial to the community. The question is as to the legal rights of the plaintiff, and, if they have been invaded, the appropriate remedy. He complains that he is deterred from vending liquors to lodgers and travelers, and they from purchasing them from him, by the ordinance in question, and that he is thereby deprived of what would otherwise be his lawful earnings, which are requisite for the support of his family. These are undoubtedly the natural results from the ordinance in its present form. It is no answer to this to say (as is stated in the affidavits of the mayor and chief of police) that it has not been enforced to prevent innkeepers from selling according to their license. Attempts may be made at any time to enforce it as it reads, and the uncertainty whether it may be thus enforced creates the injury. The terms used were adopted by the common council, and if they comprehend too much, as they certainly do, the remedy is very easy; and if they will not adopt it, they cannot complain if they should be restrained, so that parties whose lawful rights might be invaded pursuant to its provisions may know that they will be protected in the enjoyment of such rights. The damages which might otherwise result to the plaintiff could not be recovered by him, to their full extent, in any

action, for the reason that from their nature they could not be satisfactorily proved; and besides, it is questionable how far the corporation would be responsible, if they are responsible at all, for the consequential damages resulting from an illegal ordinance. The plaintiff complains also that the officers of the corporation, in their attempts to enforce the ordinance, arrest supposed offenders on the Sabbath, and imprison them until the next day, when they are subjected to an immediate trial without allowing them their constitutional privilege of a trial by jury. . . . The other matters forbidden by the ordinance are also prohibited by the laws of the state; and a court of equity ought not to interfere to protect anyone from the consequences that might result from a future violation by him of laws at all events obligatory upon him. It would be granting protection to one who can neither require nor need it, until after he has perpetrated, or resolved to perpetrate, a wrong. But the plaintiff presents a different case when he complains of the interruption of his lawful pursuits. He alleges that the business by which he earns a livelihood for himself and his family is seriously and constantly injured; that he apprehends from the course pursued by the officers of the city, that he may be illegally arrested on a Sunday, while engaged in his lawful pursuits, and confined, without the privilege of procuring bail, until the next day, and then be subjected to a hasty trial, without the benefit of a constitutional privilege, and all under an illegal ordinance. For some of these wrongs the law would afford him adequate redress, but no sufficient compensation could be made for family destitution or disreputable imprisonment."

*V. When enforcement proposed is by arrest of complainant.*

In deciding the question of enjoining the enforcement of liquor laws, it seems to be the policy of the courts to adhere strictly to the rule that equity will not interfere with the enforcement of criminal laws nor check

the activities of the prosecuting officials. So, where the injury inflicted or threatened is merely the arrest and punishment of the complainant, equity will refuse to interfere and will not decide the questions sought to be raised, leaving the complainant free to raise all such questions as the unconstitutionality of the statute, or its applicability, construction, etc., as a defense at his trial. It has been so held in the following cases: *Suess v. Noble* (1887) 31 Fed. 855; *Hemsley v. Myers* (1891) 45 Fed. 283; *Burnett v. Craig* (1857) 30 Ala. 135, 68 Am. Dec. 115; *Ex parte State ex rel. Martin* (1917) — Ala. —, 75 So. 327; *Shellman v. Saxon* (1910) 134 Ga. 29, 27 L.R.A.(N.S.) 452, 67 S. E. 438 (substitute beverage); *Nims v. Gilmore* (1910) 17 Idaho, 609, 107 Pac. 79; *Skakel v. Roche* (1888) 27 Ill. App. 423; *State ex rel. Kenamore v. Wood* (1899) 155 Mo. 425, 48 L.R.A. 596, 56 S. W. 474; *J. W. Kelly & Co. v. Conner* (1909) 122 Tenn. 339, 25 L.R.A.(N.S.) 201, 123 S. W. 622. But see *Wood v. Brooklyn and Joseph Schlitz Brewing Co. v. Superior*, discussed IV. *supra*.

Equity courts have no jurisdiction to enjoin the seizure of quantities of a beverage and the arrest of the owners or sellers thereof by officers or law-enforcement agencies of the state, acting under authority of the penal prohibitory statute of the state, upon the allegation that the beverage is not of a grade that is prohibited by the statute, and if they attempt to do so the supreme court will issue the writ of prohibition dissolving the injunction. *Ex parte State ex rel. Martin* (1917) — Ala. —, 75 So. 327. The ground for the holding is well stated by the court as follows: "The original bill's theory and purpose was to restrain the diligence and activity of the sheriff and his deputies in Jefferson county in respect of the enforcement of the state's penal and related laws expressing the state's authority and power to promote temperance and to suppress the evils of intemperance. The case made by the original bill falls squarely within the principle and doctrine of the following of our de-

cisions: *Brown v. Birmingham* (1903) 140 Ala. 590, 37 So. 173; *Old Dominion Teleg. Co. v. Powers* (1903) 140 Ala. 220, 37 So. 195, 1 Ann. Cas. 119; *Postal Teleg.-Cable Co. v. Montgomery* (1915) 193 Ala. 234, 69 So. 428, Ann. Cas. 1918B, 554; *Pike County Dispensary v. Brundidge* (1900) 130 Ala. 193, 30 So. 451,—which is that, since the jurisdiction of courts of equity is exclusively civil, they are without power to interpose injunctive interference with the agents and instrumentalities of the state or of a municipality in prosecutions for penal offenses, or in their efforts to enforce the criminal laws. The property right sought to be asserted, and protection of which is claimed, in the original bill, does not exempt the complainant's cause from the doctrine of the decisions cited, or bring his cause within the exception to their rule, recognized in the cases noted in *Mobile v. Orr* (1913) 181 Ala. 308, 318, 45 L.R.A.(N.S.) 575, 61 So. 920. The fact, if so, that complainant has brought into the state or has in his possession a beverage that, though in fact not prohibited, will subject or has subjected him to arrest and his beverage to seizure, cannot avail to invest the court of equity with jurisdiction in the premises. The issue whether the beverage is within the prohibitory laws can be fully determined by the court in which the prosecution and the proceedings on seizure are heard. The state has a manifest interest in and concern for the observance and enforcement of its criminal laws, and in the freedom of its officers to perform their duty in the detection of offenses and offenders against its laws. To restrain the sheriff and his deputies in that regard impinges upon—brings into question—the powers of the state itself. *Fitts v. McGhee* (1899) 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.”

The court, in *Hemsley v. Myers* (1891) 45 Fed. 283, *supra*, said: “The cases at bar present in a forcible light the inability of a court of equity to deal with criminal prosecutions by injunction or otherwise, and the utter confusion and failure of justice that

would inevitably result from the exercise of such jurisdiction. The answers and affidavits filed in some of these cases deny that the plaintiffs' sales were limited to original packages, and aver that they sold otherwise than in original packages, and on the Lord's day, and to minors, and that the business was conducted in such a manner as to make it a nuisance. If the court should assume jurisdiction of the cases, the chancellor, sitting without a jury, would have to hear and determine all these issues. And for what and with what result? If the chancellor should find the plaintiffs had violated the state law, as alleged by the defendants, he would be powerless to punish them for the offense. If he found the averments in the bill to be true, and granted a perpetual injunction in the terms of the temporary injunction in this case, the court could punish the defendants for a violation of the injunction, but it would have no power to punish the plaintiffs for afterwards selling in violation of the state law. Saloons are the source of a large percentage of the lawlessness and crime in the land, and their proprietors and managers are not particularly distinguished for their strict observance of the laws regulating or restricting the business. Suppose an original package vendor, after securing a perpetual injunction, as prayed in this case, sells liquor not in original packages, or otherwise violates the state law, what are the officers of the state court, whose duty it is to prosecute in such cases, to do? Must they apply to this court for leave to prosecute before commencing proceedings in the state court? Undoubtedly, if they should proceed without the previous leave of the court, the plaintiffs would charge them with a violation of the injunction, and ask the court to punish them for contempt; and the chancellor would again be required to try the same issues of fact, with a view to determine whether the state officers, including the judges of the state courts, should be punished for contempt, or whether such officers should graciously have leave to prosecute the plaintiffs for a viola-

tion of the criminal laws of the state. It is obvious that, if this court once assumed this jurisdiction, it would speedily draw to itself the supervision and control of all the criminal prosecutions in the state growing out of the traffic in liquor; for it is quite certain, if the court once enters upon this business, that every vendor of liquor in the state will claim to be a dealer in original packages only, and whenever a prosecution is commenced against him he will at once seek the shelter and protection of an injunction from this court. And the extraordinary spectacle would be presented of a United States court of chancery having its whole time taken up in keeping watch and ward over all the saloons in the state, protecting the proprietors and their clerks from prosecutions, until it should be first shown by the state to the satisfaction of the chancellor that the state law had been violated, when the chancellor would make an order granting the state leave to prosecute for that violation."

And in *J. W. Kelly & Co. v. Conner* (1909) 122 Tenn. 339, 25 L.R.A. (N.S.) 201, 123 S. W. 622, the court, in refusing an injunction to enjoin threatened prosecutions for violating laws forbidding the sale of intoxicating liquor, which were alleged to be inapplicable and invalid, even though it was alleged that refusal to interfere would permit a multiplicity of prosecutions which would greatly injure and ultimately destroy valuable property rights of complainants, said: "We are further of the opinion that courts of equity have no jurisdiction to enjoin threatened criminal proceedings under a statute enacted by a state in the exercise of the police power, in relation to which the legislature has complete jurisdiction, although it be charged that the statute is invalid and that a multiplicity of actions thereunder will injure and destroy civil and property rights of the complainants, and that the damages resulting will be irreparable, when the complainant's defense thereto, in a court having jurisdiction of the offense, is adequate and unembarrassed;

and we hold that the chancery courts of Tennessee, neither under their inherent nor statutory jurisdiction, have any such power or jurisdiction, whatever may be the exceptions to the general rule in the courts of equity of other jurisdictions." But see quotation from *M. Schandler Bottling Co. v. Welch* (1890) 42 Fed. 561, under II. *supra*, upon the question of exceptions to this rule.

Likewise in *Skakel v. Roche* (1888) 27 Ill. App. 423, *supra*, the court said: "Appellant had no license for the sale of liquor, and because he persisted in selling intoxicating liquors without such license, he was repeatedly arrested by the police and subjected to fine by the police magistrate. The general rule is well settled, and has been repeatedly announced in this state, that a court of equity will not entertain a bill to restrain prosecutions under a municipal ordinance on the ground of the alleged illegality of such ordinance. The validity of an ordinance of the character involved here can only be tested by appeal from a fine imposed under it. Courts of chancery have no jurisdiction to enjoin criminal or quasi criminal prosecutions. Counsel for appellant admit this general rule, but contend that there are exceptions to it, and insist most earnestly that the facts charged in the bill take this case out of such rule and entitle appellant to relief sought. We have carefully examined the facts as shown by the record, and have considered the authorities cited by counsel in support of their contention, and we are of opinion that no case has been made out which gives appellant a standing in a court of equity. We cannot afford the time which would necessarily be taken to discuss fully the cases cited by counsel, and to distinguish those on which they rely from the case here presented."

In *Burnett v. Craig* (1857) 30 Ala. 135, 68 Am. Dec. 115, the court, in dismissing a bill for an injunction against the enforcement of an ordinance by city authorities, by fines and imprisonment of the complainant, who was retailing liquors without obtaining the license required by the

terms of the ordinance, said: "We have not been able to find any principle or adjudged case which justifies an injunction to stay a prosecution, either criminal or quasi criminal, or to restrain a trespass to the person or personal property. We think such a precedent would be an alarming stretch of equity jurisdiction. In considering this case, simply on the equity of the bill, we have necessarily regarded its averments as true. It is not intended by this to intimate an opinion on the validity or invalidity of the ordinance, or of the fines imposed on the appellant. They will be considered when properly presented."

And in *Shellman v. Saxon* (1910) 134 Ga. 29, 27 L.R.A.(N.S.) 452, 67 S. E. 438, *supra*, where the attempt was being made to enforce, by criminal prosecution, an ordinance forbidding the sale of any "imitation of or substitute for beer, ale, wine, whisky or other spirituous or malt liquors which contains more than  $\frac{1}{4}$  of 1 per cent of alcohol," the court, on refusing the injunction, said: "We need not enter into a discussion of whether the ordinances adopted by the municipal authorities were invalid for want of power to enact them, or because they were unreasonable. Under former rulings of this court, and under the facts of this case, we are compelled to differ with our learned brother of the circuit bench as to the mode of testing those questions. The general rule is that a court of equity has no jurisdiction to enjoin criminal proceedings; and, in pursuance of this general rule, it has been said that 'chancery takes no part in the administration of criminal law. It neither aids the criminal courts in the exercise of jurisdiction, nor restrains nor obstructs them.' *Phillips v. Stone Mountain* (1878) 61 Ga. 386, 388; *Pope v. Savannah* (1884) 74 Ga. 365. This announcement has been codified in § 4914 of the Civil Code of 1895. The rule that a court of equity will not generally enjoin criminal

prosecutions has also been commonly applied to proceedings to punish for violations of municipal ordinances which are quasi criminal in their nature. In some decisions the general rule is expressed broadly, and without noting any exception, that courts of equity will not enjoin or prevent the institution of prosecutions for violations of penal ordinances, nor inquire into the validity or reasonableness of ordinances making punishable the acts for the doing of which prosecutions are threatened. But while this is the rule, there are cases where equity will protect property or franchises against invasion by municipalities, although it is sought to enforce or accomplish such invasion by using criminal process. In cases where courts of equity have granted injunctions against prosecutions under municipal ordinances, it will usually be found that this was ancillary to the exercise of some acknowledged equity jurisdiction for the protection of property or property rights against irreparable damage, resting upon grounds other than the mere harassment arising from prosecutions, though repeated."

*VI. Where complainant has only moral interest in the result of enforcement.*

In *Marshall v. Marksville* (1906) 116 La. 746, 41 So. 57, it was held that "citizens and taxpayers" have no standing in equity to enjoin the public authorities from issuing licenses to sell liquor, and to annul an ordinance of the town council fixing the license fees for the sale of liquor, on the allegation that the election, which was carried by the "wets," was held too long before, and that the sale of liquor is illegal, the right of such persons to maintain the suit being challenged upon the ground that they had no interest in the matter, such interest as was shown being only a moral interest as members of the public in general.

J. W. M.

R. C. DUNLAP, Admr., etc., of Susan C. Hart, Deceased, et al., Appts.,  
v.

I. S. HART et al., Respts.

*Missouri Supreme Court (Division No. 2) — June 3, 1918.*

(274 Mo. 600, 204 S. W. 525.)

**Will — sale of property — effect — purchase of other property.**

1. The sale by testator of lands specifically described in the will operates as an ademption of the will as to such property, and it will not, in the absence of a residuary clause, pass other lands subsequently purchased with the proceeds of the sale.

[See note on this question beginning on page 1497.]

**Appeal — objections not raised below — improper party.**

2. The objection that an administrator cannot, for want of interest, maintain an action to determine interests in real estate alleged to have passed under the will of testator, can-

not be raised for the first time on appeal.

[See 2 R. C. L. 85, 86.]

**Evidence — presumption as to intestacy.**

3. The presumption is that a testator does not intend to die intestate as to any part of his property.

APPEAL by plaintiffs from a decree of the Circuit Court for Buchanan County (Mayer, J.) in favor of defendants, in a suit to determine interest in two certain tracts of land. *Affirmed.*

Statement by Faris, J.:

This is a suit to determine interest in two certain tracts of land situate in Buchanan county. On the trial, the court found in favor of defendants, and adjudged them to be the owners in fee of the disputed lands. Plaintiffs thereupon appealed.

Plaintiff R. C. Dunlap is the administrator, cum testamento annexo, of one Susan C. Hart, deceased; the other plaintiffs are the residuary legatees of said Susan C. Hart. Defendants are the heirs at law of one William B. Hart, deceased, who was the husband of the said Susan. William B. Hart executed his will in 1891, and died in 1906. By the terms of this will he gave all of his personal property and two specifically described parcels of real property to his wife, Susan C. Hart. But sometime during the fifteen years which elapsed between the execution of his will and his death, he sold and conveyed the land which the will specifically

describes, and subsequently purchased the two tracts of land now here in controversy. It is not proved but merely to be inferred as probable, that the lands in dispute were purchased with the proceeds of the lands described in the will. The whole controversy turns, therefore, upon the terms of, and the effect to be given to, the will of William B. Hart. This will is brief, and barring the formal parts, signatures, and attestation of witnesses, all of which are conventional, it reads thus:

"1. I give and bequeath to my beloved wife, Susan C. Hart, all of my real estate in fee simple and all appurtenances thereto belonging and described as follows: Ninety-six and 22-100 acres of land in the northeast quarter of section No. three (3) in township fifty-five (55), of range thirty-six (36); also forty-three (43) acres of land at the southwest corner of the southeast quarter of section No. thirty-four (34), of township No. fifty-six



(56), of range No. thirty-six (36), all of said land being in Buchanan county and state of Missouri.

"2. I also give and bequeath to my beloved wife, Susan C. Hart, all of my personal property—household and kitchen furniture, beds and bedding, money, notes, and all of my personal effects of every kind and description.

"3. I do hereby appoint my said beloved wife, Susan C. Hart, the executrix of this, my last will and testament, and I hereby direct that she shall not be required to give bond by the probate court."

Susan C. Hart died in 1913, testate, and by the terms of her will she devised all of her personal and real property (which plaintiffs contend includes the lands here in dispute) to the plaintiffs, except Dunlap. She named as executor of her will one James R. Miller, and provided that he should sell all of her real and personal property and divide the proceeds thereof as elsewhere in her will provided. Prior to the death of Susan C. Hart said Miller departed this life, and plaintiff R. C. Dunlap was, by the probate court, duly appointed administrator cum testamento annexo of her estate.

Messrs. Culver & Phillip for appellants.

Mr. James W. Boyd for respondents.

Faris, J., delivered the opinion of the court:

The single question in the case, and that which is decisive of it, is whether the will of William B. Hart had the effect to devise to Susan C. Hart, his wife, the real estate which he acquired after he had sold all of the real estate which he devised to her by specific description. If it did, the judgment nisi is erroneous and must be reversed.

On the threshold, we may say in passing, some vague point is made by respondents that Dunlap as administrator has no standing in court as a plaintiff, for that he is not a real party in interest; no part of the title here sought to be determined being, it is averred, in him.

We need not concern ourselves about this contention, since if Dunlap is not a necessary party this question ought to have been raised by demurrer, or specifically by answer. It was not raised by demurrer, or anywhere else in the pleadings, and so defendants cannot be heard now to raise it here for the first time, even should we find ourselves compelled for another reason to reverse the case.

Did the language which we quote from the will of William B. Hart pass to his wife by devise, the lands of this testator which he subsequently acquired after the sale of the lands specifically described and devised to her in the will? We do not think so. There can be no doubt but that the will of William B. Hart (hereinafter called, for the sake of brevity, the testator) devised specific lands to his wife. We quote the whole pertinent parts of the will, and from this will the fact of specificness of devise conclusively appears. We think there was an ademption of the devise when the testator, before his death, conveyed away the land devised. From which it follows that the subsequently acquired real estate of testator passed by inheritance to his heirs.

The rule at common law (pursuant to the Statute of 32 Hen. VIII. however, rather than to the common law strictly speaking) was that a will spoke as of its own date, and not as of the date of the death of the testator, and therefore after-acquired lands could not even be the subject of a devise by will, whatever might be the intent of the testator touching such lands. *Re Miller*, 128 Iowa, loc. cit. 616, 105 N. W. 105; *Liggat v. Hart*, 23 Mo. loc. cit. 134. This harsh rule has been modified in England by the Statute of 1 Vict. chap. 26, and by statutes in most of the states of the American Union. Absent an examination into the legal history of our own enactments on this point, it is

Appeal—  
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improper party.

Will—sale of  
property—effect  
—purchase of  
other property.

a little difficult to appreciate that we too have changed this rule. The statute in this state by which a testator was given the power to devise after-acquired real estate was passed in 1807. Laws of the Territory of Louisiana 1807, chap. 39, § 18, p. 131. It changed the English rule and gave the power of disposition of after-acquired lands by providing in substance that any person of full age could devise by will all real estate then owned, or which he might have at his death. In the revision of 1835, seemingly in an effort to retrench and reform by the excision of words deemed surplusage, the words, "which he or she hath, or at the time of his or her death shall have," were omitted, and the statute was made to read substantially as it now appears (cf. § 1, p. 617, Rev. Stat. 1835; § 535, Rev. Stat. 1909), but conferring the power upon the testator to devise by last will "all his estate, real, personal and mixed, and all interest therein." The Act of July 4, 1807, first above referred to, further provided that the judges of all orphan's courts, and all others concerned in the "execution of any last will," should have due regard to the direction of the will and to the true intent and meaning of the testator in all matters brought before them. Terr. Laws (Mo.) § 48, p. 137. In the revision of 1825 this language was changed to read, "all courts," and so, in substance, has the command to construe a will by the "four corners" ever since remained. Cf. § 24, p. 796, Rev. Stat. 1825; § 583, Rev. Stat. 1909. While § 538, Rev. Stat. 1909, provides the manner in which a will may be revoked, we are of opinion that the latter section refers to revocation in toto, though it forbids, as well, revocation by interlineation (absent republication and reattestation), or by word of mouth. We do not think that any statute in this state has had the effect to change the rule at common law governing revocation by a sale of the devised property. Cozzens v. Jamison, 12 Mo. App.

452. This rule was that a sale of all of the property devised operates as a revocation in toto (Baacke v. Baacke, 50 Neb. 21, 69 N. W. 303; 30 Am. & Eng. Enc. Law, 652; Ametrano v. Downs, 170 N. Y. 388, 58 L.R.A. 719, 88 Am. St. Rep. 671, 63 N. E. 340; Brown v. Thorndike, 15 Pick. 407; Hawes v. Humphrey, 9 Pick. 361, 20 Am. Dec. 481; Worrell v. Gill, 46 Ga. 482; Webster v. Webster, 105 Mass. 542), and a sale of a part of the devised property, operated as a revocation pro tanto (Moore v. Spier, 80 Ala. 129; Warren v. Taylor, 56 Iowa, 182, 9 N. W. 128; Forney's Estate, 161 Pa. 209, 28 Atl. 1086; Emery v. Union Soc. 79 Me. 334, 9 Atl. 891; Graham v. Burch, 47 Minn. 171, 28 Am. St. Rep. 339, 49 N. W. 697; Wells v. Wells, 35 Miss. 638; Re Miller, 128 Iowa, 612, 105 N. W. 105).

Strictly speaking, and on the theory that the will, perforce the statute, speaks from the death of the testator, it is obviously not entirely accurate to speak of a failure of the will to pass specifically devised property, because such property has been theretofore disposed of, as a revocation of the will. But since such devise fails because of the fact that when the will becomes effective the testator had no property within the terms of the gift, the disposal of the property prior to death operated as a revocation in toto, or pro tanto, according as the whole or only a part of the property was disposed of by the testator before his death. The failure of the devise by a sale is in the nature of an ademption of the devise, which ademption, if it shall, by a sale or disposal, extend to all the property of the testator, obviously operates as a revocation. In the case of Ametrano v. Downs, 170 N. Y. 388, 58 L.R.A. 719, 88 Am. St. Rep. 671, 63 N. E. 340, it was said: "If a testatrix devises real estate and sells the same before the will takes effect, the proceeds of the sale will become personal estate, and no court can substitute the money received by the testatrix for the land devised."

Speaking of this latter point and to others cognate, the supreme court of Iowa in the case *Re Miller*, 128 Iowa, 617, 105 N. W. 106, *supra*, said: "The conveyance of the subject of the devise operates as a revocation of the will to the extent of the property thus disposed of. *Warren v. Taylor*, 56 Iowa, 182, 9 N. W. 128. See also cases cited in 30 Am. & Eng. Enc. Law, 2d ed. 622, 623. On the theory, however, that the will speaks from the death of the testator and with reference to his estate as it may then exist, it is perhaps not strictly accurate to speak of the result as a 'revocation,' but the devise fails because, when the will becomes effective, the testator has no property within the terms of the gift. *Warren v. Taylor*, *supra*; *McNaughton v. McNaughton*, 34 N. Y. 204. It is equally well settled that upon sale of devised real property by the testator the proceeds of such sale of which he may die possessed will not be substituted for the property itself, unless a direction so to do is found in the will. *Adams v. Winne*, 7 Paige, 97; *Gilbert v. Gilbert*, 9 Barb. 532."

But it is ably argued that the well-settled rule (enjoined upon us by the statute itself) of construing a will according to the true intent of the testator compels us to hold that the subsequently acquired lands passed by the will in lieu of those specifically devised, but sold by the testator before his death. We do not think the statute nor the rule stated and bottomed on the statute requires us to go so far. If such was in fact the intention of the testator, we agree that the common law has been so far changed as to have permitted the use of a residuary clause by the testator, explicitly declaring that all his property, without description or reservation, should pass by the will; but, as we have seen, there is no such clause. And so the difficulty we meet upon this contention is that the will made does not express the intent urged on us.

In a case similar, if not on all

fours with the instant one, it was held by the supreme judicial court of Maine that, where a testator devises real estate and subsequently conveys it to a person other than the devisee, the devise thereby becomes impliedly revoked, and in such case the proceeds of the sale, absent a specific provision in the will so declaring, do not go to that devisee, but to the residuary legatee. *Emery v. Union Soc.* 79 Me. 334, 9 Atl. 891. And the above case was so ruled, although the rule of construction according to the true intent of the testator was fully recognized as being in force in Maine.

This precise point is a matter of first impression in this court, so far as our own researches or those of counsel in the case have enlightened us. For they have cited us no local cases in point, nor have we been able to find any precisely apposite. Discussing, however, what we consider the principles involved, it was held by the St. Louis court of appeals that the alienation of devised property by the testator in his lifetime renders the will pro tanto void, notwithstanding our statute providing the methods of revoking wills. *Cozzens v. Jamison*, 12 Mo. App. 452. In this case the learned St. Louis court of appeals, at page 457, said: "The doctrine runs through all the cases that the devisor must be seised of the same estate at the time of his death that he was seised of when he made his will, to make it a good devise. *Ballard v. Carter*, 5 Pick. 116, 16 Am. Dec. 377. If there is a subsequent conveyance of the whole estate, the testamentary disposition is defeated wholly. If the conveyance be of a part only, the operation is pro tanto. *Toller, Exrs. & Admsrs.* 19."

The case of *Durboraw v. Durboraw*, 67 Kan. 139, 72 Pac. 566, is urged as being precisely in point. We cannot agree to this suggestion. There was in that case what we regard as a fairly plain residuary clause. In fact, the case rode off upon this very point. For the supreme court of Kansas in effect

ruled that all of the property passed by what was tantamount to a residuary clause. Hence in our view the Durboraw Case has no compelling, or even appealing, relevancy to the vexing question confronting us in the case at bar.

The presumption that a testator does not intend to die intestate

**Evidence—** as to any part of  
**presumption as** his property is also  
**to intestacy.** urged as a reason

why we should hold that the after-acquired property passed by this will. We recognize and concede the rule urged. *McMahan v. Hubbard*, 217 Mo. loc. cit. 637, 118 S. W. 481. But we think it has no application to the condition presented. The proper function of the presumption invoked is to throw light upon the intent of the testator, when that intent is dark and it is sought to ascertain it from the language used in the will. Such a presumption performs but a negligible office when invoked to illuminate a condition arising long after the will was written, and which originated wholly dehors the words of the will, and years subsequent to the execution thereof. In such case it would seem that, since the thing done was tantamount to and operated as a revocation pro tanto, the latter intention is as easily to be inferred from

the facts as the former. That the presumption arises in an effort to construe the language used in the will in the light of the circumstances existing when the will was written, seems obvious from the reason given for invoking it at all; for it is said that the presumption is used in order "that the instrument may not perish, and the manifest intent of the parties be not defeated by the palpable error of the scrivener." *Ibid.* Here there is no suggestion that the scrivener did not write exactly what the testator intended should be written. If the conditions had not changed years afterwards, the language of the will was in all things clear and sufficient. The difficulty is not that the language does not express the intent which was in the mind of the testator when he made the will; the difficulty lies in the fact that years afterwards the testator changed his mind. The language of a will is to be construed in the light of the circumstances existing when the will is written; the will operates, however, upon the property existing when death occurs.

We conclude that the learned trial court took the proper view of the case, and that the judgment ought to be affirmed. Let it be so ordered.

All concur.

## ANNOTATION.

### Property purchased with proceeds of sale of subject of devise or bequest as passing thereunder.

The present annotation is confined strictly to the subject stated in the title, and consequently does not include cases where there is a mere change in, or alteration of, the subject of the devise or bequest, as distinguished from a substitution of a new thing purchased with the proceeds of the sale of the property specifically devised or bequeathed.

It is, undoubtedly, the general rule, not only that a specific legacy is, in effect, revoked by a sale of the subject-matter by the testator during his

lifetime, but that such a legacy is adeemed by a material or radical alteration or change in, or substitution of, something else in place of the subject-matter thereof. Consequently, when a sale of the subject of the devise or bequest is made, and other property is purchased with the proceeds, the question arises whether or not the property so purchased may be substituted for that sold so as to pass under the specific devise or bequest in the will. Upon this question there is practically a unanimity of opinion

to the effect that the property into which the proceeds have been converted cannot be substituted, and, therefore, that the devise or bequest fails. The following cases lay down this rule:

**United States.**—*Georgia Infirmary v. Jones* (1889) 37 Fed. 750, appeal dismissed in (1893) 149 U. S. 774, 37 L. ed. 966, 13 Sup. Ct. Rep. 1047.

**Georgia.**—*Lang v. Vaughn* (1911) 137 Ga. 671, 40 L.R.A.(N.S.) 542, 74 S. E. 270, Ann. Cas. 1913B, 52.

**Illinois.**—*Updike v. Tompkins* (1881) 100 Ill. 406 (dictum).

**Maine.**—*Tolman v. Tolman* (1893) 85 Me. 317, 27 Atl. 184.

**Maryland.**—*Gardner v. McNeal* (1911) 117 Md. 27, 40 L.R.A.(N.S.) 553, 82 Atl. 988, Ann. Cas. 1914A, 119.

**Massachusetts.**—See *Unitarian Soc. v. Tufts* (1890) 151 Mass. 76, 7 L.R.A. 390, 23 N. E. 1006.

**Missouri.**—*DUNLAP v. HART* (reported herewith) ante, 1493.

**New York.**—*Hosea v. Skinner* (1900) 32 Misc. 653, 67 N. Y. Supp. 527.

**Tennessee.**—*Tipton v. Tipton* (1860) 1 Coldw. 252.

**Virginia.**—*May v. Sherrard* (1913) 115 Va. 617, 79 S. E. 1026, Ann. Cas. 1915B, 1131.

**England.**—*Pattison v. Pattison* (1832) 1 Myl. & K. 12, 39 Eng. Reprint, 585, 2 L. J. Ch. N. S. 15; *Gardner v. Hatton* (1833) 6 Sim. 93, 58 Eng. Reprint, 530; *Harrison v. Jackson* (1877) L. R. 7 Ch. Div. 339, 47 L. J. Ch. N. S. 142; *Macdonald v. Irvine* (1878) L. R. 8 Ch. Div. 104, 47 L. J. Ch. N. S. 494, 38 L. T. N. S. 155, 26 Week. Rep. 381; *Re Freer* (1882) L. R. 22 Ch. Div. 622, 52 L. J. Ch. N. S. 301, 31 Week. Rep. 426.

**Ireland.**—*Holmes v. Langley* [1913] 1 Ir. R. 232.

The cases generally treat the question as one of ademption, and apply the rule that the sale of the subject-matter adeems the devise or bequest so that there is nothing for it to work upon, notwithstanding other property has been purchased with the proceeds, which, therefore, can be traced.

For instance, in the reported case (*DUNLAP v. HART*, ante, 1493) the

court spoke of the sale of the specifically devised property as an ademption, which prevented the passing under the devise of property purchased with the proceeds.

And in *May v. Sherrard* (1913) 115 Va. 617, 79 S. E. 1026, Ann. Cas. 1915B, 1131, where a testator adeemed a specific legacy of a certain house and lot by selling the same, it was held that the devisee could not take other real estate in which the proceeds were in part invested, even though the testator, by a subsequent codicil, stated that the house and lot had been sold and a portion of the proceeds invested in other houses and lots. The court said that ademption depends upon a rule of law, and not upon the intention of the testator.

Nor can a mortgage, in which the proceeds of a mortgage which had been specifically bequeathed were invested by testator's agent in his lifetime, be taken in lieu of the bequeathed mortgage, since the bequest in such a case is adeemed. *Gardner v. Hatton* (1833) 6 Sim. 93, 58 Eng. Reprint, 530.

And it has been held that where a testator purchased corporate bonds with the proceeds of stock which had been specifically bequeathed and later sold by him, the bonds could not be substituted so as to pass under the legacy. *Hosea v. Skinner* (1900) 32 Misc. 653, 67 N. Y. Supp. 527.

So, in *Holmes v. Langley* [1913] 1 Ir. R. 232, it was held that a specific bequest of certain bonds had been adeemed by their sale and the investment of the proceeds in consols, and that, as the specific property appointed had ceased to exist, there was nothing upon which the bequest could operate, the court adhering to and applying the general rule that a material change in the character of property specifically bequeathed or devised works an ademption. And again, in *Macdonald v. Irvine* (1878) L. R. 8 Ch. Div. (Eng.) 101, 47 L. J. Ch. N. S. 494, 38 L. T. N. S. 155, 26 Week. Rep. 381, it was held that bonds purchased with the proceeds of the sale of bonds which had been specifically bequeathed could not be sub-

stituted therefor, but went into the residue.

And in *Harrison v. Jackson* (1877) L. R. 7 Ch. Div. (Eng.) 339, 47 L. J. Ch. N. S. 142, where corporate stocks were paid off during the testator's lifetime, and the proceeds reinvested, with his sanction, in other securities, it was held that the latter could not be taken under the legacy in lieu of the stocks specifically bequeathed; and this, notwithstanding such result might defeat the testator's intention.

Likewise, in *Gardner v. McNeal* (1911) 117 Md. 27, 40 L.R.A.(N.S.) 553, 82 Atl. 988, Ann. Cas. 1914A, 119, it was held that a bequest of corporate stock was adeemed by its sale by testator's agent, whose act was ratified, and the investment of the proceeds in other stock, and that the new stock could not be substituted for the former to answer the bequest.

And it has been held that where corporate stock, which has been specifically bequeathed, is sold under an order in lunacy, and the proceeds reinvested in other securities, the latter do not pass under the legacy, even though the court, in directing the sale, ordered that the proceeds be earmarked. *Re Freer* (1882) L. R. 22 Ch. Div. (Eng.) 622, 52 L. J. Ch. N. S. 301, 31 Week. Rep. 426. But, in connection with this case, see *Re Vuille* [1918] 1 Ir. R. 6, in which, as set out in *Mews' Ann. Dig.* (1918) col. 410, and *Butterworths' Ann. Dig.* (1918) col. 594, it was held that, where a testatrix, a partner in a school, bequeathed "my share of the furniture and good will in the F. school, which amount to £600," and thereafter, under an order in lunacy, the continuing partners bought such share for £600, which was invested in consols, it was unnecessary to decide whether the order in lunacy worked an ademption of the legacy, since, as the bequest was of an ascertained sum of £600, the legatee was entitled to the consols in which that amount had been invested.

In *Pattison v. Pattison* (1832) 1 Myl. & K. 12, 39 Eng. Reprint, 585, 2 L. J. Ch. N. S. 15, where testator specifically bequeathed certain "long an-

nuities," but afterwards sold the same, and with the produce purchased new annuities having a slightly different time of maturity, it was held that the legacy was adeemed, because the specific thing bequeathed did not exist at the testator's death. In this case it also appeared that, subsequent to the purchase of the new annuities, the testator, by a codicil, in terms "confirmed" his former will, but the court said that there could be no relief upon the ground of mistaken description.

In *Tipton v. Tipton* (1860) 1 Coldw. (Tenn.) 252, where testator specifically bequeathed a certain note, but later sold the same and took the note of the purchaser in payment, it was held that the legacy was extinguished, since "nothing" remained to which the words of the will could apply. And in *Tolman v. Tolman* (1893) 85 Me. 317, 27 Atl. 184, where notes secured by a mortgage were specifically bequeathed, and later surrendered, and a reconveyance taken, after which the land was again sold to another by the testator, and notes taken which remained unpaid when he died, it was held that the legacy was adeemed, and that the new notes could not be substituted so as to pass under the bequest.

In *Georgia Infirmary v. Jones* (1889) 37 Fed. 750, appeal dismissed in (1893) 149 U. S. 774, 37 L. ed. 966, 13 Sup. Ct. Rep. 1047, it was held that securities purchased with the proceeds of certain claims which had been specifically bequeathed, but had been collected, could not pass, although the purchased securities were sufficient to have paid the legacy; since it must be regarded as adeemed by the collection.

In *Georgia*, under statutes providing that a legacy is adeemed or destroyed "when the testator conveys to another the specific property bequeathed, and does not afterwards become possessed of the same," but that "if the testator exchanges the property bequeathed for other of the like character, or merely changes the investment of a fund bequeathed, the law deems the intention to be to sub-

stitute the one for the other," in which case the legacy shall not fail, it has been held that an absolute sale of land devised constituted an ademption of the devise, and that the personality in which the testator invested the proceeds did not pass to the legatee, there being nothing in the will to show a contrary intent. *Lang v. Vaughn* (1911) 137 Ga. 671, 40 L.R.A.(N.S.) 542, 74 S. E. 270, Ann. Cas. 1913B, 52.

In the reported case (*DUNLAP v. HAET*, ante, 1493), the court also discussed the question under consideration from the viewpoint of revocation, holding that a specific devise of real

estate does not pass to the devisee other realty purchased by the testator after selling the devised property, since the sale operated as a revocation of the specific devise. However, the court said that it was not "entirely accurate" to treat the question as one of revocation. And see *May v. Sherrard* (1913) 115 Va. 617, 79 S. E. 1026, Ann. Cas. 1915B, 1131 (set out supra), wherein the court said that if the gift in question be treated as a devise of real estate it was "revoked" by the alienation thereof by the testator, but that if it be regarded as a specific bequest or legacy it was adeemed. G. J. C.

## STATE OF SOUTH CAROLINA

v.

R. L. QUINN et al., Appts.

*South Carolina Supreme Court — October 8, 1918.*

(— S. C. —, 97 S. E. 62.)

### Seizure — absence of warrant — effect.

1. A Constitution securing against unreasonable searches and seizures and providing that no warrant shall issue but upon probable cause, particularly describing the place to be searched and the person or thing to be seized, does not prohibit a seizure without warrant, where there is no need of a search, but the contraband subject-matter is fully disclosed and open to the eye and hand.

[See note on this question beginning on page 1514.]

### Search — seizing liquor in plain view.

2. No unconstitutional search occurs where a police officer, on approaching the side of an automobile in which some of the occupants are drunk, sees bottles containing whisky in the car, and seizes the liquor and arrests the occupants of the car, although he has no warrant for such procedure.

[See 24 R. C. L. 704, 706.]

### Definition — search.

3. A search implies invasion and quest, and that implies some sort of force, actual or constructive, much or little.

[See 24 R. C. L. 701.]

### Trial — statement of testimony by court.

4. It is not unlawful for a trial court to state testimony about which there is no dispute.

### — motion for directed verdict — effect.

5. A motion for a directed verdict is, in its nature, a demurrer to the evidence, and, therefore, a quasi admission of its truth.

### Arrest — necessity of warrant.

6. One may, under a Constitution guaranteeing due process of law, be arrested without warrant if he is discovered in the act of violating the law.

[See 2 R. C. L. 452, 453.]

(Watts, J., dissents.)

**APPEAL** by defendants from a judgment of the Common Pleas Circuit Court for Greenville County convicting them of unlawfully transporting liquor. *Affirmed.*

The exceptions mentioned in the opinion are as follows:

That his Honor erred in refusing to direct a verdict of not guilty, when the undisputed testimony showed that the evidence upon which the defendants were arrested and convicted was obtained by an unlawful search of the persons and property of the defendants, without due process of law.

Because his Honor erred in refusing to direct a verdict of not guilty, when the undisputed testimony showed that the defendants were stopped, their persons and property forcibly searched under the authority of neither an arrest nor a search warrant, and without due process of law, and when it was admitted by the officers that the arrest was made only after evidence procured by such unlawful search.

That his Honor erred in that he charged upon the facts of the case in violation of § 26, art. 5, of the Constitution of 1895, by the following statement in the presence of the jury: "There is testimony offered in this case to show—now, Mr. Foreman and gentlemen, I don't say it shows; to show—that the witnesses, or rural policemen of the county of Greenville, and of course the law invests them with the power and authority governing such officers,—that upon information communicated to them they went out for the purpose of finding the defendants in this case; that the defendants were in an automobile drunk on the public highway, and at the time running their automobile in excess of the legal rate of speed; that as soon as the opportunity was presented they made a search of the automobile in question, and found the liquor which has been offered in evidence, consisting of 2 quarts, and a quart bottle about half full. Whereupon they were arrested and taken to jail."

That his Honor erred in charging the jury that the law governing the

conduct of rural policemen for Greenville county was as contained in § 2 of an act passed in 1914 (Acts of 1914, p. 754) which reads as follows: "Duty to Patrol County:— That it shall be the duty of the said rural policemen, under the direction of the chief, to patrol and police the county, and to prevent or detect offenses against the criminal law, and prosecute all persons for violation of the criminal law of every kind, making arrests upon their own initiation, as well as upon complaint or information, and to seize without warrant, and hold all alcoholic liquors in possession of any person for unlawful use, and . . . if such action be begun and the judgment of the court be adverse to the plaintiff, then such liquors shall be destroyed publicly by the chief of rural police, and such rural policemen shall report all their acts, and all known or suspected violations of criminal law to the chief, who shall make such reports, and give such information as may be requested by the solicitor, the grand jury or the legislative delegation of said county"—since said section is in violation of § 5, art. 1, of the Constitution of South Carolina of 1895, and of § 1, art. 14, of the amendments of the United States Constitution, and of § 16, art. 1, of the Constitution of South Carolina of 1895.

That his Honor erred in charging the jury that the law governing the conduct of rural policemen for Greenville county was as contained in § 3 of an act passed in 1914 (Acts of 1914, p. 755) which reads as follows: "That said policemen shall have authority for any freshly committed crime, to arrest without warrant, and said policemen shall, while pursuing a criminal, or suspected criminal, have authority to make arrest, or arrests, in incorporated cities and towns, and in pursuit of the criminal to enter homes, or break therein, whether in their



own county or in an adjoining county; and they shall have the authority to summon the posse comitatus to assist in enforcing the laws, and any person who shall fail to respond and render assistance, when so summoned, shall be guilty of misdemeanor, and, upon conviction, shall be punished by imprisonment for not exceeding thirty days, or fine of not exceeding one hundred (\$100) dollars"—since said section is in violation of § 5, art. 1, of the Constitution of South Carolina of 1895, and of § 1, art. 14, of the amendments of the United States Constitution, and of § 16, art. 1, of the Constitution of South Carolina of 1895.

Because the court erred in not granting defendants a new trial upon the grounds of motion for a new trial as set forth in the record.

Further facts appear in the opinion of the court.

Messrs. Bonham & Price for appellants.

Mr. J. Robert Martin for the State.

Gage, J., delivered the opinion of the court:

Indictment for unlawfully transporting liquor in Greenville county; verdict of guilty; appeal by the defendants.

There are five exceptions, reduced to three questions in the appellants' brief: (1) Verdict ought to have been directed for defendants; (2) the court charged on the facts; (3) the Act of 1914 (28 Stat. at L. 754) is in violation of the state and Federal Constitutions. Let the exceptions be reported. The prime contention of the appellants is that liquor was discovered by an illegal search of the defendants, and that the case is thus brought within the late case of *Blacksburg v. Beam*, 104 S. C. 146, L.R.A.1916E, 714, 88 S. E. 441.

Facts make a case; there is no such thing as law separable from facts. There were two witnesses, both for the state.

The testimony of Gossnell shows this transaction: The place was on the Buncombe road, running north

out of the city of Greenville, and where that road and the track of the Southern Railway cross. Gossnell and Beamlett were rural policemen, and had passed north up the Buncombe road about 3 miles, at which point they met the defendants, Quinn, Ballew, Lee, Vaughn, and Beasley, in a Ford car, going south towards the city. The officers turned around and also moved south, following the Ford car. At the crossing of the highway and the railway the Ford car had been halted, as were the policemen, too, by a passing freight train. The policemen alighted from the car and stood, the one on one side, and the other on the opposite side of the Ford car. Ballew was driver of the Ford car, and Quinn sat by him. The three others were on the back seat, and those three were drunk. The officers found on the back seat a full quart of whisky, and Beamlett picked up a full quart of whisky down about the front where Ballew sat. Quinn had something in his hands, holding it down between his legs, and Gossnell pulled it out, and it was a quart bottle of whisky, full. At that stage the arrest was made.

The testimony of Beamlett shows this transaction: The policemen alighted at the crossing and walked, one on one side, and one on the other side of the Ford. The occupants of the Ford car were all under the influence of liquor, save Ballew, and two of them were drunk to helplessness. This policeman found 1 quart in the back of the car, at the feet of Lee.

The defendants offered no testimony. It is true both policemen testified in ipsissima verba that they stopped and "searched the persons" of the occupants of the car, and that they had no warrant issued to them by an officer which empowered them to do so. But whether there was a "search" depends upon what was said and done by the officers at the time and place, and not upon the words with which they have characterized their acts.

The facts which we have recited,

and about which there is no dispute, show that there was no arrest made until the liquor was discovered in the Ford car by the officers. And the facts show, also, that there was certainly no "search" of the persons of the occupants of the Ford car to discover the liquor. On the contrary, while the Ford car was at rest, waiting for the passage across the highway of the freight train, the policemen also came to a stop, and, disembarking from their car and looking, saw some of the liquor unconcealed in the Ford car.

It will not be denied that, had the officers come by chance upon the Ford car, manifestly loaded with whisky and being transported for unlawful use, in such a case a seizure of the liquor and an arrest of the conveyors would have been lawful, and that without a warrant to arrest or a warrant to seize. The instant case is essentially none other than that supposed.

The Constitution prohibits absolutely unreasonable searches, and it prohibits any search save upon a warrant duly issued. It requires a warrant to seize only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without warrant where there is no need of a search, and where the contraband subject-matter is fully disclosed and open to the eye and hand. Art. 1, § 16.

There was no search in the instant case, for search implies invasion and quest, and that implies some sort of force, actual or constructive, much or little.

The provision of the Constitution now considered was adopted to save a citizen's person and his house from invasion by some sort of force, except the invasion is had in the most guarded way. See *State v. Wimbush*, 9 S. C. 313, and the opinion of Simonton, J., in *Bound v. South Carolina R. Co.* (C. C.) 57 Fed. 485.

We do not find so much in the books; but that some force must be exercised is evident from the history of the constitutional provision; and that is the necessary implication of the words of the Constitution, of the statute, and of the decisions. There is a luminous discussion of the history of search and seizure by Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. See also *Cooley*, Const. Law, 4th ed. p. 367.

The undisputed testimony in the instant case shows there was no exercise of any sort of force, but, on the contrary, the condition was manifest to him who had eyes to see. The case is largely governed by what was decided in *State v. Byrd*, 72 S. C. 109, 51 S. E. 544. It was there held: "Under § 16 of article 1 of the state Constitution which protects the citizen from unreasonable seizure of his person and property, there is no doubt a limit to the power of the general assembly to authorize arrest of the citizen without warrant; but we do not think that limit has been reached when an officer is required to arrest without warrant one whom he discovers in the act of violating the criminal law." (Italics have been supplied.)

The next issue arises out of what the court said, not in the charge, but when it ruled against the formal motion for the direction of a verdict. It has been held more than once that it is not unlawful for a trial court to state testimony about which there was no dispute. In the instant case the court said: "The testimony tends to show . . . that upon information communicated to them they (the policemen) went out for the purpose of finding the defendants; that the defendants were in an automobile drunk on the public highway and at the time using their automobile in excess of the legal rate of speed; that as soon as the opportunity was presented they made a search of the automobile in question and found the liquor which had been offered in

Search—seizing liquor in plain view.

Seizure—absence of warrant—effect.

Definition—search.

Trial—statement of testimony by court.

evidence . . . whereupon they were arrested and taken to jail."

The motion for a directed verdict was in its nature a demurrer to the evidence, and therefore a quasi admission of the truth.

The third issue made by the appeal involves a testing of the Act of 1914 (28 Stat. at L. 754) when laid by the side of the state Constitution; for, as no Federal question is involved, the Federal Constitution has no relevancy. The suggestion of the appellant is that §§ 2 and 3 of that act violate the due process clause of the state Constitution (art. 1, § 5), and also the search and seizure clause of the same instrument. Art. 1, § 16. These subjects are akin, and the issues will be considered together. The statute is to be judged, of course, with reference only to the facts of the instant case; if, when applied to those facts, it conforms to the superior rule of the Constitution, then no fault is to be found with it.

The second section of the statute deals, *inter alia*, with seizures, and it does empower police officers "to seize without warrant . . . all alcoholic liquors in the possession of any person for unlawful use." It does not authorize a search of a man's person or his house without a warrant. In the instant case the seizure was made without warrant to seize; but so much was lawful because, as before stated, there was no search necessary and none was made.

The third section of the statute deals, *inter alia*, with arrests, and it does empower police officers, "for any freshly committed crime, to arrest without warrant." The subject of "arrest of the person" is not mentioned in the state Constitution save in three instances not relevant here. Art. 2, § 14; art. 3, § 13; art. 13, § 2. The due process clause

of the Constitution, however, protects the citizen from unlawful arrests.

By the common law (that law which due process guarantees) a citizen may be arrested without warrant who is discovered in the act of violating the law. *City Council v. Payne*, 11 S. C. L. (2 Nott & M'C.) 475; *State v. Sims*, 16 S. C. 486. In the instant case the defendants were discovered *flagrante delicto*; they were in the very act of transporting contraband liquor.

We are, therefore, of the opinion that, when applied to the facts of the instant case, no fault can be found in the statute in the respects indicated.

The judgment of the Circuit Court is affirmed.

Gary, Ch. J., and Hydrick and Fraser, JJ., concur.

Watts, J.:

I dissent, and think judgment should be reversed.

#### NOTE.

The holding of the reported case (*STATE v. QUINN*, ante, 1500), that a constitutional provision against unreasonable searches and seizure does not preclude the making of a seizure without a warrant previously procured where no search is required, is in accord with other decisions on the point, as is shown by an annotation of the question: "Constitutional guaranties against unreasonable searches and seizures, as applied to search for or seizure of intoxicating liquor" on page 1514.

It should be noted, however, that a seizure without a warrant cannot be made, except under the authority of a statute conferring the power so to do. See subd. III. b, of the annotation referred to.

—motion for  
directed verdict  
—effect.

Arrest—necessity  
of warrant.

PEOPLE OF THE STATE OF MICHIGAN, Plff. in Err.,  
v.  
AUGUST MARXHAUSEN.

*Michigan Supreme Court — February 18, 1919.*

(— Mich. —, 171 N. W. 557.)

**Search and seizure — search for intoxicating liquors.**

1. Constitutional protection against unreasonable searches and seizures is violated by police officers entering a man's building without a search warrant, and searching for and carrying away intoxicating liquor there found.

[See note on this question beginning on page 1514.]

**— constitutional protection.**

2. Constitutional provisions against unreasonable searches and seizures and against compelling one to be a witness against himself secure the individual in his person, his home, and his property from invasion through unbridled and unrestrained executive or administrative will.

[See 24 R. C. L. 703.]

**— return of property.**

3. Intoxicating liquor seized by police officers in a search of private property without warrant should be returned to the owner by the courts upon his application.

[See 24 R. C. L. 706, 716, 717.]

**Evidence — secured by violation of Constitution — effect.**

4. The court will not pause in the trial of a criminal case to determine whether or not competent evidence offered against accused was obtained from him by violation of the constitutional provisions against unlawful searches and seizures, or furnishing evidence against oneself, but will order a return of evidence so secured if application is made before trial.

[See 24 R. C. L. 702, 718.]

**Statute — construction — use of intoxicating liquor.**

5. A statute cannot be held to be limited to prohibition of personal use of liquor, the penal section of which provides for punishment of any person who himself, or by his clerk, agent, or employee, shall violate any provision of the statute.

**— construction — intent of legislators.**

6. The court cannot, in construing a statute inquire into the intent of the legislators.

**— legislative intent.**

7. The court in the construction of a statute must determine the legislative intent by what was done by the legislature as an entity.

**— superseded statute.**

8. If a later legislative act operates to supersede an earlier one it must be accepted as the latest and final declaration of the legislative will.

**— repeal by implication.**

9. Repeals by implication are not favored in the law.

**— what constitutes repeal.**

10. Where a later act covers the whole subject, contains new provisions evidencing an intent that it shall supersede the former law, or is repugnant to the earlier act, it operates as a repeal.

**— regulation of intoxicating liquors.**

11. A statute completely covering the field of possession and sale of intoxicating liquors, expressly repealing all acts and parts of acts in conflict with its provisions, repeals an act passed a few days earlier, which is to take effect on the same day provided for it, but which merely prohibits the bringing into, carrying, receiving, or possession in the state of intoxicating liquors.

[See 15 R. C. L. 383, 384.]

**ERROR** to the Circuit Court for Wayne County (Dingeman, J.) to review a judgment quashing an information charging defendant with violating the Prohibition Law. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles H. Jasnowski, Edwin S. Bartlett, and Alexander J. Groesbeck, Attorney General, for the People.

Messrs. James McNamara and George A. Kelly for defendant in error.

Mr. Henry E. Chase, *amicus curiæ*.

Fellows, J., delivered the opinion of the court:

Defendant is the owner of Calf island, consisting of about 10 acres. It is located in the Detroit river, within the confines of Wayne county. It is defendant's home. On August 1, 1918, while defendant was in the state of South Carolina, and was known by the officers to be absent, five inspectors of the food and drug department, the marshal of the village of Trenton, a deputy sheriff of the county, and the justice of the peace, who afterwards conducted the examination of defendant, went to the island. Some of the party effected an entrance to the dwelling house without breaking locks or doors, searched the house, found some liquor there, and also found some liquor in an improvised cellar and at other points on the premises. All the liquor was seized, conveyed to the mainland, and from there to the county building in Detroit, where it was stored. All this was done without a search warrant and without consent of defendant. Two days later a complaint was filed, charging defendant with the violation of Act 161, Public Acts 1917. Upon his return he was arrested, and after a preliminary examination before the justice of the peace, who was one of the party on August 1st, was bound over for trial. In the circuit court the information was quashed, and the liquor ordered returned to him.

To review this judgment the prosecuting attorney sues out this writ of error, under the provisions of Act 159, Public Acts 1917. The following are the errors assigned:

"(1) The court erred in deciding that Act No. 161 of the Public Acts of the state of Michigan for the year

1917 was superseded and repealed by Act No. 338 of the Public Acts of the state of Michigan for the year 1917.

"(2) The court erred in entering an order quashing the information.

"(3) The court erred in directing the liquor seized to be restored to the defendant."

We shall consider these assignments of error in their inverse order.

1. Section 10, art. 2, of the Constitution of the state, provides: "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

This provision is the same as found in the Constitution of 1850, and with the exception of the use of the word "person," in place of the word "individual," the same as found in the Constitution of 1835. It is in effect the same provision found in the 4th Amendment to the Federal Constitution.

Section 16, art. 2, of the state Constitution, provides: "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

Like provisions are found in the 5th Amendment to the Federal Constitution. Similar provisions are found in the constitutions of the various states of the Union. By these provisions the rights of the individual are secured; the provisions of the Federal Constitution securing the citizen from arbitrary, unlawful conduct on the part of the Federal government and its officers, and the provisions of the state constitutions securing the citizen from arbitrary, unlawful conduct on the part of the state and its officers. These provisions not only secure the individual in his person, his home, and his

property from invasion through unbridled legislation, but they also secure the individual in his person, his home, and his property from invasion through unbridled and unrestrained executive or administrative will. It ought not to be necessary to recall the fact that it is of the essence of a free government that the individual shall be secure in his person, his home, and his property from unlawful invasion, from unlawful search, from unlawful seizure. The writing of these provisions into the Federal Constitution, into every constitution of every state in the Union, was not an idle ceremony. With a clearness of vision our forefathers provided for a lawful search and seizure, one supported by oath or affirmation, describing the place to be searched and the person or things to be seized, and in the same section safeguarded the rights of the individual by inhibiting unreasonable and unlawful search. They provided an orderly manner for search and seizure, and prohibited all others.

The substance of the provision found in the 4th Amendment to the Federal Constitution was proposed by Mr. Madison in the seventh subdivision of his first amendment. Others proposed a similar provision, and the final result was the language found in this amendment. That we may better understand this provision, it is well we consider some of the events leading up to its adoption. Obviously we cannot, within the compass of this opinion, detail at length all that preceded and finally culminated in far-reaching decisions by the courts of England. Attention is directed to a footnote which will be found in Cooley's Constitutional Limitations, 7th ed. beginning at page 426. It will suffice to say that a practice had grown up in England of issuing so-called writs of assistance, originally by the Star Chamber, and later by the Secretary of State, under color of which messengers of the King entered any and all places agreeable to them-

selves, searched and seized such papers and evidences as their will dictated. These writs were general in their character, described no premises, and named no persons to be searched. Their justification at that time was the publication of seditious libels, and the end sought the suppression of these seditious utterances. The practice of issuing and serving these writs was of long standing, and the right to issue them was unassailed for many years; indeed this was one of the reasons assigned to sustain their validity in the case to which we shall presently refer. But Lord Camden disposed of this claim in the following language: "But still it is insisted that there has been a general submission, and no action brought to try the right. I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law which a few criminal booksellers have been afraid to dispute."

The infraction of individual rights, tolerated then as now under the claim of necessity, in order to enforce the law, finally came before the courts for decision. In the case of *Entick v. Carrington*, 19 How. St. Tr. 1029, Lord Camden, pronouncing the judgment of the court, laid broad and deep the principles which were afterwards crystallized in the 4th Amendment. Of Lord Camden's decision Mr. Justice Bradley, speaking for the court in *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, said: "The law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies, as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English au-

thorities on that subject down to the present time."

Substantially contemporaneous with this case is that of *Money v. Leach*, 3 Burr. 1742, 97 Eng. Reprint, 1075. In both cases these general writs were held invalid, and in April, 1766, the House of Commons passed resolutions condemnatory of these so-called general warrants, whether for the seizure of persons or papers. Chatham thus tersely stated: "Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No. It may be a straw-built hut, the wind may whistle around it, the rain may enter it, but the King cannot."

The events bringing about the disuse of these writs in this country, and premising the adoption of the 4th Amendment, are best described by Mr. Watson in his work on the Constitution. We quote (vol. 2, p. 1415): "While officers of the Crown were issuing and serving such warrants in England, they were doing the same in the American colonies, and this contributed much to that public sentiment which eventually demanded the adoption of this amendment. So oppressive had become the practice that here, as in England, it caused great alarm among the people, and here, as there, resistance was made to such writs on the ground of their illegality. These warrants were principally issued and the seizures made in the colony of Massachusetts. The trial which tested their legality occurred in Boston in February, 1761. It proved to be more than a mere trial, as we shall see, for the greatest question which could affect the interests of the colonists was involved. James Otis, a native of Massachusetts, was Advocate General of the Crown at Boston, a legal position of great responsibility and honor; but he was so wrought up at the outrage which had been committed by the arrests under these warrants that he resigned his office, and, though offered a most remunerative fee if he would take charge of the

defense, he said: 'In such a cause as this I despise a fee.' He then acted as one of the counsel in resisting the arrests. He spoke for five hours, and it is doubtful if any legal argument ever made on this continent produced a more profound or lasting impression. He set fire to a torch which is still burning, and which will continue to burn, for in that masterful effort he impressed upon the American heart the great lesson of resistance to tyranny and outrage. As the result of the trial the writs were never afterwards served by judicial sanction."

A portion of Mr. Otis's speech will be found in *Life and Works of John Adams*, vol. 2, p. 523. In this speech Mr. Otis pronounced these general writs "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book," since they placed "the liberty of every man in the hands of every petty officer." In a letter to William Tudor, written March 29, 1817 (*Life and Works of John Adams*, vol. 10, p. 244), John Adams most graphically described this trial which he attended. In the course of his letter he said: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

These events, which we have but given in outline, occurred within the memory of the men who formulated and adopted the 4th Amendment. In clear and unmistakable language these men wrote into the fundamental law of the nation, to be afterwards incorporated into the fundamental law of the various states of the Union, the safeguard against unlawful and unreasonable search and seizure of the person and property of the citizens, irrespective of whether such unlawful and unreasonable search and seizure had the sanction of legislative approval or rested in the arbitrary will of the executive and administrative arm of the state. Does the search of de-

(— Mich. —, 171 N. W. 557.)

defendant's premises and the seizure of his property in the instant case offend the rights secured to him by this provision of the fundamental law of the state? These officers had no search warrant issued upon oath or affirmation; no search warrant of any kind. They entered the home of defendant by command of no court; they searched his premises by virtue of no process. They justify, if at all, under administrative will and mandate, not recognized by the Constitution and unauthorized in a government of law. That "the end justifies the means" is a doctrine which has not found lodgment in the archives of this court. The search and seizure detailed in this record was an unauthorized trespass and an invasion of the constitutional rights of this defendant.

—search for  
intoxicating  
liquors.

These rights of the individual in his person and property should be held sacred, and any attempt to fritter them away under the guise of enforcing drastic sumptuary legislation (no matter how beneficial to the people it may be claimed to be) must meet with the clear and earnest disapproval of the courts.

Did the trial judge commit error in ordering the return of the liquor thus seized? It must be borne in mind that we are not here dealing with the search by a jailer of one lawfully under arrest upon warrant duly issued, before placing him in a cell, and the retention of the proceeds of such search; nor are we considering a case where, under a lawful search warrant duly issued, a search and seizure has been effected; here we are dealing with the right to retain the liquor taken without any search warrant. An examination of many cases decided by the United States Supreme Court, involving both the 4th and 5th Amendments, satisfies us

—return of  
property.

that the rule announced by that court will be reached by careful consideration of three cases decided by that court, and only three; that by a careful consideration of these

three cases we will be able to clearly understand the rule laid down by that, the court of last resort of the nation, and the reason for the rule. These cases are *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; and *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177. A brief statement with reference to each of these cases will aid in understanding the discussion which follows.

In the *Boyd Case* an information was filed to forfeit thirty-five cases of polished plate glass. It was charged that the plate glass was imported by the owners in fraud of the Customs Laws. By the terms of the act under consideration such owners were liable to heavy fines and imprisonment. Pursuant to the provisions of the act the district attorney obtained an order of the court requiring the importers to produce their invoices of the shipment. It was held in an able and exhaustive opinion written by Justice Bradley that the proceedings were criminal, and that the act and the proceedings taken thereunder offended both the 4th and 5th Amendments. The opinion of Lord Camden in the case of *Entick v. Carrington*, *supra*, together with the circumstance surrounding the adoption of the amendments, were fully considered by the court. Considering the compulsory production of papers it was said: "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

The *Adams Case* brought up for review the decision of the court of



appeals of the state of New York. *People v. Adams*, 176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636. The state court had held that upon the trial the manner in which competent evidence offered against the defendant had been obtained could not be inquired into. The state court had said: "The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence. In the case before us, if there has been any illegal invasion of the rights of this defendant, by reason of alleged unlawful searches and seizures of private papers, his remedy is in an independent proceeding, not necessary to be considered at this time."

The Supreme Court of the United States adopted this view and affirmed the case; Mr. Justice Day, speaking for the court, saying: "The question was not made in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained."

In the *Weeks* Case the defendant had been arrested at his place of employment. Other officers without a search warrant went to his house, and, learning from a neighbor where the key was kept, obtained it, entered the house, searched it, and took away certain property, including letters there found. Before the trial, defendant filed a petition praying the return of such property thus taken. The trial judge ordered the return of such property as was not desired to be used as evidence, but as to this property he denied defend-

ant's petition. Before any evidence was offered, defendant again moved for the return of the property so taken, which motion was also refused, and the papers taken were received in evidence over defendant's objection. The conviction was reversed. Mr. Justice Day, who wrote the *Adams* Case, also wrote this case. Speaking for the court he said:

"The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices, destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. . . .

"The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th Amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citi-

zen accused of an offense, the protection of the 4th Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

There has been some criticism of the Boyd Case by courts and writers, who have regarded it as not in accord with a long line of cases in state courts, of which the following will be found to be illustrative, although but a fragmentary list: *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *State v. Flynn*, 36 N. H. 64; *Com. v. Dana*, 2 Met. 329; *State v. Griswold*, 67 Conn. 290, 38 L.R.A. 227, 34 Atl. 1046; *State v. Burroughs*, 72 Me. 479; *State v. Miller*, 63 Kan. 62, 64 Pac. 1033; *Williams v. State*, 100 Ga. 511, 39 L.R.A. 269, 28 S. E. 624; *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910. And after the decision in the Adams Case was handed down it was thought by some that the holding in the Boyd Case was modified thereby, notwithstanding it was expressly stated by Justice Day that "the case [Boyd Case] has been frequently cited by this court, and we have no wish to detract from its authority."

We are impressed, however, that a careful consideration of the Boyd Case, in connection with the Adams Case and the decisions of the state courts, some of which are cited above, but many of which are not, taken in the light of what was said by the court in the Weeks Case, demonstrate that in the main the United States Supreme Court and the courts of last resort of the various states are in accord, and that the Boyd Case does not conflict, as its critics claim, with the holdings of the many state courts. The Adams Case and many state cases along the line of that case belong to one class of cases, while the Boyd and Weeks Cases belong to another class of cases. In the Adams and similar cases the question of the legality of the search and seizure was sought to be raised collaterally, not by direct proceedings. In these

cases the objection was not made until the article or paper unlawfully seized was offered in evidence. It must be patent that upon the trial of a criminal case the court cannot pause in the trial, when a bit of evidence, admissible under general rules, is offered, to engage in a collateral inquiry as to how the prosecution became possessed of such evidence. That would be the trial of a collateral matter. And as a general proposition the courts have so held, and, where the evidence offered was competent, have not paused in the trial to determine the collateral issue of whether the evidence was legally secured or not. We say as a general proposition, because a few states are not in accord with this view. See *State v. Slamon*, 73 Vt. 212, 87 Am. St. Rep. 711, 50 Atl. 1097, 15 Am. Crim. Rep. 686; *Wright v. State*, 9 Ga. App. 266, 70 S. E. 1126; *State v. Height*, 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935; *State v. Sheridan*, 121 Iowa, 164, 96 N. W. 730; these cases holding that the question may be determined on the trial.

In the Boyd and Weeks Cases the question was not raised collaterally, but in both cases by a direct proceeding—in the Boyd Case by an affirmative order of the court requiring claimant to produce the invoice, which order was directly assailed in the review of the case in the Supreme Court, and which order was held to invade the claimant's rights under the Federal Constitution; in the Weeks Case by a negative order refusing the return of the property taken by the unlawful search and seizure, and which order was directly assailed upon review in the Supreme Court, and which order was held by that court to have denied defendant his constitutional rights.

From this consideration of these cases it is obvious that the rule underlying them is that, when defendant in a criminal case for the first time upon the trial objects to the admission in evidence of articles taken by unlawful search and seizure, and

they are admissible under general rules governing the admissibility of proof, the court will

**Evidence—  
secured by  
violation of  
Constitution—  
effect.**

not pause in the trial of the case to determine the collateral question of whether the prosecution became lawfully possessed of such articles; but that where it is made to appear before the trial that articles have been taken from the possession of the defendant in violation of his constitutional rights, and by unlawful search and seizure, and without any search warrant at all, it then becomes the duty of the trial court to order the return to the defendant of the articles thus unlawfully taken. The rule is thus stated in 10 R. C. L. 933: "The principle underlying the decisions admitting the evidence is that an objection to an offer of proof made on the trial of a cause raises no other question than that of the competency, relevancy, and materiality of the evidence offered, and that consequently the court, on such an objection, cannot enter on the trial of a collateral issue as to the source from which the evidence was obtained. But, since there is a right, there must of necessity be a remedy, and the remedy is to be found in the making of a timely application to the court for an order directing the return to the applicant of the papers unlawfully seized. On such an application, the question of the illegality of the seizure may be fully heard, and if the court erroneously refuses to order a return of the papers, and thereafter receives them in evidence against the applicant over his objection, it is an error for which a judgment of conviction must be reversed."

Turning, now, to our own cases, we find them in strict harmony with the rule announced. This court has held that the courts will not pause in the trial of a cause to open up a collateral inquiry of whether a wrong has been committed in obtaining information which a witness possesses. *Cluett v. Rosenthal*, 100 Mich. 193, 43 Am. St. Rep. 446, 58

N. W. 1009; *People v. Campbell*, 160 Mich. 108, 34 L.R.A. (N.S.) 58, 136 Am. St. Rep. 417, 125 N. W. 42; *People v. Aldorfer*, 164 Mich. 676, 130 N. W. 351. But this court has also held upon an application made before trial for mandamus to set aside an order of the circuit court permitting the police department to take possession of property of the citizen, pending investigation for crime, and depriving the owner of its possession, that the order should be vacated and set aside, resulting in the return of the property thus unlawfully withheld. *Newberry v. Carpenter*, 107 Mich. 567, 31 L.R.A. 163, 61 Am. St. Rep. 346, 65 N. W. 530.

In the instant case the evidence taken before the magistrate and returned to the circuit court conclusively established the invalidity of the search and seizure and the invasion of defendant's constitutional rights. The circuit judge did not err in directing the return of the liquor to the defendant.

2. We shall consider the first and second assignment of error together, as they involve but one question. The trial judge was of the opinion that the act under which the information was filed was superseded by a later one, and for this reason quashed the information. Act No. 161 of the Public Acts of 1917, under which this information was filed, was approved May 2, 1917. It will hereafter be called the "Damon Act." Act No. 338, Public Acts 1917, was approved May 10, 1917. It will hereafter be called the "Wiley Act." Both acts by their terms became effective on and after May 1, 1918.

We shall first consider the argument, advanced on behalf of the people, that the Wiley Act was passed to prohibit the dealing in intoxicating liquors, the business, except for the permitted purposes; while the Damon Act was passed to prohibit and prevent its private use. This is the foundation of the argument at the bar by the learned counsel for the people. It was forcefully pre-

sented, and the people's case largely rests upon its soundness. A reading of § 4, however, convinces us that it cannot be maintained. This section provides: "Any person, who, himself or by his clerk, agent or employee, shall violate any of the provisions of this act," etc.

Clearly, if the legislature by the Damon Act solely designed to prohibit and prevent the personal use of intoxicating liquors, there would be no occasion to use the words "clerk, agent, or employee." The use of these words in the 4th section

Statute—construction—use of intoxicating liquor.

of this act, the penal section, eliminates the argument that the Damon Act

was designed to cover and apply only to a field not contemplated by the Wiley Act.

The Damon Act simply prohibits, with a penalty for its violation, the bringing into, carrying, receiving, or possessing of intoxicating liquors, except for the permitted purposes, and by reference adopts applicable laws pertaining to search and seizure. It makes no attempt to provide for the lawful sale of liquors for medical, mechanical, chemical, scientific, or sacramental purposes, recognized in the constitutional amendment (art. 16, § 2). Its absence of detail and definiteness might well have prompted the thoughtful legislator, desiring to carry out the mandate of the constitutional amendment, to insist upon a complete, comprehensive act, superseding it

—construction—intent of legislators.

and covering the entire field. While we

may not inquire into the intent of the legislator, we are bound to ascertain the legislative intent; and this

—legislative intent.

we must determine by what was done by the legislature as an entity. If the subsequent act of the legislature operates to supersede the earlier

—superseded statute.

act, the later act must be accepted as the latest and final declaration of the legislative will.

The Wiley Act is a comprehensive measure of 61 sections, completely

covering the field, and expressly repealing all acts or parts of acts in conflict with its provisions. It shows careful thought in its preparation—a recognition of constitutional rights, without detracting from its virility. It provides in detail and definiteness the manner of sale of liquors for medical, mechanical, chemical, scientific, and sacramental purposes, both by wholesale and retail, and prohibits all others.

Repeals by implication are not favored in the law. But where the later act covers the

—repeal by implication.

whole subject, contains new provisions evidencing an intent that it shall supersede the former law, or is repugnant to the

—what constitutes repeal.

earlier act, it operates as a repeal.

In *Shannon v. People*, 5 Mich. 85, the rule was quoted, with the citation of a large number of authorities, in the following language: "That where a subsequent statute covers the whole ground occupied by an earlier statute, it repeals by implication the former statute, though there be no repugnance."

In *Breitung v. Lindauer*, 37 Mich. 217, it was said by this court, speaking through Justice Marston: "The rule is that the later act operates to the extent of the repugnancy, as a repeal of the first, or, if the two acts are not in express terms repugnant, yet if the latter covers the whole subject of the first, and contains new provisions showing that it was intended as a substitute, it will operate as a repeal."

In *Atty. Gen. v. Railroad Comr.* 117 Mich. 477, 76 N. W. 69, it was said: "While repeals by implication are not favored in the law, yet it is a rule of construction, followed by this court and other courts, that a statute revising the whole subject of a former statute, and intended as a substitute, operates as a repeal of the former law, though it contains no words to that effect."

Chief Justice Long, writing for the court in *Porter v. Edwards*, 114 Mich. 640, 72 N. W. 614, said: "The

rule is well settled that a new statute, covering the same ground as the former act, supersedes it for all further cases, without the necessity of repealing words."

In *Graham v. Muskegon County Clerk*, 116 Mich. 571, 74 N. W. 729, it was said by Mr. Justice Montgomery "that a later act, which covers the whole subject, repeals prior acts repugnant thereto, is established doctrine."

See also *People v. Bussell*, 59 Mich. 104, 26 N. W. 306; *Feige v. Michigan C. R. Co.* 62 Mich. 1, 28 N. W. 685; *People v. Furman*, 85 Mich. 110, 48 N. W. 169; *Atty. Gen. v. Parsell*, 100 Mich. 170, 58 N. W. 839; *Saginaw County v. Hubinger*, 137 Mich. 72, 100 N. W. 261, 4 Ann. Cas. 792.

In the Wiley Act we have an act carefully prepared, covering the field with minuteness of detail in many particulars, expressly repealing all former acts inconsistent with its provisions, passed to put into effect the mandate of the people, declared in the constitutional amendment but recently adopted, and fresh in the minds of the members of the legislature, dealing with the same subject-matter as the former act, that of intoxicating liquor, complete in itself, containing the latest expression of legislative will.

We are constrained to hold, in view of the former decisions of this court, that the learned circuit judge correctly held that it superseded the Damon Act. <sup>-regulation of intoxicating liquors.</sup>

3. Upon the argument it was insisted that by the so-called Reed amendment (§ 5, Act March 3, 1917, chap. 162, 39 Stat. at L. 1069) Congress had legislated upon the question of interstate commerce in intoxicating liquor, and that, Congress having occupied the field committed to it by the commerce clause of the Federal Constitution, all legislation by the state upon the subject of interstate shipments of intoxicating liquor must fail. We do not find it necessary to consider this question. Upon this record it is undisputed that defendant purchased this liquor within this state when and where its sale and possession were lawful.

It follows that the judgment must be affirmed.

*Bird, Ch. J., and Kuhn, Stone, Brooke, and Moore, JJ., concur with Fellows, J.*

*Steere, J.:*

I concur in the conclusion that the Damon Act is repealed by the Wiley Act, which is the controlling question involved.

## ANNOTATION.

### Constitutional guaranties against unreasonable searches and seizures as applied to search for or seizure of intoxicating liquor.

#### I. Introduction, 1514.

#### II. Intoxicating liquor as proper subject of search and seizure, 1515.

#### III. Conformity to constitutional requirements:

- a. Necessity of warrant for search, 1516.
- b. Necessity of warrant for seizure, 1517.
- c. Sufficiency of showing of probable cause, 1517.

#### I. Introduction.

Once it is conceded that the use of intoxicating liquors is a proper sub-

#### III.—continued.

- d. Necessity of describing place and property in complaint, 1518.
- e. Description of place to be searched, 1518.
- f. Description of property to be seized, 1519.
- g. Time for execution of warrant, 1520.
- h. Manner of executing warrant, 1520.

#### IV. Miscellaneous, 1521.

ject for public regulation under the police power, it follows that, in the exercise of its power to enact preven-

tive as well as remedial legislation, the legislature may authorize a search for and seizure of liquor unlawfully kept, subject only to the limitations upon the issuance of search warrants contained in the Constitution.

The decisions appear to warrant the generalization that a search and seizure is "unreasonable" within the meaning of the constitutional provision, where, as in the reported case (*PEOPLE v. MARXHAUSEN*, ante, 1505), it is not authorized by statute; or where the statute under which the warrant is issued does not conform to the conditions under which the Constitution permits such warrants to issue; or where the conditions prescribed by the statute have not been met; or where the warrant is not executed within a reasonable time; or where the search is made in an unreasonable manner; or where the seizure is of property other than that connected with the offense charged.

In *Santo v. State* (1855) 2 Iowa, 165, 63 Am. Dec. 487, it is said that the term "unreasonable" in the constitutions of the states has allusion to what had been practised before the Revolution, and especially to general search warrants in which the person, place, or thing was not described; and that no such warrant is unreasonable, in the legal sense, when it is for a thing obnoxious to the laws, and of a person and place particularly described, and is issued on oath of probable cause.

The provisions of the Federal Constitution against unreasonable searches and seizures relate only to action by officers of the Federal, and not of the state, government. See *Kansas v. Bradley* (1885) 26 Fed. 289, and many other cases not coming within the scope of this note.

## *II. Intoxicating liquor as proper subject of search and seizure.*

In *Gray v. Kimball* (1856) 42 Me. 299, it is said that "certain articles which are treated as property while used for lawful purposes may be subjects of forfeiture and destruction, under proper statutory provisions, if their use is deemed pernicious to the

best interests of the community. And when such articles are attempted to be used for unlawful purposes, or in an unlawful manner, and the attempts are so concealed that ordinary diligence fails to make such discovery as to enable the law to declare the forfeiture, statutes authorizing searches and seizures have been held legitimate."

In *State v. Stoffels* (1908) 89 Minn. 205, 94 N. W. 675, the court, in holding that the legislature may provide for the search and seizure of intoxicating liquor kept for sale in violation of the laws of the state, says: "The police power of the state concededly extends to the search, seizure, and destruction of property which is either the subject of crime or the means of perpetrating it. Now, when intoxicating liquors are kept for sale in a prohibition district, they are, with all implements to facilitate their sale, the subject of crime or the means for committing it. No one questions the validity of laws providing for the issuing of warrants for the search, seizure, and destruction of implements of gaming, lottery tickets, and obscene books, and other similar articles and means of crime. But it has been questioned by some courts whether intoxicating liquors are property of such character as to be subject to the application of this rule. They do not, per se, fall within the rule; but on principle, and the great weight of judicial authority, it must be held that when they are kept for sale in violation of the laws of the state, and are intended to be used as the subject or means of crime, it is a question solely for the lawmaking power to determine whether they ought to be subjected to the rule we have stated. Therefore, statutes authorizing the issuance of search warrants to search for intoxicating liquors illegally kept for sale, and directing their seizure when found, and their forfeiture or destruction, are constitutional. *Cooley*, Const. Lim. 306; *Black*, Intoxicating Liquors, §§ 52, 351."

And in *State v. Hanson* (1911) 114 Minn. 136, 130 N. W. 79, a statute providing for the search of an unlicensed drinking place, and seizure and for-

feiture of intoxicating liquors and other property used in their unlawful sale, found therein, was held to be a proper exercise of the police power of the state, and constitutional.

In *Lincoln v. Smith* (1855) 27 Vt. 340, the court said: "It is no new thing to extend the police power of a state to the search, seizure, and destruction of property; and when this principle is attempted to be applied to intoxicating liquors, I apprehend much of the opposition has its source in a settled conviction that this species of property is not of that character which ought to be subjected to the application of such a principle; which, as it seems to us, is purely a question with the lawmaking power. Nuisances may be abated in the most summary manner; dogs found chasing sheep may be shot down; bucks running at large within a given period, without the marks of the initials of the owner's name, may become the property of the captor, and race horses may be declared forfeited; gambling implements may be destroyed; lottery tickets and obscene prints may be prohibited; and, under the Quarantine Laws, the health officer of a city, to prevent the spread of infection or contagion, may destroy bedding or clothing, or any part of the cargo of a vessel, subject to quarantine, and which 'he may deem infected.' Gunpowder kept in improper places may be seized and confiscated; and the exercise of these powers is a power of prevention, highly conservative in its character, and essential to the well-being of the body politic, and ought not to be characterized as arbitrary or despotic. So the 12th section of the act under consideration is eminently preventive in its provisions, as well as remedial in its character. The power to seize and confiscate private property for the violation of municipal laws, and as a means of preventing infractions thereof, has long been exercised by the general government; and I am not aware that the existence of that power has ever been denied; and it is a familiar principle that the long exercise of a power by a government, without objection, furnishes

the strongest, if not conclusive, evidence that it was rightfully exercised."

Although there may be a right of property in intoxicating liquors and their use is not by law prohibited, yet, when kept and intended for unlawful use, such liquors fall at once under the ban of the law, and become subject to seizure and confiscation by such methods as are provided by the law, in conformity with the Constitution. *State v. O'Neil* (1885) 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586, 6 Am. Crim. Rep. 319.

It is competent for the state to provide for the abatement of liquor nuisances, and the issuance of the writ of seizure in aid thereof. *Re State ex rel. Atty. Gen.* (1912) 179 Ala. 639, 60 So. 285.

### *III. Conformity to constitutional requirements.*

The obliging reader is requested to note that the question as to what procedure conforms to the conditions prescribed by the Constitution upon which warrants for search and seizure may issue is not affected (save in the matter of sufficiency of the description of the property to be seized) by the character of the subject of the search. The cases herein reviewed are, therefore, not to be taken as completely defining the effect of such requirements, but merely as a convenient collection of the cases involving searches for and seizure of intoxicating liquor.

#### *a. Necessity of warrant for search.*

The constitutional provision is violated by a statute which practically authorizes all officers to visit houses and business places without other authority, and make searches and arrests, and close up places of business on their own well or ill founded notion that the law has been violated. *Robison v. Miner* (1888) 68 Mich. 549, 37 N. W. 21.

It has been held that one cannot be convicted of illegally transporting liquor in his trunk upon evidence of the fact secured by opening the trunk with a key obtained by forcible search of his person, without warrant (Blacks-

burg v. Beam (1916) 104 S. C. 146, L.R.A.1916E, 714, 88 S. E. 441); but, in so far as this case holds that evidence obtained by an unlawful search is inadmissible, it is opposed to the great weight of authority, which supports the rule followed in the reported case (PEOPLE v. MARXHAUSEN, ante, 1505).

*b. Necessity of warrant for seizure.*

**Seizure cannot be made without statutory authority.**

Under the settled principles of the common law, and the constitutional provisions for the security of person and property, and immunity from unreasonable searches and seizures, a seizure cannot be made except under authority of a statute conferring the power so to do. *Re Swan* (1893) 150 U. S. 687, 37 L. ed. 1207, 14 Sup. Ct. Rep. 225.

**—but may be made without warrant previously procured, where no search is required.**

A statute, which provides that "in all cases where an officer may seize intoxicating liquors or the vessels containing them upon a warrant, he may seize the same without a warrant and keep them in some safe place for a reasonable time until he can procure such a warrant," does not contravene the constitutional provision against unreasonable searches and seizures, since it merely authorizes the seizure without a warrant when such seizure can be made without the unreasonable search which is prohibited by the Constitution. *State v. McCann* (1871) 59 Me. 383; *State v. Le Clair* (1894) 86 Me. 522, 30 Atl. 7; *State v. Bradley* (1912) 96 Me. 121, 51 Atl. 816.

A statute which authorizes officers, without a warrant, to arrest any person whom they may find in the act of illegally selling, transporting, or distributing intoxicating liquor, and seize the liquor, vessels, and implements of sale in the possession of such person, and retain them in some place of keeping until warrants can be procured for the trial of the person and the seizure of the liquors, is constitutional. *Jones v. Root* (1856) 6 Gray (Mass.) 435; *Mason v. Lothrop* (1856) 7 Gray (Mass.) 354.

A constitutional provision which prohibits absolutely unreasonable searches, and prohibits any search save upon a warrant duly issued, requires a warrant to seize only in those instances where the seizure is assisted by a necessary search, and does not prohibit a seizure without warrant where there is no need of a search, and where the contraband subject-matter is fully disclosed, and open to the eye and hand. *State v. Quinn* (1918) — S. C. —, 97 S. E. 62.

The constitutional provision against unlawful searches and seizures is not violated by a statute which gives an officer the power to seize without warrant, liquor found "under circumstances warranting the belief that it is intended for sale or distribution" contrary to law, but which does not purport to confer the power of search. *State v. O'Neil* (1885) 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586, 6 Am. Crim. Rep. 319.

*c. Sufficiency of showing of probable cause.*

A statute providing that, "if any person shall make an affidavit . . . that such affiant has reason to believe and does believe" that liquors are unlawfully kept in a certain place, a search warrant shall issue, does not violate a constitutional provision that no search warrant shall issue "but upon probable cause, supported by oath or affirmation." *Rose v. State* (1908) 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228.

The requirement of the constitutional provision against unreasonable searches and seizures, that "no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized," is satisfied by an affidavit upon information and belief. *Koch v. District Ct.* (1911) 150 Iowa, 151, 129 N. W. 740.

A statutory provision that any place suspected of being a blind tiger shall be searched by an officer designated in a search warrant, issued on an affidavit that the affiant believes the place to be a blind tiger, and on such additional evidence as the court may re-



quire to make out a prima facie case, and that any intoxicating liquors found therein shall be seized by the officer and brought before the court, along with all persons found in the place, is not violative of the constitutional guaranty against unreasonable search and seizure and the issuance of a warrant without probable cause, supported by oath or affirmation. *State v. Doremus* (1915) 137 La. 266, 68 So. 605; *State v. Nejin* (1917) 140 La. 793, 74 So. 103.

"The question whether a constitutional requirement that a search warrant shall not issue without probable cause, supported by oath or affirmation, is contravened by a statute which not only authorizes but requires the issuance of the writ upon no better showing of cause than an affidavit of belief, is discussed in *Dupree v. State* (1909) 102 Tex. 455, 119 S. W. 301, in which the court, after reviewing the conflicting authorities, remarked: "The legislature has thus, in effect, determined that such oaths, in themselves, show probable cause, and we are confronted by the question whether or not it had power to do this. It is obviously true that the legislature cannot dispense with the requirement of the Constitution that probable cause be shown, and that, therefore, it cannot evade this limitation upon its power by an attempt to make that probable cause which plainly is not such. But have we such a case? In determining a question like this, we must take into consideration the history of the subject, and what has been regarded as probable cause, and when we find that that which the legislature has, in this instance, treated as being sufficient, has been thus long and extensively so regarded here and elsewhere, by both legislative and judicial authority, it would be difficult to say that there is such a plain and palpable violation of the Constitution as to justify the courts in declaring the statute void; and if this were the only objection to the act in question, we should hesitate long before reaching such a conclusion."

*d. Necessity of describing place and property in complaint.*

The constitutional provision that no warrant shall issue but on complaint in writing upon probable cause, supported by oath or affirmation, and describing as nearly as may be the place to be searched and the person or things to be seized, does not require the complaint to describe "as nearly as may be" the place to be searched, and the persons or things to be seized, such requirement having reference to the warrant only." *Re Horgan* (1889) 16 R. L. 542, 18 Atl. 279.

*e. Description of place to be searched.*

In order to avoid a constitutional guaranty against unreasonable searches and seizures, the writ must not be general; it should not leave the place to be searched to the discretion of the officer executing it; it must confine the search to one place or building. *Toole v. State* (1910) 170 Ala. 41, 54 So. 195.

But a separate warrant for each suspected place to be searched is not called for, either by the letter or spirit of the Constitution. *Gray v. Davis* (1858) 27 Conn. 447.

Under a constitutional provision that no warrant to search any place, or seize any person or thing, shall issue "without a special designation of the place to be searched," the locality must be definite, certain, and fixed, and must be capable of being described and specially designated; hence, a statute authorizing search for and seizure of intoxicating liquors lawfully kept cannot properly be construed as warranting the search for and seizure of liquors in a valise, alleged merely to be in the possession of the defendant, but not alleged to be in any definite and fixed locality or place. *State v. Fezzette* (1908) 103 Me. 467, 69 Atl. 1073.

Such constitutional requirement is not met where the designation of the place to be searched, if used in a conveyance, would not convey it, and would not confine the search to one building or place. *State v. Brann* (1912) 109 Me. 559, 84 Atl. 266.

The constitutional requirement that

no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, is contravened by a statute which requires as a basis for the issuance of a search warrant only that it describe a place where the affiant believes intoxicating liquor is being sold, or is being kept or possessed for the purpose of being sold, in violation of law, and confers authority upon the officer to enter and search not only the place described in the affidavit, but any place where the affiant has good reason to believe any such person has placed or secreted any such liquor, thus empowering the complainant to determine, upon a mere belief not even previously sworn to, what places, in addition to those described in his affidavit, shall be entered and searched. *Dupree v. State* (1909) 102 Tex. 455, 119 S. W. 301.

A complaint in which the place where the liquor was alleged to be deposited was "in the dwelling house of Russel H. Lincoln of Shrewsbury, in the county of Rutland," sufficiently describes the place to be searched. *Lincoln v. Smith* (1855) 27 Vt. 328.

And a description of the premises to be searched as "a place at 14 Jefferson street in the city of Montgomery, to wit, a stable or storehouse in the rear of a residence at said 14 Jefferson street," is sufficient. *Toole v. State* (1910) 170 Ala. 41, 54 So. 195.

A search warrant not describing and designating some particular house, building, or place for search, but authorizing the search of a "certain suit case, trunk, or other container in the possession of" a person named, "in the roads, streets, alleys, or rooms in said county," is void. *State v. Ensweller* (1916) 78 W. Va. 214, 88 S. E. 787.

#### *f. Description of property to be seized.*

The constitutional requirement that no search warrant shall issue but on complaint, describing as nearly as may be the place to be searched and the persons or things to be seized, is satisfied by a description not necessarily particular or precise, but varying according to the nature of the thing to

be described. *State ex rel. Potter v. Snow* (1854) 3 R. I. 64.

It is not necessary to state with mathematical accuracy the character or quantity of the article to be seized, inasmuch as the only description which it is possible to give in such cases must be a somewhat general one. *Re Horgan* (1889) 16 R. I. 542, 18 Atl. 279.

The purpose of the constitutional requirement that the thing to be seized shall be described "as near as may be" being only to put proper restrictions upon the power to be given by the process, no very precise or technically accurate description is required. *Dupree v. State* (1909) 102 Tex. 455, 119 S. W. 301.

The constitutional provision that "no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," does not necessarily require a minute and detailed description of the place to be searched or the property to be seized, but merely requires that such place be designated with sufficient accuracy to prevent the officer from searching the premises of one person under a warrant directed against those of another, while the description of the property to be seized will vary according to whether the identity of the property, or its character, is the matter of concern. "Thus, where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other. On the other hand, if the purpose be to seize not specified property, but any property of a specified character which, by reason of its character, and of the place where and the circumstances under which it may be found, if found at all, would be illicit, a description, save as to such character, place and circumstances, would be unnecessary, and ordinarily impossible." *State v. Nejin* (1917) 140 La. 793, 74 So. 103.

In *Lincoln v. Smith* (1855) 27 Vt. 328, it is held that a description of the property as "intoxicating liquor" satisfies the constitutional requirement

that it shall be described "as nearly as may be."

The principle and spirit of the constitutional provision that "every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure,"—are violated by a statute providing for the search and seizure of intoxicating liquors, which does not require the persons who are to make complaint to state that they have reason to believe and do believe that intoxicating liquors are kept or deposited and intended for sale by any person named, or require the magistrate to state in the warrant the name of any person believed to be the owner or keeper of such liquors, or the name of any person having the custody or possession thereof, or of any person having the intention to sell the same, and which does not limit the officer's authority and right of seizure to the articles described in the complaint, nor to those intended for sale, but directs them to seize any liquor found in the place described in the complaint. *Fischer v. McGirr* (1854) 1 Gray (Mass.) 1, 61 Am. Dec. 381.

A statute which requires neither the giving of the name nor the description of the owner, keeper, or possessor of the liquor, nor any description of the liquor itself, other than that it is intoxicating liquor intended for sale in violation of law, and which authorizes and requires, upon an affidavit merely that intoxicating liquors are being sold, or kept for sale, in a described place, in violation of law, a warrant to issue, under which it shall be the duty of the officer to seize all intoxicating liquors found in that or any other place where the affiant believes them to be kept or secreted, and which, therefore, virtually authorizes

the issuance of a general warrant for the seizure of intoxicating liquors wherever found, and for whatever purpose kept, violates the constitutional requirement that the thing to be seized shall be described "as near as may be." *Dupree v. State* (1909) 102 Tex. 455, 119 S. W. 301.

The court in the foregoing case goes on to explain that it does not mean to hold that it is not in the power of the legislature to provide that seizures may be made of liquors unlawfully kept, in a proceeding in rem, without naming therein any person as owner or keeper, but that the reference made by them to the absence of the name or description of the owner or keeper of the liquor was for the purpose of demonstrating the absence of description, and of everything by which the writ might be limited to liquors properly seizable under it.

#### *g. Time for execution of warrant.*

The constitutional provision against unreasonable searches and seizures is violated where the search warrant is not executed within a reasonable time; and what is a reasonable time is a question of law for the court to determine in each case, according to its circumstances. An unexplained delay of three days in the execution of such a warrant may be unreasonable. *State v. Guthrie* (1897) 90 Me. 448, 38 Atl. 363.

But in *Farmer v. Sellers* (1911) 89 S. C. 492, 72 S. E. 224, it was held that the question whether the search warrant has been executed with reasonable promptness is for the jury, and that a delay of forty-eight days in serving, could not be said, as a matter of law, to be so unreasonable as to destroy the force of the warrant.

#### *h. Manner of executing warrant.*

In *Buckley v. Beaulieu* (1908) 104 Me. 56, 22 L.R.A. (N.S.) 819, 71 Atl. 70, it is said that whether the conduct of the officer making the search was reasonable or unreasonable must be determined by all the circumstances of the case. "No definite line can be drawn. The division is rather by a zone within which reasoning men might reasonably differ, but outside

of which there would be a general concurrence of reasoning, thinking men. The general principle, however, is that while the officer should search thoroughly in every part of the described premises, where there is any likelihood that the object searched for may be found, they should also be considerate of the comfort and convenience of the occupants, should mar the premises themselves as little as possible, and should carefully replace, so far as practicable, anything they find it necessary to remove."

The constitutional right of a property owner against unreasonable searches is violated by officers who, in the execution of a warrant to search for liquor alleged to be illegally kept upon the premises, remove the laths and plastering for a space 2 to 4 feet wide around all the rooms of the lower floor of his dwelling, and then leave the owner to restore the house to a habitable condition, where the object of the search could have been attained by the use of some slender probe, with comparatively little injury. *Ibid.*

—re-entry upon premises after executing warrant.

The constitutional guaranty against unreasonable searches and seizures is violated where an officer, who has made an arrest for a violation of the Intoxicating Liquor Laws, after executing a warrant of arrest, though before its return, re-enters upon the premises to remove therefrom, to be used as evidence, liquors inadvertently left on the premises by him at the time of making the arrest. *Gamble v. Keyes* (1915) 35 S. D. 644, 153 N. W. 888.

IV. Miscellaneous.

A constitutional provision that all warrants to search suspected places or arrest a person for examination or trial, in prosecutions for criminal matters, are contrary to the right to be secured from all unreasonable searches and seizures if the cause or foundation of them be not previously supported by oath or affirmation, requires the warrant which authorizes a search for and seizure of liquor, for the purpose of forfeiting it, to be

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founded on a complaint charging that the liquor is kept for sale in violation of law. *State v. Spirituous Liquors* (1894) 68 N. H. 47, 40 Atl. 398.

A search and seizure cannot be deemed reasonable where nothing further appears than that the person whose premises are searched has liquor in his possession, although it is within the power of the legislature to declare the possession of intoxicating liquor for the purpose of sale as quasi a nuisance, and to enact that such possession shall be *prima facie* evidence of unlawful intent. *Sullivan v. Oneida* (1871) 61 Ill. 242.

The provisions of the Constitution guaranteeing citizens against unreasonable searches and seizures are not violated by the Alabama Prohibition Law, Special Act 1909, pages 70-74, authorizing a writ of seizure to abate the nuisances declared by the act. *Fitzpatrick v. State* (1910) 169 Ala. 1, 53 So. 1021; *Jones v. State* (1912) 4 Ala. App. 159, 58 So. 1011.

In *State v. Miller* (1859) 48 Me. 576, the provisions of a statute which do not appear in the report of the case, authorizing the seizure of intoxicating liquors upon warrants duly issued therefor, were held not to be in conflict with the Constitution.

The question whether a constitutional provision against unreasonable searches and seizures was violated by a municipal ordinance prohibiting the keeping of intoxicating liquors, the terms of which do not appear in the report, was somewhat discussed in *Bessemer v. Eidge* (1909) 162 Ala. 201, 50 So. 270; but in view of the grounds upon which the various members of the court put their decision, it cannot be said to have been definitely passed upon.

A statute authorizing an attachment of the goods and chattels of the defendant in an action to recover a penalty for the illegal sale of intoxicating liquors does not violate the constitutional provision against unreasonable search or seizure, there being in such case no search or seizure within the meaning of such provision. *State v. Marshall* (1911) 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434.

**Statute requiring person found intoxicated to disclose where liquor was obtained.**

A constitutional declaration "that the people have a right to hold themselves, their houses, papers and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, whereby any officer or messenger may be commanded or required to search suspected places, or seize any person or persons, his, her or their property, not particularly described, are contrary to that right and ought not to be granted," is directed against general warrants, and general search war-

ants in particular, not specifically describing the persons, places, or property to be searched or arrested, and has no reference to a statute providing for the apprehension of any person found in such a state of intoxication as to disturb the public or domestic tranquillity and his detention until he shall disclose the place where, and the person of whom, the liquor so producing intoxication was obtained, and that, on his refusal or neglect to do so, he may be committed to jail, until he shall make such disclosure, or be discharged by the justice before whom he was examined. *Re Powers*. (1853) 25 Vt. 261.

E. S. O.

P. C. JENKINS, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

*Kentucky Court of Appeals — December 17, 1915.*

(167 Ky. 544, 180 S. W. 961.)

**Evidence — other crime — identity.**

1. Upon trial of persons for injury to a person in consequence of a conspiracy, evidence is admissible of similar occurrences in the locality about the same time at which accused are shown to have been present, in connection with evidence of an organization of accused and others for the purpose of committing such outrages, as tending to show accused were members of the organization, and thus aiding in identifying them as responsible for the injury inflicted in the instant case.

[See note on this question beginning on page 1540.]

**Appeal — motion to set aside indictment.**

2. Where by statute the action of the trial court upon motion to set aside an indictment is not subject to exception such questions cannot be reviewed on appeal.

[See 2 R. C. L. 211.]

**Jury — grand — excusing members of panel.**

3. The court may, in selecting members for a grand jury, excuse those who have been or will be intimidated by threats of an organization against members of which an indictment is sought.

[See 12 R. C. L. 1018.]

**Venue — change — right of state — joint indictment.**

4. A change of venue may be had

by the state as to part of those jointly indicted for a felony, if the state had a right to separate trials of the several defendants.

**Criminal law — joint indictment — separate trials.**

5. The state may at its election try separately parties jointly indicted for a felony.

[See 8 R. C. L. 167.]

**Venue — change — discretion.**

6. A court does not abuse its discretion in removing to another county for trial an indictment against a member of a secret organization whose operations have terrorized the community in which they were carried on and where the indictment was found.

[See 2 R. C. L. 214.]

**Criminal law — trial on copy of indictment — change of venue.**

7. The statutory provision for trial upon a copy of the indictment in case some of several jointly indicted secure a change of venue to another county may be followed in case the change is secured by the state, although change by the state is not directly provided for by the statute.

**Continuance — denial — abuse of discretion.**

8. There is no abuse of discretion in overruling a motion for continuance on the ground of surprise upon the introduction by the state of evidence as to another crime than that for which accused is on trial, which is based merely upon the affidavit of accused stating that he can show an alibi, which mentions the name of no witness so that it cannot be read as the deposition of a witness.

[See 6 R. C. L. 544, 553.]

**Statute — construction — conspiracy to injure — punishment.**

9. An injury to person as well as injury to property is embraced within a statute providing imprisonment of from one to fifteen years in case injury to the person or property results from unlawful acts designated by the "preceding sections" of the act, and the section immediately preceding relates to conspiracy to injure property alone if the second preceding section

relates to conspiracy to injure the person, and all three sections are part of the same act.

**Conspiracy — failure to indict some conspirators — effect.**

10. That all those engaged in a conspiracy to injure were not known to the grand jury, and that some of them were therefore not indicted, does not prevent conviction of those members of the conspiracy who were known, even though they are shown to have conspired with persons not indicted.

[See 5 R. C. L. 1078.]

**— punishment of persons not present.**

11. The legislature may provide that all participating in a conspiracy which results in injury to a person shall be punished, although some of the conspirators were not present at the time of the injury.

[See 5 R. C. L. 1063, 1067.]

**Evidence — identity — relaxing rules.**

12. Where the sole issue in a case is as to the identity of the accused, the evidence on that issue by the state may properly be permitted to take a wide range, and in a measure the rigid rules of evidence will be relaxed.

[See 8 R. C. L. 188 et seq., 201.]

**— conspiracy — scope of evidence.**

13. Great latitude must be given the state in the production of its evidence in proof of a criminal conspiracy.

[See 5 R. C. L. 1087.]

**APPEAL** by defendant from a judgment of the Circuit Court for Warren County convicting him of conspiring with others to injure certain persons. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. T. W. Thomas, R. C. P. Thomas, W. A. Helm, and W. R. Gardner for appellant.

Messrs. James Garnett, Attorney General, Robert T. Caldwell, Assistant Attorney General, and John H. Giliam for the Commonwealth.

Turner, J., delivered the opinion of the court:

At the February term, 1915, of the Butler circuit court the following indictment was returned, to wit: "The grand jury of the county of Butler in the name and by the authority of the commonwealth of Kentucky accuse Silas Gardner, J. A. Gardner, Dock Gardner, Bunk Haws, Marion Drake, Andrew

Drake, Ben John Penrod, P. C. Jenkins, J. E. Mayhugh, Harry Grubb, Doss Peay, Joseph Drake, and Elzie Pendley of the offense of unlawfully, wilfully, and feloniously banding and confederating themselves together for the purpose of intimidating, alarming, disturbing, and injuring another, and did injure and wound said others, to wit, Katherine Webster, Louella Webster, and Estil Webster, and the said defendants herein mentioned, and others whose names are to the grand jury unknown, did go forth in the nighttime with guns and other weapons for the purpose of intimidating, alarming, disturbing, and injuring

and whipping said Katherine, Louella, and Estil Webster, and did in the nighttime, as aforesaid, go to the house of James Webster and seize and lay hold of said James, Katherine, Louella, and Estil Webster, and did take them from their house and from their beds, and tie them to a tree, and with blindfolds over their eyes and ropes around their necks did beat, bruise, stripe, whelp and injure, intimidate and scare, said parties, and defendants being armed and having weapons drawn upon said parties at said time."

At the same term of the court the commonwealth's attorney filed his statement, as provided by statute, and entered his motion to change the venue of the action, but before it was acted upon withdrew the same, except as to P. C. Jenkins and Marion Drake. The court, from evidence heard and personal knowledge, as recited in the order, granted a change of venue upon the ground that there was such a state of lawlessness and such a prevalent bias for and against the charge in the indictment in Butler county that a fair and impartial trial could not be had therein, and the case was, as to Jenkins and Drake, removed to the Warren circuit court for trial. The court directed the clerk to copy the indictment, orders, motions, notices, etc., and to make a complete transcript of the record, and directed that the same be delivered to the clerk of the Warren circuit court, all of which was done. At the April term of the Warren circuit court the defendants entered a motion to quash the indictment because the names of the grand jurors drawn from the jury wheel in the Butler circuit court, and which had been furnished by the clerk to the sheriff in a list showing the order in which they were drawn, had not been called by the sheriff in the order their names came on the list, but that the sheriff, instead of so calling the jurors' names, in violation of law selected twelve names out of the said list without regard to their or-

der thereon, and it was done for the purpose of securing a jury that would indict the defendants. This motion was overruled by the court, and the order overruling it shows that the sheriff in calling the names from the list in the manner set out had acted under the direction of the court. Appellant Jenkins, being put on his separate trial, was found guilty, and the verdict fixed his punishment at confinement in the penitentiary for not less than four years nor more than four years and one day. His motion for a new trial having been overruled, he has appealed.

The evidence for the commonwealth is that on the 22d of August, 1914, at Union Chapel in Butler county, there was a meeting to which numerous men in the neighborhood had been invited, and at which there appeared a man named Clark, claiming to be the representative of a secret order known as the Amalgamated Workers of the World, and claiming to be the organizer of local lodges of that order. He made a speech to those present, giving the name of the order, but saying they were sometimes called "Possum Hunters." That among other objects of the order was that its members should stand by and help each other, and if any of them got into court they were to aid each other, and that if any of their members got on the jury when a member was being tried, he was to hang the jury or clear him. After this, and possibly other speeches, appellant Jenkins, assuming to act with authority, directed that a line be drawn on the floor, and all of those who desired to join were to cross on one side of the line, and that after this division was made those who did not join were directed to "go home and hold their tongues." That shortly after this organization of the local lodge at Union Chapel there were certain night raids in various parts of the county, at which persons were whipped, beat, and bruised by bodies of masked men. On the 27th or 28th of October, at

some time during the night, a body of masked men went to the home of James Webster, broke the doors open, seized James Webster, Katherine Webster, his wife, a woman of sixty-five years of age, Louella Webster, and Estil Webster. They took them about 300 yards from the house, and after first tying the aged woman to a tree with her arms around the tree and her face towards it, lifted her clothes above her head, and with a leather strap whipped her unmercifully on her naked body. They then duplicated this proceeding with the younger woman, Louella Webster, and finally placing a rope around the neck of Estil Webster, drew him up and let him down at least twice, and finally compelled him to falsely state to them that two men named Bradley were the persons who had shot into the raiders, and after that proceeded to give him an unmerciful whipping on his bare body. The masked men had firearms and flashlights, and not only whipped both of the women, as stated, but put ropes around their necks, cursed them, and otherwise terrorized them. While they did not offer personal violence to the old man, he was taken from the house and forced to witness the fiendish punishment administered to his aged wife, his daughter, and his son.

Each of the Websters positively identifies appellant as one of the party, and each of them testified to recognizing at the time different ones who were jointly indicted with Jenkins. They also stated that Jenkins seemed to be the leader of the party and gave all orders; that the members of the party said to the wife of Estil Webster that they were her friends, and that she need not be afraid, and gave as a reason for their treatment of the other Websters that they had been guilty of some mistreatment of Estil Webster's wife, and warned them thereafter to treat her as a lady.

There is also evidence to the effect that about the time these outrages were being perpetrated in Butler

county Jenkins, in conversation with at least two persons, while denying that he was a member of the organization known as "Possum Hunters," professed to give what he understood to be their mode of procedure in dealing with persons who had, for any reasons, incurred the displeasure of the order. He stated that he was informed that they would summon a jury and witnesses in the order and try the case, and if the parties needed "attending to," they went and attended to them, and if not, they let them alone. On the trial of this case, however, Jenkins admitted on the witness stand that he was not only a member of the local chapter of this order, but was its president or leader.

Conditions became so bad in the latter part of 1914 that it was generally rumored that an extra session of the grand jury was contemplated for the purpose of investigating these raids, and, as the record discloses, a special term of the court was actually called, but later called off. About that time appellant manifested great interest in the proposed special term of court, and, it may be inferred from circumstances in the record, went to the county seat to find out what he could about the same. Knowing the county court clerk, Moats, he went to see him, and in discussing this proposed special term of the court, among other things, said to Moats, as shown by the latter's testimony:

He told me that it wouldn't do for it to be called, and said if it was called it might be that 300 or 400 men might come in there and sweep the town off the map, and if the judge and commonwealth's attorney did come, it might make them swim the river backwards home, and he went ahead to tell about the organization, that they had the very best of guns that would shine like electric lights, and was talking about the order; said the Masons and Odd Fellows was nothing to compare with the Possum Hunters, and that the organization was for the good of the community, and before the or-



ganization existed he told about how it was around Huntsville, that the boys would stay out in the yard, and after this occurred there was no laughing out in the yard, that even the chickens were afraid to crow, the cows were afraid to low, and the cats were afraid to mew after the sun would go down.

Q. Anything else?

A. He asked me the question, he said: "Say they got them up and convicted them, what are they going to do with them? The jails won't hold them and the penitentiaries won't hold them; they are about 80 per cent strong over the state."

This witness, upon being recalled by the commonwealth and asked, if he had omitted in his former testimony anything which Jenkins had said, to state it, answered:

A. Yes, sir. I remember one thing very distinctly that I omitted. In his conversation, referring to the bravery of them, he said they didn't no more care for being shot into than a brick wall; that they demonstrated that fact down at Webster's; to be shot into on the road didn't frighten them a bit; that they went right on and got their possum, and dressed it up right nice, and went on about their business.

The evidence in the whole case revolves around the organization of this order, the purpose of its organization, and the connection of Jenkins with it, and although the indictment in this case only charges a conspiracy against the Websters, yet an investigation of that charge inevitably involves reference to similar outrages perpetrated in the county about the same time. Under these circumstances the trial court permitted the commonwealth to prove other similar happenings in the county prior to and about the time of the whipping of the Websters, and in one instance to prove a whipping which occurred about nine or ten days thereafter, and was permitted to show that upon some of these occasions appellant

was present and acting in the capacity of a leader.

It is not denied that the Websters were whipped, and it is admitted that appellant was not only a member of, but the local leader of, this organization.

Six grounds for reversal are relied upon, to wit: (1) That the grand jury was improperly selected, and that appellant's motion to quash the indictment for that reason should have been sustained. (2) That the court erred in granting a change of venue as to a part only of the defendants jointly indicted. (3) That the trial was held and conviction had only on a copy of the indictment. (4) That after the admission of evidence as to other offenses the court should have sustained appellant's motion to discharge the jury and continue the case. (5) The instructions were erroneous: (1) Because they authorized the infliction of a greater penalty than was authorized by law; and (2) because they authorized a conviction if appellant had formed a conspiracy with others than those named in the indictment; (3) and because they authorized a conviction even though appellant was not in fact present at the whipping of the Websters. (6) Because the evidence as to raids other than the Webster raid was incompetent.

Upon the first question little need be said, as it is expressly provided in § 281 of the Criminal Code that the action of the trial judge upon motion to set aside an indictment shall not be subject to exception, and it has often been held by this court that such questions cannot be reviewed by it. *Com. v. Goulet*, 140 Ky. 843, 132 S. W. 151; *Com. v. Simons*, 100 Ky. 164, 37 S. W. 949.

It is proper, however, to say in this connection, in justice to the trial judge, that he explains, in an opinion handed down by him on the motion for a new trial, that in directing the sheriff not to call cer-

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tain persons as grand jurors he was acting upon information that those persons had been or would be intimidated because of fear of the "Possum Hunters" organization, and that some of them had indicated to him that they were afraid to serve as grand jurors.

Whether the commonwealth may ask for, or the court grant, a change of venue as to a part only of the defendants who are jointly indicted for a felony, has not, so far as we are aware, been passed upon in this state. In this case the change of venue was originally asked for by the attorney for the commonwealth as to all of the defendants, but before the motion was passed upon it was withdrawn as to all of them except appellant and one other, so that when the court acted there was no motion for a change of venue except as to the two. From the nature of the question it would seem to depend upon whether or not the commonwealth, as a matter of right, might have a severance and demand separate trials of the several jointly indicted defendants, for, if this right existed upon the

part of the commonwealth, it could not possibly matter to any of the other defendants whether the change of venue was granted to a specific one; while, on the other hand, if the commonwealth had no such right, and the defendants, as a matter of right, might demand that they all be tried together, it was necessarily beyond the power of the court to compel them to be tried separately by transferring the case as to a part of them to another court.

Under § 237 of the Criminal Code, any defendant who may be jointly indicted with another, or others, for a felony, is granted a right to a separate trial, but nothing is said in that section about the right of the commonwealth to a separate trial of such indictments. Under the common law, however, a defendant had no such right, and the sec-

tion of the Criminal Code referred to changed the common-law rule in so far as it applied to such defendant, but did not undertake to change or alter the common-law right of the commonwealth in the premises. That is to say, the right of the commonwealth to a separate trial of persons jointly indicted for a felony must still be controlled by the common law. In the case of *Hoffman v. Com.* 134 Ky. 726, 121 S. W. 690, this question was fully gone into, and it was held that at common law the commonwealth, in case of joint indictments, had a right of election, subject to the discretion of the court, whether to try persons jointly indicted for a felony separately or jointly, and that the provisions of § 237 of the Criminal Code had not abrogated or altered this right. The commonwealth, therefore, having this right of severance, the whole question reverts to the proposition whether the court, in changing the venue of appellant's case to Warren county, abused its discretion; for when it removed the case to Warren as to part of the defendants, it necessarily exercised its discretion upon the question whether there should have been a severance, for of course, if the case was in one court as to part of the defendants and in another court as to another part, there must necessarily be separate trials.

There is no claim in this case that the court abused its discretion in the ordinary sense in removing this case as to appellant to Warren county, and if there had been such contention, the facts of the case, already detailed, would be conclusive, not only that the court had not abused its discretion, but that he would have been grossly derelict in his duty if he had not done so.

Section 1115, Ky. Stat. provides that when there is a change of venue and a prosecution is removed to another county, the clerk of the

Jury—grand—  
excusing mem-  
bers of panel.

Criminal law—  
joint indictment  
—separate trials.

Venue—change—  
right of state—  
joint indictment.

Venue—change—  
discretion.

court shall transmit the original papers, together with a transcript of the orders pertaining thereto, to the clerk of the court to which the removal is ordered, and from this it is argued by appellant that he was entitled to a trial in the Warren circuit court on the original indictment, and not on a copy of it. From the language of the section referred to it is apparent that it does not contemplate that two prosecutions under the same indictment may be pending at one and the same time and in different courts, as was the case here; but the very next section of the statute (§ 1116) provides that where one, or some only, of several defendants charged in the same indictment, be granted a change of venue, the original indictment shall be retained and a certified copy sent, which shall serve in lieu of the original. It is true that the last-named section seems to refer to cases only wherein change of venue is granted upon the application of defendants who are jointly indicted with others, and does not prescribe the same mode of procedure when such change of venue may be granted upon the motion of the commonwealth. But in any event the last-named section points out a common-sense mode of procedure for the commonwealth in such circumstances, and that method has been strictly followed in this case. There is no pretense or suggestion that the copy of the indictment under which appellant was tried was not in every respect a true and correct copy of the original, and in no event could his substantial rights have been affected.

**Criminal law—  
trial on copy  
of indictment—  
change of venue.**

After the introduction by the commonwealth of certain evidence about other raids in that county, and particularly after the admission of the evidence as to the whipping of one Jim Ray, which occurred after the whipping of the Websters, the appellant filed his affidavit and entered a motion to set aside the

swearing of the jury and to continue the case on the ground of surprise. The affidavit states, in substance, that the evidence showing that he had been connected with and was present at the whipping of Ray was a surprise to him, and that he had been advised by his attorneys that such evidence would not be competent on his trial in this case, and that, if given an opportunity, he could show by divers persons, without naming them, that he was not present and did not participate in the whipping of Ray. His affidavit did not show, however, where he was at the time Ray was whipped, or the name of any witness by whom he could show his whereabouts, but merely stated in a general way that, if given an opportunity, he could establish a complete and satisfactory alibi. Manifestly, this affidavit could not be, in any event, read as the

**Continuance—  
denial—abuse  
of discretion.**

deposition of any witness, for the name of no witness was mentioned in it, and the court, under these circumstances, did not abuse its discretion in overruling the motion for a continuance, and particularly when it is considered that this evidence did not bear directly upon the guilt or innocence of the defendant on the charge involved, but had been admitted by the court only for the purpose of showing that appellant was a member of the organization known as "Possum Hunters."

The instructions in this case authorized the jury to inflict a penalty of not less than one nor more than fifteen years' confinement in the penitentiary if they found the defendant guilty, and it is the contention of the appellant that this is unauthorized by the statutes, and that the penalty fixed by the statute for this crime is not less than one nor more than five years. This contention involves an interpretation of § 1241a, Carroll's Stat. (Ky.) 1915, dealing with the offense of criminal conspiracy, and the three subsections of that statute. In so far as

they relate to this question, they are as follows:

"1. If any two or more persons shall confederate or band themselves together for the purpose of intimidating, alarming, disturbing or injuring any person or persons, or to rescue any person or persons charged with a public offense from any officer or other person having the lawful custody of any such person or persons with the view of inflicting any kind of punishment on them, or with the view of preventing their lawful prosecution for any such offense or to do any felonious act, they, or either of them, shall be deemed guilty of a felony, and upon conviction shall be confined in the penitentiary not less than one nor more than five years.

"2. If any two or more persons shall confederate or band together and go forth, for the purpose of molesting, injuring or destroying any property, real or personal, of another person, persons or corporation, whether the same be injured, molested or damaged or not, they shall be guilty of a felony, and upon conviction shall be confined in the penitentiary not less than one nor more than five years.

"3. If any injury shall result to the person or property of any person or persons, by reason of any unlawful acts denounced in the preceding section of this act, the person or persons engaged or participating, or any one of them, or anyone aiding or abetting such unlawful act, shall be guilty of a felony and upon conviction shall be confined in the state penitentiary not less than one nor more than fifteen years, unless death should result, in which case the penalty for such offense shall be as now prescribed by law."

Subsection 1 of the statute quoted relates wholly to offenses against the person, and subsection 2 deals only with offenses against property, and the two offenses were evidently described and denounced by different subsections because it was intended to make a conspiracy to in-

jure the person a complete offense without a "going forth," while it is an essential element, where the injury of property only is the object of the conspiracy, there should be a "going forth." Subsection 3 then provides that, when there actually results injury either to the person or property of any person or persons by reason of the conspiracy denounced in the preceding section, the penalty shall be not less than one nor more than fifteen years, it evidently being the purpose of the legislature to raise the maximum of five years to a maximum of fifteen years where there is actually injury to person or property. Appellant's whole argument on this point is that the use of the singular "preceding section" in subsection 3 refers only to conspiracies to injure property, and does not embrace conspiracies to injure the person denounced by subsection 1. To adopt this construction would be to say that the legislature had done an absurd thing; that is to say, that it had fixed a maximum punishment of five years for entering into a conspiracy to injure the person, and executing that conspiracy, and at the same time and in the same act had authorized the infliction of a maximum punishment of fifteen years for entering into a conspiracy to injure property only, and executing that conspiracy. We entertain no doubt that it was the legislative purpose in subsection 3 to embrace in its provisions the conspiracies denounced by both subsection 1 and subsection 2, and to provide that, when either injury

to the person or property should result from such conspiracies, the maximum penalty should be fifteen years. If the contemplation of appellant was correct, there would have been in subsection 3 no reference whatsoever to an injury "to the person," and the very context of that subsection is inconsistent with any other interpretation than that the words "preceding section" were intended to be "preceding sections."

Statute—construction—conspiracy to injure—punishment.

A further objection to the instructions is that they authorized a conviction if appellant had entered into a conspiracy with others than those jointly indicted with him to injure the Websters. It is quite true that the indictment only charges that the persons named therein entered into the conspiracy, but it does charge that the defendants named, and others whose names are unknown, did go forth in the nighttime armed for the purpose of carrying out the conspiracy. The instructions, however, did authorize a conviction if the defendant Jenkins and the other named defendants, or any of them, or other person or persons, banded and confederated themselves together. The evidence of the Websters disclosed that a large number of other persons were present, besides the named defendants, who were not recognized; but one of the Websters did claim to have recognized one man as a member of the party who was not named in the indictment, to wit, Hal Brown. There is no contention that there was not evidence of conspiracy between Jenkins and some of the others named in the indictment, but only that the instructions authorized the conviction of Jenkins if he was in a conspiracy with any others than those named in the indictment. The fact, however, that *all* the conspirators were not known to the grand jury, but only part of them, and that only those named were charged with the conspiracy, does not prevent the conviction of those so charged. From the evidence it might well have been found that the indictment did not embrace *all* of the conspirators, but it was amply sufficient to sustain the charge of conspiracy against those who were charged. If an indictment charges a conspiracy by two or more persons, naming them, and the evidence discloses there were others in the conspiracy, those charged may be convicted just as if all the conspirators had been charged.

Conspiracy—  
failure to in-  
dict some con-  
spirators—effect.

It may be admitted in this case that the instructions did not closely follow the charge in the indictment, but the evidence of conspiracy between those who were charged is so convincing and the motive is so clearly shown,—Jenkins being the leader of the Possum Hunters, and Silas Gardner being the father of the wife of Estil Webster, who was supposed to have been mistreated by the Websters,—it is so perfectly apparent that the jury found the conspiracy to exist between those charged, that the error could not have been prejudicial.

It is suggested in appellant's brief, but not urged, that the second instruction is erroneous because it authorized the conviction of appellant even though he was not present in person when the whipping was executed. The very language of subsection 3, quoted above, authorizes such an instruction. It contemplates, from its very language, that <sup>—punishment of person not present.</sup> if any injury shall result to the person or property from the original conspiracy, even though part of the original conspirators may not be present when it is carried out, they shall be guilty under its terms.

And, finally, we have the question as to the admissibility of the evidence of similar raids occurring in that locality at about the same time, all, except one of them, before the Webster whipping. The commonwealth first showed the organization of this order at Union Chapel on the 22d of August, 1914, and showed that appellant was a member of that order. It then showed, to some extent, the nature and purpose of that organization. It also showed that shortly after its organization bodies of armed and masked men began to commit in that locality outrages similar to the Webster whipping. It showed that the members of this organization met in the nighttime at isolated places; it showed their mode of procedure upon these occasions by the statements

of appellant himself. It unmistakably showed by many facts and circumstances that all of these occurrences were traceable to this organization. It showed by the evidence of the four Websters that appellant and several of those mentioned in the indictment as co-conspirators were present at the house of James Webster and participated in the whipping. It was after the introduction of all this evidence that the commonwealth, evidently anticipating an effort to prove an alibi, the customary defense in such cases, was permitted to show that other and similar occurrences had taken place in that locality, and that, at least in two instances, appellant was present and participated in those occurrences, and that upon other occasions when similar things happened appellant was recognized late at night with bodies of armed men going toward or coming from the direction where the whipping occurred. Upon each occasion, when such evidence was admitted, and the defendant was shown to have participated in them or to have been present, or to have been seen on the road, the jury was admonished that the evidence was admitted only for the purpose of showing that appellant was a member of this organization, and was not admitted to show his guilt or innocence of the whipping of the Websters. Not only did the court take this precaution at all times during the trial, but in its written instructions to the jury it reiterated the same. In such cases of organized outlawry usually the most carefully planned arrangements are made in advance, either to hide or destroy all evidence of guilt. The parties wear masks, turn their clothes inside out, as in this case, and adopt what they conceive to be the surest method of concealing their identity. Not only so, but experience has taught that in such cases it has almost grown to be a custom that a carefully considered and arranged alibi, prepared in advance, is ready for any occasion. It was under these circumstances and

under these conditions that the court, in a case where the only issue was as to the identity of the appellant, permitted evidence to go to the jury as to other crimes of a similar nature, committed about the same time, in the same locality, and in practically the same way, solely upon the issue of identity. The evidence was admitted solely for the purpose of fixing with greater certainty the identity of these disguised outlaws, by showing their membership in and connection with this unlawful organization, the similarity of their mode of procedure in other raids about the same time; and it may well be doubted that, but for the admission of such evidence, in the light of these carefully considered and prepared-in-advance alibis, a conviction could ever be had in such cases.

Where the sole issue in a case is as to the identity of the accused, the evidence on that issue by the commonwealth may be properly permitted to take a wide range, and in a measure the rigid rules of evidence will be relaxed. The case of *Morse v. Com.* 129 Ky. 294, 111 S. W. 714, was where the defendant had sold warehouse receipts for whisky, and had embezzled the proceeds. It was conceded that the sale had taken place, and that the proceeds had not been accounted for, the only defense being that another, and not the defendant, had committed the crime, as in this case. In that case it was held proper to admit evidence of similar transactions by the defendant with other persons, under a name which he had assumed, in order to identify him as the man who had sold the receipts for which he was being tried. The court in that case said: "When the defense of a person is that it was not himself, but another, who committed the crime, the evidence in behalf of the commonwealth may be permitted to take a wide range for the purpose of developing the past life and history of the accused and the names he has

Evidence—other  
crime—identity.

—identity—  
relaxing rules.

assumed, to the end that he may be identified under those assumed names as the person who committed the offense under investigation; but if, in the course of the evidence brought out in the elucidation of these facts, it should appear that the accused had been guilty of some other offense, the court should, at the time, admonish the jury that they should not consider evidence of other offenses as even tending to show his guilt of the crime for which he was being tried, but that it was only competent for the purpose of establishing the identity of the accused and to illustrate that at different times he had assumed various names."

From the nature of the crime itself it is difficult to prove a criminal conspiracy by direct evidence, and such conspiracies are most always proved by circumstantial and "piecemeal" evidence; and in consideration of this fact, in such cases great latitude must, of necessity, be given the commonwealth in the production of its evidence. Cyc. vol. 8, p. 678, in discussing the admission of evidence in cases of conspiracy, says: "In the reception of circumstantial evidence great latitude must be allowed. The jury should have before them every fact which will enable them to come to a satisfactory conclusion. And it is no objection that the evidence covers a great many transactions and extends over a long period of time, provided, however, that the facts shown have some bearing upon, and tendency to prove, the ultimate fact at issue. But much discretion is left to the trial court, in a case depending on circumstantial evidence, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact."

And again, the same work, under the same head, at page 684, in dealing with the introduction of evidence in conspiracy cases, says: "Where the guilt of a party depends upon the intent, purpose, or design

with which an act is done, or upon his guilty knowledge thereof, collateral facts in which he bore a principal part may be examined into for the purpose of establishing such guilty intent, design, purpose, or knowledge. It is sufficient that such collateral facts have some connection with each other as a part of the same plan or as induced by the same motive, and it is immaterial that they show the commission of other crimes. The evidence in a conspiracy is wider than perhaps in any other case. Taken by themselves, the acts of a conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances."

We are not unmindful of the wisdom of the general rule that evidence of one crime is not admissible to prove another, but we are of opinion that under the circumstances of this case, where the only issue was one of identity, the evidence was admissible with the proper admonition by the court. The enormity of the crime is to be considered from more than one aspect. Not only does the inhuman, cruel, heartless beating of this old woman 65 years of age—to say nothing of the younger woman and man—merit even a severer punishment than the maximum fixed by the statutes; but when we contemplate this organized effort to supplant the courts in the administration of justice, this defiance of the established order of things, this substitution of mob rule for government by law, these farcical secret trials, had in the absence of the intended victim, these bold efforts to intimidate public officials, the case becomes one of all-absorbing public interest, and raises the question whether there is in fact a government by law in this state.

If we are to return to a state of savagery in which men are deterred from indulging their vicious tendencies only by a fear of the hereafter, then, and not until then, will such brutal organizations be permitted to defy organized society; then, and

not until then, will we be compelled to admit that our whole social fabric is builded upon sand and must sink. But as long as we have honest, faithful, and fearless public officials such as brought appellant to the bar of justice in the face of great difficulties, and even personal danger to themselves, we may confidently indulge the hope that this cancerous growth upon the body politic will be speedily and permanently eradicated, and that this organized mob will soon realize that *the law* is yet supreme in Kentucky.

Judgment affirmed.

## NOTE.

The decision in the reported case (JENKINS v. COM. ante, 1522), that the evidence of other similar crimes was admissible for the purpose of identifying defendants as the persons who committed the offense under prosecution is an application of a well-established exception to the general rule against the admissibility of evidence of other offenses. This exception is the subject of the annotation beginning at page 1540, under the title, "Admissibility of evidence of other offenses in criminal prosecution to prove identity of defendant."

J. F. LANCASTER, Appt.,

v.

STATE OF TEXAS.

*Texas Court of Criminal Appeals — January 16, 1918.*

(— Tex. Crim. Rep. —, 200 S. W. 167.)

**Evidence — other crime — identity.**

1. Upon the question of identity of a robber, evidence of another robbery on the same night with nothing to connect the two transactions is not admissible merely because there was some similarity in the appearance of the robbers in both cases.

[See note on this question beginning on page 1540.]

**Criminal law — trial — challenge to submit case without argument.**

2. Where the Constitution guarantees the right of accused to be heard by himself or counsel, the state's attorney could not comment to the jury

upon an attempt to secure a submission of the case without argument, and challenge counsel for accused to make such submission.

[See 2 R. C. L. 405.]

(Prendergast, J., dissents.)

APPEAL by defendant from a judgment of the District Court for Milam County convicting him of robbery. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. H. Evetts and Chambers & Wallace, for appellant:

The testimony of the witnesses Harris and Smith did not show or tend to show that the persons who robbed them were the same persons who committed the robbery charged in the indictment, and no other evidence establishing or tending to establish such fact was offered; hence the testimony of said witnesses was inadmissible.

Hill v. State, 44 Tex. Crim. Rep. 603, 73 S. W. 9; Wyatt v. State, 55 Tex. Crim. Rep. 73, 114 S. W. 812; Lightfoot v. State, — Tex. Crim. Rep. —, 106 S. W. 345; Holland v. State, 55 Tex. Crim. Rep. 27, 115 S. W. 48; Williams v. State, 38 Tex. Crim. Rep. 128, 41 S. W. 645; Glenn v. State, — Tex. Crim. Rep. —, 76 S. W. 757; Barnett v. State, 50 Tex. Crim. Rep. 538, 99 S. W. 556.

No witness was offered, or circum-



stance proved, which showed that the persons who robbed the witnesses Brad Harris and Brit Smith were the same persons charged in the indictment.

Glenn v. State, — Tex. Crim. Rep. —, 76 S. W. 757; Bradshaw v. State, 44 Tex. Crim. Rep. 222, 70 S. W. 215, 15 Am. Crim. Rep. 608; Spivey v. State, 45 Tex. Crim. Rep. 496, 77 S. W. 444; Walker v. State, 42 Tex. 369; Leary v. State, 55 Tex. Crim. Rep. 547, 117 S. W. 822.

Comments by the state's attorney to the jury as to submission of the case without argument were harmful and prejudicial to defendant.

Lyon v. State, 42 Tex. Crim. Rep. 506, 61 S. W. 125; Knight v. State, 55 Tex. Crim. Rep. 243, 116 S. W. 56.

Mr. E. B. Hendricks, Assistant Attorney General, for the State.

Davidson, P. J., delivered the opinion of the court:

Appellant was convicted of robbery, his punishment being assessed at six years' confinement in the penitentiary.

The state's case, in brief, is that appellant and another party, in the town of Cameron, Milam county, committed robbery upon the person of Dave Watson. It was at night near the Santa Fe depot. The two parties who, the witnesses testify, committed the robbery upon them, were identified by such facts and circumstances and descriptions as the two parties could give, they all being strangers to each other. From one of the parties was taken some money and a pocket knife, described in a particular way. Later on, and during the same night, the appellant and his companion were arrested, and on the person of appellant was found a knife which was identified by one of the parties who claimed to have been robbed near the Santa Fe depot. It is unnecessary to go into a detailed statement of these two witnesses. They gave as accurate description as perhaps they could have done under the circumstances, of the two parties they claimed to have held them up. Later during the same evening, between the time of the alleged robbery at the Santa Fe depot and their arrest,

two other parties were introduced as witnesses, claiming also to have been held up by two men and robbed. This was something like a half hour after the first alleged robbery. This evidence was introduced over the objection of appellant, as being an independent offense and in no way connected with the first alleged robbery. Various objections were urged and overruled, and after the testimony had been introduced appellant again urged by a written charge that the testimony be withdrawn from the jury. It is unnecessary to take up these different grounds of objection and reasons assigned. The court seems to have admitted it upon the theory of identity. We are of opinion that the evidence was not introducible upon such theory under the facts of the case. The two robberies were in no way connected with each other, and the fact the second robbery occurred did not serve to identify these parties as the parties who committed the first robbery. There was no fact or circumstance which undertook to connect the two transactions, except the fact that they occurred on the same night, and that there was evidence showing some similarity in the appearance of the two robbers in both cases. This did not serve to identify appellant as being the robber in the first instance. This matter has been the subject of quite a number of decisions, and it is not the purpose here to review the authorities or discuss the matter at length. See Hill v. State, 44 Tex. Crim. Rep. 603, 73 S. W. 9; Herndon v. State, 50 Tex. Crim. Rep. 556, 99 S. W. 558; Barnett v. State, 50 Tex. Crim. Rep. 541, 99 S. W. 556; Saldiver v. State, 55 Tex. Crim. Rep. 178, 115 S. W. 584, 16 Ann. Cas. 669.

Evidence—other crime—identity.

There is a bill of exceptions reserved to some remarks of the prosecuting officer. Without discussing the matter, we believe this will not occur upon another trial. There was no necessity for these statements. They were, in substance, that the

district attorney did not see any use in arguing cases on such facts to the jury, and that there had been some conversation between himself and counsel for appellant looking to the submission of the case without argument, and he now challenged defendant's counsel to submit the case to the jury without argument. Such matters should not occur. The Constitution and law guarantee the

**Criminal law—  
trial—challenge  
to submit case  
without argu-  
ment.**

defendant may be heard by himself or counsel, or both.

This right is guaranteed him unimpaired by any criticisms or remarks of the character indulged. He may exercise the right to argue or not to argue. With this the state has no concern. It is a matter purely within the discretion of appellant and his counsel, or both. This may have had some effect upon the jury, and was not warranted. We trust this character of argument will not be again indulged.

The judgment is reversed, and the cause remanded.

**Prendergast, J., dissenting:**

The witnesses herein who were robbed could but meagerly identify appellant and his companion. They,

however, took a knife from one of them. The other party, whom they robbed just a very short time afterwards, could and did positively identify them. Just after the second robbery they were arrested, and this knife found on them. Therefore clearly the second robbery was admissible to identify them. The case should be affirmed.

I dissent.

#### NOTE.

It will be noted that the decision in the reported case (LANCASTER v. STATE, ante, 1533) that the evidence of another robbery was not admissible to prove identity was upon the ground that there was nothing to connect that transaction with the one under investigation except that they were committed the same night, and the evidence showed some similarity in the appearance of the robbers.

The general subject of the admissibility of evidence of other offenses in criminal prosecution to prove identity of defendant is treated in the annotation beginning at page 1540, and see especially page 1556 of that annotation for the robbery cases.

J. F. BATEMAN, Appt.,

v.

STATE OF TEXAS.

*Texas Court of Criminal Appeals—March 21, 1917.*

(81 Tex. Crim. Rep. 73, 193 S. W. 666.)

#### Evidence — identity — general rule.

1. Where the identification of accused is not definite as connected with the offense on trial, evidence of extraneous occurrences may be introduced to identify him with the cause on trial.

[See note on this question beginning on page 1540.]

#### Appeal — error in sending up statement of facts — effect.

2. That the statement of facts in a criminal case was included in the transcript instead of being sent separately to the appellate court, as required by statute, will not prevent its

consideration if the error could be cured by certiorari or agreement of counsel.

[See 2 R. C. L. 154, 158.]

#### Evidence — other crime — identity.

3. Upon the question of identity of one who committed a robbery at a barn

where he was not recognized, evidence is admissible that accused, with others, hired a conveyance to take him to a social function, and stopped at the barn on the way at about the time

of the robbery, and subsequently at the function about a half hour later committed a robbery upon another person.

[See 8 R. C. L. 201.]

**APPEAL** by defendant from a judgment of the District Court for Kaufman County convicting him of robbery by the use of firearms. *Affirmed.* The facts are stated in the opinion of the court.

Messrs. Charles Ashworth and Ross Huffmaster for appellant.

Mr. E. B. Hendricks, Assistant Attorney General, for the State.

Davidson, P. J., delivered the opinion of the court:

Appellant was convicted of robbery by the use of firearms, and his punishment assessed at five years' confinement in the penitentiary.

The assistant attorney general moves to strike out and not consider the statement of facts because not brought before this court in the manner provided by statute, which provides the statement of facts in felony cases must be brought up separate from the transcript. It seems that this motion is well taken. The statement of facts was transcribed in the record and certified as part of the transcript. It should not have been included in the transcript, but the original statement of

Appeal—error  
in sending up  
statement of  
facts—effect.

facts should have been sent up independent of the transcript of the proceedings. The statement of facts has, however, been read, and in view of the fact that this matter would be cured by certiorari, or by agreement of counsel, we have concluded to look at the case as if the statement of facts was properly before us.

Bills of exception were taken to the action of the court permitting the introduction of testimony not immediately connected with the offense charged. Viewed in the light of the qualification of the judge, the case could be affirmed without reference to the statement of facts; but viewed in the light of the statement of facts and qualification of the judge, for the judge refers to the

statement of facts in his qualification, there seems to have been no error in admitting this testimony, viewed in any light.

Briefly, the case is that there was a negro social function several miles from Crandall, in Kaufman county. A jitney driver took defendant and three others from the town of Crandall to this negro meeting. Just before reaching the place where the function was in vogue, and about a mile distant, the car was stopped. The four got out of the car and took a drink. One of the parties got back in the car while the other three went to a barn about 100 yards distant; they were gone a few minutes and returned. The party who is alleged to have been robbed testified that he was one of the parties in the barn when three men entered and "held them up." They robbed witness of about three dollars. This incident is the basis of this prosecution. He did not recognize any of the parties. They had a small light, which the three robbers extinguished. Upon returning to the jitney these parties got in and the car went on about a mile to where the negroes were assembled at the function, and began a series of acts, exhibiting and shooting their pistols, and robbed at least one party of something like seven dollars. The jitney driver sufficiently identified defendant as one of the parties he took in his car, and as one of them who left and went to the barn where the witness said he was robbed of \$3 by the exhibition of a pistol. He was not present at that robbery and knew nothing about it otherwise than the fact the three parties left the jitney, and were gone fifteen or twenty minutes

and returned. The parties at the barn did not recognize any of the parties, but at the social function appellant was recognized as one of those engaged in that robbery. Some of the witnesses who saw the defendant and his crowd at the social function were carried to the jail the next day after the arrest of appellant, and circumstantially recognized the defendant as one of them. His identity at the social function, over appellant's objection, was properly admitted.

The objection urged to the introduction of this testimony was that it was developing another crime, which, it is contended, was illegitimate, and the evidence inadmissible. We would be inclined to agree with this proposition if appellant had been clearly identified at the time as one of the parties to the transaction relied upon by the state for conviction, but as this was not the case we are of opinion the court did not err in admitting the evidence of identification at the other times and places mentioned. These two transactions occurred within thirty or forty minutes of each other, and at night.

Evidence—other  
crime—identity.

Where the identity of the party is not definite as connected with the offense on trial, extraneous offenses may be introduced to connect and identify with the case on trial. See Wyatt v. State, 55 Tex. Crim. Rep. 73, 114 S. W. 812, and Wright v. State, 56 Tex. Crim. Rep. 353, 120 S. W. 458. Under this view of the case we are of opinion that, even considering the statement of facts, there was no error in the ruling of the court.

The judgment will be affirmed.

#### NOTE.

The reported case (BATEMAN v. STATE, ante, 1535) held that the evidence of the other robbery was admissible as tending to prove the identity of the defendant as one of the persons who committed the robbery which was the subject of the prosecution. The general subject of the admissibility of other offenses in criminal prosecution to prove identity of defendant is discussed in the annotation beginning at page 1540. The robbery cases will be found cited at page 1556 of that annotation.

### PEOPLE OF THE STATE OF NEW YORK, Appt., v.

LOUIS THAU, Respt.

*New York Court of Appeals—July 11, 1916.*

(219 N. Y. 39, 113 N. E. 556.)

#### Evidence — other crimes — identity.

1. In an action for assault, where the defense is alibi, evidence is admissible of a visit by accused to the place of business of the prosecuting witness two weeks before the assault, and the criminal destruction of his goods, as bearing upon the question of identity of accused.

[See annotation on this question beginning on page 1540.]

—motive.

2. Upon trial of a prosecution for assault evidence is admissible that two weeks before the assault accused had visited plaintiff's shop and warned him

3 A.L.R.—97.

against working for nonunion establishments, as tending to show motive.  
[See 10 R. C. L. 946.]

—intent.

3. Upon trial of a prosecution for

assault, evidence is admissible that two weeks before the assault accused had visited plaintiff's shop, warned him against working for nonunion establishments, and destroyed some of his goods, as tending to show a common scheme or plan.

[See 10 R. C. L. 946.]

— evidence of other crimes — exclusion.

4. The rule which excludes evidence of other crimes than that which is charged in the indictment, unless the evidence is relevant to the issues on trial, should be strictly enforced.

[See 10 R. C. L. 939.]

(Hogan, J., dissents.)

**APPEAL** by the people from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment of the County Court for Bronx County, convicting defendant of the crime of assault in the second degree. *Reversed.*

The facts sufficiently appear in the opinion of the court.

Mr. Edward J. Glennon with Mr. Francis Martin, for appellant:

Evidence of the occurrence which took place in complainant's place of business on the 2d day of September, 1914, was admissible.

*People v. Molineux*, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; *Bauder v. Bryan*, 20 Kan. 369; *Johnson v. Com.* 115 Pa. 369, 9 Atl. 78; *People v. Rolfe*, 61 Cal. 541; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *People v. Place*, 157 N. Y. 584, 52 N. E. 576; *People v. Barobuto*, 196 N. Y. 293, 89 N. E. 837; *People v. Rimieri*, 180 N. Y. 163, 72 N. E. 1002; *People v. Loose*, 199 N. Y. 505, 92 N. E. 100; *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138; *State v. McCahill*, 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599.

The acts and statements of both September 2, 1914, and September 15, 1914, were all in furtherance of one object. The sole purpose of all the acts of the defendant was, by force, fear, and threats, to prevent the complaining witness from doing work for a nonunion shop.

*Pontius v. People*, 82 N. Y. 339; *People v. Daily*, 73 Hun, 16, 25 N. Y. Supp. 1050, affirmed in 143 N. Y. 638, 37 N. E. 823.

Messrs. Abraham Levy and Leo H. Klugherz, with Mr. Max S. Levine, for respondent:

It was error for the trial court to receive in evidence the acts and declarations of September 2, 1914.

*People v. Molineux*, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; *People v. Romano*, 84 App. Div. 318, 82 N. Y. Supp. 749; *People v. Flanigan*, 42 App. Div. 318, 59 N. Y. Supp. 101; *People v. Duffy*, 212 N. Y. 57, L.R.A.1915B, 103, 105 N. E. 839, Ann. Cas. 1915D, 176;

*People v. Thompson*, 212 N. Y. 249, L.R.A.1915D, 236, 106 N. E. 78, Ann. Cas. 1915D, 162.

**Willard Bartlett**, Ch. J., delivered the opinion of the court:

The indictment charged the defendant with having assaulted one Samuel Schaletskey (whose true name appears to have been Samuel Skiletsky) in the borough of The Bronx on the 15th day of September, 1914, by striking him with a bottle. The defense was an alibi. The people were permitted to introduce testimony, over the objection and exception of the defendant, tending to prove that he had visited the complainant's place of business about two weeks before (to wit, on the 2d day of September, 1914) with a large number of other persons, accompanied by a walking delegate, so-called, who warned the complainant against working for a nonunion shop; and that on this occasion the defendant destroyed about \$50 worth of garments belonging to the complainant, by pouring ink upon the goods out of a bottle which he had brought with him. The appellate division has reversed the judgment of the county court upon the conviction of the defendant, on the ground that it was error to admit evidence of this occurrence on September 2, 1914. In the opinion it is said that there was no question of identity in the case; that the evidence was not admissible as bearing upon the motive with which the assault was committed; and that the

two occurrences were so dissimilar that the proof had no tendency to establish a common intent.

We are unable to agree with the learned court below on any of these points.

The defense of an alibi raised in the most direct manner possible an issue as to the identity of the person who assaulted the complainant on the 15th of September. Any fact tending to show that the complainant was not mistaken in alleging that that person was the defendant was relevant to that issue. If the defendant, to the knowledge of the complainant, had visited his shop within a fortnight, and had then criminally destroyed some of his goods, that fact would be likely so to impress the mind of the complainant as to lessen the probability that he was mistaken concerning the identity of his assailant on the 15th of September.

While it may not have been necessary for the prosecution to establish a motive for the assault alleged in the indictment, it was entirely proper for the people to prove a motive if they could; and it seems quite clear to us that the occurrences of the 2d of September had a tendency to show that such a motive existed in the

objection, on the part of the defendant and his associates, to the conduct of the complainant in working for a nonunion shop. The learned judge who wrote for the appellate division says that it does not appear that the complainant did work or ever had worked for a nonunion shop. The testimony of the complainant, however, indicates clearly that the delegate who came to his place of business with the defendant on the 2d of September believed that the complainant was working for nonunion shops, and justifies the inference that the defendant shared that belief. Otherwise, it is difficult to account for his action in pouring ink upon the complainant's goods. It seems to us that the occurrences on

both occasions, as narrated by the witnesses for the prosecution, were so similar that they tended to establish a common intent, and hence that the evidence as to the occurrences of September 2d was admissible on that ground also.

The rule which excludes evidence of other crimes than that which is charged in the indictment unless the evidence is relevant to the issue or issues on trial should be strictly enforced.

On the other hand, where the evidence is relevant, the trial court should not hesitate to receive it, notwithstanding the fact that it tends to prove the defendant guilty of another offense. The proper practice in cases of this kind was well stated by Mr. Justice Brewer (afterward a distinguished associate justice of the Supreme Court of the United States) in *State v. Adams*, 20 Kan. 311, 319, where he said: "It is clear that the commission of one offense cannot be proved on the trial of a party for another, merely for the purpose of inducing the jury to believe that he is guilty of the latter because he committed the former. You cannot prejudice a defendant before a jury by proof of general bad character, or particular acts of crime other than the one for which he is being tried. And, on the other hand, it is equally clear that whatever testimony tends directly to show the defendant guilty of the crime charged is competent, although it also tends to show him guilty of another and distinct offense. . . . A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him. A man may commit half a dozen distinct crimes and the same facts, or some of them, may tend directly to prove his guilt of all; and on the trial for any one of such crimes it is no objection to the competency of such facts as testimony that they also tend to prove his guilt of the others." In *People v. Molineux*, 168 N. Y. 264, 62

-intent.

-evidence of other crimes—exclusion.

Evidence—other crimes—identity.

-motive.

L.R.A. 193, 61 N. E. 286, this court, speaking through our lamented associate Judge Werner, declared that evidence of other crimes is competent to prove the specific crime charged in the indictment when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan, embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial. In the present case we think that the evidence which the appellate division deemed objectionable was properly received as tending to establish motive, a common scheme or plan, and the identity of the person charged with the crime specified in the indictment.

We may add that an apt illustration of the relevancy of evidence tending to establish another crime than that charged in the indictment, where the defense is an alibi, is to be found in the case of *Reg. v. Briggs*, 2 Moody & R. 199. There the prisoner was indicted for the robbery of one Sladden; the defense was an alibi, and in order to show that the prisoner was near the place of the robbery at the time it was committed the prosecution was allowed to prove that one Makinson had been accosted by the defendant on the road, shortly before the com-

plainant was robbed, and had also been robbed by the party who accosted him. Here the testimony of Makinson tended to show that the defendant had committed another crime; but it was nevertheless held that the evidence was properly admitted.

The judgment of the Appellate Division should be reversed and the judgment of the County Court of Bronx County affirmed.

**Hiscock, Chase, Collin, Cardozo and Seabury, JJ., concur.**

**Hogan, J., dissenting:**

I dissent from the opinion of the chief judge in this case, particularly from that part of it which holds that the defense of an alibi raised in the most direct manner possible the identity of the person who assaulted the complainant on the 15th day of September, for the reason that, before any defense was offered by the defendant, the people were permitted to introduce the testimony referred to in the opinion as a part of the people's case. We cannot assume that the people then knew the grounds of defense which would be offered by the defendant, and the evidence criticized was admitted as original proof in the case, at the opening thereof. I concur with the opinion of Mr. Justice Scott of the appellate division, and vote for affirmance of the order of the appellate division.

## ANNOTATION.

### Admissibility of evidence of other offenses in criminal prosecution to prove identity of defendant.

- I. General rule, 1540.
- II. Prosecutions for particular offenses:
  - a. Arson, 1544.
  - b. Burglary, 1545.
  - c. Homicide, 1547.

#### *I. General rule.*

To the general rule that evidence of separate and independent crimes is inadmissible to prove the guilt of a person on trial for a criminal offense

#### II.—continued.

- d. Larceny, 1552.
- e. Liquor law offenses, 1555.
- f. Robbery, 1556.
- g. Other offenses, 1558.

there are several exceptions, which are as uniformly accepted by the courts as the rule itself. Among these exceptions is that, where evidence tends to aid in identifying the accused

as the person who committed the particular crime under investigation, it is admissible, in spite of the fact that it tends to show the guilt of the accused of other crimes for which he is not on trial.

**United States.**—*Boyd v. United States* (1892) 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292, reversing (1890) 45 Fed. 851; *Dean v. United States* (1917) 158 C. C. A. 538, 246 Fed. 568.

**Alabama.**—*Yarborough v. State* (1868) 41 Ala. 405; *Mason v. State* (1868) 42 Ala. 532; *Gassenheimer v. State* (1875) 52 Ala. 313; *Curtis v. State* (1884) 78 Ala. 12; *Miller v. State* (1900) 130 Ala. 1, 36 So. 379; *Mitchell v. State* (1903) 140 Ala. 118, 103 Am. St. Rep. 17, 37 So. 71; *Untreinor v. State* (1906) 146 Ala. 133, 41 So. 170; *Scott v. State* (1907) 150 Ala. 59, 43 So. 181; *Abrams v. State* (1908) 155 Ala. 105, 46 So. 464; *Gibson v. State* (1916) 14 Ala. App. 111, 72 So. 210.

**Arkansas.**—*Reed v. State* (1891) 54 Ark. 621, 16 S. W. 819; *Nash v. State* (1915) 120 Ark. 157, 179 S. W. 159.

**California.**—*People v. McGilver* (1885) 67 Cal. 55, 7 Pac. 49, 6 Am. Crim. Rep. 106; *People v. Rogers* (1887) 71 Cal. 565, 2 Pac. 679; *People v. Byrnes* (1915) 27 Cal. App. 79, 148 Pac. 944; *People v. Burke* (1912) 18 Cal. App. 72, 122 Pac. 435.

**Delaware.**—*Effler v. State* (1913) 4 Boyce, 62, 85 Atl. 731.

**District of Columbia.**—*Billings v. United States* (1914) 42 App. D. C. 413.

**Georgia.**—*Frank v. State* (1914) 141 Ga. 243, 80 S. E. 1016; *Demons v. State* (1916) 17 Ga. App. 480, 87 S. E. 690; *Thompson v. State* (1908) 4 Ga. App. 649, 62 S. E. 99; *Ledford v. State* (1917) 19 Ga. App. 610, 91 S. E. 924.

**Illinois.**—*Cross v. People* (1868) 47 Ill. 152, 95 Am. Dec. 474; *People v. Jennings* (1911) 252 Ill. 534, 43 L.R.A. (N.S.) 1206, 96 N. E. 1077; *People v. King* (1916) 276 Ill. 138, 114 N. E. 601.

**Indiana.**—*Frazier v. State* (1893) 135 Ind. 38, 34 N. E. 817; *Johnson v. State* (1897) 148 Ind. 522, 47 N. E. 926; *Dotterer v. State* (1909) 172 Ind. 357, 30 L.R.A. (N.S.) 846, 88 N. E. 689.

**Indian Territory.**—*Parker v. United States* (1898) 1 Ind. Terr. 592, 43 S. W. 858.

**Iowa.**—*State v. Kepper* (1885) 65 Iowa, 745, 23 N. W. 304, 5 Am. Crim. Rep. 594; *State v. Wackernagel* (1902) 118 Iowa, 12, 91 N. W. 761; *State v. Harris* (1912) 153 Iowa, 592, 133 N. W. 1078.

**Kansas.**—*State v. Hetrick* (1911) 84 Kan. 157, 34 L.R.A. (N.S.) 642, 113 Pac. 383.

**Kentucky.**—*Morse v. Com.* (1908) 1209 Ky. 294, 111 S. W. 714; *Richardson v. Com.* (1913) 166 Ky. 570, 179 S. W. 458; *Jenkins v. Com.* (1915) 167 Ky. 544, 180 S. W. 961; *Tye v. Com.* (1881) 3 Ky. L. Rep. 59.

**Michigan.**—*People v. May* (1917) 199 Mich. 574, 165 N. W. 832.

**Minnesota.**—*State v. Barrett* (1889) 40 Minn. 65, 41 N. W. 459.

**Mississippi.**—*Dabney v. State* (1903) 82 Miss. 252, 33 So. 973.

**Missouri.**—*State v. Balch* (1896) 136 Mo. 103, 37 S. W. 808; *State v. Spray* (1903) 174 Mo. 569, 74 S. W. 846, 14 Am. Crim. Rep. 603; *State v. Lewis* (1904) 181 Mo. 235, 79 So. 671; *State v. Spaugh* (1906) 200 Mo. 571, 98 S. W. 55; *State v. Hyde* (1911) 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191; *State v. Robinson* (1911) 236 Mo. 712, 139 S. W. 140; *State v. Weisman* (1911) 238 Mo. 547, 141 S. W. 1108; *State v. Gordon* (1913) 253 Mo. 510, 161 S. W. 721; *State v. Cox* (1915) 264 Mo. 408, 175 S. W. 73; *State v. Williams* (1916) — Mo. —, 183 S. W. 308; *State v. Lewis* (1918) 273 Mo. 518, 201 S. W. 80; *State v. Barnes* (1918) — Mo. —, 204 S. W. 264.

**Nebraska.**—*Neal v. State* (1891) 32 Neb. 120, 49 N. W. 174.

**Nevada.**—*State v. McFarland* (1918) — Nev. —, 172 Pac. 371.

**New Mexico.**—*State v. Starr* (1917) — N. M. — 173 Pac. 674.

**New York.**—*Hope v. People* (1881) 83 N. Y. 418, 38 Am. Rep. 460; *People v. Murphy* (1892) 135 N. Y. 450, 32 N. E. 138; *People v. Molineux* (1901) 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; *People v. Romano* (1903) 84 App. Div. 318, 82 N. Y. Supp. 749, 17 N. Y.



Crim. Rep. 385. And see the reported case (PEOPLE v. THAU, ante, 1537).

North Carolina.—State v. Thompson (1887) 97 N. C. 496, 1 S. E. 921.

Ohio.—Coble v. State (1876) 31 Ohio St. 100; State v. Brooks (1851) 1 Ohio Dec. Reprint, 407.

Oklahoma.—Dykes v. State (1915) 11 Okla. 602, 150 Pac. 84.

Pennsylvania.—Shaffner v. Com. (1872) 72 Pa. 60, 13 Am. Rep. 649; Brown v. Com. (1874) 76 Pa. 319; Kramer v. Com. (1878) 87 Pa. 299; Gersen v. Com. (1882) 99 Pa. 388; Com. v. Griffin (1910) 42 Pa. Super. Ct. 597.

Rhode Island.—State v. Fitzsimon (1893) 18 R. I. 236, 49 Am. St. Rep. 766, 27 Atl. 446, 9 Am. Crim. Rep. 843.

Tennessee.—State v. Becton (1874) 7 Baxt. 138; Logston v. State (1872) 3 Heisk. 414; Links v. State (1884) 13 Lea, 701.

Texas.—Washington v. State (1880) 8 Tex. App. 377; Satterwhite v. State (1879) 6 Tex. App. 609; Long v. State (1882) 11 Tex. App. 387, 13 Tex. App. 211; Musgrave v. State (1889) 28 Tex. App. 57, 11 S. W. 927; Leefer v. State (1890) 29 Tex. App. 63, 14 S. W. 398, affirmed in (1891) 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Stane-field v. State (1901) 43 Tex. Crim. Rep. 10, 62 S. W. 917; Wyatt v. State (1908) 55 Tex. Crim. Rep. 74, 114 S. W. 812; Collins v. State (1915) 77 Tex. Crim. Rep. 156, 178 S. W. 345; Davis v. State (1898) — Tex. Crim. Rep. —, 44 S. W. 1099; Leslie v. State (1898) — Tex. Crim. Rep. —, 47 S. W. 367; Watters v. State (1906) — Tex. Crim. Rep. —, 94 S. W. 1008; McCue v. State (1914) 75 Tex. Crim. Rep. 137, 170 S. W. 280, Ann. Cas. 1918C, 674; Kelley v. State (1916) — Tex. Crim. Rep. —, 185 S. W. 570; Leach v. State (1916) 80 Tex. Crim. Rep. 376, 189 S. W. 733; Baterman v. State (1917) — Tex. Crim. Rep. —, 193 S. W. 666; Lancaster v. State (1918) — Tex. Crim. Rep. —, 200 S. W. 167.

Utah.—State v. Martin (1917) 49 Utah, 346, 164 Pac. 500.

Washington.—State v. Lesev (1911) 61 Wash. 405, 112 Pac. 635.

England.—Perkins v. Jeffery [1915] 2 K. B. 702, W. N. 221, 84 L. J. K. B. N. S. 1554, 113 L. T. N. S. 456, 79 J. P. 425, 31 Times L. R. 444.

As was said in *People v. Jennings* (1911) 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077: "One of the well-known exceptions to the settled rule as to the admission of evidence as to collateral crimes is when evidence of an extraneous crime tends to identify the accused as the perpetrator of the crime charged. . . . When an alibi is disputed it is admissible to prove a collateral offense, to prove that at the time the accused was in the vicinity."

In *Demons v. State* (1916) 17 Ga. App. 480, 87 S. E. 690, the court, in an official syllabus, said: "There was no error in admitting the testimony to the effect that the defendant served a sentence on the chain gang at a time stated, which was admitted for the sole purpose of establishing his whereabouts at the time the alleged crime was committed, and tended to rebut the statement of the defendant as to his presence in the chain gang, away from the place of the crime, at the time the crime was committed."

Where it is sought to prove the identity of a person on trial for a criminal offense, by the similarity of another crime committed by him, such evidence must show that the other offense was, in fact, criminal. *People v. Byrnes* (1915) 27 Cal. App. 79, 148 Pac. 944. In that case, a prosecution for larceny by inducing a person to make bets on a fake horse race by means of a fraudulently equipped pool room, evidence that the same man was engaged in the operation of an apparently similar pool room at another place, where the witnesses lost a sum of money, was held to be inadmissible, in the absence of proof that the pool room was a blind and not in actual connection with race courses.

In order, however, for evidence of another crime to be admissible to prove the identity of the accused, there must be such a logical connection between the crimes that the proof of one will naturally tend to show that the accused is the person who committed the other. *Boyd v. United States* (1892) 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292, reversing (1890) 45 Fed. 851.

The mere fact that similar offenses

are committed by the same person does not, alone, so connect them that evidence of one may be admitted in the trial for the other, to prove the identity of the accused. Thus, in *Effier v. State* (1913) 4 Boyce (Del.) 62, 85 Atl. 731, it appeared that the accused had induced the prosecuting witness to contribute a sum of money toward the purchase of a ~~day~~ goods business, and, while the money was on a table with money contributed by the accused and others, pretended detectives entered the room and seized the money, mixing it all together, and, claiming that it was counterfeit, carried it off. It was sought to introduce evidence of a similar offense committed against another person about three months afterward for the purpose of proving identity. The court, holding the offenses to be so far unconnected as to preclude the admission of evidence of one on a trial for the other, said: "To prove identity, . . . there must be some connection between the two offenses, and it is not sufficient that they be similar offenses committed by the same person. Almost if not quite the same stringency of proof is required to prove identity of party by this kind of testimony as is required to show system or plan. We do not find the two offenses to be connected in such a manner as would make competent and relevant the proof of the similar offense to prove identity of the accused. Applying the law as we believe it to be, in respect to the general rule in relation to the admissibility of proof of other offenses and the exceptions to that rule, to the facts of the case now under consideration, we are of the opinion that the court below was in error in admitting the proof of a similar offense, as testified to by Silberman, for any of the purposes for which it was admitted."

And in *People v. Romano* (1903) 84 App. Div. 318, 17 N. Y. Crim. Rep. 385, 82 N. Y. Supp. 749, wherein it appeared that the robbery for which the accused was convicted was committed by throwing snuff in the eyes of the prosecuting witness at the time of the robbery, the prosecution, for the pur-

pose of establishing the identity of the accused, offered proof to show that three weeks prior to the commission of the offense for which he was on trial, he had committed another robbery at the same place on another person, by use of the same means. Holding the admission of such evidence to be erroneous, the court said: "The prosecution does not claim that it can support the ruling in the present case unless it be upon the ground that the prior crime tended to establish the identity of the defendant. Two facts are advanced in this regard in support of the theory that the testimony was admissible upon such question, i. e., that the prior crime was committed at the same place and in a similar manner. The defense was an alibi; consequently, evidence tending to identify the defendant was vital to the case, as that was the issue litigated. It is persuasive to say that a robbery committed a short time before, at the same place, by similar means and by the same person, tends to identify the defendant as the person who committed the crime at the same place and by the same means for which he is being tried. If the first crime be satisfactorily established, the mind is easily convinced of the guilt of the defendant as to the second, and yet it is common knowledge that numerous crimes of the same character have been committed by other individuals, and by the use of the same means. There is always more or less of similarity between the commission of independent crimes of this class, and in many instances features that are common to one are found in the other; and yet it has never been supposed that, where there was separation as to time and no connection established, beyond that of place and similarity, the first crime was admissible to establish any of the elements which constituted the other."

Nor is it proper to admit in evidence the details of separate and distinct crimes for the purpose of showing the identity of the accused. *Boyd v. United States* (1892) 142 U. S. 450, 35 L.

ed. 1077, 12 Sup. Ct. Rep. 292, reversing (1890) 45 Fed. 851.

Where the identity of the accused is established by other evidence, and therefore is no longer in issue, it is improper to admit evidence of other crimes for the purpose of proving identity. *Gibson v. State* (1916) 14 Ala. App. 111, 72 So. 210; *Billings v. United States* (1914) 42 App. D. C. 413; *State v. Spray* (1903) 174 Mo. 569, 74 S. W. 846, 14 Am. Crim. Rep. 603; *Kelley v. State* (1916) — Tex. Crim. Rep. —, 185 S. W. 570.

In *Dabney v. State* (1903) 82 Miss. 252, 33 So. 973, it was said: "It will be noted that proof of the other crime should not be admitted for the purpose simply of identifying the defendant, unless it be absolutely necessary for his identification. The learned circuit judge, when the objection was first made, sustained it, but later on overruled it, and permitted the testimony to go to the jury. We presume that he must have done this for the purpose of identifying the defendant, but it was wholly unnecessary for this purpose, since the other proof in the case abundantly identified the defendant."

## II. Prosecutions for particular offenses.

### a. Arson.

It has been held, in a prosecution for arson, that evidence of other fires set by the accused was admissible to show his identity as the person who set the fire under investigation. Thus, in *Kramer v. Com.* (1878) 87 Pa. 299, it was held to be proper to admit evidence, on a trial for arson, of a subsequent attempt to burn the same building, as tending to show the identity of the accused as the person who set the first fire, the court saying: "The offer was not to prove an independent offense on the trial of a case having no connection with it, as in *Shaffner v. Com.* (1872) 72 Pa. 60," but it was to prove acts immediately after the first attempt to burn the hotel, which tended to show a guilty purpose in *Kramer's* mind, such as would make it quite probable that he was the same person who had made the former attempt. It was a circum-

stance in the chain of proof. The fact that it indicated an attempt to fire the building again did not weaken the proof of purpose, because, if accomplished, it would be a distinct offense. The purpose of the first attempt failed because of the extinguishment of the fire, and though it had burned sufficiently to constitute the offense of arson as a complete crime, yet the purpose was not complete, for that was to consume the building entirely. Being saved, it was clearly the subject of a renewed purpose, and the evidence of this renewed purpose tended strongly to show that the person was the same who made both attempts."

Likewise, in *State v. Thompson* (1887) 97 N. C. 496, 1 S. E. 921, it was held that in a prosecution for the burning of a barn it was proper, as tending to identify the accused, to admit evidence that, at the same hour when the barn was burned, an attempt was also made to fire the dwelling house by means of pieces of wood tied up with a rope which was shown to belong to the accused.

In *Mitchell v. State* (1903) 140 Ala. 118, 103 Am. St. Rep. 17, 37 So. 76, the facts and holding of the court were set out as follows: "The defendant was convicted on an indictment charging her with burning the house of Sue Harris. On the trial, after the introduction of circumstantial evidence having a tendency to show that the house of Harris was, in the nighttime, set on fire by defendant and partially burned, the state was, against objection, allowed to introduce evidence to show that on the same night and near the same time of that burning, the house of one Murphey, which stood about 450 yards from the house of Harris, was intentionally burned, and to show, further, that after that fire tracks of a woman's shoes of the number worn by defendant were found leading from Murphey's. A rule applicable in criminal prosecutions generally renders inadmissible evidence of any offense other than that for which the prosecution is had. To this rule there are exceptions such as are mentioned in *Gassenheimer v. State* (1875) 52 Ala. 313,

and in *Curtis v. State* (1884) 78 Ala. 12, in which latter case it was said: 'When it is material to show the intent with which the act charged was committed, to illustrate its criminality, or to identify the accused as the person who committed the act, such evidence is admissible.' The jury was instructed 'not to consider the evidence as to the burning of Murphey's house, except so far as it might tend to show a guilty agency or intent in the burning of the house of Harris,' and there was evidence that defendant, having enmity towards Murphey and Sue Harris, had said she would 'fix both him and his sister Sue Harris.' Such utterances of defendant, if made, may have implied a threat to injure both of the persons at whom it was directed, and the burning of Murphey's house, if attributable to her, might by the jury have been considered as done in execution of that threat; and, therefore, the evidence in question was, in connection with the evidence of the threat, admissible as tending to identify defendant as the person who fired the house of Harris."

In *People v. Murphy* (1892) 135 N. Y. 450, 32 N. E. 138, the court, holding it to be proper to admit evidence of the malicious destruction of property to show the identity of the accused on a trial for arson, set out the facts and its ruling as follows: "The defendant had been in the employ of the owner of the burned barn as coachman and gardener, and was discharged some three months before the fire because of the ill feeling between him and the servant girl. He was familiar with the location and arrangement of the barn and other buildings upon the premises, and knew that a poisonous preparation, called London purple, was kept on a cupboard in the barn, and he had used it in spraying vines and for the destruction of insects in the garden. The people were permitted to prove, under defendant's objection, that upon the night of the fire, and before it occurred, a span of horses and a pony and cow, kept in the barn and belonging to the owner, were poisoned with London purple, and all died shortly afterwards; that his carriage in the

same barn was hacked and the curtains and cushions cut into shreds; that his carriages and cutters in the adjoining carriage house were cut and damaged; but his brother's carriages and cutters in the same barn were not injured. The evidence was sufficient to support the inference that the malicious injury to the personal property was done upon the same night that the fire occurred, and by the incendiary, and as a part of the same criminal scheme which resulted in the destruction of the barn. Under such circumstances the evidence was competent. . . . It very clearly tended to prove that the fire was not accidental; that its origin was instigated by malice and not from the desire to gain; that it was kindled by some person having the intimate knowledge of the defendant in regard to the situation of the property, and it was properly received, even though it may have tended to establish the defendant's guilt of another crime than the one set forth in the indictment on trial."

#### *b. Burglary.*

On a prosecution for burglary, evidence of other similar burglaries committed about the same time and in the same locality has been held to be admissible, as tending to show that the person who committed the prior offenses was the same as the one who committed the particular burglary charged. *Com. v. Griffin* (1910) 42 Pa. Super. Ct. 497.

In *Frazier v. State* (1893) 135 Ind. 38, 34 N. E. 817, it was held that, in a prosecution for burglary, it was not improper to permit the state to prove that burglaries other than the one charged in the indictment were committed on the same night, in connection with the proof that one of the tracks at each of the houses burglarized corresponded with the track made by the accused. It was held that this evidence tended to establish the identity of the accused as one of the participants in the burglary, and was clearly admissible.

Likewise, in *State v. Harris* (1911) 153 Iowa, 592, 133 N. W. 1078, the court, holding that evidence of other burglaries was admissible on the

question of identity, set out the facts and its ruling as follows: "The defendant was tried on an indictment charging him with breaking and entering the home of Charles F. Luburger, in the nighttime, while armed with a dangerous weapon. The burglary was committed in the early part of the 22d day of May, and the defendant was identified as the burglar by two witnesses who saw him while he was in the house. A watch was taken from the Luburger home, and this was afterwards found with property that was taken from the home of Isaac B. Smith during the night of May 19th, and with property that was taken from the home of Father Donnelly on the night of May 23d, and the evidence tended to show that all of said property had recently been in the possession of the defendant, and was, in fact, under his control at the time of his arrest for this crime. The state was permitted to show that some of the articles so found were taken from these other homes, and members of the Smith family were permitted to testify that the defendant was the man who entered their home and took the property therefrom, and that he was at that time armed with a dangerous weapon. This evidence was competent, we think, for the purpose of identifying the defendant as the man who committed the crime charged. While it is the general rule that it is not competent to prove that the defendant has committed another crime wholly independent of that for which he is being tried, there are exceptions to this rule, and one of the exceptions is that evidence which tends to identify the defendant as the person who committed the crime with which he is charged is competent, although it may incidentally tend to prove that he has committed another and independent crime."

In *Richardson v. Com.* (1915) 166 Ky. 570, 179 S. W. 458, a prosecution for breaking into a railroad depot with intent to steal, it was held to be proper on the question of identity to admit evidence of a confession that the accused had broken into the same depot during the previous month, and had taken certain property, which

was afterwards found at his home. The court said: "The necessity for establishing the identity of appellant as the person, or one of the persons, who broke into the depot in August, did exist, and the confession he made to Lunsford of his participation in the first crime, namely, the breaking into the depot in July, as well as that of the August breaking, for which he was under trial, made it permissible for the commonwealth to prove in corroboration of Lunsford's testimony as to the confession, and of the confession itself, the facts appertaining to the first offense as well as the last. This corroboration was furnished by the finding at his house of the flour, and, at the place where he had discarded them, of the sacks in which he confessed to have taken it from the depot at the time of the August breaking; and also by the finding in and near his house of the overalls, meat, tobacco, and other property which, in his confession to Lunsford, he admitted taking from the depot at the time of his breaking therein in July."

In *People v. McGilver* (1885) 67 Cal. 55, 7 Pac. 49, 6 Am. Crim. Rep. 106, it was held that evidence that at the time of the arrest the accused was attempting a burglary, and that burglar's tools and part of the proceeds of the burglary for which he was being tried were found in his possession, was admissible to identify the accused as one of the persons engaged in the first burglary.

In *State v. Fitzsimon* (1893) 18 R. L. 236, 49 Am. St. Rep. 766, 27 Atl. 446, 9 Am. Crim. Rep. 343, it was held that on a trial for burglary it was proper to admit evidence that the accused broke into the same house about two hours before the breaking for which he was on trial, since it tended to show where the accused was during the night in question, and thus to identify him as the person guilty of the crime charged.

In *State v. Leroy* (1911) 61 Wash. 405, 112 Pac. 635, a prosecution for the burglary of the house of one Plemmons, it was held to be proper to admit evidence of another burglary occurring about the same time and in

the same vicinity, the fruits of which were found on the accused when arrested, as tending to identify him as the person guilty of the second burglary. The court said: "The purpose of the testimony was to show that the appellant was in the vicinity of the Plemmons house a short time before the commission of the crime charged. Brewster is about 10 miles from the Plemmons house. A stage road extends northerly from Brewster to Conconully and passes near the Plemmons house. As we have seen, the house was entered between the morning of November 5 and the evening of November 6. On November 6 the appellant took passage on the stage north of the Plemmons house, and was carried to Conconully the same day. On the morning of November 8 he was arrested at that place. He had in his possession, when arrested, a number of the articles taken from the Plemmons house, and also a set of burglar's tools. The case was tried on circumstantial evidence, and the purpose of this testimony was to fix the whereabouts of the appellant about the time the Plemmons house was entered. In short, its purpose was to show that the appellant was in the vicinity and had the opportunity to commit the crime charged. The matter of the burglary, the key, the knives, and the wedge, tended to identify and locate him. If the appellant left a trail of crime behind him, the misfortune is his, and that fact cannot defeat the right of the state to connect him with the crime charged by proofs of all relevant circumstances."

It has been held that, in a prosecution for burglary, evidence that the accused knew that the owner had a sum of money in the house at the time that the offense was committed, and had committed an assault on him in order to get it, was admissible to show the identity of the accused, the court saying: "The circumstances show very clearly, we think, that the principal intent with which the building was entered was to commit the crime of larceny or robbery. The fact then that defendant knew that there was money in the house was a proper cir-

cumstance to be considered by the jury in determining whether he is the person who broke and entered it. And when the fact that the particular crime charged in the indictment is proven, evidence which tends to identify the defendant as the person who committed it is relevant to the issue, and is admissible, even though it tends also to prove the commission of a distinct crime from that charged in the indictment, or a different motive from that alleged." *State v. Kepper* (1885) 65 Iowa, 745, 23 N. W. 304, 5 Am. Crim. Rep. 594.

In *Barton v. State* (1908) 4 Ga. App. 649, 62 S. E. 99, wherein the accused claimed to be a railroad conductor and produced a pass and a card showing membership in a railroad brotherhood, the court admitting in evidence the testimony of the owner thereof that the articles had been stolen from him, said: "The objection to the testimony of Conductor Eaker, that the pass, membership card, letters, etc., found in the possession of the defendant Thompson, were his, and that they had been taken surreptitiously from his possession, on the ground that this tended to embarrass the defendant before the jury, by showing his complicity in another and independent crime, is not well taken. Thompson having used these papers in an attempt to establish an identity asserted by him, it was permissible for the state to show that he was thereby asserting a false identity to aid his escape, even though by its doing so another crime was indicated."

In *Mason v. State* (1868) 42 Ala. 532, a prosecution for burglary, it was held proper to admit in evidence, as tending to prove identity, that on the two nights preceding the particular burglary charged other burglaries had been committed, and that some of the property stolen was found in the possession of the accused when arrested.

#### *c. Homicide.*

It is well settled that, where the identity of the accused is in issue in a prosecution for murder, evidence of other crimes committed by him is admissible when logically connected with the crime charged, and reason-

ably tending to show his identity as the perpetrator of the crime charged. Thus, in *State v. Barrett* (1889) 40 Minn. 65, 41 N. W. 459, it was held to be proper to admit evidence that the pistol with which the crime was committed was one taken from a third person by the accused at the time of a previous felonious assault, as tending to identify the accused.

In *People v. Rogers* (1887) 71 Cal. 565, 12 Pac. 679, the evidence objected to was set out by the court as follows: "The prosecution was allowed, over his objection, to introduce evidence which tended to show that, prior to the night on which he is alleged to have murdered Kimball, the deceased, while burglarizing the latter's house, another burglary had been committed of a saloon belonging to Knight and Pardee, situated some 12 miles distant from the place of Kimball's murder, and that from the saloon a pistol, a small nugget of gold, with some other articles, were then and there stolen; that the nugget of gold was found in a box with a piece of cloth around it, other jewelry being also in the box; that the pistol was found in the woods with a sack, which contained articles of food and a cup, and that near the spot where the pistol was found was also discovered a quilt, which the evidence tended to show was the property of the defendant. . . . Evidence was also allowed to be introduced notwithstanding his objection, to the effect that the house of J. S. Connick had been burglarized the night previous to the killing of Kimball, and articles of food, a small sack, and shirt taken therefrom, and that the defendant had been seen in that neighborhood about the time of the commission of the burglary. It appeared in evidence, in addition to the matters just stated, that the box containing the jewelry and nugget of gold was found by the witness, Peterson, near by the spot at which the defendant was arrested, in a certain road; that this box had been, on the next morning, delivered to one T. M. Brown; that after such delivery he asked the defendant where he got 'that jewelry,' or 'the jewelry that is in the box,' to which the defendant

answered that he got it from Dan (who Dan was not being shown); that Mr. Knight identified the pistol as being one taken from the burglarized saloon, and Mr. Pardee identified the nugget of gold which was in the box when delivered to Mr. Brown as having been taken at the same time with the pistol. It was also shown that the person who entered Kimball's dwelling, and killed him, used to effect his burglarious entrance a knife and a chisel, and that said articles, some food, a cup, a shirt, and a sack had been taken from the burglarized house of Connick, and belonged to him; that around the box containing the jewelry and nugget of gold was a piece of cloth similar in color, texture, and general appearance to the shirt of Connick thus taken. The evidence also strongly tended to make it apparent that Kimball was killed with a pistol, and that in accomplishing his murder three shots were fired; that the pistol ball taken from the body of the deceased was the same in size as those carried by the pistol produced in evidence, and that such weapon, when stolen from the saloon, had five chambers thereof loaded, and when found had but two." Holding that this evidence was relevant and competent to show the identity of the accused, the court stated the rule as follows: "As a general proposition, the point contended for might be well taken. But it must be borne in mind in this case the evidence objected to tended directly to show that the defendant had committed the crime of which he stood charged, and must, therefore, have been relevant and competent; and if it also tended to induce the belief that he had been the perpetrator of other crimes, he cannot be heard to complain, since his own acts in multiplying his offenses against the laws of the land ought not to be permitted to diminish the volume of competent evidence."

In *People v. Jennings* (1911) 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077, wherein it appeared that the accused was arrested a short time after the murder for which he was on trial, but denied that he was in the vicinity of the place at which it was

committed, the court, in holding that evidence of neighbors that, on the same night as the murder, a man resembling the accused had broken into their houses and had attempted assaults on different women, was admissible on the question of identity, said: "In view of plaintiff in error's statements, after his arrest and before the trial, as to his whereabouts on that night, it was competent for the state to prove that shortly before the crime was committed he was near the scene of the crime, even though, when seen by some of the witnesses, he was engaged in the commission of other crimes. The evidence objected to tended strongly to contradict his statements as to his whereabouts at that time."

Similarly, in *State v. Lewis* (1904) 181 Mo. 235, 79 S. W. 671, it was held that evidence of the alleged participation of the accused in the robbery of a bank, in connection with the fact that a large sum of money found on accused, when arrested, was identified as that stolen from the bank, was admissible to prove the identity of the accused as the person who killed an officer, who was attempting to make an arrest for the bank robbery.

In *Brown v. Com.* (1874) 76 Pa. 319, it was held that in a prosecution for the murder of a woman it was proper, as tending to prove identity, to admit proof that her husband was murdered at the same time, and that coin taken from him was found in the possession of the accused.

In *State v. Brooks* (1851) 1 Ohio Dec. Reprint, 407, it was held that, in a trial for murder by placing a board on a railroad track so as to cause a derailment, evidence that the accused had previously placed other obstructions on the track, and had wantonly destroyed property of the contractors constructing the road, was properly admitted, as tending to identify the accused as the person who placed the board on the track.

In *Washington v. State* (1880) 8 Tex. App. 377, a prosecution for murder, the court, in holding that evidence of a prior assault by accused on deceased was admissible as tending to identity the accused, said: "Some

two or three weeks prior to the killing, the deceased had been waylaid and shot through the wrist, or hand, by some unknown person. On the trial, several exceptions were reserved to the rulings of the court in permitting the prosecution to inquire into this previous shooting. Floyd Williams, one of the witnesses whose testimony was objected to, said, among other things, detailing a conversation he had with defendant about this shooting: 'I asked defendant if he shot Jap. At first, defendant said nothing; but after, I asked him again, and I asked him to tell me and that I would not tell it, then defendant, laughing, said: 'The man who shot Jap would do it again.' Defendant then said, after I asked him to tell me who shot Jap, that he shot Jap. And the witness, Joe Temple, gave an account of this previous shooting of Jap through the wrist, and stated that he saw the defendant shortly afterwards, some half a mile from the place of shooting, and that defendant asked witness for a cartridge. All the testimony with regard to the first shooting was admissible, both as strongly tending to identify the perpetrator of the homicide, and as showing the animus of the prisoner towards deceased."

In *Leeper v. State* (1890) 29 Tex. App. 63, 14 S. W. 398, affirmed in (1891) 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577, it appeared that several persons living in the same community had been to town to sell their cotton. On returning along a country road one of them was killed and robbed, and that, a few moments later, others returning along the same road were held up and robbed. Answering the objection that evidence of the second robbery was not admissible on the trial for murder, the court said: "The assaults upon Bates and the two Harveys were almost simultaneous with the previous assault made upon Mathis, and were made at the same place. Robbery was manifestly the motive actuating the assailants. They had deliberately planned the robbery of the parties assaulted, and had lain in wait for them at the place where



the assaults were committed. Each of the assaults was a part of the general scheme,—a part of the conspiracy to rob the persons assaulted. They were so closely connected with, related to, and illustrative of each other as to make each res gestæ of the other. This testimony was essential to identify the parties who assaulted and shot Mathis, and to show the motive and intent of such assault. It bore directly upon the main issue in the case, and was not extraneous matter within the meaning of the rule which requires that the jury should be instructed to restrict their consideration of extraneous matter adduced in evidence, to the specific purpose for which it was admitted."

In *Logston v. State* (1872) 3 Heisk. (Tenn.) 414, it was held that in the proof of murder by circumstantial evidence, proof that other members of the family were found dead in the house where the body of the person for whose murder the accused was on trial was found was admissible, as tending to negative the hypothesis of the guilt of such persons, and thereby aiding in identifying the accused as the guilty person.

In *McCue v. State* (1914) 75 Tex. Crim. Rep. 137, 170 S. W. 280, Ann. Cas. 1918C, 674, it was held that on a trial for murder, where the accused denied being at the scene of the crime, and introduced witnesses to prove that on the night of the murder he was at home for the entire night, it was proper to introduce evidence that on that night he was seen and recognized at a house of ill fame, as tending to disprove his claim of alibi, and to aid in identifying him as the person who committed the crime charged.

In *Miller v. State* (1900) 180 Ala. 1, 36 So. 379, a prosecution of two men for the murder of two policemen who had attempted to arrest them in connection with the burglary of the Standard Oil Company plant on the night before, it was sought to introduce evidence of the burglary in order to prove the identity of the prisoners. In holding the evidence to be admissible, the court said: "The evidence of the witness Clayton, watchman at the Standard Oil Company's place,

that he saw the defendants at the Standard Oil Company's office on the outside of the fence on the Sunday or Monday afternoon before the murder, that a party of seven or eight men came there between 9 and 10 o'clock that night, and that two of said party were about the size and general appearance of the defendants. The further testimony that these men took a pistol from the witness was competent in connection with other testimony that this pistol was found in the room where Duncan was arrested at Chattanooga, and was then claimed by Duncan as his pistol, that it was a 38-caliber pistol, but carried a ball different from the 38-caliber ball of Smith & Wesson pistol, that on the night of the killing Miller had a 38-caliber Smith & Wesson, that one of the officers was shot with a bullet of that caliber such as is used in Smith & Wesson pistols, and that the other was shot with a bullet of that caliber differing from the Smith & Wesson bullet in being heavier, like the bullets used in the pistol taken from Clayton, and recovered from Duncan. Similarly, it was competent for Clayton to testify that one of the men at the Standard Oil Company's place wore a light overcoat like the coat which, other evidence showed, was worn by one of the persons who did the shooting, and which he took off and laid down on the street in his flight. And, there being evidence that in the pockets of this coat was found a bottle which contained a fluid resembling nitroglycerine in appearance, that the bottle was not full, and that the fluid found in the bottle was a very powerful explosive, testimony tending to show that the Standard Oil Company's safe was blown open with a fluid explosive by the party of men, of which there was yet other evidence that defendants were members, was properly admitted on the question of identity. And upon the same considerations, the further testimony of Wofford that a pocketbook containing certain papers, which was also found in a pocket of that overcoat, had been left by him in the Standard Oil Company's safe and had been taken therefrom on that night by said party of

men, was properly received. And so of any other testimony as to what occurred that night at the Standard Oil Company's office, tending to identify these defendants as having been at that place on the night of and two or three hours before the shooting."

But where the evidence of another offense has no tendency to identify a person on trial for homicide, it is inadmissible on the ground of proving identity. Thus, the court in *Miller v. State* (Ala.) *supra*, set out the evidence sought to be introduced and its holding as follows: "There was, however, some testimony received as to occurrences at the Standard Oil Company's place which has no tendency to show that the defendants, or either of them, were there on the occasion in question, and which, therefore, throw no light upon their identity with the men who killed Adams and Kirkley. For instances: The state's counsel, referring to what occurred at that place on the occasion when Clayton's pistol was taken, the safe was blown open, and Wofford's pocketbook was removed therefrom and carried away, asked Clayton this question: 'Well, was anything done to you the night of the 27th of March?' And he replied: 'Well, I was knocked in the head and shot in the foot.' And this question and answer: 'Now, Mr. Clayton, just tell all about it, all that happened that night?' 'Well, I have told all that happened that night. I was assaulted and knocked in the head and my pistol taken away, and the keys, and I was put in a room—the closet—locked up.' And this question to the same witness: 'If anything was said about killing you, tell the jury what it was.' To which he replied: 'I can't say what was said. I noticed one of the men waved his hand and said something, and stopped them from shooting me.' The witness Wofford was asked: 'Was there any money missing from the safe?' Reply: 'Yes, sir.' He was asked: 'How much money was taken from the safe, Mr. Wofford?' And to this he replied: 'Three hundred and thirty odd dollars.' Clayton also testified, as we have seen, that, having knocked him in the head and shot him in the foot, they took his

pistol away from him. This testimony of Clayton and Wofford went to prove four separate felonies against the defendants as constituting, in part, the gang who were at the Standard Oil Company's place that night; an assault on, with intent to murder, Clayton, the robbery of the pistol from Clayton, burglary in breaking into, and grand larceny in taking the money from, the safe. The taking of the pistol was, as we have seen, competent on the question of identity. But the admission of the testimony of Clayton and Wofford as to the assault upon Clayton, the burglary and the larceny of the money, must find justification upon another ground, if it was admissible, since it has no bearing upon identity."

In *Boyd v. United States* (1892) 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292, reversing (1890) 45 Fed. 851, the court, in holding that evidence of other crimes in no way connected with the crime charged was inadmissible, set out the facts and its ruling as follows: "This evidence tended to show, and for the purposes of the present discussion it may be admitted that it did show, that in the night of March 15, 1890, Standley, under the name of Henry Eckles, robbed Richard C. Brinson and Samuel R. Mode; that in the afternoon of March 17, 1890, he and Boyd robbed Robert Hall; that in the night of March 20, 1890, Standley, under the name of John Haynes, together with Davis, robbed John Taylor; and that, in the evening of April 5, 1890, Davis, Boyd, and Standley robbed Rigsby's store. In relation to these matters, the witnesses went into details as fully as if the defendants had been upon trial for the robberies they were, respectively, charged by the evidence with having committed. The admissibility of this evidence was attempted to be sustained, in part, upon the ground that Martin Byrd and his crowd, having the right to arrest the parties guilty of the robberies, were entitled to show that the robberies had been, in fact, committed by the defendants. While the evidence tended to show that Martin Byrd had information, prior to April 6, 1890, of the

Taylor robbery, and of Taylor having offered a reward for the arrest and conviction of the guilty parties, there is nothing to show that he or his associates had ever heard, before the meeting at the ferry, of the robberies of Brinson, Mode, Hall, and Rigsby. It is said that the evidence in chief as to what occurred at the time of the shooting left the identity of the defendants, or at least of Standley, in some doubt, and that the facts, connected with the robbery of Rigsby, showing that the defendants and Davis were all engaged in it, and were together only the night before Dansby was shot, tended not only to identify Standley and Boyd, but to show that they came to the ferry for the same purpose with which they went to Rigsby's house, namely, to rob and plunder for their joint benefit; and, consequently, that each defendant was responsible for Dansby's death if it resulted from the prosecution of their felonious purpose to rob. . . . If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robberies of Rigsby and Taylor, it may be, in view of the peculiar circumstances disclosed by the record, and the specific directions by the court as to the purpose for which the proof of those two robberies might be considered, that the judgment would not be disturbed, although that proof, in the multiplied details of the facts connected with the Rigsby and Taylor robberies, went beyond the objects for which it was allowed by the court. But we are constrained to hold that the evidence as to the Brinson, Mode, and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal

presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death."

In *People v. King* (1916) 276 Ill. 138, 114 N. E. 601, the court, while recognizing the rule that evidence of other crimes is admissible to prove the identity of the accused, held that, on a prosecution for the murder of a police officer who was attempting to arrest the accused on suspicion of participation in a series of holdups and robberies that had occurred on the same evening, it was improper to bring out such evidence on cross-examination of an accomplice, where there was no evidence of the robberies brought out on his direct examination. It was further held in that case that the court erred in allowing evidence of the details of the robberies to be given.

#### *d. Larceny.*

In a prosecution for larceny, it is proper to admit evidence of other property found in the possession of the accused, and which is shown to have been stolen from third persons, as tending to prove that the accused was the thief who stole the property described in the indictment and which was also found in his possession. *Johnson v. State* (1897) 148 Ind. 522, 47 N. E. 926.

Thus, it has been held that, in a prosecution for the larceny of a horse and buggy, it was proper to admit, on the question of identity, evidence that two mules had been stolen from the same place and on the same night, and were afterwards found in the possession of the prisoner. *Yarborough v. State* (1868) 41 Ala. 405, wherein it was said: "Although it is not material in general, and is therefore in-

admissible, to inquire into any other stealing of goods than that specified in the indictment; yet, for the purpose of ascertaining the identity of the person, it is often important to show that other goods, which have been upon an adjoining part of the premises, were stolen on the same night, and afterwards found in the possession of the prisoner."

In *Reed v. State* (1891) 54 Ark. 621, 16 S. W. 819, a prosecution for the theft of a saddle, it was held proper to admit evidence of the theft of saddle pockets, girth, and stirrups found with the saddle in the possession of the prisoner, in order to prove his identity.

In *Satterwhite v. State* (1879) 6 Tex. App. 609, a prosecution for the theft of a horse, the court set out the facts and its ruling as follows: "The mare alleged to have been stolen was, before she was missed, running on the range with a colt of hers and a gray ridgeling belonging to a man named Damon. At the time the mare was missed, the colt and the gray ridgeling also disappeared from the range. On the trial, it was proved that these animals were found in Polk county, having been sold there by the defendant, who called himself and was passing under the name of Baker. The exceptions saved were to the admissibility of any and all of the testimony relating to the colt and the ridgeling, because defendant was charged alone with, and on trial alone for, theft of the mare. This evidence was directly connected with the main fact, and, as such, was properly admitted. Evidence of independent crimes is admissible when it is necessary to establish identity in developing the *res gestæ*, or in making out the guilt of the defendant by a chain of circumstances connected with the crime for which he is on trial."

In *Long v. State* (1882) 11 Tex. App. 387, on second appeal (1882) 13 Tex. App. 211, which was a prosecution for the theft of cattle, the court, in holding it to be proper to admit in evidence the possession by the accused of other stolen animals as tending to identify the defendant, said: "The court, over objections of defendant, permitted

proof that other stolen cattle were in the bunch with which the cow charged to have been stolen was driven to Seguin. In this there was no error, in view of the peculiar facts of this case. The most difficult thing on the part of the prosecution was to connect defendant with the possession of the cow charged to have been stolen. To do this, it was necessary to describe and identify the herd with which she was when taken to Seguin. To do this, evidence that other cattle from the same range were taken at the same time was proper. Some of the state's witnesses were able to identify the herd, but not the cow in question; others the herd, and stated the fact that the cow charged to have been stolen was with it. The herd being thus identified, the state attempted to connect the defendant with it (the herd); thus showing his connection with or possession of the animal charged to have been stolen. We are of the opinion that under the circumstances of this case, these facts were admissible."

And in *People v. May* (1917) — Mich. —, 165 N. W. 832, a prosecution for the larceny of certain articles from a store, it was held to be proper to admit evidence that, when the stolen articles were found in the trunk of the accused, other articles were found which had also been stolen from the same store, as tending to identify the accused with the particular crime charged.

In *Watters v. State* (1906) — Tex. Crim. Rep. —, 94 S. W. 1038, it was held that in a prosecution for the theft of cattle, where the evidence against the accused was circumstantial, it was proper to admit evidence that hides of other cattle were found buried in his field, as tending to identify him as the one guilty of stealing the cattle charged.

However, evidence of other larcenies is not admissible unless there is a logical connection between them, so that evidence of one tends to identify the person committing it as the same person who committed the other. Thus, in *State v. Wackernagel* (1902) 118 Iowa, 12, 91 N. W. 761, the court, in holding the larcenies to be insuffi-

ciently connected, set out the evidence and its ruling as follows: "On the evening of March 2, 1901, five hogs belonging to one R. C. Beamer were taken from the stockyards at the town of Clearfield, and placed in the stockyards at the town of Lennox, some 10 miles distant. Defendant and his brother Frank were jointly indicted for the larceny of these animals, and at defendant's request he was given a separate trial, resulting in a verdict and judgment of guilty. That the hogs were conveyed from one place to the other by a team and wagon belonging to the father of the defendant, and that whoever drove it was also guilty of the larceny of some harness on the same evening, is so well settled as to be beyond the pale of reasonable discussion. The only difficulty in the case lies in the lack of evidence tending to connect defendant with either larceny. The harness which was stolen was found in a barn owned and controlled by defendant's father, and to which either the father or the brother had as ready access as the defendant. The only evidence, then, which tends to connect defendant with the larceny, is that of several witnesses, who said they saw two men in the wagon on its way from Clearfield to Lennox, and at Lennox; and of one who said that one of the men he saw would compare favorably with the defendant. No one pretends to identify defendant as being one of the men who were in the wagon, or at Lennox where the hogs were left. Evidence of similar crimes committed at the same time and by the same person is sometimes admissible; but where offered, as in this case, to show defendant's connection with the main offense, it should sufficiently appear that defendant was connected with the subject of the larceny. In the instant case there is no evidence, other than the finding of the stolen property, tending to connect defendant with the crime. It was not found in defendant's possession, and had no more of a tendency to connect defendant with the larceny than his brother or his father. Indeed, the presumption is that the father was in control of the premises where the harness was

found, and there is nothing to rebut this presumption. Because the stolen harness was found in a barn owned and controlled by the father of the defendant, there being no evidence that defendant himself was ever in the possession thereof, testimony as to the stealing of the harness should not have been admitted against the defendant, or, if admitted, should not be considered in determining his guilt or innocence. Had there been any connection between the two offenses, and evidence to show that defendant stole the harness, doubtless such evidence would not only be competent, but controlling. But, in the absence of a showing that defendant was guilty of stealing the harness, the evidence should not have been received, nor should it be considered against him. Evidence as to the possession of stolen property should be such as to indicate that the defendant, and not someone else, took the same."

It has been held that, in order for evidence of the possession of other stolen property to be admissible on the question of the identity of the accused, it must be shown that the other property was stolen at about the same time and from approximately the same place. *Parker v. United States* (1898) 1 Ind. Terr. 592, 43 S. W. 858, wherein the rule was stated as follows: "In cases of larceny, if properly connected, the proof that other stolen property was found in the possession of the defendant, with the property charged to have been stolen, is admissible . . . to identify the defendant. . . . In all . . . cases, however, it must not only be shown that the defendant was found in possession of the property, and that it was stolen; but, in addition thereto, it must appear from the proof that there was some connection between it and the property charged in the indictment to have been stolen. If nothing be shown but that it was in the defendant's possession, then it is inadmissible in every case, because it tends to prove nothing but another, and a separate and independent, larceny. If, in addition to the fact that the stolen property was found in the possession of the defendant recently after the alleged larceny, it be shown

that it had been stolen at or about the same time and place as that charged to have been stolen, then it is admissible in all of the cases, because, under the circumstances of each case, it tends to prove the matter in controversy. . . . Cases . . . are generally those where the larceny is admitted or established, and the defendant has been seen with the alleged stolen property, but under such circumstances as that he was not recognized by the witness; as, if he were a stranger to him, or was in disguise, or seen in the nighttime; or it may occur in cases where no one has seen the defendant in possession of the property alleged to have been stolen, but the circumstances point to his guilt, without clearly identifying him. In such case, proof of other stolen property having been found in his possession shortly after the theft, taken about the same time and place, is admissible for the purpose of identifying him. . . . If the larceny of the alleged stolen property be proven, but the identity of the defendant is in doubt, then, if the fact that other property which had been taken was stolen at the same time and place, and was found in the possession of defendant shortly after the larceny, be established, inferentially he is the man who took it all." It was held in that case that it was improper to admit in evidence, to prove identity in a prosecution for the larceny of cattle, the fact that the accused had in his possession other cattle stolen about the same time, where the state failed to show that they were stolen from about the same place.

In *Musgrave v. State* (1889) 28 Tex. App. 57, 11 S. W. 927, a prosecution for the theft of a bay mare, it was sought to introduce evidence that a gray pony was also found in the possession of the accused, the witness testifying that the pony had been stolen from his brother in Frio county a short time before. In holding this evidence to be inadmissible to prove identity, the court said: "Brown's mare was stolen early in March, 1885. Early in March Harkness went to Atascosa and found the gray pony. He says the pony had been stolen from

his brother a short time before this, but he does not tell us from what place or part of the county the pony was taken. He states that it was taken in Frio county. Now, if the pony and mare had been taken at the same time this fact was competent evidence, but in the absence of such proof we cannot possibly perceive what bearing the theft of the pony has upon this case. It certainly develops no criminative fact; nor does it explain a competent fact; nor even yet is it a relative fact, constituting a link in a chain of facts tending to establish the guilt of the appellant. Hence, it could serve but one purpose, which was to unjustly prejudice the case of the appellant in the estimation of his triers."

In *State v. Gordon* (1913) 253 Mo. 510, 161 S. W. 721, a prosecution for larceny committed by one who boarded the platform of a crowded street car, jostled through the crowd, and picked the pockets of the passengers, it was held proper to admit evidence that the same person had been seen on other recent occasions to board a crowded car and, after riding a short distance, alight and return to the point where he first boarded the car, and then to repeat the performance, as tending to identify him as the one guilty of the offense charged.

#### *e. Liquor law offenses.*

In a prosecution for a violation of the Liquor Laws, where the question of identity of the prisoner as the one making the illegal sale is in issue, it is competent to show that he had made other illegal sales at about the same place and time, as establishing his identity. *Scott v. State* (1907) 150 Ala. 59, 43 So. 181; *Abrams v. State* (1908) 155 Ala. 105, 46 So. 464.

In *Untreinor v. State* (1906) 146 Ala. 133, 41 So. 170, a prosecution for a violation of the Liquor Laws, it appeared that the sale was made on the premises of the defendant and in her presence, but by another person. In holding that evidence of other illegal sales made by the defendant was competent to establish her identity as the guilty person, the court said: "It was competent for the state, for the purpose of showing ownership of the

beer, and that the person making the sale was authoritatively acting for defendant, thus to establish her identity as the person who in reality made the sale of the beer, to prove other sales by her, notwithstanding these latter sales constitute separate and distinct offenses."

*f. Robbery.*

Where a series of robberies occur at about the same time and place, and are so connected as to indicate that the person guilty of one is also guilty of the other, it is proper, in a prosecution for a particular robbery, to admit evidence of the other robberies as tending to identify the accused. *Nash v. State* (1915) 120 Ark. 157, 179 S. W. 159; *State v. Balch* (1896) 136 Mo. 103, 37 S. W. 808.

In *Bateman v. State* (1917) — Tex. Crim. Rep. —, 193 S. W. 666, the court, in holding that evidence of one robbery was admissible to identify accused as the person committing the robbery charged, set out the facts and its ruling as follows: "There was a negro social function several miles from Crandall, in Kaufman county. A jitney driver took defendant and three others from the town of Crandall to this negro meeting. Just before reaching the place where the function was in vogue, and about a mile distant, the car was stopped. The four got out of the car and took a drink. One of the parties got back in the car, while the other three went to a barn about 100 yards distant; they were gone a few minutes and returned. The party who is alleged to have been robbed testified that he was one of the parties in the barn when three men entered and 'held them up.' They robbed witness of about \$3. This incident is the basis of this prosecution. He did not recognize any of the parties. They had a small light which the three robbers extinguished. Upon returning to the jitney, these parties got in, and the car went on about a mile to where the negroes were assembled at the function and began a series of acts, exhibiting and shooting their pistols, and robbed at least one party of something like \$7. The jitney driver sufficiently identified defendant

as one of the parties he took in his car, and as one of them who left and went to the barn where the witness said he was robbed of \$3, by the exhibition of a pistol. He was not present at that robbery, and knew nothing about it, otherwise than the fact that the three parties left the jitney, and were gone 15 or 20 minutes, and returned. The parties at the barn did not recognize any of the parties, but at the social function appellant was recognized as one of those engaged in that robbery. Some of the witnesses who saw the defendant and his crowd at the social function were carried to the jail the next day after the arrest of appellant, and circumstantially recognized the defendant as one of them. His identity at the social function, over appellant's objection, was properly admitted. The objection urged to the introduction of this testimony was that it was developing another crime, which it is contended was illegitimate and the evidence inadmissible. We would be inclined to agree with this proposition if appellant had been clearly identified at the time as one of the parties to the transaction relied upon by the state for conviction; but as this was not the case, we are of opinion the court did not err in admitting the evidence of identification at the other times and places mentioned. These two transactions occurred within 30 or 40 minutes of each other, and at night. Where the identity of the party is not definite as connected with the offense on trial, extraneous offenses may be introduced to connect and identify appellant with the case on trial."

In *State v. Williams* (1916) — Mo. —, 183 S. W. 308, the court, in holding the circumstances to be sufficient to justify the admission of evidence of other robberies, said: "The testimony of the witness Thomas, the second-hand dealer, that the cap, coat, sweater, and shoes worn by the defendant when arrested were the witness's property, and had been stolen from him the night of the robbery, was not inadmissible. When considered with other facts and circumstances in the case, it constitutes evidence to show the presence of the defendant at or

near the scene of the robbery a short time before its commission, and thus tended to establish the identity of the defendant. . . . The rule that the testimony of other offenses is not admissible in a prosecution for a particular crime is not without its exceptions. One of these is that testimony of this character, when taken in connection with other facts proven in a case, may afford a strong circumstance tending to show the guilt of the defendant. . . . The witness Auer saw the defendant immediately after the robbery, and subsequently identified him, at which times he was clothed in the apparel the witness Thomas states was stolen from him. When arrested at Lexington Junction a short time after the robbery, he was wearing these clothes. The relevancy, therefore, of Thomas's testimony, in view of these facts, is beyond question, although it did tend to establish a different offense than that for which the defendant was on trial."

In *Davis v. State* (1898) — *Tex. Crim. Rep.* —, 44 S. W. 1099, it was said: "A number of other robberies were introduced in evidence, and the proof on the part of the state tended to show that appellant committed them at the same time and place, and about the same time he committed the robbery in question. All this testimony was admissible for the purpose indicated in the court's charge, and, in our opinion, the court properly guarded the purposes for which the jury could consider such testimony, and in so doing avoided charging upon the weight of the testimony. He did not tell them, even, that the testimony tended to show that appellant committed such other robberies, but left it to them to say whether or not said testimony tended to show that fact, and, if they should believe that such was the case, that then they could use the testimony for the purpose of identifying appellant as the perpetrator of the robbery for which he was then on trial."

In *Coble v. State* (1876) 31 *Ohio St.* 100, it was said: "The admission of the mayor's record of former convictions of the defendant below for violations of the city ordinance was clearly

erroneous. . . . We suppose, . . . that this testimony was offered and admitted, in the court below, under a false construction of § 189 of the Criminal Code (66 *Ohio Laws*, 308), which provides that 'no person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility.' The conviction referred to in this section, which may be shown for the purpose of affecting credibility, is such, and such only, as, before the enactment of the section, would have disqualified the person from testifying as a witness. Convictions for violations of city ordinances never disqualified a person from testifying in any cause, and, therefore, such convictions cannot be shown under favor of this section for the purpose of affecting the credibility of the witness. . . . Upon the trial of a person charged with an assault with intent to rob, it is not competent for the state, in aid of the prosecution, to prove other assaults committed by the defendant, whether with or without like intent. In so far as the testimony admitted tended to show that the defendant was in the vicinity at the time the offense charged in the indictment was committed, it was clearly admissible; but, in so far as it tended simply to show an attack of like character committed by him upon another person, and at another time and place, it was clearly inadmissible."

In *State v. Becton* (1874) 7 *Baxt. (Tenn.)* 138, it was held that a witness might, in order to make this identification of a defendant on trial for robbery more explicit, give in evidence that he was the same man that he saw only a short time afterwards, threatening another person with a gun with the apparent intention of robbery.

In *Nash v. State* (1915) 120 *Ark.* 157, 179 S. W. 159, a prosecution for the robbery of one Williams, the court, in holding that evidence of other robberies occurring within a short time of the one charged was admissible to



prove identity, said: "In admitting proof of the other robberies, the court stated to the jury that such proof could be considered only as bearing upon the question of defendant's presence at the time Williams was robbed, and of appellant's participation in that crime. The three robberies committed on the night of March 3 were committed within a few hundred yards of each other, and the last occurred not more than an hour after the commission of the first, and all were committed by three men, one of whom was Hilliard, whose participation in each instance is reasonably certain. Schuh identified Hilliard as one of the men who had robbed him, but could not positively identify appellant as another. Neither could the officers who killed Hilliard while the third man was being robbed positively identify appellant as one of the three robbers participating in that crime, although they did testify that his general appearance resembled one of the robbers who fled on their approach. We think this evidence was clearly competent for the purpose for which the court admitted it. While this evidence does not show the commission of another crime than the one charged in the indictment, it also tends to show that appellant participated in the commission of the crime charged in the indictment, and refutes appellant's proof of an alibi."

In *Collins v. State* (1915) 77 Tex. Crim. Rep. 156, 178 S. W. 345, in a prosecution for assault with intent to rob, it was held to be proper to admit in evidence the fact that the accused had sought to persuade the wife of the prosecuting witness to put some powders in his coffee, it further appearing that the accused was enamored of the witness's wife, such evidence strongly tending to identify the accused as the one who assaulted and robbed the prosecuting witness.

And it has been held that letters written by the accused in which he connected himself with an attempt to commit a robbery on the prosecuting witness, a short time previous to the robbery for which he was on trial, were properly admitted in evidence, as tending to identify the person who

committed the robbery charged. *State v. Martin* (1917) 49 Utah, 346, 164 Pac. 500.

In *Lancaster v. State* (1918) — Tex. Crim. Rep. —, 200 S. W. 167, wherein it appeared that the accused was one of two men charged with the robbery of the prosecuting witness, it appeared that after their arrest certain property was found in their possession, which was identified by the prosecuting witness, who testified that it had been taken from him by the robbers, and that the men on trial resembled the men who had robbed him. As a further means of identification, the state sought to introduce evidence of a second robbery occurring shortly after the one charged, and during which the two men were recognized. In holding the evidence of the second robbery to be inadmissible, the court said: "The court seems to have admitted it upon the theory of identity. We are of opinion that the evidence was not introducible upon such theory, under the facts of the case. The two robberies were in no way connected with each other, and the fact that the second robbery occurred did not serve to identify these parties as the parties who committed the first robbery. There was no fact or circumstance which undertook to connect the two transactions, except the fact that they occurred on the same night, and that there was evidence showing some similarity in the appearance of the two robbers in both cases. This did not serve to identify appellant as being the robber in the first instance." In this case there was a dissenting opinion holding that the facts brought the case within the rule admitting evidence of connected robberies, for purposes of identification.

See also *People v. Romano* (1903) 84 App. Div. 318, 82 N. Y. Supp. 749, 17 N. Y. Crim. Rep. 385, stated at length, *supra*, I.

#### *g. Other offenses.*

In *Cross v. People* (1868) 47 Ill. 152, 95 Am. Dec. 474, a prosecution for forging the name of one Beckwith to a check, the court, in holding that evidence of other similar forgeries was admissible on the question of identity,

said: "The evidence in regard to the check on Gardner & Co., which the witness refused to take, and which aroused his suspicions that the Beckwith check was not right, and which caused the development of the whole transaction, and of the character of the prisoner, was competent, as identifying the party and the transaction, and as *res gestæ*. The mode of operating was at the time explained by the prisoner to the witness; how he obtained a genuine check from Beckwith by purchasing a small quantity of tobacco, giving a bank bill of \$100 in payment and, at his own suggestion, taking a check for the difference. The prisoner then had in his possession a check forged on F. B. Gardner & Co. for \$3,000, and a genuine one for \$80, and he went on to explain to the witness in what manner he got the Gardner check, and getting a new stamp, which accorded with the mode he pursued in getting the Beckwith check. This evidence was not for the purpose of proving the prisoner guilty of another felony in forging the check of Gardner & Co., but for the purpose of identifying him, and giving character to the entire transaction."

In *Leslie v. State* (1898) — Tex. Crim. Rep. —, 47 S. W. 367, it was held that, on a trial for passing a forged instrument, evidence that the prisoner had attempted to pass the same instrument on another was admissible to prove identity, the court saying: "It is insisted that the judge should have instructed the jury with reference to the testimony of J. M. Foy, and that he should have limited the effect of this testimony to the particular purpose for which it was introduced, to wit, as to the intent with which appellant may have passed the forged instrument charged in the indictment. Foy testified that he saw appellant in Sweetwater late on the evening of the 10th of December, and that he attempted to pass the alleged forged instrument on him. This evidence was certainly legitimate for the purpose not only of showing the intent with which the appellant may have subsequently passed the forged instrument to William Wright, if there was any question about that intent,

but it was admissible for another purpose. This was the same instrument that he subsequently passed to Wright. Appellant denied any knowledge of said instrument, or any connection therewith, and he also denied being in it to him. So this testimony was admissible at the time when Wright says he passed it to him. So this testimony was admissible for the purpose of identifying appellant with said forged instrument, and for the purpose of showing that he was in Sweetwater before the time he admits that he was. This testimony was, therefore, pertinent to other issues in the case besides the question of intent, and the court would have had no right to deprive the state of its use for such other purposes."

In *Dean v. United States* (1917) 158 C. C. A. 538, 246 Fed. 568, a prosecution for raising a postoffice money order, wherein the defendant denied that he purchased the order and claimed that he was not at the place of issuance, Macon, Georgia, when the application for the order was made, it was held to be proper to admit in evidence the testimony of a witness that he had seen the defendant in Macon on the morning of the day of the issuance of the money order, and was able to identify him because he had seen him again a few days later in Atlanta, when he was on trial for raising an express money order.

In *State v. Hetrick* (1911) 84 Kan. 157, 34 L.R.A. (N.S.) 642, 113 Pac. 383, a prosecution for obtaining money by false pretenses from a bank by impersonating the payee of a check and indorsing his name, receiving therefor a cash sum and a certificate of deposit for the balance, it was held proper to admit evidence of a similar offense against another bank on the same day, as tending to identify the accused. In that case it was said: "Objection was . . . made to the testimony showing the transaction in the national bank. Counsel frankly say that evidence of statements to other persons, similar to those upon which the money was obtained, are competent, but that it was error to allow proof 'of the fruits of such statements,' viz.,

of the giving of a certificate of deposit by the other banker. This was admissible, in connection with the evidence that the two certificates were found by the roadside together on the same day, and soon after they were obtained, as a circumstance tending to show that the same man made the representations at both banks. Proof of a collateral offense may be relevant in order to identify a defendant. . . . It is relevant to show that the defendant has made similar pretenses at another time and place. . . . Facts relevant to the issue are not excluded merely because they tend to prove another offense. . . . The admission of the evidence did not conflict with the familiar rule that proof of another crime, having no connection with the one for which the accused is being tried, is inadmissible."

In *Ledford v. State* (1917) 19 Ga. App. 610, 91 S. E. 924, the prosecution was for defacing and destroying the record of a deed whereby certain property was reconveyed to the accused by a grantee, to whom the land had been previously conveyed for the purpose of enabling the grantee to secure a loan thereon, and which was actually done, the grantee giving a mortgage therefor. Over the objection that it was admitting evidence of a separate and distinct offense, the court allowed the state to prove that the record of deed from the accused to the grantor in the deed for the destruction of which the accused was being prosecuted was also destroyed, as tending to prove the identity of the accused, the probability being strong that the destruction of the two records was done by the same person.

In *Morse v. Com.* (1908) 129 Ky. 294, 111 S. W. 714, it was held that in a prosecution for embezzlement, by means of selling under an assumed name the product of a concern for which the accused was an agent, and retaining the proceeds, it was proper to admit in evidence testimony that the accused had been indicted and convicted under another assumed name, for fraudulent use of the mails, as tending to prove his identity.

And in *Hope v. People* (1880) 83

N. Y. 418, 38 Am. Rep. 460, it was held that, in a prosecution for an assault on a night watchman at a bank, it was proper to admit evidence of the connection of the accused with a robbery of the bank on the same night, as tending to identify him as one of the persons who had assaulted the watchman.

In *Stanfield v. State* (1901) 43 Tex. Crim. Rep. 10, 62 S. W. 917, a joint prosecution of two men for placing an obstruction on a railroad track, it was said: "Evidence was introduced showing that on the same evening, and shortly after the obstruction was placed upon the track mentioned in the indictment, another obstruction was placed upon the same track some distance from the first. This was objected to for several reasons, none of which, we think, are well taken. This was a case of circumstantial evidence. Smith testified positively that he had no connection with the first transaction, while the evidence for the state strongly tended to show that he did. The foot tracks and other indications in and about the first obstruction strongly tend to show that two persons engaged in placing the obstruction upon the track. It was contended by Smith that, if Stanfield placed the first obstruction upon the track, it was inadvertently done by him; that in extricating his leg from the stock gap into which he had fallen he pulled the planks or timber out, and by this means they were thrown across the railroad track; and that he [Smith] had nothing to do with it. The immediate facts attending the second obstruction are very analogous to those attending the first, and this testimony could be used to connect defendant Smith with the first transaction, as well as to show his intent."

In *Perkins v. Jeffery* [1915] 2 K. B. (Eng.) 702, W. N. 221, 84 L. J. K. B. N. S. 1554, 113 L. T. N. S. 456, 79 J. P. 425, 31 Times L. R. 444, a prosecution for indecent exposure, wherein the accused denied that he was the man who committed the offense, it was held proper to admit evidence of the prosecuting witness that accused had been guilty of the same offense at the same place at a previous time, as showing

that she was not mistaken in her identification.

In *Jenkins v. Com.* (1915) 167 Ky. 544, 180 S. W. 961, a prosecution for criminal conspiracy in violation of a statute, forbidding the banding of persons together for the purpose of intimidating or injuring any person, the court, in holding that evidence of other similar crimes was admissible to prove identity, set out the facts and its ruling as follows: "The commonwealth first showed the organization of this order at Union Chapel on the 22d of August, 1914, and showed that appellant was a member of that order; it then showed to some extent the nature and purpose of that organization; it also showed that, shortly after its organization, bodies of armed and masked men began to commit in that locality outrages similar to the Webster whipping; it showed that the members of this organization met in the nighttime at isolated places; it showed their mode of procedure upon these occasions by the statements of appellant himself; it unmistakably showed by many facts and circumstances that all of these occurrences were traceable to this organization; it showed by the evidence of the four Websters that appellant and several of those mentioned in the indictment as co-conspirators were present at the house of James Webster, and participated in the whipping. It was after the introduction of all this evidence that the commonwealth, evidently anticipating an effort to prove an alibi, the customary defense in such cases, was permitted to show that other and similar occurrences had taken place in that locality, and that, at least in two instances, appellant was present and participated in those occurrences, and that upon other occasions when similar things happened appellant was recognized late at night, with bodies of armed men, going toward or coming from the direction where the whipping occurred. Upon each occasion when such evidence was admitted and the defendant was shown to have participated in them or to have been present, or to have been seen on the road, the jury was admonished that the evidence was admitted only for

the purpose of showing that appellant was a member of this organization, and was not admitted to show his guilt or innocence of the whipping of the Websters. Not only did the court take this precaution at all times during the trial, but in its written instructions to the jury it reiterated the same. In such cases of organized outlawry, usually the most carefully planned arrangements are made in advance, either to hide or destroy all evidence of guilt. The parties wear masks, turn their clothes inside out, as in this case, and adopt what they conceive to be the surest method of concealing their identity. Not only so, but experience has taught that in such cases it has almost grown to be a custom that a carefully considered and arranged alibi, prepared in advance, is ready for any occasion. It was under these circumstances and under these conditions that the court, in a case where the only issue was as to the identity of the appellant, permitted evidence to go to the jury as to other crimes of a similar nature, committed about the same time, in the same locality, and in practically the same way, solely upon the issue of identity. The evidence was admitted solely for the purpose of fixing with greater certainty the identity of these disguised outlaws, by showing their membership in and connection with this unlawful organization, the similarity of their mode of procedure in other raids about the same time; and it may well be doubted that but for the admission of such evidence, in the light of these carefully considered and prepared-in-advance alibis, that a conviction could ever be had in such cases. Where the sole issue in a case is as to the identity of the accused, the evidence on that issue by the commonwealth may be properly permitted to take a wide range, and, in a measure, the rigid rules of evidence will be relaxed. . . . We are not unmindful of the wisdom of the general rule that evidence of one crime is not admissible to prove another; but we are of opinion that under the circumstances of this case, where the only issue was one of identity, that the

evidence was admissible, with the proper admonition by the court."

In *People v. Burke* (1912) 18 Cal. App. 72, 122 Pac. 435, a prosecution for an attempt to injure a person by exploding dynamite against her house, it was held to be proper to admit evidence of a subsequent attempt on the part of the accused to take her life, as tending to identify him as the one who committed the original offense.

But in *Leach v. State* (1916) 80 Tex. Crim. Rep. 376, 189 S. W. 733, a prosecution for riding on a railroad pass belonging to another, the indictment charged the accused with using the pass on a trip from Greenville to Emory on December 13, 1914. The auditor of the road identified accused positively as the person who used the pass on that trip, and it was sought further to identify him by proving that he had used the pass on other occasions. Holding such evidence to be inadmissible, the court said: "This testimony is not admissible for any purpose under this record. It could serve but one purpose, so far as the writer can see, and that is to show

that appellant was riding on this pass on different occasions. The writer does not understand, however, that the mere fact that defendant is identified fully as being the man by the state's witness with a transaction occurring a month before in a different part of the state could be used to identify him on the date relied upon for conviction."

See also *Effler v. State*, 4 Boyce (Del.) 62, 85 Atl. 731 (confidence game), and *People v. Byrnes* (1915) 27 Cal. App. 79, 148 Pac. 944 (larceny by fake horse race), stated at length, *supra*, I.

In the reported case (*PEOPLE v. THAU*, ante, 1537) it is held that on a trial for assault, where the defense is an alibi, it is competent for the prosecution to show that two weeks before the assault the accused, accompanied by a number of other persons, including a so-called "walking delegate," had warned the prosecuting witness against working in a non-union shop, and had destroyed certain goods belonging to him. M. B.

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JOSEPH FENSTERWALD, Appt.,

v.

SELMA R. BURK.

*Maryland Court of Appeals — June 23, 1916.*

(129 Md. 131, 98 Atl. 358.)

**Marriage — prohibited degrees of relationship — exceptions — validity.**

1. An exception in a statute forbidding marriage within certain degrees of consanguinity because of religious belief does not violate a constitutional provision that religious opinions shall in no wise diminish, enlarge, or affect civil capacity.

[See note on this question beginning on page 1568.]

**Constitutional law — validity of statute — doubt.**

2. A legislative act will not be pronounced unconstitutional or invalid in a doubtful case.

[See 6 R. C. L. 74, 75.]

**Marriage — foreign — validity.**

3. A state will not refuse to recognize a marriage between uncle and niece, valid where contracted, although its statutes prohibit such marriages.

[See 18 R. C. L. 388.]

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**APPEAL** by plaintiff from an order of the Circuit Court of Baltimore City (Dawkins, J.) sustaining a demurrer to and dismissing a bill filed to have defendant's marriage declared null and void. *Affirmed.*

The facts are stated in the opinion of the court.

**Mr. Samuel Want, for appellant:**

In a proper case, upon proper pleadings, and instituted by proper parties, a court of equity is the appropriate tribunal for the determination of the validity of a marriage in an application for annulment.

12 Cyc. 212; *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658; *Le Brun v. Le Brun*, 55 Md. 496; *Ridgely v. Ridgely*, 79 Md. 298, 25 L.R.A. 800, 29 Atl. 597; *Dimpfel v. Wilson*, 107 Md. 329, 13 L.R.A.(N.S.) 1180, 68 Atl. 561, 15 Ann. Cas. 753; *Szlauszis v. Szlauszis*, 255 Ill. 314, L.R.A.1916C, 741, 99 N. E. 640, Ann. Cas. 1913D, 454; *Lynch v. Lynch*, 34 R. I. 261, 83 Atl. 83.

A third party has the right to institute a suit for annulment of a marriage after the death of one of the parties.

*Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658; *Ridgely v. Ridgely*, 79 Md. 298, 25 L.R.A. 800, 29 Atl. 597; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752; *Tilby v. Hayes*, 27 Hun. 251; *United States ex rel. Devine v. Rodgers*, 109 Fed. 886; *Parker's Appeal*, 44 Pa. 309; *Davis v. Whitlock*, 90 S. C. 233, 73 S. E. 171, Ann. Cas. 1913D, 538; *Mt. Holly v. Andover*, 11 Vt. 226, 34 Am. Dec. 685; *Pingree v. Goodrich*, 41 Vt. 47; *Avakian v. Avakian*, 69 N. J. Eq. 89, 60 Atl. 521.

A marriage entered into in another state between persons domiciled here is either absolutely binding in this state or is absolutely void. There is no middle ground.

*State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683; *People v. Steere*, 184 Mich. 556, 151 N. W. 617; *Lanham v. Lanham*, 136 Wis. 360, 17 L.R.A.(N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; *Johnson v. Johnson*, 57 Wash. 89, 26 L.R.A.(N.S.) 179, 106 Pac. 500; *Pennegar v. State*, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; *Cunningham v. Cunningham*, 206 N. Y. 341, 43 L.R.A.(N.S.) 355, 99 N. E. 845, 13 Harvard L. Rev. 604; *Wilson v. Cook*, 256 Ill. 460, 43 L.R.A.(N.S.) 365, 100 N. E. 222; *Henderson v. Ressor*, 265 Mo. 718, 178 S. W. 175; *Kinney v. Com.* 30 Gratt. 858, 32 Am. Rep. 690.

**Messrs. Whitelock, Deming, & Kemp, also for appellant:**

The question of whether or not the marriage is valid under the statutes of Rhode Island cannot be determined upon demurrer to the bill.

*United States ex rel. Devine v.*

*Rodgers*, 109 Fed. 886; 8 Cyc. 726, note 27.

Whether valid or invalid under Rhode Island law, this marriage cannot be recognized by the Maryland courts.

*United States ex rel. Devine v. Rodgers*, supra; *Re Stull*, 183 Pa. 625, 39 L.R.A. 539, 63 Am. St. Rep. 776, 39 Atl. 16; *Pennegar v. State*, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; *Jackson v. Jackson*, 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317; *Walker v. Walker*, 125 Md. 665, 94 Atl. 346, Ann. Cas. 1916B, 934.

**Messrs. N. Rufus Gill & Sons and Edward M. Hammond, for appellee:**

If this marriage is valid in Rhode Island, it is valid in Maryland.

*Fornshill v. Murray*, 1 Bland, Ch. 479, 18 Am. Dec. 344; *Corrie's Case*, 2 Bland, Ch. 488; *Jackson v. Jackson*, 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317; *Notes to Hills v. State*, 57 L.R.A. 155; *Gabisso's Succession*, 11 L.R.A.(N.S.) 1082; *State v. Fenn*, 17 L.R.A.(N.S.) 800; *Johnson v. Johnson*, 26 L.R.A.(N.S.) 179, and *State v. Hand*, 28 L.R.A.(N.S.) 753.

The provision of the Rhode Island statute which authorizes a marriage between uncle and niece of the Jewish faith is not a violation of either the Constitution of Rhode Island or the Constitution of the United States.

*Woodward v. Central Vermont R. Co.* 180 Mass. 599, 62 N. E. 1051; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; 8 Cyc. 726, note 27; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Bishop, Marr. & Div.* § 155.

The courts of this state will not decree a marriage a nullity, except upon the application of one of the parties to the marriage; and when one of the parties is dead, no third party can attack the validity of a marriage.

*Ridgely v. Ridgely*, 79 Md. 298, 25 L.R.A. 800, 29 Atl. 597; *Harrison v. Harrison*, 22 Md. 468, 85 Am. Dec. 658; *Dimpfel v. Wilson*, 107 Md. 329, 13 L.R.A.(N.S.) 1180, 68 Atl. 561, 15 Ann. Cas. 753; *Jackson v. Jackson*, 82 Md. 29, 34 L.R.A. 773, 33 Atl. 317; *Bonham v. Badgley*, 7 Ill. 622; *Baity v. Cranfill*, 91 N. C. 293, 49 Am. Rep. 641; *Stevenson v. Gray*, 17 B. Mon. 193; *Boylan v. Deinzer*, 45 N. J. Eq. 489, 18 Atl. 119; *Adkins v. Holmes*, 2 Ind. 197; *Elliott v. Gurr*, 2 Phillim. Eccl. Rep. 16, 161 Eng. Reprint, 1064; *Myatt v. Myatt*, 44 Ill. 473; *Sutton v. Warren*, 10 Met. 451; *Parker's Appeal*,

44 Pa. 309; *Bowers v. Bowers*, 31 S. C. Eq. (10 Rich.) 551, 73 Am. Dec. 99; *Weisberg v. Weisberg*, 112 App. Div. 231, 98 N. Y. Supp. 260.

Pattison, J., delivered the opinion of the court:

This is an appeal from an order or decree of the circuit court of Baltimore city sustaining a demurrer to and dismissing the bill, filed by the appellant against the appellee, asking that the marriage of the appellee with one Charles Burk, now deceased, be declared null and void.

The bill alleges that the appellant is a nephew and one of the heirs at law of said Charles Burk, who died on the 17th day of October, 1913, leaving surviving him as his nearest relatives one sister, Hanna Rothschild, and eleven nephews and nieces, including the appellee Selma R. Burk. That prior to the 17th day of January, 1913, the said Charles Burk had in his possession his last will and testament, by which his estate was distributed among his nephews and nieces, including the appellant, and that at such time he was about seventy years of age and was suffering from a complication of diseases and from the general infirmities, mental and physical, of old age. That for a long time prior to the last-named date the appellee had been the stenographer of the firm of Burk-Fried & Company, of Baltimore city, of which Charles Burk, as well as the appellant, was a member, and while so employed she lived in the house in which Charles Burk resided, that she was an object of his bounty and affection, and was treated by him "as if she had been one of his own children," and as a result of their relation she exercised great influence over him, and sought thereby to secure a large part of his estate. That in pursuance "of the said fraudulent purpose she resolved to induce him to go through a marriage ceremony with her, for the purpose of placing him in a position where he would be compelled to make a will leaving her a substantial portion of his estate so as to prevent

her from otherwise claiming a dower interest therein."

The bill then alleges that as the laws of Maryland prohibited their marriage, because related as uncle and niece, she employed counsel and inquired of him if there was any state in the Union by the laws of which an uncle and niece could be lawfully married, and was advised that such a marriage could be entered into in the state of Rhode Island, and that he "was prevailed upon by her to accompany her to the city of Newport, Rhode Island, where, after remaining for several days, they went through a marriage ceremony," and immediately afterwards returned to the city of Baltimore, where they continued to reside until his death.

The bill further alleges that if the marriage be "allowed to stand, it will deplete his estate by taking therefrom for the benefit of the said Selma R. Burk, the statutory widow's allowance, and also the dower and personal estate to which a widow is entitled under the laws of the state of Maryland, and it likewise entitles the said Selma R. Burk to a preference under the laws of the state of Maryland in the administration of the estate of said Charles Burk, so that the proprietary interest" of the appellant as an heir at law and as devisee of Charles Burk, in the event that the aforementioned will be declared to be his last will and testament, will be substantially affected. That upon his death it developed that the will above referred to could not be found, but that another was produced "wherein the greater portion of the estate of said Charles Burk was devised to the said Selma R. Burk, while no provision at all was made therein for the complainant," although he was a favorite nephew.

It is then alleged "that at or about the time of the institution of this suit a caveat will be filed in the orphans' court of Baltimore city" to the last-mentioned will, upon the ground of his incapacity to make it.

The bill further alleges that the

marriage in Rhode Island was in pursuance of a fraudulent plan to evade the laws of the state of Maryland, and therefore not entitled to recognition under the laws of this state. It is then charged in the bill that the laws of the state of Rhode Island "prohibit the marriage of an uncle and niece, and render such a marriage absolutely null and void, but there is a further provision in the said laws upon which the said respondent apparently relied, to the effect that the prohibitions of the law shall not apply to members of the Jewish faith, where the marriage of the particular parties is permitted under the terms and regulations of their religion; that while this exception purports to sustain the validity of the said marriage, as far as the state of Rhode Island is concerned, the same is absolutely null and void, both under the Constitution of the state of Rhode Island and the Constitution of the United States."

The statute of Rhode Island upon the subject of marriage is filed as an exhibit with the bill. It is chapter 243 of the General Statutes of 1909. In § 1 it prohibits a man from marrying his niece, and in § 2 a woman is prohibited from marrying her uncle, and by the third section a marriage between such parties is declared to be null and void, and their issue deemed and adjudged illegitimate.

The 4th section provides that "the provisions of the preceding sections shall not extend to, or in any way affect, any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion."

The 9th section provides that "any marriage which may be had and solemnized among the people called Quakers, or Friends, in the manner and form used or practised in their societies, or among persons professing the Jewish religion according to their rites and ceremonies, shall be good and valid in law."

And in the 22d section is found

the following provision: "No marriage solemnized . . . among persons professing the Jewish religion according to their respective rites and ceremonies shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected by want of jurisdiction or authority in such person or society nor by reason of noncompliance with any of the requirements of this chapter, if the marriage is in other respects lawful and has been performed with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

The bill alleges that the parties went to Newport, Rhode Island, to be married, and that a marriage was celebrated at that place. It, however, alleges that under the law of that state marriages between uncles and nieces are forbidden, except those of the Jewish faith, "where the marriage of the particular parties is permitted under terms and regulations of their religion." It is the 4th section of the act that creates the exception, and it is clear in its provisions that the preceding sections which contain the prohibition against such marriages shall not extend to or in any way affect any marriage which shall be solemnized among the Jews within the degrees of affinity or consanguinity allowed by their religion. It is then alleged, not very directly, but with sufficient clearness, that the contracting parties were of the Jewish faith, and this being alleged, with no allegation that they were not within the degrees of affinity or consanguinity allowed by their religion, the invalidity of the marriage for such cause is not alleged. Therefore, if the contracting parties, being of the Jewish faith, fall within the aforesaid exception or provision of the act, and there is no allegation that they do not, the marriage of these parties was not in violation of the Rhode Island law, unless, as contended for by the



appellant, the exception or proviso was in contravention of the Constitution of Rhode Island or the Federal Constitution.

After a very careful research we have been unable to find any case in Rhode Island or elsewhere, and the counsel have cited no case, where the constitutionality of this act has ever been raised and passed upon by the supreme court of Rhode Island, or by any other court in any other jurisdiction, although this statute of Rhode Island has been recognized as valid and has been so acted upon for a half century and more.

It is § 3 of article 1 of the Constitution of the state of Rhode Island, adopted in 1842, that the appellant contends is violated by the aforesaid exception or proviso contained in § 4 of the above-quoted statute. The section of the Constitution is as follows: "That no man shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfilment of his own voluntary contract; nor enforced, restrained, . . . or burdened in his body or goods; nor disqualified from holding any office; nor otherwise suffer on account of his religious belief; and that every man shall be free to worship God according to the dictates of his own conscience, and to profess and by argument to maintain his opinions in matters of religion; and that the same shall in no wise diminish, enlarge, or affect his civil capacity."

The appellant contends, as we understand him, that the civil capacity of a member of the Jewish faith is, within the meaning of the Constitution, enlarged by reason of this statute, and thus the constitutional provision is violated, but just how the statute has this effect he does not attempt to point out, or, if so, not with that clearness that is required by courts before striking down a statute because unconstitutional.

This court has said, in passing upon the constitutionality of acts of

our own state, that a legislative act should not be pronounced unconstitutional or invalid in a doubtful case.

**Constitutional law—validity of statute—doubt.**

It is an exercise of a judicial power of a grave and delicate nature, which can only be warranted in a clear case. *Harrison v. Harrison*, 22 Md. 491, 85 Am. Dec. 658; *University of Maryland v. Williams*, 9 Gill & J. 383, 31 Am. Dec. 72; *Doyle v. Baltimore County*, 12 Gill & J. 484; *Public Schools Comrs. v. Allegany County*, 20 Md. 449. And we should be still more reluctant in pronouncing unconstitutional the act of a sister state, where the same has never been passed upon by the highest court of that state.

In this case, after a careful consideration of the objections made to the validity of the statute, we do not feel warranted or justified in saying that it violates either the state or Federal Constitution.

**Marriage—prohibited degrees of relationship—exceptions—validity.**

Treating the statute of Rhode Island as constitutional, the marriage, in that state, is valid; but how is such marriage to be regarded in Maryland?

As Judge McSherry said in speaking for this court in *Jackson v. Jackson*, 82 Md. 29, 34 L.R.A. 773, 33 Atl. 318: "In general, a marriage valid where performed is valid everywhere. To this broad rule there are, however, exceptions. These exceptions or modifications of the general rule may be classified as follows: First, marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; second, marriages which the local lawmaking power has declared shall not be allowed any validity. . . . To the first class belong those which involve polygamy and incest; and, in the sense in which the term incest is used, are embraced only such marriages as are incestuous according to the generally accepted opinion of Christendom, which relates

only to persons in direct line of consanguinity, and brothers and sisters. The second class,—i. e., those prohibited in terms by the statute,—presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes: First, where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient; and its validity will be recognized, not only in other states generally, but in the state of the domicil of the parties, even when they have left their own state to marry elsewhere, for the purpose of avoiding the laws of their domicil. Instead of being called a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule first announced, 'if valid where performed, valid everywhere.' To the second subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive state policy, as affecting the morals or good order of society. *Pennegar v. State*, 87 Tenn. 244, 10 Am. St. Rep. 648, 10 S. W. 305, s. c. with copious notes in 2 L.R.A. 703; *Georgia v. Tutty* (C. C.) 7 L.R.A. 50, 41 Fed. 753; *Brook v. Brook*, 9 H. L. Cas. 193, 11 Eng. Reprint, 703, 7 Jur. N. S. 422, 4 L. T. N. S. 93, 9 Week. Rep. 461; *Com. v. Graham*, 157 Mass. 73, 16 L.R.A. 580, 34 Am. St. Rep. 255, 31 N. E. 706.

The provision contained in the statute of this state (Act of 1777, chap. 12), prohibiting the marriage of uncles and nieces, does not, we think, fall within any of the enumerated exceptions to the general rule. It is not incestuous, "according to the generally accepted opinion of Christendom." Mr. Bishop, in his work on *Marriage and Divorce*, vol. 1, § 861, says: "An incestuous marriage, within the meaning of our exception, is generally stated to be not every one forbidden, on account of consanguinity or

affinity, by the legislative enactments of the country in which its validity is drawn in question, for a state may prohibit, from motives of policy or from religious considerations, matrimonial connections between persons related in blood or affinity, not incestuous by natural law."

Nor do we think such a marriage comes within the "second" exception to the rule, to wit: Marriages which the local lawmaking power has declared shall not be allowed *any* validity, such as those affecting the morals or good order of society.

In *Harrison v. Harrison*, *supra*, our predecessors held a marriage between uncle and niece was not, by the laws of this state, void, but voidable, the effect of which was to hold that such marriage did not fall within the class that was not to be allowed *any* validity; if so, it would have been void and not voidable.

It is said in *Bishop*, §§ 258 and 259, that "a marriage is termed void when it is good for no legal purpose and its invalidity may be maintained in any proceeding, in any court, between any parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly or collaterally." And: "A marriage is voidable when in its constitution there is an imperfection which can be inquired into only during the lives of both of the parties, in a proceeding to obtain a sentence declaring it null. Until set aside, it is practically valid; when set aside, it is rendered void from the beginning."

The decision of the court in *Harrison v. Harrison*, *supra*, holding that the marriage was voidable, in effect held that the marriage did not fall within that class of marriages that was not to be allowed *any* validity.

Holding as we do that this case does not fall within any of the exceptions to the general rule, the marriage, being valid in Rhode Island, is valid in this state. Therefore, the order or de-

—foreign—  
validity.

cree sustaining the demurrer to the appellant's bill will be affirmed.

Order or decree affirmed, with costs to the appellee.

Writ of error dismissed by the Supreme Court of the United States, November 19, 1918 (248 U. S. 592, 63 L. ed. —, 39 Sup. Ct. Rep. 21).

### ANNOTATION.

#### Constitutionality of marriage statutes as affected by discriminations or exceptions.

The reported case (*FENSTERWALD v. BURK*, ante, 1562) seems to be a case of first impression on the question of the constitutionality of a statute, excepting from the prohibition against marriage between persons within certain degrees of consanguinity, those of a religious faith allowing such marriages. However, the holding therein to the general effect that the exception does not render the statute violative either of the Federal or the Rhode Island Constitution, as well as the specific holding that it does not violate a constitutional provision that religious opinions shall in no wise diminish, enlarge, or affect civil capacity, are supported by other cases, which have involved the constitutionality of marriage statutes which contained exceptions or worked a discrimination.

Thus, in *Peterson v. Widule* (1914) 157 Wis. 641, 52 L.R.A. (N.S.) 778, 147 N. W. 966, Ann. Cas. 1916B, 1040, it was held that the Wisconsin "Eugenics Law," requiring men, but not women, to obtain and file a certificate of freedom from venereal disease as a condition to marriage, was not unconstitutional as an unreasonable restriction on the inalienable right of marriage, or as granting special privileges or immunities, or as impairing the inherent right to enjoy life, liberty, and the pursuit of happiness, or as violative of the right to religious liberty. The court upheld the classification as against the contention that it was unreasonable, arbitrary, and discriminatory, as between men and women, on the ground that the regulation was within the police power as a health measure, and was not discriminatory, because it was generally the unmarried men, and not the women, who were affected with the dis-

eases against which protection was sought. And, as regards the objection that the act interfered with the constitutional right to religious liberty, Winslow, Ch. J., in speaking for the majority of the court, said: "We have not been able to appreciate the force of the contention that the law interferes in any respect with religious liberty. We know of no church which desires its ministers to profane the marriage tie by uniting a man afflicted with a loathsome disease to an innocent woman."

And again, in the Connecticut case of *Gould v. Gould* (1905) 78 Conn. 242, 2 L.R.A. (N.S.) 581, 61 Atl. 604, a statute making it a criminal offense for an epileptic under forty-five years of age to marry was held not to be violative of the constitutional guaranty of equality, under the law, in the right to "life, liberty, and the pursuit of happiness," the court maintaining that marriage is a right that can only be exercised under such reasonable conditions as the legislature may see fit to impose, and that the legislature may, in the interest of public health, reasonably enact that a class of persons, such as epileptics, must not marry under circumstances which may result in offspring. The court, among other things, said: "To impose such a restriction upon the right to contract marriage is not intrinsically unreasonable; it is no invasion of the equality of all men before the law, if it applies equally to all, under the same circumstances, who belong to a certain class of persons, which class can reasonably be regarded as one requiring special legislation, either for their protection, or for the protection from them of the community at large. It cannot be pronounced by the judiciary to be intrinsically unreasonable,

if it should be regarded as a determination by the general assembly that a law of this kind is necessary for the preservation of public health, and if there are substantial grounds for believing that such determination is supported by the facts upon which it is apparent that it is based. . . . There can be no doubt as to the opinion of the general assembly, nor as to its resting on substantial foundations. The class of persons to whom the statute applies is not one arbitrarily formed to suit its purpose. It is certain and definite. It is a class capable of endangering the health of families, and adding greatly to the sum of human suffering. Between the members of this class there is no discrimination, and the prohibitions of the statute cease to operate when, by the

attainment of a certain age by one of those whom it affects, the occasion for the restriction is deemed to become less imperative. . . . Laws of this kind may be regarded as an expression of the conviction of modern society that disease is largely preventable by proper precautions, and that it is not unjust in certain cases, to require the observation of these, even at the cost of narrowing what, in former days, was regarded as the proper domain of individual right."

And see *Kitzman v. Werner* (1918) 167 Wis. 308, 166 N. W. 789, wherein Minnesota and Wisconsin statutes, prohibiting epileptics to marry, were held not contrary to public policy, and were enforced. G. J. C.

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SAMUEL BERNSTEIN, Appt.,

v.

UNITED STATES OF AMERICA.

*United States Circuit Court of Appeals, Fourth Circuit—December 5, 1918.*

(254 Fed. 967.)

**Criminal law — changing date of sentence after expiration of term.**

1. The naming of a date when a sentence shall be executed or a period of imprisonment begin is not a part of the sentence proper, and such date may be changed after expiration of the term.

[See note on this question beginning on page 1572.]

**— lapse of time — effect.**

2. The expiration of the term and lapse of two years after the sentencing of a convict, during which time an appeal was taken from the conviction, and accused served time under

a conviction in another state, does not prevent the court from naming another date when the sentence shall begin to take effect.

[See 8 R. C. L. 259.]

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**APPEAL** by defendant from an order of the District Court of the United States for the Eastern District of Virginia (Waddill, District Judge), refusing to grant a writ of habeas corpus, and resentencing him to imprisonment. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Knapp and Woods, Circuit Judges, and McDowell, District Judge.

Mr. Robert H. Talley, for appellant:

There existed no legal authority whatever for holding defendant under the circumstances, and consequently the writ of habeas corpus should have been granted.

3 A.L.R.—99.

Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650.

A conviction can carry but one sentence.

Freeman v. United States, 142 C. C. A. 256, 227 Fed. 732.

As the term of the court at which the conviction was obtained and the sentence rendered had expired, the

court for that reason, was without authority to act.

*Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *St. Louis Public Schools v. Walker*, 9 Wall. 603, 19 L. ed. 650; *Brown v. Aspdon*, 14 How. 25, 14 L. ed. 311; *Sibbald v. United States*, 12 Pet. 488, 9 L. ed. 1167; *Loewe v. Union Sav. Bank*, 222 Fed. 342; *Brown v. Arnold*, 127 Fed. 387; *United States v. 1,621 Pounds of Fire Clippings*, 45 C. C. A. 263, 106 Fed. 161; *Pollitz v. Wabash R. Co.* 180 Fed. 950; *United States v. Aakervik*, 180 Fed. 137; *O'Connor v. O'Connor*, 73 C. C. A. 565, 142 Fed. 449; *Des Moines v. Des Moines Water Co.* 144 C. C. A. 624, 230 Fed. 570; *United States v. Mayer*, 235 U. S. 55, 59 L. ed. 129, 35 Sup. Ct. Rep. 16; *United States v. Wilson*, 46 Fed. 748; *United States v. New York C. & H. R. R. Co.* 90 C. C. A. 256, 164 Fed. 324; *People v. Blackburn*, 6 Utah, 347, 23 Pac. 759; *People v. Morrisette*, 20 How. Pr. 118.

Messrs. Richard H. Mann and Hiram M. Smith, for appellee:

Fixing another date for the execution is not the entry of a further judgment, nor even a judicial act; but simply carries into execution a judgment already existing.

*Nicholas v. Com.* 91 Va. 813, 22 S. E. 507; 12 Cyc. 784; 1 Bishop, Crim. Law, 8th ed. § 951, p. 573; *Neal v. State*, 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858; *Miller v. Evans*, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198; *Hollon v. Hopkins*, 21 Kan. 638; *Henderson v. James*, 52 Ohio St. 242, 27 L.R.A. 290, 39 N. E. 805, 9 Am. Crim. Rep. 711; *Kingen v. Kelley*, 3 Wyo. 566, 15 L.R.A. 177, 28 Pac. 36.

**Knapp**, Circuit Judge, delivered the opinion of the court:

On April 11, 1916, the appellant Bernstein, convicted in the court below of violating certain provisions of Bankruptcy Act of July 1, 1898, chap. 541, 30 Stat. at L. 544, Comp. Stat. 1916, § 9585, 1 Fed. Stat. Anno. 2d ed. 509, was sentenced to pay a fine of \$1,000, and to be imprisoned "in the penitentiary at Atlanta, in the state of Georgia, for the period of eighteen months from this date." He sued out a writ of error, and was released on bail pending review by this court, which affirmed the judgment in the following December.

151 C. C. A. 657, 238 Fed. 923. In the meantime, and presumably upon conviction of some other offense, he was sent by the United States district court for the eastern district of Missouri to a prison or jail in that state for a term which did not expire until nearly two years after the date when he was sentenced to Atlanta for eighteen months. Upon his discharge from confinement in Missouri, he was taken into custody by the marshal for the eastern district of Virginia under the prior sentence. He at once demanded to be released on the ground that the time specified in that sentence had long before expired, and he could not be further detained or imprisoned thereunder. At the same time he presented to the court below his petition for a writ of habeas corpus ad subjiciendum, in which he sets forth his contention as follows: "Your petitioner contends and insists that such judgment and sentence is now inoperative and void because the time therein specified, to wit, eighteen months from the date thereof, has now expired, petitioner, after such sentence and until lately, having been confined in prison under sentence of another Federal court, to wit, the United States district court for the eastern district of Missouri, at St. Louis, the confinement being in the Missouri jail at St. Charles, and he cannot, therefore, be held for further confinement or imprisonment thereunder, the time of the imprisonment pronounced by such sentence having actually run out and expired on the 11th day of October, 1917, and there being no further imprisonment ordered or set forth in said judgment and sentence, and the court being without authority or power to re-sentence petitioner, the term at which he was convicted and sentenced having long since expired."

The court below refused the writ prayed for, and thereupon "resentenced" Bernstein to pay a fine of \$1,000 and to be imprisoned "in the penitentiary at Atlanta for the period of eighteen months." He ap-

peals from the refusal to grant the writ, and from the resentence.

The question raised by appellant is not new and has been frequently answered. It may be assumed, as he contends, that a court is without power, in the absence of statutory authority, to alter or amend a final judgment in either a civil or criminal case after the expiration of the term at which the judgment was rendered, unless during that term there was some reservation of subsequent control. But it has been repeatedly held that the naming of a date when the sentence shall be executed, or the period of imprisonment begin, is not a part of the sen-

**Criminal law—  
changing date  
of sentence  
after expiration  
of term.**

tence proper, and therefore such date may be changed after the term expires.

In a legal sense, the sentence is the punishment fixed for the offense of which the accused has been convicted, and any order respecting the time of its infliction is but the award of execution or a direction to the clerk for framing the mittimus. Such an order of direction is said to be not a judicial, but merely a ministerial, act, to which the rule invoked by appellant does not apply. In 12 Cyc. 784, the distinction is thus stated: "After the term is passed at which the original sentence was imposed, the court has as a general rule no power to modify, amend, or revise it, particularly if the new punishment is in excess of the original sentence. Changes in the sentence, however, which do not alter the punishment, but only change the time and place of its infliction, may be made at a subsequent term."

In 16 C. J. 1304, it is said: "As a general rule, the time for imprisonment to commence or to be inflicted is no part of the judgment or sentence proper, and according to the weight of authority, in the absence of a statute requiring it, the time when the imprisonment is to begin or end need not be specified in the sentence; it being sufficient to state merely its duration."

The Supreme Court says, in *Hollden v. Minnesota*, 137 U. S. 483, 495, 34 L. ed. 734, 738, 11 Sup. Ct. Rep. 143, 148: "The order designating the day of execution is, strictly speaking, no part of the judgment, unless made so by statute."

And again, in *Schwab v. Berggren*, 143 U. S. 442, 451, 36 L. ed. 218, 224, 12 Sup. Ct. Rep. 525, 528: "Besides, it is well settled that the time and place of execution are not strictly part of the judgment or sentence, unless made so by statute."

True, these were capital cases, as was *Nicholas v. Com.* 91 Va. 813, 22 S. E. 507, where the death penalty was fixed by statute, and the court had no discretion. But as respects the power of a court, after the expiration of the term at which sentence was imposed, to change the date of its execution, or the date when its execution shall be commenced, we perceive no difference in principle between the case where a specific penalty is fixed by statute, and the case where limits are named within which the court may exercise its discretion; and for the reason that when sentence has once been pronounced in the latter case it becomes the same in legal effect as though that sentence had been prescribed by statute, and no other could be imposed. As was said in *Hollon v. Hopkins*, 21 Kan. 638: "The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, is not a part of the sentence at all."

The essential portion of a sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it is to be inflicted."

Directly in point, for the facts are strikingly similar, is *State v. Cockerham*, decided in 1842, 24 N. C. (2 Ired. L.) 204, in which the supreme court of North Carolina said: "The time at which a sentence shall be carried into execution forms no

part of the judgment of the court. The judgment is the penalty of the law, as declared by the court, while the direction, with respect to the time of carrying it into effect, is in the nature of an award of execution. In this case the judgment was that the defendant be imprisoned two calendar months, and the words which follow in the record, 'from and after the 1st of November next,' direct the time of executing the judgment. The entry, indeed, would have been more formal, had the judgment and the mandate for carrying it into effect been separate and distinct. But, however informal, it can be understood, in conformity to the law, as consisting of distinct parts, and therefore ought to be so understood. Upon the defendant appearing in court and his identity not being denied, and it being admitted that the sentence of the court had not been executed, it was proper to make the necessary

order for carrying the sentence into execution."

It follows from these decisions, with which we are in accord, that the court below had full power to make the order of April 8, 1918, which requires ap-  
~~pellant to serve the~~ <sup>-lapse of time</sup>  
~~sentence imposed~~ <sup>-effect.</sup>  
 upon him two years before. Although the order so recites, we think it inaccurate to say that he was "re-sentenced," since the court made no change in the original sentence, but merely changed the previous direction as to the time when imprisonment should begin. When the order is so considered, as properly it should be, the other contentions of appellant are made to disappear.

Affirmed.

Petition for writ of certiorari denied by the Supreme Court of the United States, March 10, 1919 (249 U. S. 604, 63 L. ed. —, 39 Sup. Ct. Rep. 260).

## ANNOTATION.

### Power to change time for commencement of sentence.

#### General rule.

It is generally held that the date fixed by a sentence for the punishment to commence is no part of the sentence, and if for any reason the sentence is not carried into effect at the prescribed time, the accused may be brought before the court on motion, and a new period designated.

United States.—*Re Morse* (1902) 117 Fed. 763.

California.—*Re Collins* (1908) 8 Cal. App. 367, 97 Pac. 188.

Florida.—*Terrell v. Wiggins* (1908) 55 Fla. 596, 127 Am. St. Rep. 196, 46 So. 727.

Georgia.—*Neal v. State* (1898) 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858.

Indiana.—*Bland v. State* (1851) 2 Ind. 608.

Kansas.—*Hollon v. Hopkins* (1879) 21 Kan. 638.

Mississippi.—*Ex parte Bell* (1879) 56 Miss. 283.

New Mexico.—*Re Lujan* (1912) 18 N. M. 310, 137 Pac. 587.

North Carolina.—*State v. Cockerham* (1842) 24 N. C. (2 Ired. L.) 204; *State v. Cardwell* (1886) 95 N. C. 643.

Oklahoma.—*Ex parte Eldridge* (1908) 3 Okla. Crim. Rep. 499, 27 L.R.A. (N.S.) 628, 139 Am. St. Rep. 967, 106 Pac. 980.

South Carolina.—*State v. Kitchens* (1835) 20 S. C. L. (2 Hill) 612, 27 Am. Dec. 410.

The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, is not a part of the sentence at all. *Hollon v. Hopkins* (Kan.) *supra*.

"The date fixed by a sentence for the punishment to commence, or to be inflicted, is directory merely, and forms no part of the sentence itself, as has been uniformly held from the earliest times. Hence, if, from any cause, it is not carried into effect at

the period named, the party may be brought before the court again upon motion, and a new period be prescribed. There are frequent instances in the books where men have been sentenced to be hung upon a day named, who have escaped before the time arrived, and been absent for years, but who, when finally arrested, have been, by a new order of court, executed under the old sentence." *Ex parte Bell* (1879) 56 Miss. 283.

"The date fixed by a sentence for the punishment to commence is directory merely, and forms no part of the sentence itself; hence, if from any cause it is not carried into effect at the period named, the party may be brought before the court again upon motion, and a new period be prescribed." *Ex parte Eldridge* (1910) 3 Okla. Crim. Rep. 499, 27 L.R.A. (N.S.) 625, 139 Am. St. Rep. 967, 106 Pac. 980.

#### Application of rule.

In the case of *Re Collins* (1908) 8 Cal. App. 367, 97 Pac. 188, it appeared that the defendant had been sentenced to six months' imprisonment for vagrancy. This sentence was suspended, and subsequently, more than six months after the judgment was rendered, the defendant was arrested and committed for the term of the original sentence. It was held that the court had authority to commit the defendant, since the time at which a sentence is to be carried into execution forms no part of the judgment, and where a convicted defendant is at liberty without having served his sentence, he may be arrested as an escaped convict and ordered into custody on the unexecuted judgment.

In *Terrell v. Wiggins* (1908) 55 Fla. 596, 127 Am. St. Rep. 196, 46 So. 727, it appeared that a convicted person had been sentenced to twelve months at hard labor, and, at the time the twelve months were up, he had served only two months of this time,—being out on his recognizance the remainder of the time. It was held that the court had power to remand him to serve the remainder of the original sentence, the particular time of the execution of a sentence not being one of its essen-

tial elements, and, strictly speaking, not being a part of the sentence at all.

In *Neal v. State* (1898) 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858, the defendant was sentenced to six months in the chain gang, the time of the running of the sentence to be counted from the time of his reception into the chain gang, and in addition should pay a fine of \$300. The sentence of imprisonment was suspended until the further order of the court. The defendant paid the fine and costs; and was discharged. A year later, the court ordered the execution of the sentence that the defendant should serve six months with the chain gang. It was held that the court had power to make this order, as the provision in the original sentence that sentence was suspended until the further order of the court was void, and the sentence should be read as if it did not contain that provision. It was also held that the defendant could not be said to have served out the time of the sentence, merely because the time of the original sentence had elapsed. The time did not begin to run until the defendant actually started to serve with the chain gang, as the original sentence contained that provision.

In *Bland v. State* (1851) 2 Ind. 608, it was held that the court had power at a subsequent term to carry out a sentence of death previously imposed upon the defendant, who had escaped from jail before the original sentence could be executed.

In *Hollon v. Hopkins* (1879) 21 Kan. 638, the accused had been sentenced to three years' imprisonment for perjury, but on the way to prison he escaped from custody, and was not recaptured until after the entire term of his sentence had elapsed. It was held that he could be imprisoned for the term originally imposed without being resentenced, as the original sentence was still in force. The court said: "The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, is not a part of the sentence at all."

In *Ex parte Bell* (1879) 56 Miss.



283, the defendant was convicted of assault and battery with intent to kill, and was sentenced to serve one year in the penitentiary. He entered into a recognizance for his appearance, and was released pending the result of an appeal of the case. This recognizance was illegal and void. The appeal was stricken from the docket, as it had not been properly taken, and thereupon the defendant was arrested and placed in jail by the sheriff. He had been at large on the recognizance for nine months. When the full twelve months had expired he sued out a writ of habeas corpus on the ground that his term of imprisonment had expired, although he had never been in the penitentiary at all. The court held that the fact that the term of his original sentence had expired did not entitle him to a discharge, the court saying: "The date fixed by a sentence for the punishment to commence, or to be inflicted, is directory merely, and forms no part of the sentence itself, as has been uniformly held from the earliest times. Hence, if from any cause it is not carried into effect at the period named, the party may be brought before the court again upon motion, and a new period be prescribed. There are frequent instances in the books where men have been sentenced to be hung upon a day named, who have escaped before the time arrived, and been absent for years, but who, when finally arrested, have been, by a new order of court, executed under the old sentence. Our statute on that subject (Code 1871, § 2820) is simply declaratory of the common law. So also, where the punishment is imprisonment for a certain term, and from any cause the time elapses without the imprisonment being endured, the convict can be brought before the court at a subsequent term, and a new date specified at which the term shall begin."

In *Re Lujan* (1912) 18 N. M. 310, 137 Pac. 587, the defendant was convicted of assault with a deadly weapon, and was sentenced to two years' imprisonment at hard labor, this sentence, however, not to go into effect if the defendant should leave the territory of

New Mexico and remain absent from the said territory. Several years thereafter, the defendant violated the terms of this judgment, and was taken into custody and sent to the penitentiary. The defendant sued out a writ of habeas corpus. It was held that the court had the right to commit the defendant, and the fact that the time for which the original sentence had been made out had elapsed did not act as a bar to prevent the carrying out of the sentence.

In *State v. Cockerham* (1842) 24 N. C. (2 Ired. L.) 204, the defendant was sentenced to serve two months for assault, and was allowed to be at liberty on his recognizance. The time specified in the sentence had elapsed, but the defendant had not been imprisoned. At the next term of court, sentence was pronounced for the same length of time as that originally fixed. It was held that, as the time at which a sentence should be carried into execution formed no part of the judgment, the court had the power to make the order changing the time of the commencement of the sentence.

In *State v. Cardwell* (1886) 95 N. C. 643, the defendant was sentenced to death, but was set at liberty by some men who forced the jail, and was not recaptured until after the date set for his execution, which had been previously postponed by the governor. It was claimed on behalf of the prisoner that the court was without power to set a date for his execution on the original sentence, as the date fixed was already passed. It was held that the original sentence was still in force, and it was proper for the court to direct that it be carried into execution on some designated day.

In *Ex parte Eldridge* (1910) 3 Okla. Crim. Rep. 499, 27 L.R.A.(N.S.) 625, 139 Am. St. Rep. 967, 106 Pac. 980, the defendant was sentenced to thirty days at hard labor, and to pay a fine of \$50 and costs. He appealed and was allowed to go on bail. The appeal was not perfected within the time allowed by law, and the defendant was ordered to be arrested and confined in jail in accordance with the judgment.

The defendant claimed the sentence had expired by lapse of time. It was held that the date fixed by a sentence for the punishment to commence was merely directory, and was no part of the sentence itself; so that if, for any cause, it was not carried into effect at the period named, the party might be brought before the court again upon motion, and a new period be prescribed.

In *State v. Kitchens* (1835) 20 S. C. L. (2 Hill) 612, 27 Am. Dec. 410, wherein the defendant was convicted of murder and sentenced to death by hanging, but the sentence was not carried out on the day specified in the sentence, owing to the death of the sheriff, it was held that the court was authorized to designate another time at which the sentence should be executed. B. F. D.

MORTON WALL WATSON, by Guardian ad Litem, Appt.,  
v.

INEZ WALL WATSON, Exrx., etc., of M. G. Watson, Deceased, and  
Guardian of Morton Wall Watson.

*Kentucky Court of Appeals—March 7, 1919.*

(183 Ky. 516, 209 S. W. 524.)

**Will — proceeds of insurance policy — effect of change of beneficiary.**

1. A provision in a will directing payment of a debt of a policy of insurance is not revoked by change of the beneficiary in the policy, if the will expressly stated an intention to assign the policy to the new beneficiary, notwithstanding which the payment was to be made.

[See note on this question beginning on page 1579.]

**Insurance — effect of change of beneficiary.**

2. A change of beneficiary in an insurance policy is tantamount to an assignment of the policy.

[See 14 R. C. L. 1389.]

**— burden of trust.**

3. A substituted beneficiary in an insurance policy takes the policy, charged with the trust imposed by the will of the insured upon the policy for payment of a debt, if in the will the intention is expressed of assigning the policy to the new beneficiary, subject to payment of the debt.

[See 14 R. C. L. 1377.]

**Parent and child — allowance of support out of child's estate.**

4. A parent cannot be allowed anything out of the estate of his child for its support and maintenance unless the parent is in such needy financial circumstances as to be unable to furnish them himself, notwithstanding a statute permits the use of the ward's estate for its maintenance when it is best for the ward to do so.

[See 12 R. C. L. 1159; 20 R. C. L. 622.]

**Equity — jurisdiction over person under disability.**

5. Courts of general equity jurisdiction within the limits prescribed by statute, if any, have general supervisory authority and jurisdiction over the person as well as the property of all citizens who are under any disability.

[See 10 R. C. L. 340.]

**Incompetent person — authorizing expenditure out of estate.**

6. A chancellor may direct expenditures for the benefit of an infant ward out of its estate, if the circumstances are such that he would approve the expenditure after it is made.

[See 12 R. C. L. 1158.]

**Evidence — judicial notice — expense of living.**

7. The court takes judicial notice that the expenses of living are now extraordinarily high, and that \$58.75 per month cannot be considered, under present conditions, as excessive allowance for the support and education of an infant ward and for maintaining him in the way and manner in which he should be reared. [See ante, p. 605.]

**APPEAL** by defendant from a judgment of the Circuit Court for Lawrence County in favor of plaintiff in a suit to obtain directions from the Chancellor with respect to the disposition of the proceeds of a life insurance policy mentioned in testator's will, and to obtain permission to expend a certain amount of the income of plaintiff's ward in payment of his maintenance and education. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. A. O. Carter for appellant.

Messrs. F. M. Vinson and Hager & Stewart, for appellee:

The operation of a trust upon a particular fund is not affected by a change in form of the property upon which the trust is impressed.

Graham v. English, 160 Ky. 375, 169 S. W. 836; May v. Smith, 177 Ky. 707, 198 S. W. 2; Allen v. Russell, 78 Ky. 105.

Thomas, J., delivered the opinion of the court:

M. G. Watson died testate on December 26, 1914, a resident of Lawrence county, Kentucky. On July 14 and 15, 1913, he executed two papers, which were probated by the county court of Lawrence county after his death as his last will and testament. His widow, the appellee, was made executrix of the will, and since her husband's death she has been duly appointed and qualified as guardian for her only child, the appellee, Morton Wall Watson, who, at the time of the rendition of the judgment herein, was about six years of age.

The appellee, as guardian for her infant child, as executrix of her husband's will, and in her individual capacity, filed this suit against her ward to obtain directions from the chancellor with reference to the disposition of the proceeds of a \$10,000 life insurance policy mentioned in the will, and to obtain permission from the chancellor to expend a certain amount of the income of her ward in payment of his board, maintenance, and education. Perhaps other relief was also sought in her individual capacity, but no question relating to that is involved in this appeal. The judgment rendered upon final submission approved the expenditure of the proceeds of the life insurance policy as made by the executrix, and directed and author-

ized her as guardian to expend as much as \$58.75 per month in maintaining, caring for, and educating the ward, until the further orders of the court. Calling in question the correctness of the judgment, the guardian ad litem, who was appointed for the ward, prosecutes this appeal.

From the record it would seem that the testator held a number of insurance policies on his life, but the exact number of them, or their amounts, does not appear. It is shown, however, that at the time of the execution of his will he held a policy in the Home Life Insurance Company of New York for \$10,000, payable to his estate. He also held a policy in the New York Life Insurance Company, which, upon his death, paid \$25 per month for a period of twenty years. He held stock in quite a number of undeveloped companies engaged in mining enterprises of different natures, some of which were oil companies, others coal companies, and something more than \$17,000, par value, of stock in the Olive Hill Clay Products Company, a concern which, we conclude from the record, was organized for developing and manufacturing clay products. To pay for the stock in the Clay Products Company the testator had borrowed \$1,000 from his sister, Mrs. Stewart, for which he had executed his note, and \$5,000 from his mother-in-law, Mrs. Pennypacker, for which he had also executed his note, and to secure which he pledged his stock in that company, making thereon this indorsement:

This stock is security for a collateral note of \$5,000, and when the note is paid by insurance of my son, Morton Wall Watson, then he is to become the owner of same.

M. G. Watson.

Whether that indorsement was made before or after the execution of the will is not shown, but in the will the infant son is devised that stock. The will also includes this clause: "Further, I will later assign ten thousand dollars (\$10,000) of life insurance (now payable to my estate) to my son, which insurance I wish to have applied, in part, to the payment of a debt against my clay stock, and such a part of the remainder as is necessary to the purchase of the corner store or brick building of the Gunnell Block and the vacant lot and the lot and barber shop below that, with such room as necessary for ingress and egress for the convenience of said store, which store is located on the corner north of the Louisa National Bank in Louisa, Kentucky."

Later on, in speaking of the same \$10,000 policy, the will says: "Then of the residue of the ten thousand dollars (\$10,000) such an amount as remains, to and including the amount of a note which I owe my sister (Mrs. F. L. Stewart) of one thousand dollars (\$1,000) I would want paid. This ten thousand dollars (\$10,000) namely, from the Home Life Insurance Company policies; and in the event the ten thousand dollars (\$10,000) above referred to should not be sufficient to completely liquidate the indebtedness of the two properties," etc.

The two pieces of property referred to in the last quotation were property in which the testator owned only a one-fourth undivided interest. He directed his executrix to purchase the other three-fourths' interest in one of the pieces, and to sell his one-fourth interest in the other, and to pay the difference out of the proceeds of the \$10,000 policy. As will be seen, he also placed the proceeds of that policy in trust for the discharge of the balance of the indebtedness which he owed to his mother-in-law and sister, as well as expressly placing in trust such proceeds for the payment of his mother-in-law's debt by the indorsement which he made

upon the stock. After executing the will, and before his death, instead of assigning the policy to his son, as he stated in his will he would do, he changed the beneficiary in the policy from his estate to his son, and, conceiving that there might be some question as to her right to pay the proceeds of that policy as directed in the will after the change of beneficiary, the executrix is now asking the advice of the chancellor.

To state the proposition we think is sufficient to settle the right of the executrix to appropriate the proceeds of the policy toward the extinguishment of the two notes of the mother-in-law and sister, which at the time of the trial aggregated \$5,857.35.

If the testator in his will had said nothing about his contemplated assignment of the policy to his son, burdened with the trust which he placed upon it in his will, there could be but little question that the change of beneficiary in the policy afterward was a change of his intention, and a pro tanto revocation of the will. But having stated in his will his intention to assign that policy to his son, when he did so it was but a carrying out of the terms of his will, and may be considered a part of it. So that when he subsequently

changed the beneficiary in the policy, so as to make it payable to his son (and which is tantamount to an assignment of the policy, having no greater force than an assignment), he was conforming his will to what he had therein stipulated he would do. We, therefore, have but little difficulty in concluding that the son, as the new beneficiary in the policy, took it burdened with the trust imposed by the will.

Under this view the judgment approving the expenditures by the wife of the proceeds of the policy as the will directs was fully authorized.

Will—proceeds of insurance policy—effect of change of beneficiary.

Insurance—effect of change of beneficiary.

—burden of trust.

As heretofore stated, a large portion of the testator's property was and is nonproductive. The income from all his productive property, including the \$25 per month from the New York Life Insurance Company, amounts to \$117.50 per month, and this income was devised by the will to the wife and son jointly for their maintenance and support. The testator owned no residence, but lived with his mother-in-law, where his widow and son are now living.

Section 2032 of the Kentucky Statutes provides, in substance, that the guardian shall have the custody of his ward and the possession, care, and management of his estate, and out of such estate shall provide for the necessary and proper maintenance and education of the ward. Section 2034 of the Statute reads:

"No disbursements shall be allowed the guardian for the maintenance and education of the ward beyond the income of the estate, except in the following cases, unless authorized by the deed or will under which the estate is derived:

"1. When the ward is of such tender years or infirm health that he cannot be bound out as an apprentice, or no suitable person will take him as such.

"2. When it is best for the ward that the principal of his personal estate shall be applied for his board and tuition, and the court, upon settlement of the accounts, shall deem such application to have been judicious and properly made. But neither the ward nor his real estate shall be liable for any such disbursement."

Notwithstanding such provisions it is the settled rule that, since there is imposed upon parents the natural duty to support and maintain their children, they may not, as guardians for them, be allowed anything out of the ward's estate for such purposes, unless the parent is in such needy financial circumstances as that he is unable to do so. Hug-

hart v. Spratt, 78 Ky. 313; Overfield v. Overfield, 17 Ky. L. Rep. 313, 30 S. W. 994; Davis v. Richards, 22 Ky. L. Rep. 590, 58 S. W. 477; Hedges v. Hedges, 24 Ky. L. Rep. 2220, 73 S. W. 1112; Harper v. Payne, 24 Ky. L. Rep. 2301, 73 S. W. 1123; Clay v. Clay, 27 Ky. L. Rep. 1020, 87 S. W. 807.

The needy circumstances of the mother in this case are shown by uncontradicted testimony, and that this is true there can be no question. It is likewise established by the most convincing proof that the ward's one half of the income (\$58.75) is barely sufficient to meet his necessities in the way of board, clothing, education, and other supplies which one in his social circumstances needs and requires.

Courts of general equity jurisdiction within the limits prescribed by the statutory law of the forum, if there be any such law upon the subject, have general supervisory authority and jurisdiction over the persons as well as the property of all citizens who are under any legal disability. *Equity—jurisdiction over person under disability.*

Keegan v. United States Trust Co. 182 Ky. 330, 206 S. W. 486, and Fielder v. Harbison, 93 Ky. 482, 20 S. W. 508. And if the chancellor would approve of an expenditure by the fiduciary for the benefit of the ward after it was made, upon the ground that it was authorized by the local law, he may direct such expenditure in advance, if the facts authorizing it are made to appear. Thus, in the Fielder Case, supra, this court says: "A guardian may exceed the income of the ward's estate when the ward is of such infirm health, or of such tender years, as requires the expenditure. This is a provision of the statute; but when authorized to make such an expenditure, it is only so much of the income as is required on account of the condition of his ward." *Incompetent person—authorizing expenditure out of estate.*

Parent and child—allowance of support out of child's estate.

less the parent is in such needy financial circumstances as that he is unable to do so. Hug-

Further along in the opinion, after referring to the case of Withers v. Hickman, 6 B. Mon. 292, in which it was held that the guardian could not encroach upon the capital of the ward's estate in any event, the court said: "This rule has been, to some extent modified by the statute referred to, and in Withers v. Hickman, already cited, it was held that if the expenditures by the guardian would have been allowed by the chancellor, if called on, then the guardian should be credited by it; and, while this rule is equitable, it is best always to consult the chancellor before making extraordinary expenditures."

It will thus be seen that the court not only recognized the rule that the ward might consult the chancellor in advance as to the propriety of expenditures, but, further, that it is the better rule in all cases to do so. Furthermore, in the instant case the sum asked for expenditures for

the ward might well be considered as needed only for ordinary expenses, since it is shown by the proof—a fact which we know from current history—that the expenses of living are now extraordinarily high, and the small amount of \$58.75

Evidence—  
judicial notice—  
expense of  
living.

cannot be considered, under present conditions, as an excessive allowance for the support and education of the ward, and to maintain him in the way and manner in which he should be reared. We, therefore, conclude that the court had the authority to direct the guardian to expend the present income of the ward for the purposes indicated, and the judgment so directing was correct. That judgment, according to its terms, is subject to modification at any time, to be governed by the changed circumstances.

Wherefore the judgment appealed from in its entirety is affirmed.

### ANNOTATION.

#### Subsequent change of beneficiary as affecting provisions of will in relation to proceeds of insurance.

With the exception of the reported case (WATSON v. WATSON, ante, 1575), there seems to be no case bearing on the question whether a change of beneficiary in a life insurance policy, subsequent to the execution of a will disposing of the proceeds of the policy, affects the provision of the will. In that case it appeared that the testator held two policies of life insurance, payable, on his death, to his estate. In his will he bequeathed the insurance to his son subject to a designated charge, and made reference to an intention to assign the policy to him. Subsequently, he made the son beneficiary of the insurance policy, not making any declaration as to a charge on it. The son refused to pay the charge,

claiming that the provision in the will was revoked by the subsequent change made in the policy. The court holds that the change of beneficiary did not act as a revocation of the provision of the will, but was in furtherance of it, saying that, had the testator, in his will, said nothing about his contemplated assignment of the policy to his son, burdened with the trust which he placed on it in his will, there would have been but little question that the change of the beneficiary in the policy indicated a change of his intention, and was a pro tanto revocation of the will; but that, his intention having been expressed in the will, the provision would be upheld.

J. C. L.

J. A. PUTNAL, plff. in Err.,  
v.  
W. E. INMAN.

*Florida Supreme Court — December 16, 1918.*

(— Fla. —, 80 So. 316.)

**Libel — information as to credit.**

1. Merchants have the right to organize for their own protection, and enter into mutual agreements for the purpose of giving each other the benefit of their knowledge about those in the community who meet their obligations promptly, and those who do not; and a communication on this subject, made by a member of the association to the other members, is privileged, if made in good faith and in such a manner and on such an occasion as to properly serve the purposes of the association.

[See note on this question beginning on page 1585.]

**— privilege.**

2. A communication, although it contains criminating matter, is privileged, when made in good faith upon any subject in which the party communicating has an interest, or in reference to which he has a right or duty, and made upon an occasion to properly serve such right, interest, or duty, and in a manner and under circumstances fairly warranted by the occasion and the duty, right, or interest, and not so made as to unnecessarily or unduly injure another, or to show express malice.

[See 17 R. C. L. 341.]

**Pleading — libel — innuendoes — support in facts.**

3. Turning an account over to an attorney of a merchant's protective

association for collection, with knowledge that he will report the debtor's name to other members of the association, does not warrant innuendoes in a declaration for libel that defendant meant that plaintiff would not pay his debts, but obtained support by dishonest and dishonorable means, and was a deadbeat, although the constitution of the association recited that its purpose was to protect merchants from persons of that character.

[See 17 R. C. L. 396.]

**Definition — trust.**

4. "Trust," in a merchant's agreement for protection against persons unworthy of trust, means "to give credit to," and relates to a person's financial ability to pay his debts.

Headnotes 1 and 2 by BROWNE, Ch. J.

**ERROR** to the Circuit Court for Taylor County (Horne, J.) to review a judgment in favor of plaintiff in an action brought to recover damages for an alleged libel. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Davis & Diamond, for plaintiff in error:

The publication in question could not possibly be libelous unless it affected plaintiff in his business or trade.

Stannard v. Wilcox & G. Sewing Mach. Co. 118 Md. 151, 42 L.R.A. (N.S.) 515, 84 Atl. 335, Ann. Cas. 1914B, 709; Weeks v. News Pub. Co. 117 Md. 126, 83 Atl. 162; Lumley v. Allday, 1 Cramp. & J. 301, 1 Tyrw. 217, 9 L. J. Exch. 62; Miller v. David, L. R. 9 C. P. 118, 43 L. J. C. P. N. S.

84, 30 L. T. N. S. 58, 22 Week. Rep. 332; Wilson v. Cottman, 65 Md. 190, 3 Atl. 890; Nichols v. Daily Reporter Co. 30 Utah, 74, 3 L.R.A. (N.S.) 339, 116 Am. St. Rep. 796, 83 Pac. 573, 8 Ann. Cas. 841; Townshend, Libel & Slander, 4th ed. §§ 146, 147; Fry v. McCord Bros. 95 Tenn. 680, 33 S. W. 568.

The alleged libelous communication was privileged.

Montgomery v. Knox, 25 Fla. 595, 3 So. 211; McDermott v. Union Credit Co. 76 Minn. 86, 78 N. W. 96, 79 N.

W. 673; Missouri P. R. Co. v. Richmond, 73 Tex. 568, 4 L.R.A. 280, 15 Am. St. Rep. 801, 11 S. W. 555; Holt v. Parsons, 23 Tex. 9, 76 Am. Dec. 49; Bradstreet Co. v. Gill, 72 Tex. 115, 2 L.R.A. 405, 13 Am. St. Rep. 768, 9 S. W. 753; Coogler v. Rhodes, 38 Fla. 248, 56 Am. St. Rep. 170, 21 So. 109.

The simple entry of plaintiff's name in a list of persons who were in default in the payment of their accounts was not a libel.

Windisch-Muhlhauser Brewing Co. v. Bacon, 21 Ky. L. Rep. 928, 53 S. W. 520; Sanders v. Hall, 22 Tex. Civ. App. 282, 55 S. W. 594; Hollenbeck v. Hall, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; 25 Cyc. 258; Trussell v. Scarlett, 18 Fed. 214; Locke v. Bradstreet Co. 22 Fed. 771; Woodhouse v. Powles, 43 Wash. 617, 8 L.R.A.(N.S.) 783, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 Ann. Cas. 54.

Mr. William T. Hendry, for defendant in error:

Plaintiff's declaration states a cause of action in charging that the defendant, by reporting plaintiff's name to the association, and causing the same to be entered upon the blacklist, or list of delinquent debtors, published of the plaintiff that he was a person "unworthy of trust," for such a publication is libelous per se.

25 Cyc. 251; Montgomery v. Knox, 23 Fla. 595, 3 So. 211; Weston v. Barnicoat, 175 Mass. 454, 49 L.R.A. 612, 56 N. E. 619; Muetze v. Tuteur, 77 Wis. 236, 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 123; Harnett v. Plumbers' Supply Asso. 169 Mass. 229, 38 L.R.A. 194, 47 N. E. 1002; Woodhouse v. Powles, 43 Wash. 617, 8 L.R.A.(N.S.) 785, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 Ann. Cas. 54; Saloman v. Armour, 123 Fed. 342; Cleveland Retail Grocers' Asso. v. Exton, 18 Ohio C. C. 321; Hazy v. Woitke, 23 Colo. 556, 48 Pac. 1048.

Browne, Ch. J., delivered the opinion of the court:

W. E. Inman sued J. A. Putnal in the circuit court of Taylor county for libel. The case was tried on an agreed statement of facts, and judgment rendered for the plaintiff, and the defendant took writ of error to this court.

The defendant was a member of the Perry Merchants' Protective Association, composed of a number of

the merchants of the town of Perry, having a constitution and by-laws, and an agreement, signed by all its members, which contained these recitals: "Whereas, past experience has taught the undersigned that there are those who visit and for a time live in a growing town like Perry, who are inclined to live on the confidence that the merchants have in humanity," and "by reason of such confidence the merchants of the town of Perry have time and again extended credit to those who were not worthy of such credit," and "in the past it has been possible for persons to obtain several months' support from all the merchants, on account of the lack of organization on the part of the merchants, by trading with one merchant for a short while and then with another, etc., until he had completed the round."

The purpose of the association, set out in the constitution, was "the protection of its members against loss by reason of extension of credit to those unworthy of trust." The constitution provided for the appointment of an attorney, one of whose duties was "to furnish each member of this association with a list of all accounts placed in his hands for collection for any member of this association." The agreement also provided that "when any member of this association shall give notice by and through the attorney of this association that any person has failed to pay his or her account, together with the amount of such account, and that the notifying merchant is no longer willing to carry the account of such defaulting person, that none of the members of this association shall thereafter extend credit to such defaulting person and should any member of this association thereafter credit such defaulting person, said member so selling and crediting such defaulting person agrees to assume the account and accounts due the other members of this association, of which such member so crediting had notice: Provided, however, that it shall be



the duty of the attorney to notify each member of this association when any person is reported in default, together with the amount of the account and to whom it is due, and, further, if such account should thereafter be paid by the defaulting person or satisfactorily arranged, then it shall be the duty of the attorney to so notify the members of this association, and all members shall thereafter be released from any liability on account of extending credit to such party who had theretofore been in default."

The constitution provided that "each member should use discretion in making reports, and should not report any person to the attorney of this association, unless the person, firm, or corporation making the report is no longer willing to carry the account of the person so reported on his or her books."

The declaration contains extracts from the agreement, and from the constitution and by-laws, which were attached to the declaration and by apt words made a part thereof. It alleges among other things that the defendant presented plaintiff with a bill for \$14, which he claimed he did not owe, and that subsequently the defendant "reported the plaintiff's name to the attorney of said association, as provided for in rule 1 of the discretionary rules of the by-laws, rules, and regulations of said association, hereinbefore alleged and set forth as a part of this declaration; that the said attorney of said association thereupon, in accordance with the provisions of § 10 of article V. of the constitution and by-laws of said association, also made a part of this declaration, furnished the several members of said association with a list containing plaintiff's name as being in default in an account with the defendant, and the said attorney then and there entered plaintiff's name upon the blacklist, or list of delinquents or persons in default in their accounts, in the hands of said several members of said association; and the defendant then and there and

thereby caused to be published to various persons, members of the said Perry Merchants' Protective Association, . . . that the plaintiff was 'a person who was inclined to live upon the confidence that the merchants had in humanity;' and, further, that the plaintiff was a person 'not worthy of such credit;' and, further, that the plaintiff was a person who would 'obtain several months' support from all the merchants, by trading with one merchant a while and then with another,' etc., 'until he had completed the round;' meaning thereby that plaintiff would not pay his debts, but obtained support for himself and family by dishonorable and dishonest methods; that plaintiff was a deadbeat; and, further, that the plaintiff was a person 'unworthy of trust.'

We do not think that the innuendoes are supported by the alleged libelous act of the defendant. The agreement set out several methods by which the merchants of Perry had sustained losses, and the constitution stated that the purpose of the organization was to protect its members against loss by reason of extending credit to those unworthy of trust. "Trust," in the sense here used, means "to give credit to," and relates to a person's financial ability to pay his debts.

Pleading—libel  
—innuendoes—  
support in facts.

Definition—  
trust.

It is claimed that when the attorney of the association gave notice in writing to members of the association that he held for collection a claim from Putnal to Inman, that it was a publication, and that Putnal was responsible for the attorney's act, because when he gave him the claim he knew the constitution required the attorney to give notice thereof to all the members. This is quite true, but was it a publication to the effect that the plaintiff belonged to all the objectionable classes that the association sought to protect its members from? We do not think so.

The act of the attorney, in order to be the act of the defendant, must relate to some act required by the constitution, when a member gives a claim to the attorney for collection, and also to what the attorney was thereupon required to do. The constitution provided that when "any person has failed to pay his or her account," and the "merchant is no longer willing to carry the account of such defaulting person," he may turn the account over to the attorney for collection, and it then becomes the duty of the attorney to notify all the members of the association. He is not required to notify all the members that the plaintiff was such a person as described in the innuendoes, but merely that the plaintiff was "in default, together with the amount of the account, and to whom it is due." According to the agreed statement of facts this was all that he did.

The matter of extending credit is a large part of modern business, and merchants have the right to organize for their own protection and agree to report to each other the name of a person to whom credit has been extended, who has failed to pay his account, and agree that they will not extend credit to such person without assuming his indebtedness. This is not the same as blacklisting or boycotting by refusing to trade with him, but is only an agreement not to extend him credit without assuming whatever indebtedness he may owe to any other member of the association.

In the case of *Woodhouse v. Powles*, 43 Wash. 617, 8 L.R.A. (N.S.) 783, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 Ann. Cas. 54, the court said: "Counsel for the appellant, however, as we understand his argument, takes the position that the association was in itself unlawful, and that the act of the respondents in notifying their fellow members that the appellant was delinquent on one of his purchases, when he was not so delinquent, was an act libelous per se, from which malice is presumed, and entitles him

in itself to recover substantial damages, without proofs of any other fact. As to the first position, we do not think it tenable. Courts, it is true, uniformly hold it libelous for a person, or association of persons, to attempt to coerce the payment of debts by holding the debtors out to the world as being dishonest and unworthy of credit, or to publish their names in circulars, pamphlets, and books for distribution among dealers, as persons who have contracted debts and failed to pay them; but no court, so far as we are advised, has held it unlawful for dealers in a common line of goods to agree among themselves not to extend credit to a person who had defaulted in a payment to some one of them. The right that each one has to protect his legitimate interests justifies such an agreement. And it being lawful to enter into such an agreement, it is, of course, lawful, and hence not libelous, for one party to the agreement to report to the others the names of such of his customers as have become delinquent; and especially is this so where, as in this case, the purchaser is informed in advance of his purchases that a denial of further credit will be the consequence of his failure to pay at the required time."

In the case at bar the plaintiff was informed in advance, by a communication from defendant, that the plaintiff was "under obligation to report to the association's attorney the name of every person who does not pay his or her bill promptly," and that defendant "would dislike very much to turn your name over to the association, as it would probably affect your credit in the town of Perry," and he was asked to "come to see us, and let us have a satisfactory understanding of the matter."

In noting the distinction between the case of *Muetze v. Tuteur*, 77 Wis. 236, 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 123, and the one under consideration, the court in the case of *Woodhouse v. Powles*, supra, said: "But the principle up-

on which the case rests differs from that involved in the case before us. Public policy forbids the resort to this method for the purpose of collecting debts, but no rule of public policy forbids a wholesaler to refuse to credit a retail dealer who has made default in his payments to another wholesaler, and it follows, as of course, that he may resort to any legitimate method for ascertaining who is in default. As we hold that the method pursued in this case was a legitimate one, no action can be found on that act alone."

The pivotal question in this case is the nature of the communication made by the defendant to the other members of the association through their attorney. If it was a privileged communication no action will lie.

The rule governing privileged communications is thus laid down by this court: "A communication, although it contains criminating matter, is privileged when made in

good faith upon any subject in which the party communicating has an interest, or in reference to which he has a right or duty, . . . and made upon an occasion to properly serve such right, interest, or duty, and in a manner and under circumstances fairly warranted by the occasion and the duty, right, or interest, and not so made as to unnecessarily or unduly injure another, or to show express malice." *Abraham v. Baldwin*, 52 Fla. 151, 10 L.R.A.(N.S.) 1051, 42 So. 591, 10 Ann. Cas. 1148.

In order that merchants may prudently do a credit business, it is expedient for them to know those in the community who meet their obligations promptly, and those who do not, and they have the right to organize and enter into mutual agreements, for the purpose of giving each other the benefit of their knowledge on these subjects, and a communication made by a member

of the association to the other members, is privileged, if made in good faith, and in such a

manner and on such an occasion as to properly serve the purpose of the association.

It does not appear from the agreed statement of facts that the defendants charged the plaintiff with dishonesty or dishonorable dealings, or imputed to him any questionable transaction, but only that "defendant claimed an account due by plaintiff which plaintiff refused to pay," and "that thereupon the account was placed with E. C. Calhoun for collection," and that Calhoun "entered plaintiff's name, together with the defendant's name and the amount claimed by the defendant against plaintiff, in a book kept by B. P. Blanton, a member of said association," and furnished P. F. Bloodworth in writing with plaintiff's name and the amount of his account with defendant.

The agreed statement of facts also shows that Calhoun would swear that he did not notify all the members of the association that the defendant had given him a claim against the plaintiff for collection, and that the only persons notified by him were Blanton and Bloodworth, both of whom were members of the association, and were also his private clients, and that he gave them the information about the claim at their request and as their attorney. This is not contradicted.

Even if Calhoun, when he notified these parties, was acting as the attorney of the association, and notified them in accordance with the requirements of the constitution, such notice was a privileged communication, and it does not appear that the privilege was abused by giving it undue publication by proclaiming it to persons other than members of the association.

There is nothing in the agreed statement of facts, nor in the declaration itself, to show malice on the part of the defendant, nor did the attorney of the association disregard the restraints and qualification imposed by law upon the publicity to be given to such communications, nor did he exceed reasonable bounds

in making the communication. As the communication made by Calhoun to the members of the association was privileged, there can be no recovery, and it is needless to discuss the many questions presented by the assignments of error on the pleadings.

The judgment is reversed.

All concur.

**NOTE.**

The reported case (PUTNAL v. INMAN, ante, 1580) is of interest in connection with TURNER v. BRIEN, infra, as solving a similar problem in a different way. Both cases involved

the question of listing a nondealer as unworthy of credit as libel. In TURNER v. BRIEN, the publication under consideration was regarded as libelous per se, and no question of privilege was raised; but, in the PUTNAL CASE, the listing of plaintiff's name was held privileged upon the theory that merchants have a right to organize for their own protection against those unworthy of credit, wherefore a list circulated among the members of the association is privileged, provided the same is done in good faith, and to further the ends of the association. This particular phase of the question is treated in subdivision III. of the annotation following TURNER v. BRIEN, post, 1592.

JOHN B. TURNER

v.

SAM BRIEN, Appt.

*Iowa Supreme Court — May 17, 1918.*

(— Iowa, —, 167 N. W. 584.)

**Libel — statement that one is unworthy of credit.**

1. Publishing in a merchants' credit book a false statement that one is unworthy of credit is libelous per se.

[See note on this question beginning on page 1590.]

**Appeal — absence of exceptions.**

2. Error in rulings on admission of evidence to which no exceptions were preserved will not be considered on appeal.

[See 2 R. C. L. 92.]

— refusal to instruct verdict.

3. The court on appeal will not consider a refusal of an instructed verdict, to which no exceptions are preserved.

[See 2 R. C. L. 92-94.]

— refusal of instructions — error.

4. There is no error in refusing requested instructions which, so far as pertinent to the issues tendered, are given substantially by the court in another form.

[See 2 R. C. L. 261.]

**Libel — statutory definition.**

5. The statutory definition of criminal libel is the malicious defamation of a person, made public by print or writing, tending to provoke him to

3 A.L.R.—100.

wrath, or to deprive him of the benefits of public confidence and social intercourse, as applicable to civil actions.

[See 17 R. C. L. 262.]

— presumptions raised by.

6. Upon proof of publication of matter which is libelous per se, the law will presume the falsity of the matter charged, that the publication is malicious, and that some damage follows.

[See 17 R. C. L. 417.]

**Evidence — burden of proof — libel.**

7. One seeking damages for publications not actionable per se must show falsity, malice, and special damage.

[See 17 R. C. L. 264, 311.]

**Libel — construction.**

8. In ascertaining the thought intended to be conveyed by a publication alleged to be libelous, the court cannot disassociate the circumstances under which the publication was made

from the libel itself, or the purpose that prompted it.

[See 17 R. C. L. 313.]

**Appeal — failure to instruct — right to complain.**

9. Defendant in a libel suit cannot complain of the court's failure to instruct the jury that the publication was libelous per se, and that malice and damage were presumed.

[See 2 R. C. L. 261.]

**Pleading — libel — damages.**

10. Special damages need not be alleged to warrant recovery for a publication which is libelous per se.

[See 17 R. C. L. 391.]

**Libel — interpretation — scope of inquiry.**

11. In determining whether or not

a cipher publication in a merchants' credit book is libelous, the court is not confined to the literal interpretation of the language used, but may regard the thought conveyed or intended to be conveyed to the reader.

[See 17 R. C. L. 312 et seq.]

**— truth as defense.**

12. That a publication in a merchants' protective book that a customer owed the publisher a sum of money was true does not prevent the publication from being libelous, if the intent was to convey information that the customer was not worthy of credit, which was not true.

[See 17 R. C. L. 299, 300, 325 et seq.]

**APPEAL** by defendant from a judgment of the Municipal Court of Des Moines (Meyer, J.) in favor of plaintiff in an action brought to recover damages for an alleged libel. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Dunshee, Haines, & Brody, for appellant:

The words published were not libelous per se, and there was no proof of special damages.

O'Connell v. Shontz, 126 Iowa, 709, 102 N. W. 807; Hollenbeck v. Hall, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; Sterling v. Jugenheimer, 69 Iowa, 210, 28 N. W. 559; Achorn v. Piper, 66 Iowa, 694, 24 N. W. 513; Homer v. Engelhardt, 117 Mass. 539; Newbold v. J. M. Bradstreet & Son, 57 Md. 38, 40 Am. Rep. 426; Nichols v. Daily Reporter Co. 30 Utah, 74, 3 L.R.A. (N.S.) 339, 116 Am. St. Rep. 796, 83 Pac. 573, 8 Ann. Cas. 841.

The question of whether words are libelous per se is one of law, not fact.

Sheibley v. Ashton, 130 Iowa, 195, 106 N. W. 618; Hollenbeck v. Hall, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; Mosnat v. Snyder, 105 Iowa, 500, 75 N. W. 356; Wallace v. Homestead Co. 117 Iowa, 348, 90 N. W. 835.

If the matter published is not libelous per se upon its face, it cannot be made so by innuendo.

Wallace v. Homestead Co. *supra*.

Where words are not actionable per se, such matters as mental distress, illness, worry, and the like do not usually constitute special damage.

Newell, Libel & Slander, p. 863; Sutherland, Damages, 3d ed. § 1218;

Achorn v. Piper, 66 Iowa, 694, 24 N. W. 513; Prime v. Eastwood, 45 Iowa, 640.

The publication is not libelous per se, for the reason that the words carry no necessary imputation that plaintiff is dishonest.

Newell, Libel & Slander, pp. 192-197; Stannard v. Wilcox & G. Sewing Mach. Co. 118 Md. 151, 42 L.R.A. (N.S.) 515, 94 Atl. 335, Ann. Cas. 1914B, 709; Denney v. Northwestern Credit Asso. 55 Wash. 331, 25 L.R.A. (N.S.) 1021, 104 Pac. 769; Bentley v. Reynolds, 26 S. C. L. (1 McMull.) 16, 36 Am. Dec. 251; Platto v. Geilfuss, 47 Wis. 491, 2 N. W. 1135; Sanders v. Edmonson, — Tex. Civ. App. —, 56 S. W. 611; McDermott v. Union Credit Co. 76 Minn. 84, 78 N. W. 967, 79 N. W. 673; Fry v. McCord Bros. 95 Tenn. 678, 33 S. W. 568; Windisch-Muhlhauser Brewing Co. v. Bacon, 21 Ky. L. Rep. 928, 53 S. W. 520.

Mr. S. B. Allen, for plaintiff:

The malicious defamation of a person, made public by any printing or writing, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, "is libelous per se."

Morse v. Times Republican Printing Co. 124 Iowa, 707, 100 N. W. 867; Hughes v. Samuels Bros. 179 Iowa, 1077, L.R.A. 1917F, 1088, 159 N. W.

589; Sheibley v. Ashton, 180 Iowa, 195, 106 N. W. 618; Call v. Larabee, 60 Iowa, 212, 14 N. W. 237; Halley v. Gregg, 74 Iowa, 564, 38 N. W. 416.

A publication which imputes an unwillingness or refusal to pay just debts is libelous per se, as tending to destroy the party's reputation for integrity and fair dealing. So, it is generally held libelous per se to publish, or cause to be published, one's name as a delinquent debtor, or as one unworthy of financial credit.

25 Cyc. 258; Codner v. Central Rating Agency, 180 Iowa, 188, 161 N. W. 657; Davis v. Hamilton, 85 Minn. 209, 88 N. W. 744; Mertens v. Bee Pub. Co. 5 Neb. (Unof.) 592, 99 N. W. 847; Masters v. Lee, 89 Neb. 574, 58 N. W. 222; Muetze v. Tuteur, 77 Wis. 236, 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 123; 18 Am & Eng. Enc. Law, 2d ed. 923; White v. Parks, 93 Ga. 633, 20 S. E. 78; Hollenbeck v. Ristine, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355, 114 Iowa, 358, 86 N. W. 377; Hollenbeck v. Hall, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; Sheibley v. Ashton, 180 Iowa, 195, 106 N. W. 618.

Gaynor, J., delivered the opinion of the court:

This is an action for libel. Plaintiff is a laboring man. Defendant runs a grocery store. During the years 1914 and 1915, plaintiff became indebted to the defendant for groceries, and appears not to have been able, or not to have been willing, to pay. Thereupon defendant refused him further credit, and plaintiff went elsewhere for his groceries. Plaintiff claims that his failure to pay was due to the fact that the defendant had overcharged him, and was insisting on \$20, when there was in fact but \$16 due; that he offered to pay the \$16, but refused to pay the \$20; that the defendant insisted on the \$20, threatened him with personal violence, and also threatened to see that plaintiff lost his job. The record shows a clear dispute between the parties as to the amount due, and there is controversy as to the reasons assigned by the plaintiff for refusal or neglect to pay. While this controversy was on, the defendant caused to be published in a pamphlet issued

by a certain trust book and credit company, the following:

Turner John. R., pkr., 802 e  
23d .....37—\$20.00

This was afterwards superseded by a bound volume, which was issued on the 24th day of November, 1915, and in the bound volume appeared:

John Turner. Watch, 802 23d  
Court .....MSR

The publication contained a key which explained the language used as follows: "M—Medium Pay. S—Slow Pay. R—Party reporting would require cash in future dealings."

The figure "37," appearing in the first report before the figure "\$20," indicates the party conveying the information to the credits company for publication, and this record shows that the person so indicated was the defendant in this suit. The explanation given by a witness who had knowledge of the internal workings of this credit company is that the report indicates that on the 23d day of February, 1915, the defendant reported that the plaintiff was indebted to him in the sum of \$20. The letter "R" indicates that the defendant reported that he would not extend further credit to the plaintiff; that he would require cash. This publication was made by the company for the enlightenment of retail dealers from whom plaintiff might desire to make purchases. Each subscriber to this company receives one of these publications, with a key explaining the meaning of the entries opposite the name of each party complained of. In the fall of 1915, the plaintiff made arrangements with the defendant to pay this account, and completed his payment in the month of January, 1916. He paid the sum of \$16 in full of the account. These publications still appeared in the bound volume, unchanged, after the arrangements had been made for payment and after payment was made. Plaintiff claims that after these

publications were made he was refused credit by various merchants; that said publications were intended to, and did, provoke the plaintiff to wrath, and did deprive him of the benefit of public confidence and intercourse, and exposed him to public hatred and ridicule, and that said publication was made for the purpose of disgracing this plaintiff among the retail dealers of Des Moines, and that it had the effect intended; that after said publication he applied to several firms for credit, and was refused; that some of said parties, after reference to this book, refused credit to him.

This statement is sufficient for the purpose of an intelligent review of the matters complained of on this appeal. The jury returned a verdict for the plaintiff for \$250, which was reduced by the court to \$75, and judgment entered in favor of the plaintiff for \$75. From this judgment defendant appeals, and complains:

(1) That the court erred in its ruling on the admission of evidence; but as no exceptions were preserved to these rulings they will not be considered.

(2) That the court erred in overruling a motion made by the defendant at the conclusion of all the evidence, for an instructed verdict. No exceptions were preserved to this, and it is not, therefore, considered.

(3) The court erred in refusing to give certain instructions asked by the defendant. As to this we have to say that, in so far as the instructions asked were pertinent to the issues tendered, they were given substantially by the court in the instructions given to the jury, and, therefore, the refusal was without prejudice.

The other complaints are bot-tomed on the thought that the publication is not libelous per se, and that, therefore, special damages must be alleged and proved before

plaintiff is entitled to recover. It is further urged that the court should have said to the jury that the words are not actionable per se, and that no recovery could be had except on proof of special damages. It is to these last propositions that we address ourselves.

The plaintiff in his petition alleges that the publication was false and untrue, and known to be false and untrue by the defendant herein when he caused the same to be published and circulated; that he caused the publication to be made with the intent to provoke the plaintiff herein to wrath, and to deprive him of the benefit of public confidence, and for the sole purpose of disgracing this plaintiff among retail dealers in Des Moines; that the same was published wilfully and maliciously, and for the purpose and intent aforesaid; that the effect of said publication was to deprive plaintiff of the benefits of public confidence in the city of Des Moines, and that he has been damaged thereby.

Criminal libel is defined by our statutes to be "the malicious defamation of a person, made public by any printing, writing, . . . tending to provoke him to wrath . . . or to deprive him of the benefits of public confidence and social intercourse." Code 1897, § 5086. And this definition has been accepted as applicable to civil actions. See *Stewart v. Pierce*, 93 Iowa, 136, 61 N. W. 388.

It has been the general holding by this court that any publication which comes within the statutory definition of libel is actionable per se; that is, upon the proof of such publication, the law will presume the falsity of the matter charged, that the publication was with malice, and that some damage follows. In this it differs from publications which are not actionable per se. In such publications the burden of

Appeal—absence of exceptions.

—refusal to instruct verdict.

—refusal of instructions—error.

Libel—statutory definition.

—presumptions raised by.

Evidence—burden of proof—libel.

proof remains upon the plaintiff in respect to all these matters, and recovery can be had only upon the allegation of proof of special damages.

It seems to be the thought of the defendant that in construing this publication we are confined to a literal interpretation of the language used, disassociated from the purposes and intent and consequences that may follow from the thought which is suggested by the language used. If the publication is made maliciously, and for the purpose and with the intent of injuring the plaintiff, and would, in its ordinary meaning and purpose, tend to expose one to public hatred, contempt, or ridicule, or deprive him of public confidence or esteem, it is actionable per se; that is, if, upon the face of the publication, this would be the usual and ordinary effect upon the minds of other people to whom it comes, it must be presumed that it had that effect,—the effect that it usually and ordinarily has upon the mind. It is the thought conveyed to the minds of others by the publication that produces the poison which defames the good name and character of the person assailed. If the effect of such publication is usually and ordinarily to convey to the mind the existence of an assumed fact that affects prejudicially one about whom the publication is made, or tends to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule, or to deprive him of public confidence or esteem, the law presumes that it worked that effect, and the burden is on the defendant to negative these presumptions. The jury could well find the thought conveyed and intended to be conveyed was that the plaintiff was not worthy of credit. It was a warning to the public not to trust him. Such publications usually and ordinarily have the effect of depriving one of public confidence and esteem. The general rule is that any publication concerning a person or his affairs,

which, from its nature, necessarily must or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, is libelous per se. To say of one, "I have trusted him, he has failed me; I would not trust him again," and to publish this, is to say to the public: "This one is not worthy of your confidence or your credit. You should require cash of him in your dealings." The record shows a clear dispute, not only as to the account, but as to why the account was not paid.

In ascertaining the thought intended to be conveyed by this publication, we cannot disassociate the circumstances under which the publication was made from the publication itself, or the purpose that prompted it. The jury could well find that, while the credit company published the information for the good of its patrons, this was not the purpose of the defendant. The purpose was to expose plaintiff to contempt, and to deprive him of the confidence and esteem of the public, and to affect his credit and standing among the retail business men of Des Moines. This the jury could well have said under this record. This is the purpose which the plaintiff charges the defendant with having intended to accomplish by the publication. There is evidence that the purpose was accomplished. The words were actionable per se as charged. The evidence supports the allegations of the petition. Damages are presumed.

It is true the court should have told the jury in its instructions that the words were actionable per se, and that malice and damages were presumed, but its failure to do this did not prejudice any right defendant had in this suit, and of this it cannot complain. Special damages are required to be alleged and proved only when the publication, with its at-

Libel—construction.

—statement that one is unworthy of credit.

Appeal—failure to instruct—right to complain.



tending facts and circumstances, is such that damages do not naturally arise from the publication. If the publication, with its attending circumstances, is such that the court can presume legally that injury followed as a natural and inevitable consequence of the act complained of, then there is no occasion that the plaintiff allege and prove special or peculiar damages. If the publication complained of usually, ordinarily, and naturally detracts from the reputation and standing of the plaintiff, and tends proximately and naturally to deprive him of public confidence and esteem, and is maliciously made, then it is libelous per se, and special or peculiar damages are not required to be alleged or proved. The injury, however, must flow from the publication, but not necessarily from a literal interpretation of the words used in the publication.

**Libel—interpretation—scope of inquiry.** It is the thought conveyed, not the words, that does the harm. One who is charged with refusing to pay an honest debt is charged with dishonesty,—a charge which, if believed, affects his good name, fame, and reputation among his fellows, and deprives him of public confidence and esteem. We say, therefore, that the plaintiff charged a publication which was libelous per se, and that the proof supports the charge.

It is contended that the publication was true. In its literal interpretation we may assume that this contention is right, but in the broader scope and purpose of the publication it is not shown to be true. It may be true that the plaintiff owed the defendant a sum of money. It may be true that the defendant would not thereafter trust him, but it is not true or shown to be true that the plaintiff was not worthy of credit, and that others, dealing fairly with him, could not trust him; and this is the thought which the jury could well find the defendant intended to convey, and did convey, by the publication made. As supporting these conclusions, see *Codner v. Central Credit Rating Agency*, 180 Iowa, 188, 161 N. W. 657; *Hughes v. Samuels Bros.* 179 Iowa, 1077, L.R.A.1917F, 1088, 159 N. W. 589; *Sheibley v. Ashton*, 130 Iowa, 195, 106 N. W. 618; *Morse v. Times-Republican Printing Co.* 124 Iowa, 707, 100 N. W. 867; *Halley v. Gregg*, 74 Iowa, 564, 38 N. W. 416; *Call v. Larabee*, 60 Iowa, 212, 14 N. W. 237.

Upon the whole record we find no ground for interfering with the judgment of the court below, and the cause is affirmed.

**Preston, Ch. J., and Weaver and Stevens, JJ., concur.**

Petition for rehearing denied, September 23, 1918.

## ANNOTATION.

### **Libel: listing nontrader as unworthy of credit.**

- I. Scope, 1590.
- II. In general, 1590.
- III. Privileged communications, 1592.
- IV. Sufficiency of pleadings, 1593.

#### *I. Scope.*

The present annotation is confined strictly to the question whether the publishing or listing of the name of a person other than a dealer or a trader, in a merchants' credit book or list, as unworthy of credit, is libelous.

This limitation, of course, excludes the class of cases illustrated by *Muetze v. Tuteur* (1890) 77 Wis. 236, 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 123, where the complaining party was in business, and his credit as a dealer was impugned.

#### *II. In general.*

The listing or publishing of one's name as a delinquent debtor may be libelous, notwithstanding the publica-

tion is of him as an individual, and not in relation to any business or profession carried on or practised by him; since the charge may be such as naturally tends to injure his standing in the community, and lower him in the esteem and respect of the public. It was expressly so held in *McDermott v. Union Credit Co.* (1899) 76 Minn. 84, 78 N. W. 967, on rehearing in (1899) 76 Minn. 88, 79 N. W. 673. In this case the court, upon the original argument, held that a false publication of plaintiff's name on a merchants' credit list, as "slow" pay, was libelous per se within the above-stated rule; but, upon reargument, reached a different conclusion, saying that the publication, when construed in connection with the full key to the list, indicated merely that the plaintiff did not always pay promptly, weekly or monthly, or even on demand, but that he did pay without being "pushed," and without the necessity of taking legal proceedings against him; and that he did not dispute his bills, refuse payment, or break his promises to pay; wherefore, the publication did not appreciably injure his reputation for integrity or honesty, or destroy the esteem and respect of his neighbors, and was not actionable per se. And in *TURNER v. BRIEN* (reported herewith) ante, 1585, it was held that the false listing in a merchants' credit book of a nontrader as one who refuses to pay a debt (the amount of which was in dispute), and a poor credit risk, is libelous per se in that, upon the face of the publication, the ordinary effect upon the public mind would be to make them regard him as unworthy of credit. So, in *Werner v. Vogeli* (1901) 10 Kan. App. 536, 63 Pac. 607, where a nontrader, who owed defendant nothing, was listed in the credit book of a merchants' association as "bad pay," and "unworthy of credit," it was held that such publication was libelous, the law presuming that such a false publication is malicious. In *Tuyes v. Chambers* (1919) 144 La. —, 81 So. 265, it was held that the printing and publishing of a nontrader's name on a list of delinquent debtors as part of a plan to extort money claimed to be due,

and with the intent to impute a refusal to pay just debts and destroy plaintiff's reputation for integrity, is libelous per se. And, in Georgia, the rule is that if a merchants' association falsely and maliciously blacklist and publish a person as a delinquent debtor, when in fact he owes nothing, the publication is libelous per se, since it tends to some extent to injure his reputation, render him in some degree odious, and expose him to public contempt. See *White v. Parks* (1894) 93 Ga. 633, 20 S. E. 78, and *Western U. Teleg. Co. v. Pritchett* (1899) 108 Ga. 411, 34 S. E. 216.

On the other hand, some lists have been held not to be libelous per se. Thus, in *McDonald v. Lee* (1914) 246 Pa. 253, L.R.A.1916B, 915, 92 Atl. 135, it was held that it was not libelous per se for a member of a medical association to contribute the name of a slow-pay patient to a confidential list prepared by the association for the benefit of its members, there being nothing upon the face of the publication to indicate its purpose, and the list being printed in such a manner that no one but a member would know its meaning. And in *Fry v. McCord Bros.* (1895) 95 Tenn. 678, 33 S. W. 568, it was held that the publication in an abstract of unsettled accounts issued by a commercial agency, of a memorandum that one not a merchant or trader was indebted in a certain sum, in connection with a special notice to the effect that the information was furnished in strict confidence, for the exclusive use and benefit of the subscribers, was not libelous per se, since the publication on its face was not injurious. The court said: "Words which upon their face, and without the aid of extrinsic proof, are injurious, are libelous per se; but if the injurious character of the words appear not from their face, in their usual and natural signification, but only in consequence of extrinsic circumstances, they are not libelous per se. . . . Looking alone to the words used in the pamphlet, we are of opinion that, taken in their ordinary and usual and natural sense and mean-

ing, they are not libelous or injurious on their face, or per se."

However, in some cases falling within the scope of the present annotation, the courts have applied the rule that, where the words published are capable both of a harmless and an injurious meaning, it is a question for the jury which meaning the reader would, on the particular occasion in question, have reasonably given to the words. Thus, in *Getchell v. Merchant Tailors' Exch.* (1892) 26 Ohio L. J. 233, where a protective association published a list of judgments held by members against customers, and applied the word "delinquent" to each judgment debtor, it was held that the question whether the publication was, under all the surrounding facts and circumstances as to such a debtor, open to the innuendo that he had dishonestly and dishonorably evaded and refused to pay such claim, and was not entitled to the confidence and respect of the community, etc., so as to constitute a libel, was one for the jury. And in *Cleveland Retail Grocers' Asso. v. Exton* (1899) 18 Ohio C. C. 321, 10 Ohio C. D. 145, it was held that the language used in a "delinquent book," purporting to have been "compiled from the reports of delinquent customers" furnished by members of the association, and to contain "the names of people who in the past have failed to pay their grocery bills, and are unworthy of credit," was susceptible of being construed as tending to expose the listed debtors to public hatred, contempt, or ridicule, and deprive them of the benefit of public confidence and social intercourse, so as to entitle one so listed to have the question whether or not the list was a libel submitted to the jury. And again, in *Traynor v. Sielaff* (1895) 62 Minn. 420, 64 N. W. 915, it was held that the mere listing of a delinquent debtor's name on a merchant association's "special reference list of unsettled claims," with a cipher rating, is not, standing alone and unexplained, libelous, yet the words used are reasonably susceptible of a defamatory meaning, and the complaint alleges and the proof tends to show the con-

nection in which the words were used, their meaning, and how they were understood by the persons to whom the publication was sent, and that the same were defamatory, the question whether the publication was libelous was for the jury. In *Masters v. Lee* (1894) 39 Neb. 574, 58 N. W. 222, it was held that the court should have instructed the jury to the effect that if a person's name (a case of a non-trader) was placed in a merchants' credit book to stop his credit and to compel payment of an alleged debt, and that thereby the plaintiff's credit was injured, the defendant should be found liable.

It should be noted, in connection with the cases which hold that the question of libel is one for the jury under the facts, that, according to the general rule of libel, where the publication under consideration does not amount to libel per se, the question is not one for the jury in the absence of allegation and proof of special damages; since such damages are essential to a recovery for a publication which is not libelous per se. In other words, the court ordinarily should dismiss the action, if the publication is not regarded as libelous per se, unless special damages have been alleged and proved. For cases which illustrate such a state of facts, see *McDonald v. Lee* (1914) 246 Pa. 253, L.R.A.1916B, 915, 92 Atl. 135, and *Fry v. McCord Bros.* (1895) 95 Tenn. 678, 33 S. W. 568. In the latter case it was also held that the question whether a publication is libelous per se is one of law for the court.

### III. Privileged communications.

In a few cases, the question under consideration has been treated as one of privileged communication.

Thus, in *PUTNAL v. INMAN* (reported herewith) ante, 1580, the court laid down the rule that merchants have a right to organize for their own protection, against "extension of credit to those unworthy of trust," by entering into agreements to give each other the benefit of their knowledge about those who do not meet their obligations, as well as not to extend credit to a per-

son listed as a delinquent; in consequence of which, the listing of a delinquent debtor's name for circulation among the members of the association is privileged, when made in good faith and for the purpose of serving the ends of the association.

But it seems that the listing of a nondealer's name as unworthy of credit is not privileged, when done for the purpose of coercing payment, rather than as a mere protective measure. Thus, in *Traynor v. Sielaff* (1895) 62 Minn. 420, 64 N. W. 915, it was held that the listing of one's name as a delinquent was not privileged, where it was shown that the real purpose of publication was to coerce plaintiff to pay a disputed bill, rather than for the protection of the defendant's private interests. And in *Western U. Teleg. Co. v. Pritchett* (1899) 108 Ga. 411, 34 S. E. 216, a similar conclusion was reached, it having been held that a written communication, which in effect "blacklisted" plaintiff as a delinquent debtor of the writer, when he in fact owed the writer nothing, was not privileged on the ground that it was made to protect the writer's interest in a matter where it was concerned, by expectations of similar notifications from the addressee, under an agreement to exchange confidential information as to their respective delinquent debtors.

#### IV. Sufficiency of pleadings.

The elements essential to libel need not be specifically charged in so many words, if by fair implication and reasonable interpretation the language used has that effect. This was expressly ruled in *Tuyes v. Chambers* (1919) 144 La. —, 81 So. 265.

And in *Traynor v. Sielaff* (1895) 62 Minn. 420, 64 N. W. 915, a complaint which alleged the false and malicious publication of plaintiff's name on the delinquent list of a Merchants' Protective Association, and set out the formula used, alleged an intent to thereby impute insolvency and dishonesty in business, and that the list was so understood by its readers, was held to state a cause of action in libel.

And in *Cleveland Retail Grocers' Asso. v. Exton* (1899) 18 Ohio C. C.

321, 10 Ohio C. D. 145, it was held that a petition in libel which alleged that defendant published a book entitled "A Delinquent Book," that the book expressly stated that it was "compiled from the reports of delinquent customers . . . who in the past have failed to pay their grocery bills, and are unworthy of credit," and that the quoted words meant that the listed persons, including the plaintiff, were dishonest, deceitful, and unworthy of credit, and had been found guilty of fraudulently and dishonestly evading and refusing to pay their just debts, stated a cause of action sufficient to warrant the admission of evidence and the submission of the case to a jury.

In *Ingraham v. Lyon* (1894) 105 Cal. 254, 38 Pac. 892, a complaint in libel which, in effect, alleged that defendant members of a Merchants' Protective Association placed plaintiff's name upon the association's "blacklist," that such publication was intended to charge, and have it understood and believed, "that plaintiff was a person engaged in making accounts which he never paid or intended to pay, and was dishonest and wholly unfit and unworthy of credit," that the publication was understood by those to whom it was made as conveying such meaning and charge against the plaintiff, and that such publication was made without cause "and out of pure malice," was held to state a cause of action good as against a general demurrer, especially since the California statutes require that the allegations of a pleading, for the purpose of determining its effect, shall be liberally construed with a view to substantial justice between the parties.

So, in *White v. Parks* (1894) 93 Ga. 633, 20 S. E. 78, a declaration in libel which alleged in substance that the defendants, members of a merchants' association, published and caused to be published a false and malicious libel of and concerning the plaintiff, by placing his name upon a list of delinquent debtors, thereby representing that he was indebted to such defendants, when in fact he owed them nothing, was held good as against a general demurrer.

G. J. C.

MARY THOMPSON, Appt.,  
v.  
ADELBERG & BERMAN.

*Kentucky Court of Appeals — October 1, 1918.*

(181 Ky. 487, 205 S. W. 558.)

**Libel — placards requesting payment of debt.**

1. Placing in the windows of a debtor's house and on supports near the sidewalk, so that the public may see them, cards printed in large type stating that "collector was here," and requesting debtor to call and pay, is libelous per se.

[See note on this question beginning on page 1596.]

— what constitutes.

2. To render written or printed words libelous, it is sufficient if they have a natural and reasonable tendency to degrade or disgrace the one

to whom they relate, or to render him odious, ridiculous, or contemptible in the estimation of the public.

[See 17 R. C. L. 263.]

**APPEAL** by plaintiff from a judgment of the Circuit Court for Kenton County sustaining a demurrer to and dismissing a petition filed to recover damages for an alleged libel. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. William A. Byrne for appellant.  
Messrs. John E. Shepard and Bert J. King for appellee.

eight dollars and ninety-five cents (\$8.95).

Clay, C., filed the following opinion:

Plaintiff Mary Thompson brought this suit against Adelberg & Berman, a corporation, to recover damages for libel. A demurrer was sustained to the petition, and the petition dismissed. Plaintiff appeals.

The petition is as follows:

"Plaintiff, Mary Thompson, says that she is a widow, residing at No. 35 Lincoln avenue, Latonia, Kentucky, where she keeps house with her children. She says she is compelled during the daytime to go out to work, in order to maintain herself and children.

"Plaintiff says that on or about April, 1916, she purchased for her son a suit of clothes from defendant company's store in Covington, Kentucky, known as the Union Store, for the sum of fifteen dollars and ninety-five cents (\$15.95), which sum she was to pay in partial payments, and all of which sum she paid, as she was able, excepting

"Plaintiff says that defendant, Adelberg & Berman, Incorporated, is a corporation organized under the laws of New York, and conducts stores in various cities in the United States, and is conducting a clothing store at No. 710 Madison avenue, Covington, Kentucky, under the name of the Union Store, where plaintiff made the purchase aforementioned.

"Plaintiff says that on or about the — day of November, 1916, defendant, through its officer or agent, without right or authority of law, and unlawfully, wickedly, and maliciously, did circulate and publish of and concerning her the following libelous matter in the following manner (meaning that she was a person who did not pay her debts): Came upon her home grounds, in her use and occupation, and placed numerous yellow cards in the apertures and crevices of the front door of her residence at No. 35 Lincoln avenue, Latonia, Kentucky, also in the windows of the dining room on the Thirty-fifth

street side, and the front room windows on the Lincoln avenue side, and the windows on the railroad side, and in the dining room windows in the rear yard, and placed one in a stick which was driven in a flower mound about 2 feet from the sidewalk on the Lincoln avenue side, which cards read in large type, and each word in capital initial letters, 'Please Take Notice,' and then, in larger capital letters, 'OUR COLLECTOR,' and then, in smaller letters, 'was here for payment. We would save you the annoyance of his further calls, if you will pay at the store.' Then, in large capital letters, 'THE UNION CLOTHING STORE.'

"Plaintiff says that, she being away at her work, said cards remained in said door and windows, and on the stick described, visible to the public, for a long time, most of the day, and until she returned at about 6:30 o'clock P. M., causing her great mental pain and humiliation, and affecting her good name injuriously, to her damage in the sum of three thousand dollars (\$3,000).

"Wherefore plaintiff prays judgment against defendant in the sum of three thousand dollars (\$3,000), and for her costs and all other just and proper relief."

There is a broad distinction between verbal slander and a written or printed publication. In determining whether written or printed words are libelous per se, it is not necessary that they should impute to the person concerning whom they are published the commission of a crime involving moral turpitude, or an infectious disease, or unfitness to perform the duties of an office or employment, or prejudice him in his profession or trade, or tend to disinherit him. It is sufficient if they have a natural and reasonable

Libel—what constitutes.

tendency to degrade or disgrace him, or to render him odious, ridiculous, or contemptible in the estimation of the public. *Axton-Fisher Tobacco Co. v. Evening Post*

*Co. 169 Ky. 64, L.R.A.1916E, 667, 183 S. W. 269, Ann. Cas. 1918B, 560.*

It is argued for the defendant that such is not the reasonable effect of the publication in question, and that the natural import of the words employed cannot be extended by innuendo. It must be remembered, however, that the cards in question were put in several conspicuous places about plaintiff's residence, so that they could be easily seen by the public from almost any angle. If the sole purpose of the defendant had been to notify plaintiff that its collector had called, and to request her to come to its store to pay the account, the mere placing of the card inside the door would have been sufficient. Hence, some effect must be given to the studied effort of the defendant's agent to give the publication as wide and as effective publicity as the circumstances would permit. Viewing the transaction in the light of this fact, it cannot be doubted that defendant's real purpose was to coerce the payment of its debt by publishing plaintiff's delinquency, and thus disgracing her in the eyes of the public. That being true, it cannot be said that the natural meaning of the words was enlarged by the innuendo.

In the case of *Muetze v. Tuteur*, 77 Wis. 236, 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 881, it was held that the sending of a red envelop through the mails, addressed to a merchant, and indorsed for return to the organization "For Collecting Bad Debts," these words being in very large type, so as to attract special attention, constituted a libel. In the case of *State v. Armstrong*, 106 Mo. 395, 13 L.R.A. 419, 27 Am. St. Rep. 361, 16 S. W. 604, it was held that the words "Bad Debt Collecting Agency," printed in large, bold type on envelopes mailed to a debtor, especially when mailed to him in care of his employers, constituted a criminal libel, under Rev. Stat. 1889, § 3869, as tending to "expose him to public hatred, contempt, or ridicule,

or deprive him of the benefit of public confidence." These cases cannot be distinguished from the case under consideration. In the former, the publication was through the mails, and necessarily confined to few persons. In this case the publication was by means of cards so artfully placed as not only to attract the attention of those who were naturally curious, but to lure

the gaze of those whose proneness to pry had long since lost its edge. We, therefore, conclude that the words in question were libelous per se. It follows that the demurrer to the petition should have been overruled.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

## ANNOTATION.

### Placarding debtor as libel.

It has been held that placards are libelous per se if they have a natural and reasonable tendency to degrade or disgrace the person toward whom they are published, or to render him odious, ridiculous, or contemptible in the estimation of the public.

This rule was applied in the reported case (*THOMPSON v. ADELBERG & BERMAN*, ante, 1594), where large yellow cards reading, "Please Take Notice, OUR COLLECTOR was here for payment. We would save you the annoyance of his further calls, if you will pay at the store. THE UNION CLOTHING STORE," were placed in the door and windows of plaintiff's house, and on a support near the front sidewalk, the court holding that the placing of the placards in such conspicuous places, and in so artful a manner, showed a studied effort to coerce the payment of a debt by publishing plaintiff's delinquency, and thus disgracing her in the eyes of the public, and, therefore, that they were libelous per se.

So, in *Green v. Minnes* (1891) 22 Ont. Rep. 177, where large yellow posters advertising a number of accounts for sale, including that of the plaintiff, were posted by a collection agency conspicuously in several parts of the city where plaintiff lived, it was held, in accordance with plaintiff's contention, that such posters were intended to force and compel payment, and that the necessary and intended consequences of such posting were to injure and defame the plaintiff's reputation, and to degrade and subject him

to annoyance, ridicule, and disgrace, and to make him guilty of fraud and dishonesty, and appear unworthy of trust or credit, which implied that he was a cheat and swindler,—that the posters were libelous, *Armour, Ch. J.*, arguing that, since the poster was striking in color and unusual in character, reasonable men reading it would understand from it that the debtors referred to therein were persons from whom the accounts which they were therein alleged to owe could not be collected by process of law, and were insolvent or dishonest debtors, and being so understood by reasonable men, the poster would have the effect of bringing discredit upon the debtors therein mentioned, and of lowering them in the estimation of their neighbors. It was further held in this case that, since the action was a civil one, the defendant could justify only by showing the truth of the whole matter published, and that he had not done so, since the amount stated in the poster was in excess of that actually owed by plaintiff.

And in *Woodling v. Knickerbocker* (1883) 31 Minn. 268, 17 N. W. 387, it was held that the placing on furniture standing on the sidewalk in front of a store, of a placard, reading, "This was taken from Dr. Woodling, as he would not pay for it; for sale at a bargain," and of another placard but 2 feet from it, worded, "Moral: Beware of dead-beats," was a publication of a gross libel, since, when read together, as they were undoubtedly intended to be, they were clearly defamatory.

And again, in *Wolfenden v. Giles* (1892) 2 B. C. 279, where a commercial agency printed a large yellow placard containing the names of a number of well-known and well-to-do persons, with alleged debts of small amounts set opposite their names, with the nature of the debts, and announced a sale of such debts at auction, taken together with a circular demanding payment by a certain date, in which case the debtors' names would be removed from the placard, it was held that such placard and circular constituted a libel, the court maintaining that the method adopted was not the ordinary one provided by law for the collection of debts, and that the placard, under the circumstances, was in fact a black list, since it implied to any reasonable man looking at it that all ordinary efforts to obtain payment had failed, and that the debtors either would not, or could not, pay for it, and were either dishonest or insolvent; especially since it did not appear that any usual method of collection had been resorted to, and had failed. The question in this case arose on a motion for an injunction to restrain further publication of the alleged libel, and the court, in granting a restraining order, took the position that it could only be granted if it clearly appeared that the alleged wrongful matter was libelous.

But the placarding of a mere offer to sell an alleged debt is not criminal libelous, where it does not necessarily imply inability to pay, and it does not appear to be false. *Reg. v. Coughlan* (1865) 4 Fost. & F. (Eng.) 316. The publication consisted of a placard reading as follows: "W. Gee, solicitor, Bishop Startford. To be sold at auction if not previously disposed of by private contract, a debt of the above, amounting to £3,197, due upon partnership and mortgage transactions."

Where a plea of justification is entered against a declaration in libel based upon the posting of placards, the plea, which by its nature is in confession and avoidance, admits a *prima facie* case for the plaintiff, so that any evidence in support of the plea, of

whatever amount or weight, necessarily raises a question of preponderance, and makes a question for the jury, thereby precluding for the from directing a finding for either party absolutely. Thus, in *Gault v. Babbitt* (1878) 1 Ill. App. 130, where a landlord posted upon and in front of the premises occupied by his tenant, signboards and cards upon which were conspicuously painted the words, "Waiting for Tom Gault's house rent for lower story . . . several months due," which were alleged to thereby charge a fraudulent withholding of such rent, it was held that any evidence, however slight, in support of the plea, made a case for the jury as to the real meaning of the words used on the placards, as well as to whether the whole charge, substantially as made, was justified.

In *Woodling v. Knickerbocker* (Minn.) *supra*, it was held that the question whether or not the words on a placard affixed to furniture standing in front of a furniture store, "Taken back from Dr. Woodling, who could not pay for it; to be sold at a bargain," were libelous, was for the jury since they were reasonably susceptible of a defamatory meaning, as well as an innocent one, according to the circumstances. In other words, "what meaning, whether injurious or not injurious to plaintiff, they would convey to ordinary men who read them without a knowledge of the transaction to which they referred, was for the jury to determine, in view of the circumstances under which they were exposed to the public perusal."

In *Spall v. Massey* (1819) 2 Starkie (Eng.) 559, an action on the case for setting up near the plaintiff's door a board inscribed, "Beware of bad houses," etc., the defendant pleaded justification in that plaintiff did keep a disorderly house, and, having made out a strong case, the plaintiff elected to be nonsuited.

See also *Davis v. Weltner* (city court of New York, February, 1889) in which, as cited in *Townshend, Libel and Slander*, p. 211, note 1, it appeared that a barber, claiming that a customer was in his debt, put in his store



window a cup with the customer's name on it, inscribed, "This man owes this shop, for shaving, \$1.15 since

1885," and in which the customer, denying owing anything, recovered a verdict as for a libel. G. J. C.

## KETHI ROBAR OROZEM

v.

C. A. MCNEILL, Appt.

*Kansas Supreme Court — July 6, 1918.*

(103 Kan. 429, 175 Pac. 633.)

### Limitation of actions — fraud — implied contract — concealment — discovery.

1. Assuming that one who has been defrauded of money has the privilege of maintaining an action against the wrongdoer upon an implied contract to restore it, arising out of the fact of the fraud, recovery being dependent upon proof thereof, such a proceeding, unless begun within two years of the discovery of the fraud, is barred by the statute requiring "actions for relief on the ground of fraud" to be brought within that period, notwithstanding that the limitation fixed for an action upon a contract not in writing, express or implied, is three years.

[See note on this question beginning on page 1603.]

### On Rehearing.

#### Attorney and client — petition for settlement — effect.

2. The petition in an action against an attorney by his client to recover a part of an amount collected held, to show a settlement between the parties, and therefore to state no cause of action, unless by virtue of its allegations of fraud.

#### — employment of assistants — relation to client.

3. No contractual relation exists between attorneys employed as assistants by an attorney who has taken a case on a percentage basis, and his client, so as to prevent their effecting a settlement with the client on any terms possible.

[See 2 R. C. L. 968, 969.]

Headnotes 1 and 2 by MASON, J.

(Marshall, J., dissents from proposition 1.)

APPEAL by defendant from a judgment of the District Court for Crawford County overruling a demurrer to a petition charging him with defrauding plaintiff of money, by alleged false representations. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. E. L. Burton and Denison & Kirkpatrick for appellant.

Mr. S. L. Walker for appellee.

Mason, J., delivered the opinion of the court:

Kethi Robar Orozem brought an action against C. A. McNeill, charging him with having retained too large a portion of a collection made for her through him. A demurrer to her petition, on the ground that

the action was one for relief on the ground of fraud and was barred by the two-year Statute of Limitations, was overruled. The defendant appeals.

The petition set out substantially these facts: The plaintiff had a claim against a railroad company on account of the death of her husband. She made a contract with a lawyer to undertake the collection thereof for a contingent fee of 40

per cent. The lawyer arranged with the law firm of which McNeill was a member to assist in the prosecution of an action against the company for one half of the fee, after the deduction of expenses. Such an action was brought in a Missouri court. A verdict for \$7,000 was returned for the plaintiff, on which judgment was rendered. While a motion for a new trial was pending, McNeill negotiated a compromise with the company, by which the claim was to be satisfied by the payment of \$6,000. He then induced the plaintiff to give him a power of attorney to effect a settlement, and to agree to an adjustment by which she should receive \$2,650. To accomplish this he concealed from her the fact that the agreement with the company on a \$6,000 basis had already been made, and represented to her that, unless she consented to accept the \$2,650 as her share of the claim, an appeal would be taken and a new trial had, and that delay and a net loss to her would result. The company paid McNeill \$6,000, of which he turned over to the plaintiff \$2,650, retaining the rest. This action is brought for \$950, on the theory that she was entitled to 60 per cent of the amount collected, and that her consent to the acceptance of \$2,650 in full of her claim was obtained by the false representations already set out.

The money was paid and divided in November, 1913. No allegation is made that the fraud alleged to have been practised upon the plaintiff was not at once discovered. This action was begun in January, 1916. The defendant maintains that it is one for relief on the ground of fraud, and is barred because not brought within two years; no tolling of the statute through a delay in the discovery of the real facts being alleged. *Young v. Whittenhall*, 15 Kan. 580. The plaintiff contends that it is her privilege to sue upon the implied contract arising from the defendant's duty to pay her the amount claimed, and that such an action may be brought at any time

within three years, since the statute fixes that period as the limitation for "an action upon contract, not in writing, express or implied." Gen. Stat. 1915, § 6907, subd. 2. This court has held that "wherever one person commits a wrong or tort against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, imply or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to such wrongdoer." *Fanson v. Linsley*, 20 Kan. 235.

And such is the general rule (note in Ann. Cas. 1913D, 230), which extends to cases where one has been fraudulently induced to part with his money (same note, p. 237; note in 134 Am. St. Rep. 194, 195, 15 Am. & Eng. Enc. Law, 1107). The courts do not agree in their statements of the precise grounds of the rule, or of its scope. It is not merely an expression of the thought that, if a contract exists, the ordinary remedy for its violation is not cut off because the act complained of also amounts to a tort or fraud. Cases illustrating that phase of the matter are collected and discussed in the note first referred to, at pages 228, 229. In such cases the plaintiff is not required to prove the tort in order to obtain a judgment, and the defendant is not allowed to prove it in order to defeat it; the contract actually exists by the agreement of the parties, and does not result from a legal fiction. But in the broader form in which the rule is stated in the Kansas decision quoted from, it is based, at least in part, upon the principle that the fact that property has been wrongfully obtained from another creates an obligation to return it, which may be treated as the result of an implied promise. Therefore, to show the existence of the fictitious contract or quasi contract sued upon, the plaintiff not only may, but (where this phase of the rule is relied on) must, allege and prove the tort or fraud. It is often

said that the person aggrieved may waive the tort and sue upon the implied contract, but this expression is open to some misapprehension. What he waives is the right to seek relief through a procedure peculiar to actions founded on tort. Having the privilege of pursuing either remedy, he elects to declare upon an implied contract, instead of upon the tort. He does not waive the wrong or fraud that has been practised upon him, by which the defendant has obtained his money or property; but he alleges in effect that, because it was so unlawfully obtained from him, a promise to restore it is implied.

"The tort is, however, waived only in the sense that a party having a right to sue in tort or assumpsit will not, after he has elected to sue in assumpsit, be allowed to sue in tort. By such an election that which was before the election tortious does not cease to be so. In fact, when the assumpsit is brought, it is only by showing that the defendant did a tortious act that the plaintiff is able to recover. There being no contract between the parties, unless the defendant is guilty of some wrong the plaintiff can establish no cause of action against him." Keener, *Quasi Contracts*, 159, 160.

According to this view, the circumstance that the plaintiff is required to prove the fraud or other tort in order to recover does not prevent the maintenance of his action as one upon an implied contract. In a number of cases it has been held that the fact that a right of action upon a tort has been barred by the Statute of Limitations does not ordinarily prevent a suit being maintained upon the resulting implied contract, where the situation is such as to make that remedy otherwise available. Note in *Ann. Cas.* 1913D, 238. This doctrine has been criticized on the ground that "there is no conceivable reason why, in the case of a particular wrong, one form of action should be available after another is barred; the purpose of the statute is that upon the expira-

tion of the specified period no action shall be brought for the redress of the wrong." Woodward, *Quasi Contracts*, § 294.

In jurisdictions where the common-law forms of action have been abolished, the nature rather than the form of an action is regarded as determining what Statute of Limitations is applicable. Note in 12 *Ann. Cas.* 175. Adherence to that view is indicated by a decision of this court, the scope of which is shown by this language of the opinion: "It may be objected that this was not an action for relief on the ground of fraud; that it was simply a proceeding against a garnishee. But legal proceedings, like things, are what they are in essence and not what they may be named. The essential thing in this proceeding was that the plaintiff desired to be relieved from the legal consequences of the execution of these conveyances, and for this purpose he charged that they were fraudulently made. That he charged this by his evidence, rather than by a formal petition, could make no difference in the nature and essence of his action, nor limit the right of the party against whom the relief was sought, to urge the bar of the Statute of Limitations." *Nelson v. Stull*, 65 *Kan.* 585, 591, 68 *Pac.* 618.

In the present case, according to the allegations of the petition, an adjustment was had between the plaintiff and the defendant, by which she agreed to accept \$2,650 in full of her claim. She cannot recover in any form of action, unless she in effect succeeds in having that settlement set aside on the ground of fraud; to accomplish that purpose is essentially the object of her proceeding. The statute declares that "an action for relief on the ground of fraud" must be brought within two years from the discovery thereof. *Gen. Stat.* 1915, § 6907, subd. 3. By its terms this provision might apply to an action nominally based upon an implied contract, as well as to one avowedly founded upon a tort. Inasmuch as the fraud

must be shown in order to warrant a recovery, the action is literally one "for relief on the ground of fraud." The contract feature of the case is a mere fiction growing out of the fraud. This provision of the statute is fairly to be regarded as entitled to preference over the one relating to the time within which actions upon contracts must be brought, because of being more specific in its nature.

Another reason exists for giving it the greater effect. In enacting this law the legislature had before it the question as to how long, as a matter of public policy, a person who has been defrauded, and who knows of the fraud, ought to be allowed to wait before invoking a judicial examination of the facts. Consideration must have been given to the argument that the peculiar difficulty in meeting a charge of fraud—in establishing the good faith of a transaction which, upon its face, is conclusive of the rights of the parties—may be greatly increased by delay, and that the accused ought in fairness to be called to account within a reasonable time, short enough so that his means of showing the true facts would not be likely to have been impaired. Inasmuch as the lawmaking body, presumably upon this reasoning, has decided that a charge of fraud as a basis for relief to the injured person should not be entertained unless made within two years of its discovery, it may well be thought that for the courts to permit substantially the same result to be achieved by bringing an action upon an implied contract to restore the fruits of the fraud would be to allow the legislative purpose to be defeated by indirection.

The court concludes that, whatever may be the rule as to other torts, an action upon an implied promise, resulting from the fraudulent obtaining of the plaintiff's money, must be

brought within two years after the discovery of the fraud.

The judgment is therefore reversed, and the cause remanded, with directions to sustain the demurrer to the petition.

Johnston, Ch. J., and Burch, Porter, West, and Dawson, JJ., concur.

Marshall, J., dissents.

A petition for rehearing having been filed, Mason, J., on November 9, 1918, handed down the following additional opinion (103 Kan. 694, 176 Pac. 106):

The plaintiff has filed a petition for a rehearing, in which the legal questions passed upon are further discussed. The court, however, remains of its original view.

The plaintiff also contends that the opinion is based upon an erroneous conception of her petition, especially in that the court assumed that the allegations of the pleading showed that a settlement had been effected between the plaintiff and the defendant, by the terms of which she was to accept \$2,650 in full of her share of the sum paid by the company. She asserts that this assumption is unfounded, and maintains that, considered as a whole and properly interpreted, her petition shows that an arrangement existed between her and the defendant, by which the latter was to receive 40 and the former 60 per cent of any amount collected from the railroad company; and that while this arrangement was in force she agreed with him that an adjustment might be made with the company, such that 60 per cent of the amount paid (which would have to be \$4,416.66) would amount to \$2,650. If this were the actual situation, and the plaintiff received that sum (\$2,650), while she was entitled to \$960 more, because of the company having paid \$6,000, then, of course, she would be entitled to recover from McNeill the difference (or \$950) irrespective of any question of fraud. If the petition shows such a state of facts, and the allegations of fraud

Limitation of  
actions—fraud—  
implied contract  
—concealment—  
discovery.

are ignored, it sets out a good cause of action on contract.

To determine whether it fairly bears this construction requires a consideration of its exact language. The portion of it affecting this question reads as follows: "That immediately after the acceptance of the said \$6,000 settlement of said judgment, the said C. A. McNeill caused this plaintiff to be sent for, and brought from her then home in Ross township to his office in the city of Columbus, Kansas, and the said C. A. McNeill then and there failed, neglected, and refused to notify and inform the plaintiff that a settlement of said case and judgment for the sum of \$6,000 had been agreed upon, but then and there falsely stated and represented to the plaintiff that, if she did not accept the sum of \$2,650 as her share of said claim and judgment, there would be an appeal taken in said case from said judgment, and that there would be much more expense added, and a long time before she got any money, and that she would not get as much as \$2,650 in the end, and she would have to make another trip to the state of Missouri, and take her witnesses, and have another trial of said case, and the said C. A. McNeill then and at all times failed, neglected, and refused to notify her of said settlement, and that by virtue of the terms of the contract of employment with said attorneys she was entitled to the sum of \$3,600, and that there was then due and owing her the sum of \$3,600, as her share of said compromise settlement, but by the false statement aforesaid led her to believe that no settlement had been made, but that one could probably be made for such sum and amount that her share, 60 per cent thereof, would amount to \$2,650, and that if she did not accept said sum of \$2,650 another trial would be had, and she would have to make another trip to the state of Missouri for such trial, and take witnesses to Missouri, and the expense would be large, and that she would not

then receive as much as \$2,650, and, relying on such false representations and statements of said C. A. McNeill, and believing them to be true, and not knowing of said settlement for \$6,000, the plaintiff informed him that under such conditions she would rather accept \$2,650, and authorized him to make a settlement accordingly."

The petition does not show that any contractual relations whatever existed between the plaintiff and defendant until the time of the conference between them referred to. The plaintiff's agreement, providing for a 60-40 division of the amount collected, was made with the other attorneys, and the fact that they employed McNeill to assist them did not make him the plaintiff's attorney, nor create any contract between the plaintiff and the defendant. 2 R. C. L. 968, 969. There seems never to have been any negotiation between the plaintiff and the defendant, fixing his fee at 40 per cent of the recovery.

Attorney and client—employment of assistants—relation to client.

The petition alleges that McNeill had effected a settlement with the railroad company before his conference with the defendant. This could not be literally true as a legal proposition, for up to that time the defendant had not authorized him to bind her by an agreement; the allegation should doubtless be construed as meaning that he had ascertained that the company was willing to pay \$6,000 for a full release. The allegation is also made that McNeill told her that for various reasons it would be wise for her to agree to an adjustment by which she should receive \$2,650 in full of her claim; that she understood from this that the settlement contemplated would be made on such a basis that 60 per cent of the amount paid by the company would amount to \$2,650. It is not alleged that McNeill said so, but that, by what he did say as to the wisdom of her accepting such sum, she was led to be-

lieve this to be the case. The part of the petition relating to the adjustment winds up by the statement that the plaintiff informed McNeill that, under the conditions he had stated, she would accept that sum and "authorize him to make a settlement accordingly." This seems clearly to mean, not that she authorized him to settle with the company for such an amount that 60 per cent would be \$2,650, but that she authorized him to make an adjustment which would include a settlement with himself, she to receive \$2,650 in full satisfaction of her claim. If this interpretation is correct, the pleading shows a settle-

ment between the plaintiff and the defendant, which interposes a bar to her recovery, unless it is set aside for fraud, and the action is not one upon contract, except in the sense in which an action for fraud resulting in a benefit to the tort-feasor's estate may always be so regarded. In that case the conclusions stated in the original opinion control, and require an affirmation.

—petition for  
settlement—  
effect.

An argument is made to the effect that the petition should be interpreted as showing that the plaintiff did not at once learn of the falseness of the representations made to her. If she claimed that she did not learn the real facts until within two years before the commencement of the action, she could have set the matter at rest by so alleging. The case cited in the original opinion (Young v. Whittenhall, 15 Kan. 579) is decisive of the proposition that such an allegation is necessary.

It may be added that Mr. Justice Porter and the writer of the opinion were inclined to agree with Mr. Justice Marshall, who dissented therefrom, that the three-year Statute of Limitations applied, but acquiesced in the decision of the majority; the question being one of the construction of a local statute, the meaning of which seems open to doubt, and the conclusion reached by the court not being one likely to produce unjust results.

The petition for a rehearing is denied.

All the Justices concur.

### ANNOTATION.

**Action on implied contract arising out of fraud as within statutes of limitation applicable to fraud.**

A search has disclosed only two cases other than the reported case (OROZEM v. MCNEILL, ante, 1598) as to the applicability of the Statute of Limitations relating to actions for fraud, to an action brought on an implied contract arising out of fraud. In each of these cases it was held that an action on an implied contract arising out of fraud was not barred, where the remedy in assumpsit was not barred by the Statute of Limitations, even though the statute had run against an action for the fraud, the court holding that the form of the action determined what Statute of Limitations was applicable. Bates v. Bates Mach. Co. (1907) 230 Ill. 619, 82 N. E. 911, 12 Ann. Cas. 174; Lamb v. Clark (1827) 3 Pick. (Mass.) 193.

In Bates v. Bates Mach. Co. (Ill.) supra, the action was for fraud in the violation of a contract, whereby the defendant had agreed to assign to the plaintiff certain patents for the manufacture of woven wire fence. The defendants set up the Statute of Limitations as a defense. It was held that the action, having been brought for fraud, within the statute relating to such actions, was barred, although, if the action had been on the written contract, it could not have been barred.

In Lamb v. Clark (Mass.) supra, it appeared that the defendant had come into possession by fraud of certain promissory notes of the plaintiff's testator. The plaintiff brought suit in assumpsit for the amount of the notes. The defendant claimed that the proper

form of action was for fraud, and that an action in that form was barred by the Statute of Limitations. It was held that the plaintiff had the right to elect his remedy, and could waive the tort and sue in assumpsit, and that the fact that one remedy was barred did not bar the other.

In the reported case (*OROZEM v. MCNEILL*, ante, 1598), however, it is held

that the nature of the cause of action, and not the form of the action, determines which Statute of Limitations applies, and that therefore, where the action is based on fraud, the Statute of Limitations governing actions arising out of fraud applies, whether the action is in form on an implied contract or ex delicto for fraud.

B. F. D.

## EXCHANGE NATIONAL BANK OF ATCHISON, KANSAS, Appt.,

v.

## ESTATE OF J. B. BETTS, Deceased.

*Kansas Supreme Court — December 7, 1918.*

(103 Kan. 807, 176 Pac. 660.)

### Executor and administrator — contract by executor — who bound.

1. The doctrine that the only effect of contracts made by an executor or administrator is to bind himself individually applies to a contract made by the personal representative, in attempting to carry on and complete a building contract entered into by the decedent in his lifetime.

[See note on this question beginning on page 1608.]

### — duty to complete contract.

2. Notwithstanding the contract survives, the personal representative is not obliged to complete it; in case he does elect to carry on, he and those who deal with him are charged with knowledge of the law, which declares that the estate is interested in the business only to the extent of the profits.

[See 11 R. C. L. 163, 164.]

### — notes for material — who bound.

3. A decedent in his lifetime held a contract for the erection of a building, actual construction of which had been in progress about a month, when he died. The widow, who was the exec-

utrix of the estate, executed notes to a bank, signed by her as executrix, and applied the proceeds toward payment for labor and material which had been used in the construction of the building. She afterwards abandoned the enterprise, and the building was completed by the surety of the decedent. Held, that the notes were not a valid claim against the estate.

[See 11 R. C. L. 166.]

### — authority to borrow money.

4. An executor has no general authority to borrow capital or funds with which to carry on or complete a contract made by his testator.

[See 11 R. C. L. 171.]

Headnotes 1-3 by PORTER, J.

APPEAL by the bank from a judgment of the District Court for Shawnee County affirming a judgment of the Probate Court disallowing its claim against the estate of decedent, for an amount alleged to be due on promissory notes given to secure loans made by the bank to the executrix.

*Affirmed.*

The facts are stated in the opinion of the court.

liss, G. L. De Lacy, Walter E. Brown, W. A. S. Bird, and J. D. M. Hamilton, for appellant:

Contracts which are not personal survive the promisor's death and constitute a binding obligation upon the estate, for a breach of which it will be held liable.

2 Parsons, Contr. 9th ed. 685; 8 Page, Contr. p. 2120, ¶ 1367; Woerner, Am. Law of Administration, 2d ed. § 328; Quick v. Ludborrow, 3 Bulstr. 30, 81 Eng. Reprint, 25; Allam's Estate, 199 Pa. 573, 49 Atl. 252; Macdonald v. O'Shea, 58 Wash. 169, 108 Pac. 436, Ann. Cas. 1912A, 417; Cox v. Martin, 75 Miss. 229, 36 L.R.A. 800, 65 Am. St. Rep. 604, 21 So. 611; Kadish v. Lyon, 229 Ill. 35, 82 N. E. 194; Ferrin v. Myrick, 41 N. Y. 815, reversing 53 Barb. 76.

Mr. John L. Hunt, for appellee:

The estate is not liable.

Fletcher v. American Trust & Bkg. Co. 111 Ga. 300, 78 Am. St. Rep. 201, 36 S. E. 767; 7 Am. & Eng. Enc. Law, 299; Shrigley v. Black, 59 Kan. 487, 53 Pac. 477; Chicago Lumber Co. v. Tomlinson, 54 Kan. 770, 39 Pac. 694; Brown v. Quinton, 80 Kan. 44, 25 L.R.A.(N.S.) 71, 102 Pac. 242, 18 Ann. Cas. 290; Milbourne v. Kelley, 93 Kan. 753, 145 Pac. 816, Ann. Cas. 1916D, 389; 2 Schouler, Wills, Exrs. & Admsrs. 5th ed. § 1256; Hostetter v. Hoke, 17 Kan. 81.

Messrs. Clay Hamilton and Hazen & Gaw also for appellee.

Porter, J., delivered the opinion of the court:

The sole question for determination is whether, under the particular facts in this case, the estate of the decedent is liable upon a contract made by his executrix.

J. B. Betts in his lifetime held a contract for the erection of a building for the Y. M. C. A. at Atchison; actual construction of the building had been in progress about a month at the time of his death. His widow was made executrix by his will, and some time after letters of administration issued from the probate court of Shawnee county she went to Atchison and arranged with the owner of the building to allow an estimate of the work already done, the estimate to be sent to the surety

company (which had guaranteed the faithful performance of the contract), presumably in order to obtain its approval of the payment of the amount allowed. Without waiting to hear from the surety company, the executrix arranged with the Exchange National Bank of Atchison to make her a loan of \$980 on two promissory notes, which she executed to the bank and signed "Lulu M. Betts, Ex." The proceeds of these notes went in partial payment for labor and material used in the construction of the building. The surety company never approved the allowance of the estimate, and, a week or ten days after the money was obtained from the bank, Mrs. Betts turned over the contract to the surety company, which completed the building with a loss under the original contract. The estate is insolvent; it is said the general creditors will receive from 10 to 15 cents on the dollar of their claims. The bank's claim for the amount due on the promissory notes was presented and filed against the estate. The probate court disallowed the claim. The district court held that the notes are not a valid claim against the estate, and rendered judgment against the bank, and from the judgment the bank appeals.

The plaintiff concedes the force of the general rule that the executor or administrator cannot bind the estate by a new contract, and that the only effect of contracts made by him is to bind himself individually. Shrigley v. Black, 59 Kan. 487, 53 Pac. 477; Campbell v. Faxon, 73 Kan. 675, 5 L.R.A.(N.S.) 1002, 85 Pac. 760; Brown v. Quinton, 80 Kan. 44, 25 L.R.A.(N.S.) 71, 102 Pac. 242, 18 Ann. Cas. 290; Milbourne v. Kelley, 93 Kan. 753, 759, 145 Pac. 816, Ann. Cas. 1916D, 389.

The contention is that an exception arises in cases of building contracts entered into by the decedent during his lifetime, which remain uncompleted at the time of his death, and which the executor or administrator elects to complete.

The plaintiff contends that the



rule upon which it relies has been the law since Chief Justice Coke, as early as 1615, in the case of *Quick v. Ludborrow*, 3 Bulstr. 30, 81 Eng. Reprint, 25, used this language: "If a man be bound to build a house for another before such time, and he which is bound dies before the time, his executors are bound to perform this."

Plaintiff also quotes from Woerner on the American Law of Administration, 2d ed. § 328, as follows: "Thus, if one agrees to build a house before a given time, and dies before that time, his executors are bound to perform the contract; and the completion by an administrator of a decedent's contract to build a house attaches to his work all the liabilities of the original contract, so that a subcontractor is entitled to his lien for materials furnished the intestate."

From 3 Williams on Executors, 7th ed. 1892, the plaintiff quotes: "It must be observed that, when the law speaks of executors not carrying on the business of their testator, it means that they are not to buy and sell. There are many cases when executors not only may, but are bound to, continue the business to a certain extent. Thus, if a party contracts for himself and his executors to build a house, and dies, the executors must go on, *or they will be liable in damages for not completing the work*. So, if a party engages to build a house, and dies, after having procured all the necessary materials, it should seem that his executors ought to complete the work; . . . for otherwise those parts which he has purchased, upon the faith of the work being completed, are useless." \*1794. (Italics ours.)

These authorities do not go the extent claimed by the plaintiff. All they decide is that building contracts are binding upon the heirs and executors of a decedent, and must be performed, or the estate "will be liable in damages for not completing the work." We fail to

find any modern authority which upholds the contention that building contracts are in a class by themselves, and bind the executor or administrator to carry them out, regardless of consequences.

Executor and administrator—contract by executor—who bound.

In *Chicago Lumber Co. v. Tomlinson*, 54 Kan. 770, 39 Pac. 694, an action was brought against the executor and heirs to foreclose a mechanic's lien for material and labor used in erecting a building. In that case two parties made a contract for the erection of a building; one of them died, and the other contractor abandoned the contract before the completion of the building. The executor of the deceased contractor, who was also one of the heirs, entered into a new contract with the plaintiff and completed the building. It was held that he was personally liable, but could not as executor, without express authority in the will, bind the estate by the new contract. The contention of the plaintiff in the present case that building contracts stand in a class by themselves was not considered.

In 40 L.R.A.(N.S.) 201, 236, there will be found an exhaustive note, with numerous citations from the American courts, on the question of the powers and liabilities of a personal representative, testamentary trustee, or guardian carrying on business. The author classifies the exceptions to the rule, holding the personal representative alone liable, some of the exceptions being based upon statutory provisions, or the fact that the business has been carried on under the order of court; but no reference is made to any exception to the rule based upon building contracts. It is said in the note: "The weight of authority is to the effect that the executor, even though he carries on a trade or business pursuant to testamentary authority, is individually liable to creditors for all debts contracted by him while so engaged, and that the creditors cannot pro-

ceed against the estate in order to satisfy their claims." 40 L.R.A. (N.S.) 203.

In 11 R. C. L., the exhaustive article on Executors and Administrators, while enumerating some of the exceptions to the general rule, makes no mention, so far as we have been able to discover, of any exception based upon building contracts. It is said that "to authorize executors to carry on a trade with the property of a testator held by them, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose." Page 139.

Again it is said:

"Although, where a business or trade is carried on under the provisions of a will by virtue of a statute permitting it, or by an order of a competent court, a personal representative will be relieved from individual liability to the estate for losses, he will continue to be bound personally for all debts incurred by him in reference to the business. *The courts take the position that he need not carry on the trade and incur this hazard, although authorized or directed to do so by the will;* but by engaging in the business he voluntarily assumes the responsibility of making its contracts his personal obligations." (Italics ours.) Section 147.

"So careful have the courts always been to guard against the perilous consequences resulting from embarking the assets of an estate in trade that, even when the will authorizes the executor to carry on the business of the decedent, he cannot in so doing create liabilities against the general estate. Hence, such creditors have no claim on the general assets, since to hold the general assets liable would be attended with great inconvenience, and would prevent their distribution for a considerable period, or disturb a distribution already made." 11 R. C. L. § 148.

In Campbell v. Faxon, 73 Kan. 675, 5 L.R.A. (N.S.) 1002, 85 Pac. 760, which is not, however, directly

in point, because the contract there was one which was dissolved by the death of the decedent, it was held that in the absence of a testamentary direction an administrator cannot carry on the business of a deceased person, "and if he does so without authority he will be individually bound for the contracts of the business." 73 Kan. 675, syl. 2. It was said in the opinion that one authorized by will "is not bound to incur the hazard; but, if he does, the contracts made will be his own, and he will be individually bound by them." 73 Kan. 679.

In arguing for the necessity of an exception to the general rule, the plaintiff says in its brief that "to say in one breath that there are certain contracts which the representative must complete, and in the next that he will be held personally liable for his acts, would be to create a situation so unjust and repugnant to the present-day standards that it could not be tolerated."

But the representative is not bound to complete a building contract. There are doubtless situations where it would be the exercise of wise discretion

on his part to elect to finish a building, but he is not obliged to do it; and in case he does elect to carry on, he and all those who deal with him are charged with knowledge of the law, which declares that the estate is interested in the business only to the extent of the profits. Besides, no executor or administrator has general authority to borrow capital or funds with which to carry on or complete a contract made by the decedent. In any event, he would have authority to do no more than to employ capital or funds coming into his hands from the estate. He cannot bind the estate by executing notes for money borrowed by him,

—duty to complete contract.

—authority to borrow money.

—notes for material—who bound.

no matter whether the proceeds are used for the benefit of the estate or otherwise.

It is insisted that the original contract was not one which required the personal skill of J. B. Betts. This may be conceded, and the reason why it is a contract which survives is that because, upon the death of J. B. Betts, it would not have been difficult to find others equally capable of completing the building according to the plans and specifications. But this very test, which demonstrates that the services of the contractor were not personal, and might have been performed by the successors of the promisor, or some other person employed by them, also

demonstrates that the damages likely to be sustained by the owner of the building by the breach of the contract would probably not amount to much. In such a situation, an executor or administrator in determining whether to elect to carry out the contract might well consider the hazard of attempting to carry on, compared with the slight damages the owner of the building would be entitled to recover for the breach of the contract.

The judgment is affirmed.

All the Justices concur, except Marshall, J., who did not sit.

## ANNOTATION.

### **Liability of estate for debts incurred by executor or administrator in completing performance of a contract made by decedent.**

The few decisions on the question concur with the reported case (*EXCHANGE NAT. BANK v. BETTS*, ante, 1604) in holding that (except where the executor is authorized by statute to complete unfinished work; see *Bambrick v. Webster Groves Presby. Church Asso.* (Mo.) *infra*) the general rule that an executor or administrator cannot bind the assets of the estate by his contracts is not subject to an exception in the case of debts incurred in completing the performance of a contract made by decedent in his lifetime, the obligation of which is not terminated by his decease. See *Chicago Lumber Co. v. Tomlinson* (1895) 54 Kan. 770, 39 Pac. 694; *Alam's Estate* (1901) 199 Pa. 573, 49 Atl. 252; *Oram's Estate* (1874) 9 Phila. (Pa.) 358; *Bates's Estate* (1910) 11 Del. Co. Rep. (Pa.) 429.

In *Bambrick v. Webster Groves Presby. Church Asso.* (1893) 53 Mo. App. 225, it was held that, under a statute providing that "if any person die leaving . . . property so exposed as to be in danger of loss in value, or work in an unfinished state, so that the estate would suffer material loss from the want of care and additional labor, the executor or administrator may until the meeting of the court procure such indispensable labor

to be performed on the most reasonable terms that he can," the executrix of one who had died pending the completion of his contract for the erection of a building, might bind the estate for the reasonable value of materials furnished for the completion of the building, the executrix having acted in good faith, and to prevent injury to the estate.

To say that the rule that an executor or administrator cannot bind the assets of the estate by his contract is not subject to an exception in the case of debts incurred by him in carrying on an uncompleted contract is not, however, completely to dispose of the question, which has in it a further possibility which seems to have been overlooked in the reported case.

It is well settled that where an executor or administrator continues his decedent's business by virtue of authority conferred by the will or by articles of copartnership, he is entitled to be indemnified out of the assets embarked in the business (and, in some instances, out of the general assets of the estate) against the personal liability thus incurred (see 11 R. C. L. p. 140); and, as to the right of recourse for debts contracted in the performance of an unfinished contract, to the compensation received for

the performance of the contract (*Allam's Estate* (1901) 199 Pa. 573, 49 Atl. 252, *supra*; *Re Walsh* (1904) 35 Pittsb. L. J. N. S. (Pa.) 289, and *Bates's Estate* (1910) 11 Del. Co. Rep. (Pa.) 429). This right, however, may not be asserted as against testator's creditors, who have the right to insist on immediate realization and payment, unless it can be shown that the business was not merely continued under the will for the benefit of those interested under the will, but that it was so carried on with the sanction and assent of the creditors and on their behalf. See 11 R. C. L. p. 141. Thus, in *Allam's Estate* (Pa.) *supra*, it was held that the executor could not exercise his right to reimbursement for debts contracted in completing an unfinished contract as against creditors of the decedent. The auditor, whose report was affirmed by the court, said: "In Pennsylvania, when a person dies, all his creditors at once acquire a lien upon all his personal property within the state, and the law commits it to the care of an administrator or executor, upon the express trust to give each his due according to law. *Horn-er v. Hasbrouck* (1861) 41 Pa. 169. Was, then, this lien of the general creditors at death subject to be defeated by the election of the administrator to complete these contracts, or was their lien superior to any right of reimbursement by the administrator? No authority has been cited upon this question, and the auditor has been unable to find any in this state. Upon principle, however, he is of the opinion that debts contracted by the decedent in his lifetime are the superior lien. These debts are known, or ought to be known, by the administrator to be in existence at the time of the decedent's death, and his election to complete the contracts was made with this knowledge. His right to reimbursement in this regard is somewhat similar to the right of the heir to inherit personal property, subject to be defeated by those who were his creditors at his death. This seems to have been the accepted view in the analogous case of a direction in a will to continue the business of the testator. In

*Lindley on Partnership*, vol. 2, p. 609, the author says: "The liability of the estate of a deceased partner to persons who become creditors after his decease is subject to its liability to those who were his creditors at his decease. These last must first be paid, and although, as in such a case as *Ex parte Garland* (1803) 10 Ves. Jr. 120, 32 Eng. Rprint, 787, they might not be able to follow the assets of the deceased into the hands of the trustee in bankruptcy, yet, in administering the estate of a person whose assets have been employed in trade, in pursuance of directions contained in his will, the creditors who have become such since his decease cannot compete with his other creditors." See also *Collyer on Partnership*, § 633. The effect of this view will be to exclude from the present distribution all debts contracted by the administrator in the completion of these contracts, for the reason that the claims of creditors in existence at the time of the death of the decedent will much more than consume the fund. In fact, the amount of these claims in existence when decedent died exceeds many times the amount for distribution. This is no doubt a hardship as to the debts contracted by the administrator; but parties dealing in this way are bound to look to his authority, and are held to a knowledge of the limitations which the law places upon him. Their only remedy is against the administrator, and where, as here, there is no property against which he can have recourse."

It is, however, generally conceded that the case of an unfinished contract stands upon a different plane than the case of an ordinary business enterprise, engaged in by the decedent at the time of his death, from which his executor or administrator may withdraw without subjecting the estate to any liability for damages. Thus, it is said in *Marshall v. Broadhurst* (1831) 1 Crompt. & J. 403, 148 Eng. Reprint, 1480: "When the law speaks of the executors not carrying on the business of their testator, it means that they are not to buy and sell. We do not say that executors are bound to go on

to an indefinite extent, but it is reasonable that they should do so to a certain extent. For instance, if a man make half a wheelbarrow or half a pair of shoes, and die, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state." It was accordingly held in that case that if one contracts for himself and his executors to build a house, and dies, the executors must go on, or be liable in damages for not completing the work; and that, having done so, they may recover in their representative capacity. So also, in *Allam's Estate* (1901) 199 Pa. 573, 49 Atl. 252, it is said that the principle to be deduced from the authorities seems to be that the administrator is vested with a sound discretion as to whether or not he will complete such contract; and that if he has acted as a cautious and prudent man would act under similar circumstances, and in good faith, he will not be surcharged, although the consequence may be bad.

Accordingly, in *Re Walsh* (1904) 35 Pittsb. L. J. N. S. (Pa.) 289, it was held that as an administrator has the right to complete his decedent's contracts, he should be entitled to a pro rata distribution with the creditors of the decedent on the amount of loss sustained by him in their completion, the court saying: "It is true this conclusion does not appear to be sustained by *Allam's Estate* (Pa.) *supra*; but there does not appear to have been any claim made in that case by the administrator for a pro rata distribution with the other creditors on the amount of loss sustained by him, and this question was not discussed nor decided there. Had the executor here refused to complete these contracts, the estate would have been liable for the loss sustained by the hospital, Rowe, and Verner in finishing them, and they would have been creditors of the estate to the amount of such loss, and entitled to pro rata distribution thereon. And if the executor had paid them he would be subrogated to their rights as creditors, and entitled to pro rata distribution on the amount so paid. His right to such distribu-

tion is surely not defeated because, instead of allowing them to finish the work and paying them directly the amount of the loss, he assumed and paid it by completing the contracts himself."

And in *Macdonald v. O'Shea* (1910) 58 Wash. 169, 108 Pac. 436, Ann. Cas. 1912A, 417, it was held that a surety on the contractor's bond, which had discharged obligations incurred by the administrator in carrying out the contract after the contractor's death, might collect the amount so paid by foreclosing an indemnity mortgage held by it upon property of the decedent.

Now, where the executor or administrator is entitled to be indemnified for indebtedness incurred by him in carrying on the business, the creditors of the business may be subrogated to the rights of the executor or administrator against his decedent's estate (see *Foxworth v. White* (1882) 72 Ala. 224; *Fridenburg v. Wilson* (1885) 20 Fla. 359; *Laible v. Ferry* (1880) 32 N. J. Eq. 791, reversing (1879) 31 N. J. Eq. 566; *Re Johnson* (1880) L. R. 15 Ch. Div. (Eng.) 548, 49 L. J. Ch. N. S. 745, 43 L. T. N. S. 372, 29 Week. Rep. 168; *Re Frith* [1902] 1 Ch. (Eng.) 342, 71 L. J. Ch. N. S. 199, 86 L. T. N. S. 212; *Re Kidd* (1894) 70 L. T. N. S. (Eng.) 648, 8 Reports, 261, 42 Week. Rep. 571; *Frisby v. Owen* (1892) 66 L. T. N. S. (Eng.) 718; *Braun v. Braun* (1902) 14 Manitoba L. R. 346); such right, however, being governed by the same conditions as attend the right of the executor or administrator to be indemnified.

Accordingly, it would seem that where the completion of an unfinished contract is a proper act of administration, a debt thereby incurred by the executor or administrator might, though not a debt of the estate, be asserted against it on the theory that the creditor is equitably subrogated to his debtor's right to indemnity.

One other possibility remains to be considered.

It has been held that where an executor or administrator carries on the decedent's business for a reasonable time for the purpose of winding it up,

the debts incurred by him may be allowed as expenses of administration. See *Fleming v. Kelly* (1902) 18 Colo. App. 23, 69 Pac. 272 (where, however, the business was carried on under the authority of the court and at a profit); *Carroll v. Davidson* (1871) 23 La. Ann. 428 (where the business was carried on under the authority of the court); *Cornwell v. Deck* (1874) 2 Redf. (N. Y.) 87, affirmed on other points in (1876) 8 Hun, 122; *Merritt v. Merritt* (1876) 62 Mo. 150; *Re Semple* (1899) 189 Pa. 385, 42 Atl. 28, reversing

(1898) 28 Pittsb. L. J. N. S. (Pa.) 431; *Newton v. Poole* (1841) 12 Leigh (Va.) 112.

It would seem entirely consistent with the principle of these cases that an executor or administrator who, acting reasonably and in good faith, has elected to complete an unfinished contract made by his decedent, instead of paying damages, should be allowed (at least, where the estate is solvent) the amount of the debts thereby incurred. E. S. O.

## RE PETITION OF JOSIE DUNKERTON.

*Kansas Supreme Court — March 8, 1919.*

(104 Kan. 481, 179 Pac. 347.)

### Constitutional law — industrial farm for women — discrimination.

1. Chapter 298 of the Laws of 1917, establishing a state industrial farm for women, does not violate § 1 of the 14th Amendment to the Constitution of the United States, nor § 1 of the Bill of Rights of the Constitution of the state of Kansas, and does not deny the equal protection of the law to women convicted of offenses punishable by imprisonment.

[See note on this question beginning on page 1614.]

### — equal protection — different punishment for men and women.

2. The legislature may determine that women convicted of crime shall be less severely punished than men convicted of the same crime.

[See 6 R. C. L. 430.]

### Criminal law — parole — interference with power of court.

3. A statutory provision giving the

Headnote 1 by MARSHALL, J.

board of administration the power to parole women convicts after they are placed on the state farm does not interfere with the power of the court to grant parole at time of judgment, or before confinement on the farm begins.

[See 20 R. C. L. 577-579.]

APPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which she had been committed for alleged violation of the so-called Bone Dry Law. *Writ denied.*

The facts are stated in the opinion of the court.

Messrs. A. M. Etchen and Bert Van Leuven, for petitioner:

Chapter 298, laws of 1917, is unconstitutional and void for the reason that it contravenes § 1 of the 14th Amendment to the Constitution of the United States, and § 1 of the Bill of Rights of the Constitution of the state of Kansas, in that females over twenty-

five years are denied the equal protection of the laws.

*Re Howard*, 72 Kan. 273, 83 Pac. 1032; *State v. Lewin*, 53 Kan. 679, 37 Pac. 168; *Morgan v. State*, 179 Ind. 300, 101 N. E. 6; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150,

41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; 6 Am. & Eng. Enc. Law, 2d ed. 969; *Union County Nat. Bank v. Ozan Lumber Co.* 127 Fed. 206; *State v. Scougal*, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858.

Messrs. Alfred G. Armstrong and Thurman Hill for appellee.

Marshall, J., delivered the opinion of the court:

Josie Dunkerton presents an application for a writ of habeas corpus. Notice of the hearing of the application has been given, and the matter is submitted on its merits. The petitioner is confined on the state industrial farm for women, under conviction for violating § 1 of chapter 215, Laws of 1917, commonly known as the "Bone Dry Law." She argues that the act under which she is confined (Laws 1917, chap. 298) is unconstitutional, for the reason that it contravenes § 1 of the 14th Amendment to the Constitution of the United States, and for the further reason that it contravenes § 1 of the Bill of Rights of the Constitution of the state of Kansas, in this, that the act denies the equal protection of the law to women over twenty-five years of age. To support this argument, the petitioner contends that, in every case where a woman is convicted of violating any criminal law, and punishment by imprisonment is prescribed, the act takes from the trial court the right to impose the minimum penalty on her; that it takes from that court the right to parole women; that, under the act, women must be sentenced to the penitentiary; and that in these respects the punishment of women is more severe than the punishment of men for the same offense.

Boys under the age of sixteen years, who commit offenses punishable by imprisonment, may be sent to the state reform school. Gen. Stat. 1915, § 10,081. Girls under the age of eighteen years who commit similar offenses may be sent to the industrial school for girls.

Gen. Stat. 1915, § 10,108. Any male person between the ages of sixteen and twenty-five, who shall be convicted for the first time of any offense punishable by confinement in the state penitentiary, may be sent to the Kansas state industrial reformatory. Gen. Stat. 1915, § 10,053. Under these statutes boys and girls, and men and women, are not treated alike. Women cannot be sent to the state industrial reformatory. Boys over sixteen years of age cannot be sent to the state reform school, while girls between sixteen and eighteen years of age may be sent to the industrial school. Prior to the passage of the act now questioned, a woman over eighteen and under twenty-five who committed an offense punishable by imprisonment in the penitentiary, was sent to that institution. She could not be sent to any one of the other three institutions. Reformation and education are the primary objects of the reform school, of the state industrial reformatory, and of the industrial school. Punishment is incidental only. These institutions are primarily schools, not prisons. The constitutionality of the acts creating them, and of the acts providing for confinement of violators of the law in them, has not heretofore been questioned on the ground now presented.

The statute under consideration establishes an industrial farm for women, to which all women above the age of eighteen years, who shall be convicted of any offenses against the criminal laws of this state, must be sent. Section 5 of the act reads: "Every female person, above the age of eighteen years, who shall be convicted of any offense against the criminal laws of this state, punishable by imprisonment, shall be sentenced to the state industrial farm for women, but the court imposing such sentence shall not fix the limit or duration of the sentence. The term of imprisonment of any person so convicted and sentenced shall be terminated by the state board of administration, as authorized

by this act, but such imprisonment shall not exceed the maximum term provided by law for the crime for which the person was convicted; provided, that where the person, so convicted and sentenced to said industrial farm for women, is not more than twenty-five years of age and said conviction is for her first offense, the board of administration may parole or release such person under rules and regulations prescribed by said board before the expiration of the minimum term, but in all other cases, the person so committed to said institution shall not be eligible to parole by the board of administration until the expiration of the minimum term fixed by law for the punishment of the offense for which she has been convicted; provided further, that where any person has been committed to such institution on conviction for murder in the first or second degree, such person shall not be released from said institution until the expiration of the term for which such person is sentenced, except by action of the governor exercising his pardoning or parole power." (Laws 1917, ch. 298, § 5.)

The petitioner directs the attention of the court to part of § 14, and to all of § 22 of the act. The material part of § 14 reads: "The state board of administration shall provide equipment for the regular employment of all inmates of the state industrial farm for women, by erecting shops for the manufacture of goods and utensils and the purchase of farm machinery and stock which will permit light forms of agriculture, such as truck gardening, chicken raising and dairying, not to the exclusion of the cultivation of cereals and grasses. It shall be the duty of the superintendent to provide for the daily labor of all inmates according to their capacity and adaptability."

The purpose of the Act of 1917 is to ameliorate the condition of women who have been convicted of an offense punishable by imprisonment. Under the act, women are

not subject to the debauching influence of the county jail and of the penitentiary, and of the close confinement therein, but are placed in a field where labor is pleasant and restraint is limited, and where the evil influence of other persons convicted of crime is minimized. The act seeks to improve, to educate, and to build up, not to punish. The court is asked to say that the law is unconstitutional because, in accomplishing these objects, it imposes restraint on women different from that imposed on men. *Morgan v. State*, 179 Ind. 300, 101 N. E. 6, is cited by the petitioner. There, the supreme court of Indiana held that a statute which prescribed a treatment of men acquitted of crime on the ground of insanity, different from that accorded women thus acquitted, denied to women the equal protection of the law, and contravened the 14th Amendment to the Constitution of the United States. The reasoning in that case is not convincing. The legislature may very properly determine that women convicted of crime shall be less severely punished than

Constitutional law—equal protection—different punishment for men and women.

men convicted of the same crime. The number of women that commit crimes is much smaller than the number of men committing similar crimes, and that fact may be taken into consideration by the legislature, and punishment may be prescribed which recognizes that difference.

It is argued that the Act of 1917 takes away from the district court the right to parole a woman convicted in that court of any offense. The statute does not in terms so declare. It does provide that, after she has been placed on the farm, the board of administration may parole, but that does not exclude the trial court from paroling at the time judgment is rendered, or before confinement on the farm begins. There is always a depart-

Criminal law—parole—interference with power of court.



ment of the state government with authority to parole a woman who has been convicted of an offense punishable by imprisonment, or who is confined on the industrial farm.

It is argued that sentencing a woman to the industrial farm is the same as sentencing her to the penitentiary. The industrial farm is not the penitentiary; they are separate institutions, operated in dif-

ferent ways, to accomplish different objects. The only resemblance between the two is the restraint placed upon their inmates to prevent them from leaving the institutions. The petitioner's at-  
Constitutional  
law—industrial  
farm for women  
—discrimination.  
 tack on the law cannot be sustained, and her application for a writ of habeas corpus is denied.

All the Justices concur.

### ANNOTATION.

#### Constitutionality of statute as affected by discrimination in punishments for same offense based upon age, color, or sex.

- I. Age, 1614.
- II. Race or color, 1616.
- III. Sex, 1618.

##### *I. Age.*

The constitutionality of statutes providing for the detention of juveniles who have been convicted of offenses punishable by imprisonment for a period of time and at a place different from that of more mature offenders has often been upheld, as against the contention that unequal penalties are thus imposed.

California.—Ex parte Liddell (1892) 93 Cal. 633, 29 Pac. 251; Ex parte Nichols (1896) 110 Cal. 651, 43 Pac. 9.

Georgia.—Taylor v. Means (1912) 139 Ga. 578, 77 S. E. 373.

Illinois.—People ex rel. Bradley v. Illinois State Reformatory (1894) 148 Ill. 413, 23 L.R.A. 139, 36 N. E. 76.

Massachusetts.—Com. v. Pear (1903) 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719.

Minnesota.—State ex rel. Schulman v. Phillips (1898) 73 Minn. 77, 75 N. W. 1029.

New York.—People ex rel. Duntz v. Coon (1893) 67 Hun, 523, 22 N. Y. Supp. 865.

Texas.—Ex parte Walker (1889) 28 Tex. App. 246, 13 S. W. 861; Johns v. State (1911) 63 Tex. Crim. Rep. 416, 140 S. W. 1093.

Thus, in California, it has been held that the fact that, under statutes providing that minor children who have

been convicted of an offense punishable by imprisonment in the county jails or penitentiaries may be committed to the state reformatory or industrial schools for a term not less than one nor more than five years, the term of detention at the reform school may be made greater by the judgment of the court than the term of imprisonment in the county jail or in the state prison for the same offense would be, does not render the statute unconstitutional as prescribing unjust or unequal penalties; since, as the object of the act is not punishment, but reformation, discipline, and education, it cannot be said that the punishment inflicted is greater than would be put upon an adult for the same offense. Ex parte Liddell (1892) 93 Cal. 633, 29 Pac. 251; Ex parte Nichols (1896) 110 Cal. 651, 43 Pac. 9. In Ex parte Liddell (Cal.) supra, the court argued as follows: "While detained for a longer period, perhaps, than he would be if sent to state prison or the county jail, the conditions surrounding the child are vastly different. He is given the opportunity and instruction to learn a trade, and qualify himself for the duties of citizenship, so that at the end of his term he will go out prepared to take care of himself and those dependent upon him, without the odium which is attached to an ex-convict. There is no doubt of the power of the state to make and enforce provisions for the compulsory education of all children within the state; and

it is equally clear that the state may arrest the downward tendency of those who have offended against its laws, and manifest a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education, and discipline necessary to prepare them for honorable citizenship. . . . The legislature, in its wisdom, has endeavored to provide a place for children manifesting criminal traits, where they can be cared for without being thrown under the baneful influence of veterans in crime. We think the policy of the act a wise one, and we see no constitutional ground for declaring it invalid."

So, in Georgia, it has been held that the sentencing of a minor to an industrial farm, in accordance with a statute providing for so sentencing minors convicted of misdemeanors, was not void on the ground that such minor was thereby denied the equal protection of the laws, in that all other persons, upon being convicted of a misdemeanor, can only be sentenced to a term of imprisonment not exceeding twelve months, whereas the sentence complained of was for confinement for a term not exceeding eleven years. *Taylor v. Means* (1912) 139 Ga. 578, 77 S. E. 373. This, also, was upon the theory that the sentence in the present case was not one imposing punishment under the purely penal statutes of the state, it being said that the purpose of the statute was not punishment alone, but restraint and correction under circumstances that tended to the mental and moral uplift of the child, and the proper formation of its character.

Likewise, in *State ex rel. Schulman v. Phillips* (1898) 73 Minn. 77, 75 N. W. 1029, it was held that a statute providing for the commitment of minors under sixteen years of age, convicted of crime, to a state training school during minority, unless sooner released by the board of managers, was not unconstitutional as inflicting a greater degree of punishment upon children under sixteen years of age than for older children, and, therefore, that an infant under sixteen, who

had been convicted of petit larceny and sentenced to the reform school under the statute, could not obtain his release by habeas corpus. The court said: "The school is not a 'prison,'—a place of punishment,—in the usual acceptation of the term, but a public industrial school, where children who have made a wrong start in life are educated, trained, and afforded an opportunity to become honest, self-reliant, industrious, and useful citizens. The necessary restraint imposed upon them is not punitive, but parental, in its character."

And in *People ex rel. Duntz v. Coon* (1893) 67 Hun, 523, 22 N. Y. Supp. 865, a statute establishing a house of refuge for women, and providing for the sentencing thereto of all females between the ages of fifteen and thirty, who have been convicted of certain specified misdemeanors, for a term of not more than five years, unless sooner discharged by the board of managers, has been held not to be unconstitutional as an unequal protection of the laws, in that the statute provides a longer term and a different place of confinement for females falling within its terms than for females of other ages, whose punishment for similar offenses is a fine or imprisonment for one year or both. It was said that it is within the power of the legislature to provide a punishment for children and young women at a different place and for a different period than the imprisonment provided for persons of a different age for the same offense, that the statute applies equally to all females within the ages specified, and that such power has been too long exercised to be now questioned.

And again, in Illinois, it has been held (*People ex rel. Bradley v. Illinois State Reformatory* (1894) 148 Ill. 413, 23 L.R.A. 139, 36 N. E. 76) that a constitutional requirement that all penalties shall be apportioned to the nature of the offense was not violated by a statutory provision for the commitment of minors between the ages of sixteen and twenty-one, who have been convicted of crime, to a reformatory for an indefinite period, while an adult convicted of the same crime has

a statutory right to have the term of his imprisonment, within the limits fixed by statute, determined by a jury. The court reasoned that there is a marked distinction between persons of mature age and those who are minors, and that the legislature could properly take such distinction into consideration in fixing the punishment for crime, both in determining the method of its infliction, and in limiting its quantity and duration. However, the court was also of opinion that a sentence imposed by virtue of the statute was, in fact, a penalty and punishment for crime committed, and not for the sole and only purpose of reforming the offender.

In *Ex parte Walker* (1889) 28 Tex. App. 246, 13 S. W. 861, without setting out the reasons therefor, it was held that a statute abolishing capital punishment in all cases where the offender has not, at the time of the commission of the offense, arrived at the age of seventeen years, was not subject to the constitutional objection that it was class legislation, and contrary to the principles of American government.

And that a statutory provision for incarceration of defendants under sixteen years of age in a state reformatory instead of a penitentiary is not unconstitutional, but is a wise and salutary provision of the law, see *Johns v. State* (1911) 63 Tex. Crim. Rep. 416, 140 S. W. 1093.

In *Com. v. Pear* (1903) 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719, it was held that the exemption of minors from the penalty imposed by a statute for refusal to be vaccinated did not render the statute unconstitutional as working an inequality, since it only limited such liability to persons who had a right to control their own conduct.

## II. Race or color.

Equality of protection under the laws, as guaranteed by the 14th Amendment to the United States Constitution, implies that in the administration of criminal justice no person, by reason of his race or color, shall be subjected for the same offense to any greater or different punishment

than that to which persons of another race or color are subjected. *Pace v. Alabama* (1883) 106 U. S. 583, 27 L. ed. 207, 1 Sup. Ct. Rep. 637; *Ho Ah Kow v. Nunan* (1879) 5 Sawy. 552, Fed. Cas. No. 6,546; *Ellis v. State* (1868) 42 Ala. 525.

Applying this general rule, it has been held that an ordinance which was directed against and confined in its execution to Chinamen, and which provided for the cutting or clipping of the hair of all persons confined in the county jail to within 1 inch of the head, was in violation of the 14th Amendment in that it constituted special legislation, and imposed an additional as well as degrading and cruel punishment upon a class of persons who are entitled to the equal protection of the law. *Ho Ah Kow v. Nunan* (1879) 5 Sawy. 552, Fed. Cas. No. 6,546.

But in the Maryland case of *Plunkard v. State* (1887) 67 Md. 364, 10 Atl. 225, 309, it was held that a bastardy law relating to "any white woman" giving birth to an illegitimate child, and not embracing in its terms colored women, and providing for her incarceration unless she give bond or disclose the father of the child, was not unconstitutional as denying the equal protection of the laws as guaranteed by the 14th Amendment. The majority of the court, after recognizing that a proceeding under this statute against the white mother of an illegitimate child would be criminal in its nature, adopted the following views: "The statute aims at no redress for private or personal wrongs done to the mother. The act intended to be punished involves no invasion of the mother's rights; no element of trespass or violence; she is a consenting party. It is not a case where she would otherwise be left exposed, without the protection of the law, to trespasses, assaults, or violence; hence the argument that the colored mother is exposed when the white mother is protected, and that redress is extended to the one and denied to the other, is really without foundation. No personal right is invaded; no privilege or immunity of the white or colored

mother is interfered with. Still more unfounded is the suggestion that the child itself is protected in the one case, and left exposed in the other. No such result is contemplated by the statute, and nothing of the kind follows as an incident of its enforcement. The security required is not for the benefit of the child; it is intended only to protect the public from the maintenance of the child; and if that indemnity is not given, it is a mistake to suppose that the child is left without nurture, maintenance, or support. The county or public is charged with its maintenance, and unless the indemnity contemplated by the statute is given, the burden of maintaining the child, whether the illegitimate offspring of a white or colored mother, still rests upon the public. If the child is not left to perish under the law, as the argument assumes, the burden of its support is only shifted and placed on the father as a measure of punishment upon him, and this punishment falls equally, without respect to race or color." It should be noted that in this case the defendant was the disclosed father of an illegitimate child by a "white" woman, and that the objections to the constitutionality of the statute were raised by him, and not by "any white woman" incarcerated for failure to comply with the statute. In the latter case it would seem that a stronger case of discrimination could be presented. It is also of interest that Stone, J., dissented, upon the ground that since the 14th Amendment means that there shall not be in any state one law applying to the white race, and another and different one applying to the black, especially with respect to criminal laws, the Maryland statute above cited is in direct controversion of that Amendment, in that it applies exclusively to the whites.

And it has been held that an Alabama statute, punishing adultery or fornication committed by a white person and a negro with each other more severely than the same offense committed between persons of the same race and color is punished, does not make a discrimination against the

3 A.L.R.—102.

colored person, within the meaning of the rule as laid down in the preceding paragraph where the statute applies the same punishment to both offenders, the black and the white, the offense, as outlined, being distinct, and the discrimination in the punishment prescribed being directed against the offense designated, and not against the person of any particular race or color. *Pace v. Alabama* (1883) 106 U. S. 583, 27 L. ed. 207, 1 Sup. Ct. Rep. 637, affirming (1881) 69 Ala. 231, 44 Am. Rep. 513 (see also *Rose's Notes to this case*); *Ellis v. State* (1868) 42 Ala. 525; *Ford v. State* (1875) 53 Ala. 150, 2 Am. Crim. Rep. 161.

In Arkansas, it was held that a statute making it a capital offense for a negro or mulatto merely to attempt the commission of rape on a white woman, whereas a white man was only to be imprisoned therefor, did not contravene a constitutional provision that "any slave who shall be convicted of a capital offense shall suffer the same degree of punishment as would be inflicted upon a free white person, and no other." *Charles v. State* (1851) 11 Ark. 389; *Pleasant v. State* (1853) 13 Ark. 360. In *Charles v. State* (Ark.) supra, the court argued as follows: "It is contended that the proper construction of this constitutional provision is that the legislature cannot declare that a negro shall be hung for an offense, when a white man, for the same offense, is only punishable by imprisonment. It is conceded by counsel for the accused that the legislature possesses the power to make an act criminal in a slave, which would not be so in a white man; but then he insists that, as to acts or offenses which are common to both, and made criminal in both, a slave cannot be hung, when for the same offense a white man would only be imprisoned. We cannot concur in the construction claimed for the constitutional provision referred to; but, on the contrary, are fully persuaded that it is not in accordance with the spirit and intention of that instrument. If the offense charged against the appellant had been declared capital, whether committed by a white man or negro, but

that, in the case of the former, the mode of execution should be by hanging by the neck, whereas the latter should be first scourged, and then burned, and finally destroyed by hanging, there can be no doubt but that such act would be unconstitutional, and consequently void. . . . All that was designed to be understood by the provision in the Constitution was that, in case a negro should be convicted of a capital crime, he should not undergo other or greater punishment than that which should be inflicted upon a white man for an offense which would subject him to capital punishment." It will be observed that this decision, therefore, was made to turn upon the fact that a distinctive crime was provided for by the act, and does not amount to an adjudication that discriminating penalties may be imposed upon persons of different color for the same offense.

### III. Sex.

In the reported case (*EX PARTE DUNKERTON*, ante, 1611), it was held that a statute establishing a state industrial farm for women was not unconstitutional because of the fact that it allowed women to be less severely punished than men convicted of the same crime. In other words, that the legislature may make a discrimination in punishment for the same offense, based entirely upon the sex of the offender. This conclusion, that the legislature may very properly determine that women convicted of crime shall be less severely punished than men convicted of the crime, seems to have been based upon the theory that the legislature, in prescribing punishment for a crime, may take into consideration and recognize the fact that the number of women who commit crimes is much smaller than the number of men committing similar crimes.

So, in *State v. Heitman* (1919) — Kan. —, 181 Pac. 630, it was held that a special statute, providing that a woman upon conviction of a misdemeanor should be sentenced to the state industrial farm for women, for an un-

determined period, with a maximum limit, was not violative of the 14th Amendment to the Federal Constitution, either as denying the equal protection of the law, or as abridging women's privileges and immunities, in that men convicted of similar offenses would be sentenced under the general law to the county jail for a definite period, within the same maximum limit, the court adopting the theory that female criminals, because of their different nature, etc., should be completely segregated from male criminals, so that the attendant problems of the two classes may be differentiated, and each given the proper and necessary corrective treatment; that the principle of the indeterminate sentence is the only correct one; and that the effort of the legislature, in enacting the statute under consideration, was evidently an honest attempt to keep law up with the advanced tenets of the new penology, and seemed neither arbitrary nor unreasonable.

And a New York statute, relating to the medical examination and confinement of prostitutes who have been convicted of vagrancy, has been held not to be unconstitutional as discriminating between men and women, it being declared a health measure, and within the police power. *People ex rel. Barone v. Fox* (1910) 69 Misc. 400, 127 N. Y. Supp. 484, reversed on other grounds in (1911) 144 App. Div. 611, 129 N. Y. Supp. 646, 26 N. Y. Crim. Rep. 177, which was reversed in (1911) 202 N. Y. 616, 96 N. E. 1126.

But a contrary conclusion was reached in *Morgan v. State* (1912) 179 Ind. 300, 101 N. E. 6, set out and disapproved in the *DUNKERTON CASE*. In the *Morgan Case* it was held that Indiana Act March 5, 1909, § 16½ (Acts 1909, p. 202), which provides that if a male person charged with a felony shall interpose the defense of insanity, and there shall be a finding for him on such plea, but against him as to the commission of the act charged, he shall be confined in the state colony for insane criminals, denied the equal protection of the law as guaranteed by the 14th Amendment to the

Federal Constitution, in that the statute included only "male," and did not include "female," defendants; the court, in effect, maintaining that such a classification was arbitrary.  
G. J. C.

EUGENE TAYLOR, Appt.,  
v.  
ALBERT SHIELDS et al.

*Kentucky Court of Appeals — February 25, 1919.*

(183 Ky. 669, 210 S. W. 168.)

**Police — unlawful arrest — liability of bond.**

1. An arrest by a police officer without warrant, and in the absence of circumstances where an arrest is authorized by statute without warrant, is in his private and not his official capacity; and, therefore, sureties on his official bond are not liable for his act.

[See note on this question beginning on page 1623.]

**Bond — official — liability.**

2. The surety on the bond of a police officer is not liable for his wrongful act in making an arrest not authorized by statute.

**Police — individual liability.**

3. Police officers who arrest and assault persons without authority of law are individually liable for the trespass.

[See 2 R. C. L. 490.]

**Pleading — allegation of official action — sufficiency.**

4. An allegation of a complaint in an action on the bond of a police officer that at the time of the alleged wrong the officer was acting as a police officer of a specified city is not sufficient to show that he was acting by virtue of his office, so as to render it good against demurrer.

[See 2 R. C. L. 491; 21 R. C. L. 440 et seq.]

**APPEAL** by plaintiff from a judgment of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County, sustaining a demurrer to and dismissing the petition, as to the defendant surety company, in an action brought to recover damages for the alleged unlawful arrest of plaintiff by the defendant policeman. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles Carroll and J. Frank Withers for appellant.

Messrs. Furlong, Woodbury, & Furlong, for appellees:

The petition and the petition as amended fail to state a cause of action against any of the defendants, because of a failure to negative in every respect the legal presumption that the officers did their duty in making the arrest, and by omitting to allege that plaintiff, at the time he received the injuries complained of, was not resisting the officers generally, and was not resisting his incarceration in the police station.

Connelly v. American Bonding & T. Co. 113 Ky. 903, 69 S. W. 959; Kouns

v. Townsend, 165 Ky. 163, 176 S. W. 989.

The assault of the plaintiff complained of, if made by the officers, was their individual act, and not in the line of their official duties, and therefore imposed no liability upon the surety company.

Jones v. Van Bever, 164 Ky. 80, L.R.A.1915E, 172, 174 S. W. 795; Kouns v. Townsend, supra; Jewell v. Mills, 3 Bush, 64; Murrell v. Smith, 3 Dana, 463; Calvert v. Stone, 10 B. Mon. 152; Com. v. Hurt, 23 Ky. L. Rep. 1171, 64 S. W. 911, 65 S. W. 610; Carson v. Dezarne, 28 Ky. L. Rep. 761, 90 S. W. 281.

Sampson, J., delivered the opinion of the court:

Shields and Shore were members of the police force of Louisville in 1916, and the Chicago Bonding & Surety Company was the surety on the official bond of each of said policemen. In October, 1916, this action was filed in the Jefferson circuit court by Taylor against Shields and Shore as policemen, and their surety, the Chicago Bonding & Surety Company, to recover \$5,000 for the malfeasance in office of Shields and Shore.

The petition alleges that on the "night of August 29, 1916, plaintiff was arrested by the defendants Shields and Shore, and was by them detained and confined in the Highland police station, in Louisville, Kentucky, and that while so detained and confined he was assaulted by said defendant officers, and was struck and beaten upon and about his head, body, and limbs, and his head, body, and limbs were thereby bruised, cut, and lacerated, and he was caused, by reason of said injuries, great pain and suffering, both physical and mental. Plaintiff says that said assaulting, beating, and striking as aforesaid, were done wantonly and maliciously by the said defendants Shields and Shore."

On December 9th following, an amended petition was filed, the material allegations of which are as follows:

"The plaintiff says that each of defendants, Albert Shields and John J. Shore, executed before the 29th day of August, 1916, to the commonwealth of Kentucky, a bond upon which the defendant Chicago Bonding & Surety Company was surety, that he would well and faithfully discharge the duties of his office as policeman according to law. Said bond was accepted and approved by the board of public safety of Louisville, and was in full force and effect on the 29th and 30th of August, 1916. Certified copies of each of said bonds will be filed herewith, if required.

"Plaintiff says that on the night

of August 29, 1916, he was arrested by the defendants Albert Shields and John J. Shore, acting as police officers of the city of Louisville; that said arrest was wrongful and without warrant or judicial order, or other authority of law, and at said time plaintiff was acting in a quiet, peaceable and law-abiding manner, and he had not committed any breach of the peace, or committed any offense, either a misdemeanor or felony, in or out of the presence of defendants, or either; and that neither of said defendants had reasonable grounds to believe plaintiff had committed a misdemeanor or felony.

"Plaintiff says said defendants wrongfully and unlawfully, under the circumstances before set out, under their authority as police officers of the city of Louisville, took plaintiff and detained and confined him in the Highland police station, in Louisville, Kentucky, and while he was detained and confined he was assaulted by said defendant officers and each, and was struck and beaten on and about his head, body, and limbs, with great force and violence by said defendants and each, and his head, body, and limbs were thereby bruised, cut and lacerated, and he was caused, by reason of said injuries, great pain and suffering, both physical and mental, and that said beating and striking by said defendants and each was done wrongfully and unlawfully and wantonly and maliciously, and at said time he was not resisting arrest by said defendants, or either, or by any other officer or any other person, and had not attacked or attempted to attack said defendants, or either, or any other officer, and he says at the time or prior thereto he had not committed a felony and had not been arrested for the commission of a felony, and was not attempting to escape arrest, and, by reason of said acts, defendants and each violated the covenants of the bonds aforesaid executed by each."

To this petition, as amended, the three defendants interposed a general demurrer, which was overruled

as to the policemen Shields and Shore, and sustained as to the Chicago Bonding & Surety Company, and the plaintiff declining to plead further, the petition was dismissed as to the Surety Company, and of this Taylor complains and prosecutes this appeal, seeking a reversal of the judgment, asserting that a surety upon the official bond of a policeman of the city of Louisville is liable for the act of the policeman in committing assault and battery upon a prisoner while confined in a station house by said policeman, after having been arrested by him, there being no effort on the part of the prisoner to escape or to assault the officer.

"An arrest may be made by a peace officer, or by a private person." Crim. Code, § 35.

"A peace officer may make an arrest (1) in obedience to a warrant of arrest delivered to him; (2) without a warrant, when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony." Crim. Code, § 36.

"A peace officer in this state, under the provisions of § 36 of the Criminal Code, may lawfully arrest one only in obedience to a warrant delivered to him, or without a warrant if a public offense is committed in his presence, or if he has reasonable grounds to believe that the arrested person has committed a felony." *Morton v. Sanders*, 178 Ky. 839, 200 S. W. 25.

"A policeman of the city of Louisville, like any other peace officer, can make an arrest without a warrant only where a public offense is committed in his presence, or he has reasonable grounds for believing that the person arrested has been guilty of a felony." *Madden v. Meehan*, 151 Ky. 220, 151 S. W. 681.

"A peace officer can make an arrest without a warrant only where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a fel-

ony." *Jamison v. Gaernett*, 10 Bush, 222.

According to the allegations of the petition as amended, the arrest of Taylor "was wrongful and without warrant or judicial order, or other authority of law, and at said time plaintiff (Taylor) was acting in a quiet, peaceable, and law-abiding manner, and he had not committed any breach of the peace, or committed any offense, either a misdemeanor or felony, in or out of the presence of defendants, or either, and that neither of said defendants had reasonable grounds to believe plaintiff (Taylor) had committed a misdemeanor or a felony."

If these allegations be true, and upon demurrer they are so considered, then the acts of the policemen were their individual acts, and not their official acts, or acts done by virtue of their office. The policemen had no right to arrest Taylor without a warrant, or other order of a court, unless he had committed a public offense in the presence of the officers, or the officers had reasonable grounds for believing that Taylor had committed an offense. The allegations of the petition show that the arrest of Taylor was made without process of any kind, and that Taylor had committed no public offense either in or out of the presence of the officers. The officers had no writ for Taylor; he had committed no public offense, either in or out of their presence, and they had no reasonable grounds to believe that Taylor had committed a felony. There was, therefore, no ground for the exercise of their authority as policemen.

Where there is a duty imposed by law on a police officer, as when he has in his hands a warrant, or a public offense is committed in his presence, if the duty is neglected, or performed in an improper manner, the surety is liable, but if there is no duty imposed upon the officers, as aforesaid, to make an arrest, and the officer voluntarily undertakes to do so and thereby

Bond—Official—  
Liability.



commits a trespass, the surety is not liable. Whatever the policemen did to Taylor, if anything, was their individual act, and not their official act.

In order for the surety to become liable on the bonds of Shields and Shore, their acts must have been done by virtue of their office as policemen, and in order for their acts to have been so done, the acts must have been done in attempting to serve or execute a writ or process, or as a means to that end, or in acting under a statute giving them the right to arrest without a writ or process. If they acted otherwise, and without a writ, or other process, and without Taylor having committed a public offense in their presence, then they acted as individuals and not as officers. If they acted on their individual responsibility they are liable for the trespass as individuals, but the surety on their official bond is not liable, because the act was not an official act, or done by virtue of their offices.

**Police—unlawful arrest—liability of bond.**

When an officer assumes to act under color of his office, having no writ or process whatsoever, or having process which on its face is utterly void, it seems to be the prevailing doctrine that whatever he may do under such circumstances imposes no liability on his sureties. To constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes the act to be done without process, then there is no such color of office as will enable him to impose a liability upon the sureties in his official bond." *Chandler v. Rutherford*, 48 C. C. A. 218, 101 Fed. 774; *Jones v. Van Bever*, 164 Ky. 80, L.R.A.1915E, 172, 174 S. W. 795; *Kouns v. Townsend*, 165 Ky. 163,

**—individual liability.**

176 S. W. 989; *Jewell v. Mills*, 3 Bush, 64; *Murrell v. Smith*, 3 Dana, 463; *Calvert v. Stone*, 10 B. Mon. 152; *Com. v. Hurt*, 23 Ky. L. Rep. 1171, 64 S. W. 911, 65 S. W. 610; *Carson v. Dezarne*, 28 Ky. L. Rep. 761, 90 S. W. 281.

"An official bond is not regarded as imposing liability for the purely personal acts of officers not done as a part of or in connection with their official duty, as, for example, the receipt of money which it was not the officer's duty to receive, or the arrest of an individual, or the seizure of property without a warrant." 29 Cyc. 1455; 2 R. C. L. 486.

In the case at bar, no writ had been issued for Taylor, and the officers had no process whatever for his arrest, and he had committed no public offense, either in or out of their presence, and therefore there was no excuse whatever for his arrest by Shields and Shore. They were not, therefore, acting in their official capacity or by virtue of their office, because they were not armed with a writ for his arrest, and there was no statute or city ordinance authorizing the arrest of a person who had committed no public offense without a warrant.

It therefore appears Shore and Shields were acting in their individual capacity, and that their surety, Chicago Bonding & Surety Company, is not liable for their wilful and wanton trespass, as alleged in the petition as amended, and the general demurrer was properly sustained to the petition as amended; and, the plaintiff failing to plead further as to the Bonding Company, the petition was properly dismissed.

The allegation of the petition that the policemen Shields and Shore were "acting as police officers of the city of Louisville" is a mere description of the person, or a conclusion of the pleader, and does not sufficiently show that Shields and Shore were acting by virtue of their offices at the time of the alleged assaulting and beating of Taylor.

**Pleading—allegation of official action—sufficiency.**

Judgment affirmed.

## ANNOTATION.

**Liability of sureties on police officer's bond for unlawful arrest without a warrant.**

This note does not include arrests on void or defective warrants, or warrants for a third party. Cases holding that bonds of municipal officers are simply for the benefit of the municipality are also excluded. It will be observed that some of the cases in the latter part of the note refer to the change of opinion, showing an enlarged view of the liability of sureties on official bonds, for acts of the principals, while the greater number of the cases cited are on the side of non-liability; but it is to be remembered that the cases here cited are on a small subdivision of the general subject of the liability of sureties on official bonds.

It has been held in a number of cases that the sureties on a police officer's bond are not liable for an unlawful arrest by him without a warrant.

**United States.**—*Chandler v. Rutherford* (1900) 43 C. C. A. 218, 101 Fed. 774.

**Colorado.**—*People use of Tamplin v. Beach* (1911) 49 Colo. 516, 37 L.R.A. (N.S.) 873, 113 Pac. 513 (stating the rule); *People use of Purdy v. Pacific Surety Co.* (1911) 50 Colo. 273, 109 Pac. 961, Ann. Cas. 1912C, 577.

**Indiana.**—*Hawkins v. Thomas* (1891) 3 Ind. App. 399, 29 N. E. 157.

**Kentucky.**—*TAYLOR v. SHIELDS* (reported herewith) ante, 1619.

**Missouri.**—*State use of Goodwin v. McDonough* (1880) 9 Mo. App. 63; *State ex rel. Brennan v. Dierker* (1903) 101 Mo. App. 636, 74 S. W. 153.

**Oklahoma.**—*Inman v. Sherrill* (1911) 29 Okla. 100, 116 Pac. 426; *Jordan v. Neer* (1912) 34 Okla. 400, 125 Pac. 1117; *Taylor v. Morgan* (1914) 43 Okla. 142, 141 Pac. 679.

**Texas.**—*Gold v. Campbell* (1909) 54 Tex. Civ. App. 269, 117 S. W. 463.

**Washington.**—*Marquis v. Willard* (1895) 12 Wash. 528, 50 Am. St. Rep. 906, 41 Pac. 889.

**West Virginia.**—*State v. Mankin* (1911) 68 W. Va. 772, 70 S. E. 764.

In *Scott v. Com.* (1906) 29 Ky. L. Rep. 571, 93 S. W. 668, where judgment was affirmed giving damages against a marshal and his surety for unlawful arrest without a warrant and assault, the surety did not object or except to the trial court's actions, nor did it move for a new trial.

In *Taylor v. Morgan* (1914) 43 Okla. 142, 141 Pac. 679, supra, the court said: "Where an officer, while doing an act within the limits of his official authority, exercises such authority improperly, or exceeds his official powers, or abuses an official discretion vested in him, he becomes liable on his official bond to the person injured. But where he acts without any process, and without the authority of his office, in doing such act he is not to be considered an officer, but a personal trespasser. Sureties on the official bond of a town marshal are only answerable for the acts of their principal while engaged in the performance of some duty imposed upon him by law, or for an omission to perform some such duty."

In *People use of Tamplin v. Beach* (Colo.) supra, the court said in relation to the liability of sureties: "If the arrest of the prisoner was not a lawful one,—if made under a void warrant, or without warrant in a case where a warrant is required, or if not made in such circumstances as justify the arrest without warrant,—the officer was not acting in his official capacity, either by virtue of, or under color of, office."

"To make the sureties in his official bond liable for personal injury or wrongful death, inflicted by him in making an arrest, a constable must act under a warrant or other writ calling into execution his official powers in the particular case, or he must act under a claim that an offense has been committed in his presence, based upon conduct giving color to such claim, or calling for judgment and opinion as to whether an offense has

been so committed. That he is an officer and professes to act in his official capacity are not sufficient to impose liability upon the sureties." *State v. Mankin* (W. Va.) *supra*.

Some of the cases go upon the principle that sureties are liable only for acts done *virtute officii*, and not for those done *colore officii*. Others, while holding that a surety may be liable for an act done *colore officii*, set a high standard for *colore officii*. In *State ex rel. Brennan v. Dierker* (1903) (Mo.) *supra*, the court said: "A distinction which formerly enjoyed a wider vogue than it does now is taken between the acts of a sheriff, or other executive officer, done by virtue of his office, or *virtute officii*, and acts done under color of his office, or *colore officii*; and there have been many decisions that the officer's sureties are responsible for acts of the first sort when they are illegal, but not for those of the second sort. This distinction is subtle, and, having proved barren of wholesome results, in recent well-considered judgments it has given place to the rule that illegal acts done only *colore officii* lay the bondsmen liable if the illegality consists in an abuse of authority, instead of an outright usurpation. . . . Whether this doctrine is more tangible than the other, or more likely to work satisfactorily, remains to be seen; and it may well be doubted whether an official's sureties ought not to answer for any of his misconduct under color of office, unless it is apparent he made a pretext of his authority to gratify personal malice or accomplish a personal end."

**Cases holding the surety liable.**

In *Mitchell v. Malone* (1886) 77 Ga. 301, the court, in a brief opinion, held that the sureties of a sheriff were liable for an arrest of the wrong person for felony, made by him out of his county, without a warrant.

While most of the cases holding the sureties of a police officer liable for an unlawful arrest, made without a warrant, do so on the ground that the officer exceeded his authority, these cases divide into classes. One class is in general accord with the general

view of nonliability of the surety. Thus, in *Riter v. Neatherly* (1913) — Tex. Civ. App. —, 157 S. W. 439, where an arrest without warrant by a marshal was illegal only because of mistaken identity of the person arrested, the sureties on the marshal's bond were held liable. Probably of the same class is *Gomez v. Scanlan* (1909) 155 Cal. 528, 102 Pac. 12, holding that, while "the sureties on a constable's bond are not liable for his trespasses committed not under color of office nor in the line of official duty," a complaint against a constable and his sureties is sufficient which alleges that he, acting in his capacity as constable, did arrest and imprison the plaintiff on a pretended charge of grand larceny, as he had authority, on a charge of felony, to arrest without a warrant.

Other cases decided on the ground of excess of authority take a more enlarged view of the sureties' liability. Thus, in *Clancy v. Kenworthy* (1887) 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427, it was held that the sureties on a constable's bond were liable for an arrest made by him without a warrant for a private and malicious purpose, without probable cause, in pretense of a cause which would have justified arrest without a warrant, where the bond was conditioned that he would "faithfully and impartially, without fear, favor, fraud, or oppression, discharge all the duties now or hereafter required of his officer by law." (For the condition, see *Yount v. Carney* (1894) 91 Iowa, 564, 60 N. W. 114.) The court said: "But it is insisted that, as the constable is shown to have had no lawful authority to arrest plaintiff, his act was, therefore, not done in the line of his duty. In truth his act was in the line—direction—of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions he violated his duty, and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot

be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he, of course, is not liable. It follows that, if defendant's position be sound, no action can be maintained upon the bond in any case."

Similarly, in *Yount v. Carney* (1894) 91 Iowa, 559, 60 N. W. 114, it was held to be error under a similar bond, to direct a verdict for the defendants, and not to submit to the jury the question whether a marshal, in making an arrest without a warrant, had reasonable ground for believing that the plaintiff had committed a public offense.

*Clancy v. Kenworthy* (Iowa) *supra*, was quoted from in *Drolesbaugh v. Hill* (1901) 64 Ohio St. 257, 60 N. E. 202, holding that the sureties on the bond of an officer, conditioned for the faithful performance of his duties, are liable thereon to the party injured, where, in making an arrest under color of his office, with or without warrant, and without probable cause, he uses more force and violence than is necessary.

In *Lee v. Charmley* (1910) 20 N. D. 570, 33 L.R.A.(N.S.) 275, 129 N. W. 448, it was held that "a deputy sheriff who, falsely claiming to have a warrant for the arrest of a person not formally charged with crime of any kind, goes to his house in the nighttime, and, under guise of the authority of his office, arrests and takes such person into custody, has committed an unauthorized and unlawful act under color of his office, for which the sureties upon his official bond are liable in a proper action." The court said: "The almost uniform current of the latter cases . . . regards wrongful acts of a public officer, *colore officii*, as official acts, for which the sureties upon his bond are liable."

In *Greenius v. American Surety Co.* (1916) 92 Wash. 401, L.R.A.1917F, 1134, 159 Pac. 384, the court, in holding a constable's surety liable for the arrest of the wrong person for felony without a warrant, said: "It is insisted by counsel for respondent, and

the court below so held, that the complaint sets forth a naked trespass, an act done *colore officii*, for which the surety is not liable. Much mental energy has been expended in drawing distinctions between acts of public officers done *colore officii*, and acts done *virtute officii*, and we shall not undertake to assemble definitions. Our understanding is that, when an officer acts in the performance of his duty, and, so acting, acts to the hurt or annoyance of a third party, or an innocent party, he is nevertheless acting in virtue of his office. That is to say, if his office gives him authority to act, he is acting in virtue of his office, although, in the performance of a specific duty, he improperly exercises his authority. For instance, if an officer have a warrant for 'A', and, without reasonable ground for believing him to be the guilty person, takes 'B', he is still acting in virtue of his office. If it were not so, he would never be liable upon his bond. Nor would his surety ever be liable except for his lawful acts, which is *reductio ad absurdum*, for it follows that there could be no liability if there had been no breach of duty.

. . . The best argument against attempting to fix an arbitrary line of demarcation between acts done *colore officii*, and those done in virtue of office, is that the cases, after a hundred years of exposition, are in hopeless and interminable confusion. . . . We think, too, that this court is committed to the latter and better rule, and is in line with the preponderating authority." The court, in referring to *Marquis v. Willard* (1895) 12 Wash. 528, 50 Am. St. Rep. 906, 41 Pac. 889, criticizes the statement therein that, "when an officer without process does an act which, under the law, he has no right to do, he cannot in any proper sense be said to be acting by virtue of his office, and it is going far enough to hold that in so doing he is acting under color of office. Such is the reasonable rule," and says: "We think the use of the words, 'when an officer without process does an act which, under the law, he has no right to do,' was ill advised. The court should have said, rather, that when one who

is an officer is engaged outside of the performance of any duty imposed by law, his surety is not liable."

In view of the foregoing case, reference may be here made to *Weber v. Doust* (1914) 81 Wash. 668, 143 Pac. 148, holding that the sureties of the chief of police of a city were liable for the illegal arrest, without a warrant, of a child thought to be a juvenile delinquent, as the officer was attempting to perform an official act in the general line of official duty, but acted in excess of his authority. The court, however, said in the opinion that the child was "taken into custody and detained, without any attempt to comply with the statute." This case was reversed on rehearing;— (1915) 84 Wash. 330, 146 Pac. 623,—on the ground that the restraint without a warrant was not false imprisonment as matter of law.

Perhaps the theory of excess of authority is the explanation of the decision in *People use of Johnson v. Morgan* (1914) 188 Ill. App. 250, holding that the sureties on the bond of a village night policeman were responsible for his illegal arrest without warrant, and malicious beating, of the plaintiff, under color and by virtue of said office, the bond being given under the statute directing that the bonds of officers be "conditioned for the faithful performance of the duties of the office, and the payment of all moneys received by such officer, according to law and the ordinances of said city or village." The court said: "Official acts in performance of the duties of an office do not mean simply the lawful acts of the officer holding that office, but include all acts done in his

official capacity, under color and by virtue of said office."

It has been held that a statute making sureties liable for acts of the officer done under color of his office will bind the sureties for illegal arrests without a warrant. Thus, where the statute extends the liability of sureties on official bonds to injuries from wrongful acts done by the officer under color of his office, the sheriff and the surety on his official bond are responsible for an illegal arrest by a deputy sheriff without warrant. *Deason v. Gray* (1914) 189 Ala. 672, 66 So. 646. Similarly, in holding that the sureties on a constable's bond were liable for illegal arrests without a warrant, the court said: "Whatever may have been the liability of official bonds for such conduct formerly, the following lines, added to § 1883 of the Code by the Code Commissioners, are broad enough to cover this case, to wit: 'Every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue and under color of his office.'" *State ex rel. Warren v. Boyd* (1897) 120 N. C. 56, 26 S. E. 700.

It may be noted that, where a sheriff having a warrant for the arrest of the plaintiff arrested him without the state, falsely representing that he had a warrant for his extradition, the sureties of the sheriff were not liable for the acts without the state, but were liable for so much of the imprisonment as occurred within the state, as the plaintiff was not found within the state, within the terms of the warrant. *Kendall v. Aleshire* (1890) 28 Neb. 707, 26 Am. St. Rep. 367, 45 N. W. 167. B. B. B.

JOHN J. YORK, Admr., etc., of William Anheier, Deceased, Appt.,  
v.

ROBERT W. HARGADINE, State Fire Marshal, Resp't.

*Minnesota Supreme Court — April 11, 1919.*

(— Minn. —, 171 N. W. 773.)

**Constitutional law — destruction of dilapidated building.**

1. Chapter 469, Laws 1917 (amending sections 5140–5146, Gen. Stat. 1913 [Gen. Stat. Supp. 1917, §§ 5140–5146]), authorizing the state fire marshal to condemn and order torn down a building which, by reason of age, dilapidated condition, or other defect, is especially liable to fire, and is so situated as to endanger life and limb or other buildings or property in the vicinity, is a valid exercise of the police power of the state. A structure coming within the purview of the statute may be regarded as a nuisance and abated as such.

[See note on this question beginning on page 1630.]

**Evidence — sufficiency.**

2. The evidence sustains the finding that the building condemned is especially liable to fire and dangerous to life and surrounding structures.

**Nuisance — dilapidated building.**

3. A building in the condition established by the finding is in fact a nuisance, even if that term is not used either in the findings or the statute mentioned.

[See 4 R. C. L. 413.]

**Constitutional law — abatement of building — taking of property.**

4. Abatement of old and dilapidated

buildings which endanger life or property is not a taking of private property for public use for which compensation must be made.

[See 6 R. C. L. 477.]

**Nuisance — dilapidated building — repairs.**

5. Where repairs or alterations can be made lawfully upon a wooden building so as to eliminate the special dangers arising from its condition and location to surrounding property and to persons, such repairs or alterations should be ordered, rather than destruction of the building.

[See 4 R. C. L. 413.]

Headnotes 1–3 by HOLT, J.

APPEAL by administrator from a finding of the District Court for Hennepin County (Leary, J.) that an order of the state fire marshal, condemning and ordering demolished a wooden building located within the fire limits of the city, and belonging to the estate of William Anheier, deceased, was reasonable. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. George M. Bleecker for appellant.

Messrs. Clifford L. Hilton, Attorney General, James E. Markham, and Elias Rachie, Assistant Attorneys General, for respondent:

The Fire Marshal Law is valid and constitutional under the police power which every state exercises under and by virtue of its sovereignty to promote the general welfare.

Fire Dept. v. Gilmour, 149 N. Y. 453, 52 Am. St. Rep. 748, 44 N. E. 177; Ex

parte Fiske, 72 Cal. 125, 13 Pac. 310; Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188; Baxter v. Seattle, 3 Wash. 352, 28 Pac. 537; Knoxville v. Bird, 12 Lea, 121, 47 Am. Rep. 326; Olympia v. Mann, 12 L.R.A. 150, note; Wilson v. Eureka City, 173 U. S. 32, 32 L. ed. 603, 19 Sup. Ct. Rep. 317; American Print Works v. Lawrence, 21 N. J. L. 248; Bowditch v. Boston, 101 U. S. 16, 25 L. ed. 980.

No duty rests upon the state to indemnify persons whose liberties are

curtailed in an exercise of the police power.

*Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 380, 28 L.R.A. (N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; *Nelson v. Minneapolis*, 112 Minn. 16, 29 L.R.A. (N.S.) 260, 127 N. W. 445; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 115 Minn. 460, 51 L.R.A. (N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029; *J. T. McMillan Co. v. State Bd. of Health*, 110 Minn. 145, 124 N. W. 828.

The fire marshal's order must be reasonable.

*Steenerson v. Great Northern R. Co.* 69 Minn. 353, 72 N. W. 713; *Hunstiger v. Kilian*, 130 Minn. 474, 153 N. W. 869; *Sorknes v. Lac Qui Parle County*, 131 Minn. 79, 154 N. W. 669.

Holt, J., delivered the opinion of the court:

In virtue of the authority given by chapter 469, Laws of 1917 (amending the §§ 5140-5146, Gen. Stat. 1913 [Gen. Stat. Supp. 1917, §§ 5140-5146]), the state fire marshal condemned and ordered demolished a wooden building located within the fire limits of the city of Minneapolis and belonging to the estate of William Anheier. Upon a hearing in the district court the order was found reasonable. The administrator of the estate appeals.

The section here assailed as unconstitutional reads: "The state fire marshal may condemn and by order direct the destruction, repair, or alteration of any building or structure which by reason of age, dilapidated condition, defective chimneys, defective electric wiring, gas connections, heating apparatus or other defect, is especially liable to fire and which building or structure, in the judgment of said state fire marshal, is so situated as to endanger life or limb or other buildings or property in the vicinity." Section 5140.

The right to condemn and direct the destruction of property granted by this statute must be sought in the police power possessed by the state. It is contended the power does not extend to a destruction of property without compensation to the owner, unless the property constitutes a nuisance, except perhaps in cases of extreme emergencies. The proposition is not tenable. Regulating or compelling the repair or alteration of buildings that have become a nuisance to persons or surrounding property is conceded by appellant to be a proper exercise of the police power of the state. Whether as a result of the compulsory repair or alteration, or the manner in which it is required to be done, the owner suffers a pecuniary loss, thus depriving him of his property, is of no vital consequence. In principle there would seem to be no room for making a distinction between the right under the police power to compel the alteration of a building, and the right to compel its reduction into lumber, so far as in either case it may result in a loss to the owner.

Appellant also concedes that the police power of the state is properly directed against the abatement of a nuisance, and that no valid objection to legislation enacted for that purpose can be made on the ground that the owner of the nuisance is deprived of property by the abatement. Our statutes define certain conditions and acts to be private or public nuisances, and provide for their abatement or redress. If a structure is so old and dilapidated that it endangers life and limb or buildings and property in the vicinity it is in fact a nuisance, although that word is not applied to it in the act. We deem chapter 469, Laws 1917, a valid exercise of the police power, so far as it relates to condemning buildings found in the condition therein prescribed. Public welfare calls for the abatement of that which endangers life and property. Such

Constitutional law—destruction of dilapidated building.

building-taking of property.

erty for public use, entitling the owner to compensation. The public takes nothing, it simply causes one who maintains upon his land that which unduly endangers life and property to remove it. In *Patterson v. Johnson*, 214 Ill. 481, 73 N. E. 761, it is held that under the power granted cities to abate and remove nuisances was included the power to regulate the removal or construction of wooden buildings within the corporate limits, and in the opinion the following was quoted, with approval, from *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830: "A wooden building is not in itself a nuisance, but when erected in a place prohibited by law, and where it endangers the safety of adjoining property, it may become a nuisance. If the locality and character of such a building do endanger the safety of surrounding buildings, then it may be treated as a nuisance, and a governmental body, having authority to legislate upon such subjects, may prohibit its erection in places where it would endanger the safety of surrounding property."

Appellant contends that the findings of fact are not sustained by the evidence. The court finds "that said building is a frame structure approximately sixty-two years old; that it is composed almost entirely of combustible material; that the sills and supporting members are decayed and weak; that the walls of the building are warped and bulging; that the roof is shingled and the shingles are curled and loose. That said building is in a region densely occupied and populated. That said building, due to its age and composition, is especially liable to fire, and is dangerous to other buildings and property in the vicinity and to human life and limb."

The building is on Marquette avenue and First street, within the established fire limits. It is a low two-story structure, with dilapidated additions on the end and side

vided into small rooms by wooden partitions; the hall leading to those rooms is narrow; the only access is by a narrow staircase. The rooms cannot well be used except as sleeping quarters for transients who must needs put up with the meanest accommodations. The chimney rests on wall brackets. There is no basement, but a small cellar has been excavated wherein is placed a furnace which may be used to heat a part of the building. The wall next to First street is about 6 inches out of plumb. The roof sags in the middle. We consider the findings amply sustained. That other old shacks within the fire limits have so far escaped condemnation by the fire marshal does not tend to prove that the one in question should be immune. That the building still is capable of producing a considerable income for its owner is not decisive proof that it is not dangerous to life or surrounding property. We think the situation presented by the evidence and the findings fully justified the conclusion that the order of the marshal was reasonable.

Evidence—  
sufficiency.

We disagree with appellant's contention that since the court did not, in terms, declare the building a nuisance the order directing it to be torn down cannot be sustained. As already stated, the finding that, due to its age and composition, the building is especially liable to fire and dangerous to property in the vicinity and to human life and limb is equivalent to a finding that it is a nuisance, and one to be removed under the authority of the statute mentioned. We agree with appellant that both the fire marshal, in determining whether a building which is in use or usable shall be torn down, and the court, when called upon to determine whether the order in directing it to be dismantled is reasonable, should exercise great caution. Where re-

Nuisance—  
dilapidated  
building.



pairs or alterations can be made lawfully upon a wooden building so as to eliminate the special dangers arising from its location and condition to surrounding property and to persons, such repairs or alterations should be or-

—dilapidated  
building—  
repairs.

dered rather than a tearing down of the building.

In this case, however, we think the record sustains the conclusion of the learned trial court that the fire marshal's order was reasonable and should be carried out:

Affirmed.

## ANNOTATION.

### Validity of statute requiring the tearing down or removal of a building.

It is held in the reported case (*YORK v. HARGADINE*, ante, 1627) that the state may, by statute, provide for the destruction of buildings in certain circumstances.

A statute providing that, when the mayor and aldermen of any city or the selectmen of any town, after due notice to the owner of any burnt, dilapidated, or dangerous building, shall adjudge the same to be a nuisance to the neighborhood or dangerous, they may cause it to be removed, was held constitutional in *Swett v. Sprague* (1867) 55 Me. 190.

A statute conferring upon the state fire marshal power to order buildings to be repaired, torn down, demolished, materials removed, and all dangerous conditions remedied and abated, where it appears that, by reason of age and dilapidated conditions, defective or poorly installed electric wiring, or equipment, defective chimneys, defective gas connections, defective apparatus, or for any other cause or reason, the building is especially liable to fire, and provide for appeal to the district court from the decision of the state fire marshal, is not unconstitutional as depriving persons of property without due process of law. *Runge v. Glerum* (1917) 37 N. D. 618, 164 N. W. 284.

Nor is such a statute an unconstitutional interference with the local government of cities and villages; and it

is, therefore, not invalid for this reason. *Ibid*.

But in case of a statute providing for the destruction of any building which shall have become dangerous or insecure, upon the order of a court, it has been held that the statute must make provision for notice to the owner of the building, and an opportunity to be heard in the proceeding for the destruction of the property, in order to afford due process of law. *Re Brooklyn* (1895) 87 Hun, 54, 33 N. Y. Supp. 869. The fact that notice was given to the owner in the particular case was held insufficient to meet the difficulty that, to answer the requirements of the Constitution, the statute itself must confer the right to a notice.

A statute conferring upon the state fire marshal power to make an inspection of buildings and, in certain cases, order their destruction, vests in the state fire marshal the primary duty of determining whether the premises are dangerous; and it is only when the trial court is convinced that the marshal has abused his discretion that his judgment will be interfered with. *Runge v. Glerum* (N. D.) supra.

The power to order the destruction of buildings erected in violation of statute has not been considered herein.

W. A. E.

THOMAS KEARNEY et al., Plffs. in Err.,  
v.  
CHARLES WEBB.

*Illinois Supreme Court — April 19, 1917.*

(278 Ill. 17, 115 N. E. 844.)

**Gaming — recovery of money seized by police official.**

1. A police official who, in a raid of a gaming house, takes from employees money furnished by the proprietor to finance the games, cannot defeat an action by such proprietor to recover the money by setting up the illegal contract under which the money was delivered to the employees.

[See note on this question beginning on page 1635.]

**Appeal — directed verdict.**

2. Where the trial court directed a verdict for plaintiff the reviewing court must consider the facts most favorable to defendant.

[See 2 R. C. L. 198.]

**Parties — plaintiff — action to recover money.**

3. The proprietor of a gaming house does not lose title to money turned over to his employee to finance the game, so as to prevent his maintaining an action to recover it from a stranger who wrongfully takes possession of it.

[See 20 R. C. L. 665.]

**Assumpsit — action to recover money advanced to finance game.**

4. The proprietor of a gaming house, whose employee refuses to return money advanced to him to finance the game, but which has not been used for that purpose, may maintain an action against him for money had and received.

[See 2 R. C. L. 778-780.]

**Gaming — recovery of money from stakeholder.**

5. One who has wagered money

may recover it from the stakeholder before it has been turned over to the other party to the wager.

[See 12 R. C. L. 765, 766.]

**— recovery on contract.**

6. A party to a gaming contract cannot recover profits or gains made in the carrying out of such illegal contract, or recover in any way directly upon the instrument.

[See 12 R. C. L. 767.]

**Assumpsit — when lies.**

7. One can recover in assumpsit only where the other party has money belonging to him which, in equity and good conscience, he ought not to withhold.

[See 2 R. C. L. 778.]

**— to recover money seized by police.**

8. Assumpsit lies in favor of the proprietor of a gaming house, to recover from a police official money seized in a raid of the house, which the proprietor was using to finance the games, if the prosecutions for violations of the criminal laws have terminated.

[See 2 R. C. L. 778; 12 R. C. L. 745.]

ERROR to the Appellate Court, Fourth District, to review a judgment reversing a judgment of the Circuit Court for St. Clair County (Crow, J.) in plaintiffs' favor, in a suit to recover possession of property alleged to have been wrongfully taken from them by defendant. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. C. E. Chamberlin, August Barthel, James A. Farmer, and Louis Klingel for plaintiffs in error.

Messrs. Dan McGlynn and T. M. Webb for defendant in error.

Duncan, J., delivered the opinion of the court:

Thomas Kearney and Henry Becker, plaintiffs in error, sued defendant in error in assumpsit in the cir-

cuit court of St. Clair county. The declaration consists of the common counts only, with this bill of particulars: "This suit is brought to recover from the defendant the sum of, to wit, \$2,000, with lawful interest from the 18th day of January, A. D. 1913, to date, which said sum is the property of the plaintiffs, and which defendant took from the possession of the plaintiffs, or their agents, on, to wit, the 18th day of January, A. D. 1913, in a certain building known as 126 West Broadway, in the city of East St. Louis, and which said sum the defendant has since said date wrongfully and unlawfully withheld from the plaintiffs, and still unlawfully withholds, and has refused, and still refuses, to return same to the plaintiffs, although requested so to do."

Defendant in error pleaded non-assumpsit. At the close of plaintiffs in error's evidence, and again at the close of all of the evidence, defendant in error moved the court to instruct the jury to find a verdict in his favor, but the court refused so to do. Plaintiffs in error then asked the court to direct a verdict for them in the sum of \$1,536.75, which the court did, and entered judgment accordingly. On appeal to the appellate court for the fourth district, the judgment of the circuit court was reversed, and the cause was remanded, but on reconsideration the appellate court changed its order and reversed the judgment, without remanding. The cause has been brought to this court for review by certiorari.

The trial court having given judgment on a directed verdict, the facts to be considered by us must be those most favorable to defendant in error. Those facts, as recited by the appellate court, are, briefly, that plaintiffs in error on and prior to January 18, 1913, conducted a gaming house in the basement of the building at said number in East St. Louis, in violation of the statutes of this state. For that purpose there were in said room a large

and a small gaming table, at which was played the game called "craps." Plaintiffs in error had employed John Schneider, John Maguire, and a man by the name of Rosenberg, who had charge of and operated the gaming tables. On said date plaintiffs in error gave to their said employees \$1,600 in silver, contained in three sacks, to be used by them "to bank the crap game." Maguire and Schneider stationed themselves at each end of the large table with \$600 each of the money, and Rosenberg had \$400 of the silver at the small table, and those parties conducted the game at their several stations. They began the games that afternoon, and continued them for more than an hour. One hundred persons or more were crowded around and betting at the tables; the bets running from 25 cents to \$4. At about 4 o'clock P. M. said employees had lost about \$60 of the money so furnished them by plaintiffs in error. About that time a raid was made on the gaming house by police officers under the direction of defendant in error, as the state's attorney of said county, and the tables and other paraphernalia used by the employees in conducting the game, and the money that had been furnished them therefor, or what remained of it, were seized by the officers. The money was delivered in said sacks to the state's attorney, who counted it, and found it to amount to \$1,536.75. He took charge of the money, and has refused to return it at all times on demand of plaintiffs in error, who had paid their fines, and made demand for the money after all intended prosecutions for violations of the statute for gaming and keeping gaming houses at said place had been concluded.

It is argued by defendant in error that when plaintiffs in error turned the money in question over to their employees to run the games, they parted with all title and right to the money, and that it became the money of the gamekeepers; that they could neither sue for and re-

Appeal—directed  
verdict.

such delivery by any legal or equitable proceedings, nor maintain any action at law or equity against defendant in error, who took the money, not from plaintiffs in error, but from their said employees. Defendant in error's position cannot be sustained under the law and the facts. When plaintiffs in error delivered the three sacks of silver to their said employees, and put them in charge of the room and the gambling tables and other paraphernalia in use for the said business, with directions to conduct or manage the gambling room and the games to be conducted there, the agents did not take title to the money, the room, the tables, or any of the other paraphernalia to be used in connection with the gaming to be there conducted. The silver money in the sacks was just as much a necessity to conduct the gaming to be done there as were the tables and other paraphernalia. The money was delivered to them in bulk, in sacks, and was kept in bulk, unmixed with the money of the employees, and for the purpose of conducting a crap game, and for no other purpose. They had no right or authority to use it for any other purpose. The tables and other paraphernalia were placed under their charge for the same purpose. They took the same right and title to the money that they did to the other personal property there,—nothing more, nothing less,—the right to possess and use it for the business which they had been employed to manage and control. They had no interest in the business in which they were employed, or in the profits thereof. They shared no profits or losses, and there were no profits or gains on that day. They were simply paid employees. The money taken by the officers was a part and parcel of the money so delivered to said employees. The very moment those employees should have undertaken to divert the money placed in their hands for use in that gam-

Parties—plaintiffs—action to recover money.

appropriate it to their own personal use, a right of action, on demand, would have accrued to plaintiffs in error against such employees for money had and received. *Morgan v. Groff*, 4 Barb. 524; *Klock v. Brown*, Ann. Cas. 1914D, 48, and cases cited in note (172 Mich. 379, 137 N. W. 636).

Plaintiffs in error also had the legal right to repudiate the illegal contract or direction to their employees to use the money for gambling, if done before it had been used for the illegal purpose, and to maintain a suit directly against the agents for money had and received in case they refused to return the money on demand. *Tyler v. Carlisle*, 79 Me. 210, 1 Am. St. Rep. 301, 9 Atl. 856; *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98. It is a well-established rule of law that where a party delivers money to another party, to bet for him upon an election or a horse race or other such event, and his agent makes the bet for him and deposits the money with the stakeholder, or where the party himself makes such a bet and deposits his money with a stakeholder, he may retract his illegal act, and, on demand of the stakeholder at any time before the money is delivered to the other party, recover from the stakeholder the amount so deposited on the common counts for money had and received. Permitting recovery in such a case is not a recognition or sanction of the illegal contract. It is simply a recognition by the courts of the party's right to repudiate, and to refrain from further recognition of, the illegal contract. The stakeholder in such a case, after demand made upon him for the money, pays the money to the other party, although the winner of the bet, at his peril. *Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787; *Pabst Brewing Co. v. Liston*, 80 Minn. 473, 81 Am. St.

Assumpsit—action to recover money advanced to finance game.

Gaming—recovery of money from stakeholder.

Rep. 275, 83 N. W. 448; McLennan v. Whiddon, 120 Ga. 666, 48 S. E. 201; Stevens v. Sharp, 26 Ill. 404.

It is a well-established rule of law that a party to a gaming contract,

or to any illegal contract, cannot recover profits or

gains made in the carrying out of such illegal contract, or recover in any way directly upon the illegal contract, against the other party, whether agent or not. The reason for the rule is that to allow such a recovery the court would be lending its aid and sanction to such illegal contract. Where any party seeks a recovery on such a contract by suing directly thereon, or brings an action of account against the other party to the illegal contract to recover for his money and profits embarked and gained in the carrying out of such illegal contract, courts of law and equity will refuse to aid either party in such recovery because they are both equally culpable, and the courts will leave them where it finds them, without giving aid to either party. In such cases the parties rely on the illegal contract for recovery, and in such cases only are they said to be in *pari delicto*. The cases of Bishop v. American Preservers' Co. 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765, and Shaffner v. Pinchback, 133 Ill. 410, 23 Am. St. Rep. 624, 24 N. E. 867, relied on by defendant in error, belong to that class.

The appellate court erred in holding that the plaintiffs in error are prohibited by law from having the

aid of the courts to restore to them their money in this case. They proved

their title to the money without relying on the illegal contract in question,—i. e., they made out completely under their declaration, without even a reference to the illegal contract, their *prima facie* case. They used two of their said employees as their witnesses, and there is no claim to the money in question by anyone except the plaintiffs in error.

It was the defendant in error himself who introduced the proof of the illegal contract, and relied thereon for his defense. He cannot be permitted to rely on the illegal contract for a defense. Clarke v. Brown, *supra*.

It is also insisted by defendant in error that the action in *assumpsit* for money had and received is in its nature an equitable action, and that it is contrary to the principles of equity to permit plaintiffs in error to recover under the facts in this case. It is true

that such action is equitable in its nature, and that a plaintiff in such action can only recover where the defendant has money of the plaintiff which in equity and good conscience he ought not to withhold from the plaintiff. The facts here show just such a case. In determining the equities in such a case, the respective rights of the parties in the suit to the money are only to be considered. If the money is found to belong to the plaintiff, and the defendant shows no right thereto whatever, courts will not go back to inquire by what unconscionable or illegal methods the plaintiff obtained it, or to what illegal purposes he had, in other transactions, employed the use of it. The subject of recovery in this case—money—is not of the obnoxious class of property which the law condemns, but is of the harmless and moral class, that cannot be condemned or destroyed by the state under any statute. Glennon v. Britton, 155 Ill. 232, 40 N. E. 594. The money can serve the state, as evidence or otherwise, in no suit pending or contemplated, as the evidence clearly shows that there is no further suit contemplated in the way of criminal prosecutions, and none pending that grew out of the transactions at said gambling house. Defendant in error has no right to the money or to the possession of it, and does not claim to have, in his official capacity or otherwise. No one of the employees of plaintiffs in error from

*Assumpsit—  
when lies.*

—recovery of  
money seized by  
police official.

whose manual possession the money was taken makes any claim to the money in question. Defendant in error cannot legally make it for them, as he does not represent them, or claim to represent them. When the evidence in the case is properly limited to the legitimate issues, it will be seen that the proof will simply show that the plaintiffs in error have proved their title to the money, and that defendant in error has proved no right or title thereto, and does not even claim any right or title to the money. Under such a showing, how can it be said that the legitimate evidence shows that plaintiffs in error are not equitably entitled to receive the money, or that defendant in error is not in equity and in good conscience bound to return the same to them? When the evidence in the case is properly restricted, plaintiffs in error will not be shown to claim the money or the right to recover it through any illegal contract, as no evidence thereof in such case will appear in the

record. The court, therefore, cannot properly be said to be recognizing or sanctioning any illegal contract or action by permitting a recovery by plaintiffs in error. No court of law or equity has ever denied a recovery to a party simply because he has been a violator of the law, if he can show his right to such recovery without reference to any illegal contract, and without causing the court to recognize or sanction any illegal conduct on his part. There is absolutely no reason, therefore, for saying that an action in assumpsit for money had and received cannot be maintained for the money in question by plaintiffs in error. The action was in every way appropriate. *Highway Comrs. v. Bloomington*, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471.

Assumpsit—to  
recover money  
signed by police.

For the reasons aforesaid, the judgment of the Appellate Court is reversed, and the judgment of the Circuit Court is affirmed.

## ANNOTATION.

**Right to recover money which the plaintiff placed in the hands of an agent, to be used for gambling purposes.**

This note does not include stock jobbing nor dealings in futures, nor does it include cases where the agent has used the money as directed.

The reported case (*KEARNEY v. WEBB*, ante, 1631) rightly decides that money placed in an agent's hands for gambling purposes can be followed by the principal into the hands of a police officer who has seized it.

The law is clear that a principal may sue his agent for money he has placed in his hands to be used for gambling, and which has not been so used. *Morgan v. Groff* (1848) 4 Barb. (N. Y.) 524 (overruling in effect an earlier decision in the same case (1848) 5 Denio, 364, 49 Am. Dec. 273); *Klock v. Brown* (1912) 172 Mich. 379, 137 N. W. 636, Ann. Cas. 1914D, 48; *Kohler v. Rosenthal* (1909) 135 App. Div. 438, 120 N. Y. Supp. 325 (obiter).

Thus, one who gives his agent money to bet with a certain person on an

election may recover the amount from the agent, where he bet it with a person other than the one designated, and lost it. *Morgan v. Groff* (1848) 4 Barb. (N. Y.) 524, supra.

In *Klock v. Brown* (1912) 172 Mich. 379, 137 N. W. 636, Ann. Cas. 1914D, 48, supra, it was held that the plaintiff might recover money given to the defendant to bet on an election, which was not bet.

"If one commissions another to make a bet for him, and gives him money for that purpose, and recalls his authority before the money is used, he has a right of action on demand to recover it back." *Kohler v. Rosenthal* (N. Y.) supra.

The owner of property who has employed the defendant gratuitously to put it up in a lottery, and has handed it to him for that purpose, may recover from him the value of the property which has been lost by the gross care-

lessness of the defendant. *Woolf v. Bernero* (1883) 14 Mo. App. 518, 1 Am. Neg. Cas. 911.

This note does not include cases arising out of gambling partnerships; but it may be said in general that unused original capital may be recalled, and that, while the courts will not, in general, settle the accounts of such partnerships, they may dispose of assets not connected with gambling. Thus, for example, in *Keen v. Price* [1914] 2 Ch. (Eng.) 98, 83 L. J. Ch. N. S. 865, 111 L. T. N. S. 204, 30 Times L. R. 494, 58 Sol. Jo. 495, it was held that a partner in a betting partnership can recover any balance of his

capital which has not been applied in payment of bets, so an account may be ordered for this purpose. In *Watson v. Fletcher* (1850) 7 Gratt. (Va.) 1, it was held in substance that an account between a gambling partnership would exclude gambling matters, but would include matters not connected with gambling, and in *Central Trust & S. D. Co. v. Respass* (1902) 112 Ky. 606, 56 L.R.A. 479, 99 Am. St. Rep. 317, 66 S. W. 421, it was held, upon settlement of the affairs of a partnership for racing horses, that money lost in bets made for the benefit of the firm could not be allowed to the surviving partner. B. B. B.

## RE TRANSFER TAX UPON THE ESTATE OF CHARLES E. ORVIS, Deceased.

EDWIN W. ORVIS et al., Appts.

COMPTROLLER OF THE STATE OF NEW YORK, Respt.

*New York Court of Appeals — February 26, 1918.*

(223 N. Y. 1, 119 N. E. 88.)

### Tax — inheritance — survivorship of joint fund.

1. The right of the survivor under a contract between two partners by which a fund is established, to belong to the partners jointly during life, and to the survivor upon the death of either, for the continuation of the business, is subject to transfer tax under a statute imposing such tax upon a transfer by deed, grant, bargain, sale, or gift, intended to take effect in possession or enjoyment at or after death.

[See note on this question beginning on page 1640.]

### Partnership — contract for continuation fund — enforceability.

2. An agreement between partners to constitute, from undivided profits, a fund for continuation of the business, which shall be the property of the survivor upon the death of either, rests upon mutual and equal consideration, and is enforceable.

### Tax — inheritance — transfer for consideration.

3. Transfers resting upon a valuable and adequate consideration, although within the classification of the Inheritance Tax Law, are not within its intendment, and are not taxable.

APPEAL by the surviving partner et al. from a judgment of the Appellate Division of the Supreme Court, First Department, reversing an order of the Surrogate's Court for New York County, assessing a transfer tax upon the estate of Charles E. Orvis, deceased, and amending the report of the appraiser by adding a certain amount to the amount reported taxable. *Affirmed.*

The facts are stated in the opinion of the court.

he Transfer Tax Law does not impose a tax upon property passing under a contract made for a valuable consideration.

*Blair v. Herold*, 150 Fed. 199, affirmed in 86 C. C. A. 64, 158 Fed. 804; *Birdsall*, 22 Misc. 180, 49 N. Y. App. 450, affirmed in 43 App. Div. 60, 60 N. Y. Supp. 1133; *Re Spaulding*, 49 App. Div. 541, 63 N. Y. Supp. 930, affirmed in 163 N. Y. 607, 57 N. E. 4; *Re Reynolds*, 49 Cal. Dec. 383, affirmed in 169 Cal. 600, 147 Pac. 268; *Viotor, Chrystie, Inheritance Taxn.*; *Re Miller*, 77 App. Div. 473, 78 N. Y. Supp. 930; *Re Thorne*, 44 App. Div. 8, 60 N. Y. Supp. 419, appeal dismissed in 162 N. Y. 238, 56 N. E. 625; *Edgerton*, 35 App. Div. 125, 54 N. Y. App. 700, affirmed in 158 N. Y. 671, 52 N. E. 1124; *Re Hess*, 110 App. Div. 96, 96 N. Y. Supp. 990, affirmed in 187 N. Y. 554, 80 N. E. 1111; *Re Demers*, 84 N. Y. Supp. 1109; *Re Robbins*, 52 Misc. 446, 103 N. Y. Supp. 3; *Re Polhemus*, 84 Misc. 335, 145 N. Y. Supp. 1107; *Re Heiser*, 85 Misc. 5, 147 N. Y. Supp. 557; *Re De Escorza*, 87 Misc. 517, 149 N. Y. Supp. 796. The agreement of January 2, 1911, as a valid contract for a valuable consideration.

*Atty. Gen. v. Clark*, 222 Mass. 291, 1916C, 679, 110 N. E. 299, Ann. Cas. 1917B, 119; *Hamer v. Sidway*, 124 N. Y. 538, 12 L.R.A. 463, 21 Am. St. Rep. 693, 27 N. E. 256; *St. Mark's Church v. Teed*, 120 N. Y. 583, 24 N. E. 1014; *Emery v. Wilson*, 79 N. Y. 78. The agreement of January 2, 1911, by its express terms, gave to Edwin W. Orvis, and vested in him at the time of its execution, the two funds, if he survived his brother; and even if voluntary (which is not the fact), the funds are not taxable.

*Hiles v. Fisher*, 144 N. Y. 306, 30 L.R.A. 305, 43 Am. St. Rep. 762, 39 N. E. 887; *Blair v. Herold*, supra; *Re Willey*, 166 App. Div. 240, 151 N. Y. App. 79, affirmed in 215 N. Y. 702, 109 N. E. 1094; *Re Thompson*, 167 App. Div. 356, 153 N. Y. Supp. 164, affirmed in 217 N. Y. 609, 111 N. E. 101; *Re Dalsimer*, 167 App. Div. 365, 153 N. Y. Supp. 58, affirmed in 217 N. Y. 608, 111 N. E. 1085; *Atty. Gen. v. Clark*, 222 Mass. 291, L.R.A.1916C, 679, 110 N. E. 299, Ann. Cas. 1917B, 119; *McDougald v. Boyd*, 172 Cal. 758, 159 Pac. 168; *Re McKelway*, 221 N. Y. 18,

*Baker*, 88 App. Div. 530, 82 N. Y. Supp. 390, affirmed in 178 N. Y. 575, 70 N. E. 1094; *Re Cory*, 177 App. Div. 871, 164 N. Y. Supp. 956, affirmed in 221 N. Y. 612, 117 N. E. 1065.

The parties had a legal right by contract to provide for survivorship, as they have done, and the state has no right to say that a person is not to do something which he has a legal right to do, so that his property may remain taxable.

*People ex rel. Thurman v. Ryan*, 88 N. Y. 143, 42 Am. Rep. 238; *People ex rel. Keppler & Schwarzmunn v. Barker*, 22 App. Div. 123, 47 N. Y. Supp. 958.

Messrs. Alexander Otis, Schuyler C. Carlton, and Lafayette B. Gleason for respondent.

Collin, J., delivered the opinion of the court:

The appellate division added to the taxable estate of Charles E. Orvis, deceased, the sum of \$443,342.11 under these facts: Charles E. Orvis and Edwin W. Orvis had, on January 2, 1911, constituted the firm of Orvis Brothers & Company for many years. Since December 31, 1903, the liability of each for the joint losses, and the interest of each in the firm assets, were equal with those of the other. The duration of the firm was without limit, subject to dissolution at any time by mutual consent. On January 2, 1911, they signed, sealed, and delivered an agreement reading: "Whereas, it is the desire of Charles E. Orvis and Edwin W. Orvis, founders of the firm of Orvis Brothers & Company, to provide for the continuation of said firm by the survivor, in event of the death of either of them: Now, therefore, it is hereby mutually agreed by and between said Charles E. Orvis and Edwin W. Orvis, that the sum of \$500,000 shall be drawn from the profits and accumulations of said firm, heretofore accrued, and shall be placed to the credit of foundation account, and that such account shall be owned equally (half and half) by said Charles E. Orvis and Edwin W. Orvis; and it is hereby expressly and distinctly agreed by and between the



parties hereto, that in the event of the decease of either of them, the survivor of them shall be the sole owner of the said foundation account, and the heirs of the one deceased shall have no right, title, interest, or claim thereto. And it is hereby further agreed that, to provide against any impairment of said foundation account, an equal amount of \$500,000 shall be placed to the credit of contingent account, and it is expressly and distinctly agreed by the parties hereto that the terms of this agreement, in relation to the said contingent account shall in every respect be exactly the same, as the terms in regard to the foundation account, as hereinbefore stated."

The two funds provided for by the agreement were created, and the firm carried on its business with them as its capital. On June 1, 1914, the agreement creating the firm was renewed and extended for a period to expire on June 1, 1916, and the \$500,000 foundation account was the capital contributed by Charles and Edwin under such renewal or extension agreement. In the contingent account was kept all the business of the firm down to June 1, 1914, and the account was used to liquidate the business of the firm to that date, as in that liquidation nobody was interested except Charles and Edwin. Charles died on March 8, 1915. Between December 31, 1903, and March 8, 1915, the membership of the firm was changed, but the liability and interest, of each, of Charles and Edwin in the two funds remained unchanged. At the death of Charles, the contingent account was intact. The foundation or capital account had been reduced to \$386,644.22. The one half of the two accounts is the sum of \$443,342.11. Edwin took this sum under the agreement of January 2, 1911. The surrogate's court decided that the agreement effected a transfer to Edwin upon the death of Charles, nontaxable because made for a valuable consider-

ation. The appellate division reversed the decision.

The statute authorizing the tax is § 220 of the Tax Law (Consol. Laws, chap. 60), which provides: "A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed: (1)

(2) . . . (3) . . .  
(4) When the transfer is of intangible property, or of tangible property within the state, made by a resident, or of tangible property within the state made by a nonresident, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death. (5) . . . (6) . . .  
(7) . . . Laws, 1911, chap. 732.

Subdivisions 1, 2, and 3 relate to transfers by will or by the intestate laws of this state. Subdivisions 5, 6, and 7 are irrelevant to the instant case.

The intention, nature, and effect of the instrument of January 2, 1911, are neither complex nor obscure. It (a) established the two funds within the capital and accumulated profits of the firm, and (b) provided that upon the death of either member, during the existence of the firm, the survivor should be the owner of the interest of the deceased in the joint assets as comprised in those funds. It did not create the firm, nor did it fix, extend, or affect the period of its existence. The relations of the members to each other as partners, their respective contributions to the capital of the firm, or their respective shares in the joint liabilities or profits during the period of the lives of both and the existence of the firm, were not affected by it. During that period each member owned, possessed, and enjoyed his interest as a partner as he would had the agreement

been nonexistent. The appellants assert, and correctly, that the execution of the agreement was not a gift of the interest of either to the other. It did not attempt to interdict either member from withdrawing moneys from either fund, or to compel the survivor to continue the business after the dissolution of the firm by the death of a member. As an instrument of transfer, it was intended to and did take effect in ownership, possession, and enjoyment at the death of the transferor. Such death was the event which effected the transfer and secured to the survivor the possession and enjoyment of the interest or property. The record here presents the clear-cut question: Is the share of a deceased partner in the assets of a firm of two members dissolved by the death received in ownership by the surviving member under a mutual agreement that either surviving the other shall be the owner of the share of the other, taxable under § 220 of the Tax Law?

The agreement rested upon a mutual and equal consideration and was enforceable. The language of the statute, literally adopted and applied, would, manifestly, subject the share to the tax.

Partnership—  
contract for  
continuation  
fund—enforce-  
ability.

The only limitation expressed on the imposition of the tax upon the transfer "by deed, grant, bargain, sale, or gift" is that it be not made "in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death." *Carter v. Craig*, 77 N. H. 200, 52 L.R.A.(N.S.) 211, 90 Atl. 598, Ann. Cas. 1914D, 1179. The nature of the tax (*Re White*, 208 N. Y. 64, 46 L.R.A.(N.S.) 714, 101 N. E. 793, Ann. Cas. 1914D, 75; *Keeney v. Comptroller*, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105) and the language of the statute, considered in its entirety, have convinced us that the legislature did not, however, in-

tend that conclusion. Transfers resting upon a valuable and adequate consideration, although within the classification of the statute, are not within the intendment of it, and are not taxable.

Tax—inheritance  
—transfer for  
consideration.

*Re Baker*, 83 App. Div. 530, 82 N. Y. Supp. 390, affirmed on opinion below in 178 N. Y. 575, 70 N. E. 1094. In certain other jurisdictions it is so enacted. *Clarke v. Treasurer*, 226 Mass. 301, L.R.A.1917D, 800, 115 N. E. 416; *State v. Mollier*, 96 Kan. 514, L.R.A.1916C, 551, 152 Pac. 771. The legislature did not intend that a purchaser who had paid full value for the property transferred should directly or indirectly pay the tax besides. We have not decided, however, that subdivision 4 of the section which we have quoted is applicable only to voluntary transfers or gifts which are within its conditions. *Re Keeney*, 194 N. Y. 281, 286, 87 N. E. 428. Its language does not permit that conclusion. It makes taxable a transfer by bargain or sale when made in contemplation of the death of the grantor or vendor, or intended to take effect in possession or enjoyment at or after such death. The provision discloses a distinction in the legislative mind between a transfer by gift and a transfer by bargain or sale. It enacts, moreover, that transfers by bargain or sale should be taxable, or should not always and indiscriminately be non-taxable. The meaning of that enactment must be ascertained from the context and the object sought to be accomplished by the statute. The statute was not intended to restrict or burden the right of persons to transfer property in all legitimate ways and for all the usual and manifold purposes and objects of trade, commerce, and purchase, or of voluntary transfers or gifts not made in contemplation of the death of the transferor, or intended to take effect in possession or enjoyment after such death. It was intended to tax all transfers which are accomplished by will or the intestate

laws of this state, and those made or incepted prior to the death of the transferor in contemplation of or intended to take effect in possession or enjoyment after his death, which are, in their nature and character, instruments or sources of bounty or benefaction, and which can be classed as similar in nature and effect with transfers by wills or the intestate laws, because they accomplish a transfer of property, donative in effect, under circumstances which impress on it the characteristics of a disposition made at the time of the transferor's death. In all cases in which the value of the consideration for the property transferred, under the statutory conditions, is so disproportionately less than the value of the property transferred that the transfer is, in the light of reason or of ordinary intelligence and judgment, beneficent and donative, the transfer is taxable. The taxability does not depend upon fraud, or an attempt to evade the statute; nor does it depend upon the purpose or inducement of

the transfer; nor does it depend upon the form given the transfer. The law searches out the reality, and is not halted or controlled by the form. *Re Gould*, 156 N. Y. 423, 51 N. E. 287. The measure determining the liability of freedom from liability to the tax is the nature, the essence, the effect of the transfer. If, in truth, it in effect bestows, under the statutory conditions, a bounty or benefaction, and is not a transfer for money's worth, it is taxable.

The application of the statute in the instant case leaves no ground for discussion. The mind does not hesitate in determining <sup>—inheritance—  
survivorship of  
joint fund.</sup> that the transfer was in essence and in effect beneficent and donative, or in classing it as similar in nature and effect with transfers by wills.

The order should be affirmed, with costs.

*Hiscock, Ch. J., and Cuddeback, Hogan, Cardozo, Pound, and Andrews, JJ., concur.*

### ANNOTATION.

#### Personal property passing under mutual survivorship agreement as subject to transfer or succession tax.

- I. In general, 1640.
- II. Statutes taxing transfers in contemplation of death, 1642.
- III. Joint bank accounts, 1644.

##### *I. In general.*

Property passing under agreements between partners for vesting in the survivor certain property of the partnership has usually been held taxable, as was held in the reported case (*RE ORVIS*, ante, 1636). Thus, the agreement of two partners to the effect that, upon the death of either, his interest in the good will of the business should be deemed to be of no value, does not prevent the state from ascertaining whether such good will has a market value, and from assessing a tax upon the value so ascertained, against the surviving partner, or other persons who are the beneficiaries thereof. *Re*

*Halle* (1918) 103 Misc. 661, 170 N. Y. Supp. 898; *Re Cohen* (1918) 170 N. Y. Supp. 156. An agreement between partners that the survivor should have the right to purchase, and should purchase, the stock of the other at a certain specified price, was held not to limit the state in assessing a transfer tax to the price agreed upon, but that the state might appraise the stock at its actual value. *Re Cory* (1917) 177 App. Div. 871, 164 N. Y. Supp. 956, affirmed in (1917) 221 N. Y. 612, 117 N. E. 1065. The interest of a decedent in the good will of a partnership which passed to the surviving members thereof by the death of the decedent, under an agreement that in the event of the dissolution of the co-partnership by reason of the death of any member the good will of the business and the right to use the firm

name, etc., should belong to and become the property of the survivors, without any compensation, and should form no part of the assets of the firm, is taxable, even though the agreement was for a valuable consideration. *Re Hellman* (1918) 172 N. Y. Supp. 671.

In *Brown v. Atty. Gen.* (1898) 79 L. T. N. S. (Eng.) 572, there was held a taxable succession upon the interest of a father which vested in his son, upon the father's death, under an agreement between them, upon entering into a partnership, that if the father should die the whole capital should go to the son, who was to give to his father's executors a bond sufficient for payment of a certain amount, and, if the son should die, the father was to have the entire business and capital, but was to pay the executors of the son a stipulated amount. The English Succession Act of 1853 (16 & 17 Vict. VI. chap. 51) provided as follows: "Section 2. Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this act . . . shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition of devolution a succession." The Earl of Halsbury, Lord Chancellor, in holding the property which vested in the son subject to the tax, states that, looking at the whole circumstances and the provisions in the partnership agreement, the father was actuated by a desire to provide, in the event of his death, for his son. In consequence the son must be liable to duty, because it is his father's provision for him. Nothing is said about the provision in the agreement looking to the contingency of the death of either.

In *Re Reimers* (1919) 107 Misc. 322, 176 N. Y. Supp. 430, the two members of a partnership contributed, as special partners, a specified sum to a limited partnership, under an agreement that, upon the decease of any member of the original partnership, the survivor shall "have the benefit and shall

assume the burden of all the rights and liabilities of a deceased member of the firm." The interest in the limited partnership which passed to the survivor of the original partnership was held subject to the tax.

But the transfer to the surviving partner of the good will of the partnership business upon the death of one of the partners, under an agreement that upon the death of any of the partners the surviving partner or partners should have the exclusive right to use the firm name, has been held not to be a transfer taxable, under the statutory provisions taxing transfers by deed, grant, bargain, sale, or gift, intended to take effect in possession or enjoyment at or after death. *Re Borden* (1916) 95 Misc. 443, 159 N. Y. Supp. 346.

The United States Revenue Act of June 13, 1898 (30 Stat. at L. 448, chap. 448, Comp. Stat. § 6144, 4 Fed. Stat. Anno. 2d ed. p. 185) making subject to a duty tax, personal property, or any interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment at or after the death of the grantor or bargainor, to any person or persons, was construed as applying only to deeds, etc., without consideration, and, as thus construed, the interest passing to a son under a partnership agreement with his father, by which the son, upon the death of the father during the term of the partnership, became vested with the father's interest for a recited consideration, was held to be not taxable in *Blair v. Herold* (1907) 150 Fed. 199, affirmed in (1908) 86 C. C. A. 64, 158 Fed. 804.

A case involving an agreement somewhat similar to that involved in the reported case (*RE ORVIS*, ante, 1636), although not a partnership agreement, is *Re Spring* (1912) 75 Misc. 586, 136 N. Y. Supp. 174, where it was held that the half interest in mortgages, which were assigned to a mother and daughter by instruments containing provisions that the survivor of the two assignees should become the absolute owner, and neither should have the power to affect the

rights of the last survivor, and in others assigned by instruments, stating that the security should be held by the party and the survivor of them, was taxable under the provision of the Transfer Tax Act, taxing transfers intended to take effect in possession or enjoyment at death. It is stated that by the agreement and transfer the decedent took an interest in the mortgages which can be likened to an intermediate estate; while the survivor took a remainder under the assignment which thus amounted to a transfer, intended to take effect in possession or enjoyment on the death of one of the joint tenants.

In *Re Pitou* (1913) 79 Misc. 384, 140 N. Y. Supp. 919, decided before the statute subsequently referred to, upon the theory that there was no joint tenancy in mortgages and bonds which had been transferred to husband and wife, and the survivor of them, with habendum to them and the survivor of them, to their assigns, and to successors, legal representatives, and assigns of each survivor, it was held that the part of these securities owned by the husband was taxable upon his death, as within the statute taxing transfers intended to take effect in possession or enjoyment at death. In the assignment of three of the mortgages there was a provision that it was the intention that the survivor of the said husband and wife should become the absolute owner of the bond and mortgage, and that neither the husband nor wife should have the power to affect the rights of the survivor thereof.

In most instances mutual survivorship agreements have been of such a nature that they have been held to create a joint tenancy, and it is a general theory that the interest going to the survivor upon the death of the cotenant passes as an incident to the estate, and is not a taxable transfer. *Re Dalsimer* (1915) 167 App. Div. 365, 153 N. Y. Supp. 58, affirmed in (1916) 217 N. Y. 608, 111 N. E. 1085. This is held true, regardless of the proportion in which the cotenants contributed to the estate. *Ibid*.

But where the statute expressly

makes the vesting in the survivor of a joint tenancy of the entire estate upon the death of the other, a taxable transfer, it has been held that personal property that was vested in the joint tenancy before the enactment of the statute, under an agreement that the survivor should have the entire amount should the agreement be in force at the death of either, may be taxed upon the subsequent death of one to the extent of one half the value thereof. *Re McKelway* (1917) 221 N. Y. 15, L.R.A.1917E, 1143, 116 N. E. 348. Similar decisions appear under this statute in *Re Teller* (1917) 178 App. Div. 450, 165 N. Y. Supp. 517, appeal dismissed in (1918) 223 N. Y. 565, 119 N. E. 1081; *Re Moebus* (1917) 178 App. Div. 709, 165 N. Y. Supp. 887; *Re Horler* (1918) 180 App. Div. 608, 168 N. Y. Supp. 221, in cases of mortgages and joint bank accounts held by two persons as joint tenants. And the same is held with reference to a joint certificate of deposit, in *Re Hauser* (1917) 166 N. Y. Supp. 1079. The contrary decisions of surrogates' courts in *Re Maguire* (1917) 99 Misc. 466, 165 N. Y. Supp. 1067, and *Re Teller* (1916) 161 N. Y. Supp. 1110, cases involving joint bank accounts, seem to be overruled by the foregoing decisions. The statute involved in the foregoing New York cases was enacted in 1915 (Laws 1915, subd. 7, chap. 664) after the date of many of the decisions from that state set out in the present note.

## *II. Statutes taxing transfers in contemplation of death.*

In the absence of a statute expressly taxing joint tenancies, the creation of a joint tenancy by the owner of personal property between himself and another, with all the incidents of a joint tenancy, particularly that of survivorship, does not, upon the death of the owner and the consequent vesting of the property in the surviving joint tenant, amount to a gift intended to take effect in possession or enjoyment after death, and is, therefore, not taxable under a statute taxing such gifts. Thus, stocks and bonds owned by a husband and deposited by

him with a trust company in a joint account for himself and wife, the husband and wife thereafter signing a writing directed to the trust company and requesting that all securities and money then held or thereafter received by the trust company for their account should be held for the joint account of the husband and wife, acting jointly and severally as joint tenants, and not as tenants in common, with all the rights that such joint and several relations can confer, and particularly with the rights to each, at any time, to withdraw or otherwise dispose of the same, and, upon the death of either, the survivor to be the sole owner of the securities and money remaining to the credit of the account, pass to the wife upon the death of the husband by virtue of the contract, and are held not to be a taxable transfer under a statute taxing gifts intended to take effect in possession or enjoyment after the donor's death. *Re Dalsimer* (1915) 167 App. Div. 865, 153 N. Y. Supp. 58, affirmed in (1916) 217 N. Y. 608, 111 N. E. 1085. Bonds and mortgages purchased with the husband's money, made payable to husband and wife jointly, and others made payable to the husband and assigned by him to himself and wife, were held not taxable to the wife on the death of the husband, in *Re Thompson* (1915) 167 App. Div. 356, 153 N. Y. Supp. 164, affirmed in (1916) 217 N. Y. 609, 111 N. E. 1101, although the assignment was not recorded until after the decedent's death, but the mortgages were delivered to the wife during the lifetime of the husband and were in her possession at the time of his death. It is stated that, in the absence of evidence to the contrary it must be presumed a right of survivorship is created when the security is taken which, upon the death of the husband, is not taxable. This case was followed in *Re Keil* (1915) 91 Misc. 667, 155 N. Y. Supp. 824, and a bond secured by a mortgage, and a certificate of deposit purchased with money earned by the joint industry of husband and wife, and standing in their joint name, were held not

taxable as to any part thereof upon the death of the husband, the court stating that, even if there had been no evidence of the source of the money, the same result would obtain. Where there was no evidence of the ownership of the money which was loaned on bonds and mortgages executed in favor of husband and wife, and "the survivor of them," or of any agreement between the husband and wife limiting the interest which each of them legally took under the bonds and mortgages, the same are not taxable to the wife upon the death of the husband. *Re Teller* (1916) 161 N. Y. Supp. 1110. It seems that a different decision is required under the New York statute referred to above, subd. I.

A conveyance in pursuance of an antenuptial contract of property to the wife is not a transfer taxable under a statute taxing transfers of property made in contemplation of death, or intended to take effect in possession or enjoyment at the death of the transferor, although, on the next day, the woman transfers the stock in trust to her intended husband under an agreement by which he is to hold the same, and that the property shall vest in the survivor. *Re Miller* (1902) 77 App. Div. 473, 78 N. Y. Supp. 930.

In some cases involving a joint tenancy created by joint contributions by both parties, the joint contribution is emphasized, and it is held that in that situation there is no taxable transfer. Thus, the interest in bonds and mortgages held in joint tenancy, passing to the survivor upon the death of one of the tenants, is not subject to transfer tax, where the joint tenants each contributed to the purchase of the property. *Re Heiser* (1913) 85 Misc. 271, 147 N. Y. Supp. 557.

On the contrary, where corporate stock is transferred by the owner thereof to himself and another as joint tenants, by way of a gift to take effect at the death of the donor in case the other joint tenant survives, and a new stock certificate is issued and delivered to the other, and remains in his possession until the death of the donor, the transfer is taxable under

the statutory provisions taxing gifts intended to take effect in possession or enjoyment at or after death, in *Re William B. Dana Co.* (1914) 164 App. Div. 45, 149 N. Y. Supp. 417, affirmed in (1915) 214 N. Y. 710, 108 N. E. 1112.

As to whether the creation of a joint bank account, and the consequent vesting of the entire amount in the survivor, is a transfer intended to take effect at death, see *infra*, III.

### III. Joint bank accounts.

Where money belonging to one person is deposited in a joint bank account to the credit of himself and another, with the provision that either or the survivor may draw thereon, it is the general theory of some cases that the money thereby becomes the joint property of the persons, and, upon the death of the depositor, vests in the survivor by virtue of the joint tenancy, and is not a taxable transfer. *McDougald v. Boyd* (1916) 172 Cal. 753, 159 Pac. 168; *Re Stebbins* (1907) 52 Misc. 438, 103 N. Y. Supp. 563; *Re Graves* (1907) 52 Misc. 433, 103 N. Y. Supp. 571. Some statutes expressly provide that money deposited in a bank in a joint account becomes the property of the persons in whose names it is deposited as joint tenants. Under such a statute, money belonging to a husband and deposited in a bank to the joint account of himself and wife, both of whom sign an agreement that it shall be payable to either during their joint lives, and shall belong absolutely to the survivor of them, has been held to become the property of the husband and wife as joint tenants, and, upon the death of the husband, the wife is held to take by virtue of her estate originating at the time of the creation of the joint tenancy, and there is, therefore, no taxable transfer under a statute which does not purport to tax the right accruing to a surviving joint tenant upon the death of his cotenant. *McDougald v. Boyd* (Cal.) *supra*; *Re Gurnsey* (1918) 177 Cal. 211, 170 Pac. 402. In some such deposits the parties have expressly agreed to create a joint tenancy, nothing being said as

to survivorship. *Re Gurnsey* (Cal.) *supra* (money deposited belonged to community estate). Under a similar statute, making a deposit in the name of the depositor, and another in form to be paid to either or the survivor of them, the property of such persons as joint tenants, with the right to the whole amount in the survivor, there was held to be no taxable transfer upon the wife, succeeding to such a deposit upon the death of her husband. *Re Tilley* (1915) 166 App. Div. 240, 151 N. Y. Supp. 79, affirmed in (1915) 215 N. Y. 702, 109 N. E. 1094, where the money deposited belonged in part to husband, and in part to wife.

Money deposited to the credit of the depositor "or" another was held not taxable upon the death of the depositor, in *Re Reynolds* (1916) 163 N. Y. Supp. 803. Upon entering the account in the form above stated, the parties signed an agreement reciting that any money which "is now standing to or may be hereafter deposited to the credit of account No. 495, . . . shall be especially set aside and made subject to the provisions of this agreement, that either of us shall have full power at all times to draw all or any part of such money, and that, upon the death of one of us, any money then standing to the credit of said account shall belong to the survivor."

It has been held, however, that where the proof is clear that money belonging to one person was deposited in a joint account of herself and another, with no intention to vest any interest in this other, this fact may be shown, and, upon the death of the other, no transfer tax is assessable against the original owner. *Re Buchanan* (1918) 184 App. Div. 237, 171 N. Y. Supp. 708. The money in question in this case was deposited in four savings bank accounts; two of these accounts were made payable to the original owner, "or" the other person as her attorney, or the survivor; the other accounts omitted the word "attorney," and were payable to the other person or the original owner, payable to either or the survivor of them.

Where a joint tenancy in a bank deposit is created by the deposit to the

joint names of the depositors, the transaction is complete, and does not constitute a gift intended to take effect at or after death. *Re Thompson* (1915) 167 App. Div. 356, 153 N. Y. Supp. 164, affirmed in (1916) 217 N. Y. 609, 111 N. E. 1101; *Re Stebbins and Re Graves* (N. Y.) *supra*. Where a joint tenancy is created by a husband depositing funds to the credit of himself and wife in a joint bank account under circumstances making them joint tenants, in contemplation of the husband's death, and intended to take effect in possession and enjoyment after his death, there is no taxable transfer, under a statute taxing a transfer of property without valuable consideration, in contemplation of the death of the transferor, and intended to take effect at or after such death, where it is not further shown that there was no valuable consideration. *McDougald v. Boyd* (1916) 172 Cal. 753, 159 Pac. 168. See statute referred to in *Re Gurnsey* (Cal.) *supra*.

See II. *supra*, for decisions as to whether the transfer to the survivor, of property other than joint bank accounts, is a transfer in contemplation of death.

A joint deposit made up of sums which appeared to have been previously given by the decedent to his wife was held not taxable in *Re Rosenberg* (1908) 114 N. Y. Supp. 726.

The decisions in the foregoing cases are not based upon the original ownership of the funds making up the joint deposit. In some cases, this fact is held the determinative feature. Money originally belonging to one person, which vests in another who is made a joint depositor with the original owner, upon the death of the original owner, is held subject to the transfer tax. Thus, in *Re Durfee* (1913) 79 Misc. 655, 140 N. Y. Supp. 594, so much as belonged to the husband, of a bank deposit made by the husband and wife in their joint names with the intention that upon the death of one the survivor should come into immediate, absolute, and sole possession of what remains, was held to become transferable to the wife upon

the death of the husband, as a gift to the wife, and taxable under the provisions of the Transfer Tax Law, subjecting to such a tax gifts intended to take effect in possession or enjoyment at or after death. Under a statute making a deposit in the joint names of two persons the property of such persons as joint tenants, it has been held that, where one of the joint depositors originally owned the entire amount, the transfer upon his death to the survivor was subject to the transfer tax, as one intended to take effect in possession or enjoyment at or after death. *Re Reed* (1915) 89 Misc. 632, 154 N. Y. Supp. 247. The courts regard a provision in the statute that it is to be conclusively inferred that both parties intended to vest the title in the "survivor," as requiring this construction, since until death there could be no survivor. A joint account of husband and wife, made up of money belonging to the wife, payable to the order of either, and vesting in the survivor upon the death of either, was held taxable upon the wife's death in *Re Von Bermuth* (1913) 143 N. Y. Supp. 672, on the theory that it was a gift taking effect at death. "To the right which the husband had," says the court, "during the lifetime of his wife, to draw any part of the money from the bank, was added, upon her death, the absolute right of ownership to the amount then on deposit. This latter right he did not have before, and could not have until her death." This decision was rendered by the same surrogate's court which subsequently rendered the decision in *Re Dalsimer* (1915) 167 App. Div. 365, 153 N. Y. Supp. 58, affirmed in (1916) 217 N. Y. 608, 111 N. E. 1085. In *Re Dalsimer*, the money belonged partly to the husband and partly to the wife. This seemingly is the distinction, although no reference is made to *Re Von Bermuth* in this connection.

The interest of the parties is emphasized in *Re Kline* (1909) 55 Misc. 446, 121 N. Y. Supp. 1090, where the court, in holding that the interest of the husband in a joint deposit in a bank, in the joint names of himself and his wife, and payable to either or



to the survivor, is taxable upon the death of the husband, states that from the evidence it appears that it was not the intention of either party to divest himself or herself of the controlling use of this money so long as both lived, and that the accounts were entered as joint accounts so that either could draw money during their joint lives, and that upon the death of either, the deposit would become the absolute property of the survivor. Accordingly, the transfer was held not to have become absolute in the wife until the death of the husband, and the transfer to the wife was, therefore, taxable.

But under this theory, where the joint tenancy is created by contributions of the joint tenants, it is not tax-

able. Thus, where husband and wife have each contributed to a joint account, and have agreed that either of them could draw upon the account, and that the survivor would be entitled to what remained to the credit of the account upon the death of either, the amount remaining to the credit of the account after the husband's death, has been held to pass to the widow by virtue of the agreement entered into between them, and is not a gift intended to take effect in possession or enjoyment at or after death; consequently, is not subject to a transfer tax. *Re Delsimer* (1914) 148 N. Y. Supp. 914.

Some statutes expressly tax the right of the survivor in a joint bank account. See *supra*, I. W. A. E.

## RE SUCCESSION OF ABRAHAM LEVITAN and Wife.

DR. LOUIS LEVY, Appt.

*Louisiana Supreme Court — June 29, 1918.*

(143 La. 1025, 79 So. 829.)

### Physician — charges — ability to pay.

1. It is a matter of common information that physicians and surgeons do not regulate their charges for professional services by any fixed standard of pecuniary value, but, to a certain extent, upon the basis of the ability of the patient to pay, and, on that basis, more frequently than otherwise, perhaps, are but poorly compensated. Where such services are shown to have been of the highest value, in so far as the life and welfare of the patient were concerned, and the charge is neither unreasonable nor inconsiderate, as compared with the financial ability of the employer, it should be allowed by the court.

[See note on this question beginning on page 1648.]

### Evidence — employment — corroboration.

2. The testimony of a physician and surgeon, to the effect that he was employed by the mother of his patient, a married woman, rather than by the patient or her husband, and rendered valuable services, for which he considered the mother able to pay, but

doubted the ability of the husband so to do, is strongly corroborated by the circumstance that the patient, having succeeded, as sole heir to the estate of her mother, hears the testimony, and does not take the stand to question its verity.

[See 10 R. C. L. 887; 21 R. C. L. 412, 413.]

Headnotes by MONROE, Ch. J.

APPEAL by opponent from a judgment of the Civil District Court for the Parish of Orleans, Division "B" (King, J.), dismissing opposition to and

vitan. *Judgment annulled.*

Statement by Monroe, Ch. J.:

Dr. Louis Levy rendered professional services to Mrs. Esther J. Gordon, wife of J. Gordon, and daughter of decedent, from about May 27, 1914, until November or December of that year, during which period he successfully performed a Cæsarian operation upon her. There is no issue here as to the value of the services or the necessity of the operation, in so far as the life and well-being of the patient were concerned; the real question in the case being one of dollars and cents. In July, 1915, the doctor brought suit against Mrs. Levitan and J. Gordon for \$500, alleging that he had been employed by the former and had performed the operation at her request, and that the latter was cognizant of the fact that the services were rendered and of the necessity therefor. The defendants filed exceptions and answers, but the case, for one reason or another towards the last, because of the illness of Mrs. Levitan), was never brought to trial; and, she having died on December 6, 1916, it was hereafter discontinued, following which, on February 19, 1917, the plaintiff therein set up the same claim by way of opposition to the provisional account filed by Mrs. Gordon, who is the executrix and sole heir of her deceased mother. It is shown that opponent had been the family physician of Mrs. Levitan and had no acquaintance with Mr. Gordon, but knew that he was a gentleman of very limited means; that Mrs. Levitan brought her daughter to him and requested him to take charge of her; that on November 16 she called him to her house, where her daughter was having convulsions from kidney trouble; that she was very much excited, and said that she wanted everything done that could be done, and, at her instance, a consultation was had, and the patient was taken to the infirmary, where the opera-

tion mentioned was at once performed; that at the infirmary, after the operation, Mrs. Levitan told opponent to put special nurses on the case, and spare no expense; that opponent was never, at any time, consulted by Mr. Gordon about the case; and that the services were well worth the amount charged. Attention is called to the circumstance that Mrs. Gordon was present in court when the facts thus recapitulated were testified to, and did not take the stand to deny the truth of the testimony. The opposition was dismissed and opponent appealed.

Messrs. Woodville & Woodville for appellant.

Messrs. Edgar M. Cahn, and Joseph Rosenberg, for appellees:

Testimony which seeks to bind the estate of a deceased person is of the weakest kind.

Turgeon's Succession, 130 La. 651, 58 So. 497.

Opponent cannot recover upon any suggestion that Mrs. Levitan is liable because she agreed to pay the debt of a third person.

Gaines's Succession, 45 La. Ann. 1426, 14 So. 251; Edwards's Succession, 34 La. Ann. 228.

Monroe, Ch. J., delivered the opinion of the court:

We are of opinion that the evidence, uncontradicted as it is, and given under circumstances in which it would have been easy and natural for the person most interested to have contradicted it, if she thought that she could conscientiously do so, sufficiently establishes the employment of the opponent by Mrs. Levitan. It is a matter of common information that physicians and surgeons do not regulate their charges by any fixed standard of pecuniary value, but, to a certain extent, base them on the ability of the patient to pay, and, on that basis, more frequently than

Evidence—  
employment—  
corroboration.

Physician—  
charges—  
ability to pay.

otherwise, perhaps, are but poorly compensated. The provisional account filed by Mrs. Gordon shows only the cash collections which came into her hands, up to the date of its filing, amounting to \$9,140.85, against which there are some \$4,000 or \$5,000 of bills, due or paid, from which we infer that the decedent had been engaged in quite an active furniture business. The inventory of the succession property has not, however, been filed in evidence. Considering the case as presented, we find no sufficient reason

for holding that the amount demanded by the opponent is unreasonable, or even inconsiderate.

It is therefore ordered that the judgment appealed from be annulled, and that there now be judgment in favor of the opponent, recognizing him as an ordinary creditor of this succession in the sum of \$500, and directing that he be placed on the account for that amount, with legal interest thereon from November 16, 1914, until paid.

Petition for rehearing denied, November 4, 1918.

### ANNOTATION.

#### Ability to pay as factor in determining reasonableness of charge of physician or surgeon.

- I. Majority rule, 1648.
- II. Minority rule, 1649.
- III. Rule in Pennsylvania, 1650.

##### *I. Majority rule.*

The rule in the majority of the jurisdictions which have passed on the question is that the affluence, financial ability, or pecuniary circumstances of a patient cannot be considered as a factor in determining the reasonableness of a physician's charge for professional services, and evidence to that effect in an action or proceeding is inadmissible.

*Morrisett v. Wood* (1898) 123 Ala. 384, 82 Am. St. Rep. 127, 26 So. 307; *Cotham v. Wisdom* (1907) 83 Ark. 601, 12 L.R.A. (N.S.) 1090, 119 Am. St. Rep. 157, 104 S. W. 164, 13 Ann. Cas. 25; *Robinson v. Campbell* (1878) 47 Iowa, 625; *Morrell v. Lawrence* (1907) 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571, 11 Ann. Cas. 650; *Swift v. Kelly* (1910) — Tex. Civ. Rep. —, 133 S. W. 901.

Thus, in *Robinson v. Campbell* (1878) 47 Iowa, 625, wherein the plaintiff attempted to show, in an action to recover for the value of professional services consisting in a surgical operation on the mother of the defendants, that the affluence and pecuniary condition of the defendants justified the amount of the charge, the court held that the evidence was im-

proper, and that the circumstances of the defendants did not constitute an element in fixing the services, saying: "There is no more reason why this charge should be enhanced on account of the ability of the defendants to pay than that the merchant should charge them more for a yard of cloth, or the druggists for filling a prescription, or a laborer for a day's work. It is true a physician in general practice will often be called upon to treat indigent persons from whom he will not be able to recover the value of his services. He may take this into account and regulate his charges with reference to that fact, just as a merchant may take into account probable bad debts in fixing his per centum of profit upon his goods. But the value of a service depends upon the difficulty of rendering it, and the skill required in its performance, and, sometimes, upon the results accomplished, and not upon the riches or the poverty of the person for whom the service is performed. If the ability to pay determines the reasonableness of a charge, then the richer a man is the more he should pay for any service. No such rule of charge can be recognized or countenanced by the law."

So, in *Swift v. Kelly* (1910) — Tex. Civ. App. —, 133 S. W. 901, an action to recover the value of medical services rendered to the defendant, the

court held that evidence as to the defendant's wealth and ability to pay, as a factor controlling the reasonableness of the physician's fees, was inadmissible, the court saying: "Certainly no court would hold that the value of ordinary labor could be determined by such a test, and upon principle we can see no distinction between such a claim and one of the character now under discussion."

Where the plaintiff, a physician, brought an action to recover on an implied contract the value of professional services rendered to the defendant's son, and in the course of the action offered to prove the affluence of the defendant as a factor in determining the professional fee, the court held that such evidence was inadmissible, and that the plaintiff was entitled to recover only the reasonable value of the services rendered, uncontrolled by the wealth of the defendant. The court said: "He is entitled to a verdict for the reasonable value of his services, although the defendant may be a poor man; he is not entitled to a verdict for more than the reasonable value of his services, although the defendant may be a man of great wealth." *Morrell v. Lawrence* (1907) 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571, 11 Ann. Cas. 650.

In *Morrisett v. Wood* (1898) 123 Ala. 884, 82 Am. St. Rep. 127, 26 So. 307, an action brought by a physician to recover from the defendant, as executor of the patient's estate, compensation for medical services rendered, it was sought to show the value of the estate. The court held the evidence to be inadmissible, since the amount or value of the decedent's estate could shed no light on the value of the plaintiff's services.

In *Cothan v. Wisdom* (1907) 83 Ark. 601, 12 L.R.A. (N.S.) 1090, 119 Am. St. Rep. 157, 104 S. W. 164, 13 Ann. Cas. 25, a proceeding to recover the value of medical services rendered immediately after an accident and while the patient was unconscious, evidence as to the wealth of the patient and the fact that he was a bachelor was held to be inadmissible, since there was no actual contract, but a mere legal fic-

tion implied by the law because of the circumstances, the court saying: "There is a conflict in the authorities as to whether it is proper to prove the value of the estate of a person for whom medical services were rendered, or the financial condition of the person receiving such services, and while the law may admit such evidence as throwing light upon the contract and indicating what was really in contemplation when it was made, yet a different question is presented when there is no contract to be ascertained or construed, but a mere fiction of law creating a contract where none existed, in order that there might be a remedy for a right. This fiction merely requires a reasonable compensation for the services rendered. The services are the same, be the patient prince or pauper, and for them the surgeon is entitled to fair compensation for his time, service, and skill. It was, therefore, error to admit this evidence and to instruct the jury . . . that in determining what was a reasonable charge they could consider the 'ability to pay of the person operated upon.'"

## II. *Minority rule.*

In at least three jurisdictions it is well settled that the financial ability of a patient or his estate to pay is one of the elements to be considered in determining the reasonableness of a physician's charge for professional services rendered. *Czarnowski v. Zeyer* (1883) 35 La. Ann. 796; *Haley's Succession* (1898) 50 La. Ann. 840, 24 So. 285; *Lange v. Kearney* (1889) 21 N. Y. S. R. 262, 4 N. Y. Supp. 14, affirmed without opinion in (1891) 127 N. Y. 676, 28 N. E. 255; *Schoenberg v. Rose* (1914) 145 N. Y. Supp. 831; *Gibson v. Mackay* (1907) 10 Ont. Week. Rep. 1081; *Paquet v. Balcer* (1913) Rap. Jud. Quebec 45 C. S. 202; *Chevallier v. Girard* (1915) Rap. Jud. Quebec 48 C. S. 211. And see the reported case (*LEVITAN'S SUCCESSION*, ante, 1646).

In *Lange v. Kearney* (1889) 21 N. Y. S. R. 262, 4 N. Y. Supp. 14, affirmed without opinion in (1891) 127 N. Y. 676, 28 N. E. 255, an action to recover the value of medical services rendered by the plaintiff to the defendant's son,

the court laid down the rule that evidence of the financial ability or condition of a person is admissible as a factor bearing on the reasonableness of a physician's charge for professional services.

In *Schoenberg v. Rose* (1914) 145 N. Y. Supp. 831, the court followed the rule laid down in *Lange v. Kearney* (N. Y.) *supra*, holding that in an action to recover the value of medical services evidence as to the value of the patient's estate was competent as a proper element entering into the question, what charge should be made by the physician. The court said: "The financial condition of a patient is an element that, it may be assumed, is considered by both physician and patient when the services are contracted for, rendered, and accepted, and may also be considered by the court in determining the reasonableness of the charge; and that element should apply to a case where there is and was no contract, but a mere fiction of the law creating one, else, in a case where services are rendered to an unconscious man who never recovers, the charge against his estate might be so great and unreasonable as to be out of all proportion to the value of the estate. This charge a man who recovers could resist and successfully defend by showing his limited means, and, in the case of an unconscious man who does not recover, such value is an aid to the court in fixing the reasonableness of the claim, whether made against a large or a small estate. Therefore, the evidence as to the value of the deceased's estate was properly allowed and properly taken into consideration, and that, together with the experience of the physician as such, and the nature and difficulty or easiness of the case, and what is considered by him and by other physicians an ordinary or reasonable charge for the services, are the proper elements upon which a judge or jury may act in fixing the value of the services."

In the reported case (*LEVITAN'S SUCCESSION*, ante, 1646), on the question of the reasonableness of a physician's charge of \$500 for professional serv-

ices rendered to the defendant's testatrix, the court held that, in view of the value of the estate, the amount of the fee was not unreasonable, saying: "It is a matter of common information that physicians and surgeons do not regulate their charges by any fixed standard of pecuniary value, but, to a certain extent, base them on the ability of the patient to pay, and on that basis, more frequently than otherwise perhaps, are but poorly compensated."

In *Haley's Succession* (1898) 50 La. Ann. 840, 24 So. 285, in making an allowance for medical services rendered a deceased person on the proceedings for a settlement of the estate, the court held that it was proper to fix the physician's fees by taking into consideration the value of the succession.

In *Czarnowski v. Zeyer* (1883) 35 La. Ann. 796, an appeal from an allowance of \$500 for medical services rendered to the defendant's testator, the court held that the allowance was disproportionate to the decedent's estate and condition in life, his estate being inventoried at \$8,705, and accordingly raised the allowance to \$1,000.

In *Chevalier v. Girard* (1915) Rap. Jud. Quebec 48 C. S. 211, the court held, in an action to determine the value of medical services rendered by the plaintiff physician to the defendant, that regard must be had to the financial and pecuniary circumstances of the patient to determine the reasonableness of a physician's charge.

So, in *Paquet v. Balcer* (1913) Rap. Jud. Quebec 45 C. S. 202, it was held in an action to recover the value of professional services rendered by the plaintiff, a physician, to the defendant, that a charge of \$250 was excessive, regard being had to the pecuniary circumstances of the defendant.

In *Gibson v. Mackay* (1907) 10 Ont. Week. Rep. 1081, the court received evidence as to the custom in vogue in the medical profession of charging fees in proportion to the financial ability of the patient.

### III. Rule in Pennsylvania.

In Pennsylvania, the question has not been passed on by the court of last

resort. Of two decisions of lower courts, treating of the subject, one holds that the ability to pay is not a factor governing the charge of a physician or surgeon, while the other adopts the rule that ability to pay is a factor, and uses the rule to determine the reasonableness of a physician's fee.

In *Mortimer's Estate* (1904) 29 Pa. Co. Ct. 387, in the settlement of a claim of a physician against the estate of a decedent, it appeared that the plaintiff maintained two rates of charging for professional services, a "maximum" rate for the rich, and the ordinary rate for the resident patients. The court held that, while such a custom no doubt existed in the profession, it could not be recognized in a court of law, since the existence of the two rates furnishes the strong-

est evidence, on the question of reasonableness of the charge, that the "maximum" fee was unreasonable and excessive. In *Moyer's Estate* (1912) 49 Pa. Super. Ct. 187, the court held, in a proceeding to determine the claims of a physician for services rendered to a person since deceased, that an award of fifty dollars (\$50) was ample, considering that "the balance of the estate for distribution . . . was small." The court received and considered the testimony of a practicing physician, who testified as follows: "I really would have to make an allowance for poor people always, and I should think that a proper fee for that sort of an operation would be fifty dollars (\$50) for the whole matter. I think that that would be a very proper, reasonable, and right fee."

W. J. K.

ALBERT J. BEROT, Appt.,

v.

ALBERT PORTE.

*Louisiana Supreme Court — March 3, 1919.*

(— La. —, 81 So. 323.)

**Libel — privilege — statement to committee of secret society.**

1. A qualified, not an absolute, privilege, applies in favor of communications to a committee of a secret society engaged in investigating the character and qualifications of an applicant for membership in the order.

[See note on this question beginning on page 1654.]

**Evidence — burden of proof — malice of slanderer.**

2. To recover damages for slander uttered under circumstances of qualified privilege, plaintiff must show malice in fact, or that defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made.

[See 17 R. C. L. 418.]

**Libel — investigation of applicant for secret society.**

3. One who applies for membership in a secret society is charged with notice that his character and reputation will be subjected to investigation, and cannot complain of disclosures made thereat unless he shows that objectionable testimony was giv-

en through actual malice or ill will towards him.

[See 17 R. C. L. 369, 370.]

**— conditions of privilege.**

4. One need not be under legal obligation to speak to be entitled to qualified privilege, but it is sufficient if the duty is social or moral in its nature, and he believes in good faith that he is acting in pursuance thereof, although he is mistaken.

[See 17 R. C. L. 341-343.]

**Appeal — finding on conflicting evidence.**

5. The finding of the jury on conflicting evidence as to whether or not an alleged slanderous statement was in fact made will not be disturbed on appeal.

[See 2 R. C. L. 194.]

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans (Parker, J.) in favor of defendant in an action brought to recover damages for alleged slander. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John D. Nix, Jr., and Ulic Burke, for appellant:

Proof of actual malice is admissible in evidence as in this case, though no charge of actual malice is made in the petition.

Spotorno v. Tourichon, 40 La. Ann. 423, 4 So. 71; Newell, Slander & Libel, 942; 25 Cyc. 496; Root v. Lowndes, 6 Hill, 518, 41 Am. Dec. 762; Botelar v. Bell, 1 Md. 175; Kendrick v. Kemp, 6 Mart. N. S. 500; Miller v. Holstein, 16 La. 389; Daly v. Van Benthuyzen, 3 La. Ann. 69; Billet v. Times-Democrat Pub. Co. 107 La. 751, 58 L.R.A. 62, 32 So. 17; Covington v. Roberson, 111 La. 326, 35 So. 586; Tresca v. Maddox, 11 La. Ann. 206, 66 Am. Dec. 198; Cass v. New Orleans Times, 27 La. Ann. 214.

If imputation be made, the exact language used is immaterial.

Fellman v. Dreyfous, 47 La. Ann. 907, 17 So. 422; Luzemberg v. O'Malley, 116 La. 699, 41 So. 41; Warner v. Clark, 45 La. Ann. 863, 21 L.R.A. 502, 13 So. 203; Spotorno v. Tourichon, 40 La. Ann. 423, 4 So. 71.

Messrs. Friedrichs, Moise, Barksdale, & Barksdale for appellee.

Sommerville, J., delivered the opinion of the court:

Plaintiff sues defendant in damages for alleged slanderous words spoken on two separate occasions. He says that defendant, without cause or provocation, referred to him as being of negro blood; that the statements were slanderous, false, and defamatory; but he does not charge malice, evil intent, or ill will on the part of defendant.

Defendant denied the use of the language attributed to him in the petition, and it was not proved. He claimed that the only occasion upon which he had referred to plaintiff was when he, as a member of the Order of Druids, appeared before the investigation committee of the George Washington Grove of Druids, by request, where the application of plaintiff for admission to the Grove was being considered, and that the communications he there

made were privileged. He denied the second charge of slander, and that was not proved. Only one witness testified to the use of the objectionable statements alleged to have been made on the second occasion, on the street, and that witness was contradicted by witnesses who were present at the time, and who testified on the trial. There was a trial by a jury, a verdict in favor of defendant, and plaintiff has appealed.

The privilege claimed by defendant is not absolute.

It does not belong to that narrow class which is limited to

Libel—privilege  
—statement to  
committee of  
secret society.

legislative, judicial, and other acts of state. But it falls within the class of qualified privileged communications, where the occasion on which it was made rebuts the inference prima facie arising from a statement prejudicial to the character or reputation of plaintiff, and puts the burden on him to prove that there was

Evidence—  
burden of proof  
—malice of  
slanderer.

malice in fact, that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made.

"Although the general rule is that a communication made in good faith on any subject-matter in which the person communicating has a duty is privileged if made to a person having a corresponding interest, and this duty need not be a legal one, but may be only a moral or social duty of imperfect obligation, it has been very clearly stated that no privilege results merely from the fact that a defendant believes that he owes a social duty to give currency to rumors of a libelous character, so that the victim of them may be avoided. Such broad and indefinite duties the doctrine of qualified privilege has not yet been extended to cover." 17 R. C. L. 342.

No attempt was made to prove malice or ill will on the part of defendant, either before, at the time of, or after the meeting of the committee of Druids. The testimony shows that defendant was acting solely in the interest of the order to which he belonged, and to which he owed certain duties, and to which plaintiff applied for membership. Plaintiff knew when he made application that his character and reputation would be investigated, and he submitted himself thereto. He cannot be heard to complain of that investigation, unless he shows that objectionable testimony was given through actual malice or ill will towards him.

**Libel—investigation of applicant for secret society.**

The rule of Mr. Newell in his work on Defamation, Slander, and Libel is quoted in the case of Bayliss v. Grand Lodge, 131 La. 579, 59 So. 996, as follows: "Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication and a right to know and act upon the fact stated, no presumption of malice arises from the speaking of the words, and therefore . . . an [no] action can be maintained in such case without proof of actual malice."

It is held in the case of Gilbert v. Palmer, 8 La. Ann. 130: "Where the declarations of the defendant concerning the plaintiff appear to have been uttered without malice, and under circumstances from which no malice is in law implied, they carry with them no pecuniary responsibility."

The duty under which the party is qualifiedly privileged to make the communication need not be one having the affairs of a legal obligation; but <sup>—conditions of privilege.</sup> it is sufficient if it is social or moral in its nature, and defendant in good faith believed he was acting in pursuit thereof, although in fact he was mistaken.

Only one witness testified to the use of the language charged in the petition; and he was contradicted by another witness for plaintiff, who said that he was present all of the time while the investigating committee was examining defendant, and that he did not use the language alleged, but that he said there was a streak in the family, and that a full investigation should be made. The two other persons present at the meeting, and defendant, testified positively that the language, or its equivalent, was not used. The allegations made in the <sup>Appeal—finding on conflicting evidence.</sup> petition were not proved to the satisfaction of the jury, and their finding will not be disturbed.

The testimony shows that the communication, whatever it may have been, was made by defendant in good faith, without malice, prejudice, or ill will towards plaintiff, to a social or fraternal organization of which defendant was a member, and which plaintiff had applied to be admitted to while the character of the application for membership was being investigated. The statement was privileged, and carried with it no pecuniary responsibility from defendant to plaintiff.

The judgment appealed from is affirmed.

Petition for rehearing denied, March 31, 1919.



## ANNOTATION.

### Libel and slander: privilege of communication in relation to member, or prospective member, of society, other than church.

- I. General rule, 1654.
- II. Communications to society by members, 1654.
- III. Communication by officers, or higher bodies, to local society or members, 1655.
- IV. Statements made by one member to another member, 1656.
- V. Communications before committees, 1657.
- VI. Statements at conference of officers, 1658.
- VII. Member's statement to prospective member, 1658.

#### I. General rule.

Upon the theory that a communication is qualifiedly privileged, if made bona fide by one who has an interest in the subject-matter, to one who also has an interest, or stands in such a relation that it is a reasonable duty, or proper, to give the information, it is held, as a general rule, in accord with the reported case (*BEROT v. PORTE*, ante, 1651), that communications by members, or officers of societies, made in good faith to the society, its members, or committees, concerning members, or prospective members, are qualifiedly privileged. *Wise v. Brotherhood of Locomotive Firemen & Enginemen* (1918) — C. C. A. —, 252 Fed. 961; *Graham v. State* (1909) 6 Ga. App. 436, 65 S. E. 167, second appeal in (1910) 7 Ga. App. 407, 66 S. E. 1038; *Cadle v. McIntosh* (1912) 51 Ind. App. 365, 99 N. E. 779; *Kirkpatrick v. Eagle Lodge* (1881) 26 Kan. 384, 40 Am. Rep. 316; *Holmes v. Royal Fraternal Union* (1909) 222 Mo. 556, 26 L.R.A.(N.S.) 1080, 121 S. W. 100; *Kersting v. White* (1904) 107 Mo. App. 265, 80 S. W. 730; *Ostheimer v. Blumert* (1883) 1 N. Y. City Ct. Rep. Supp. 17; *Hayden v. Hasbrouck* (1912) 34 R. I. 556, 42 L.R.A.(N.S.) 1109, 84 Atl. 1087; *McKnight v. Hasbrouck* (1890) 17 R. I. 70, 20 Atl. 95.

The burden of proving malice, and thus avoiding the privilege, in such cases, is upon the plaintiff. *Graham v. State* (1909) 6 Ga. App. 436, 65 S. E. 167, second appeal in (1910) 7 Ga. App. 407, 66 S. E. 1038; *Cadle v. McIntosh* (1912) 51 Ind. App. 365, 99 N. E. 779; *Kirkpatrick v. Eagle Lodge* (1881) 26 Kan. 384, 40 Am. Rep. 316; *Holmes v. Royal Fraternal Union*

(1909) 222 Mo. 556, 26 L.R.A.(N.S.) 1080, 121 S. W. 100; *Ostheimer v. Blumert* (1883) 1 N. Y. City Ct. Rep. Supp. 17.

#### II. Communications to society by members.

It has been held that a presentment by a member of the Odd Fellows, to a lodge of which both the plaintiff and defendant were members, of charges against the plaintiff, for the purpose of having their truth inquired into and the plaintiff dealt with according to the laws of the order, is prima facie privileged. *Streety v. Wood* (1853) 15 Barb. N. Y. 105.

And it was further held in this case that, if the defendant had probable cause for presenting the charges to the lodge, no recovery could be had against him, whether he was actuated by malice or not. The court stated that in cases of communications addressed to public officers to prevent the appointment of particular individuals to office, and to procure removals from office, or for the redress of grievances, if charges made in them are pertinent, and the officers addressed have power to act in the matter, the doctrine is firmly established that, to maintain an action for a libel founded upon them, it must appear that the charges were made both maliciously and without probable cause; that the action, though in the form of a libel, was in the nature of an action for malicious prosecution, and required the same proof in the respects mentioned to sustain it, and the court stated that they did not feel at liberty to hold that the privilege allowed by law to the communication in the case

at bar was less in extent than the privilege allowed in case of communications to public officers.

And it has been held that a charge against a member of a secret organization, made by another member to the society for the purpose of bringing him to trial before the organization of which they were members, is privileged if made in good faith. *Graham v. State* (1915) 6 Ga. App. 436, 65 S. E. 167. The same conclusion was reached on a second appeal of this case. (1910) 7 Ga. App. 407, 66 S. E. 1038.

And in *McKnight v. Hasbrouck* (1910) 17 R. I. 70, 20 Atl. 95, it was held that where it is the duty of a member, and an official of a medical society, to communicate to the society statements with regard to other members, a communication in the bona fide discharge of this duty is privileged. In this case the defendant's plea, stating that he was a member of a physician's society organized to maintain the honor and dignity of the medical profession, and that the duty was imposed upon him to inform the society of all matters and things relating to members, which, in his judgment, it was necessary or advisable that the society should be acquainted with, and that he wrote the letter complained of in discharge of this duty, and without any malice, or intent to injure the plaintiff, was held good on demurrer, although it did not allege that the defendant made the statements, believing them to be true.

In *Caldwell v. Hayden* (1914) 42 App. D. C. 166, certain statements made by the president of a union of musicians at a regular meeting, concerning another member, were construed as a mere criticism and not actionable, the court stating that the words were uttered at a meeting of the union, in relation to a matter in which all the members were equally interested, and that under the circumstances wide latitude would be tolerated in discussion; that the member criticized, in assuming to serve the union in a certain matter, was subject to reasonable criticism in respect to the work performed, and that the

presumption was that the statement was made under these circumstances, without malice and for the good of the order, unless the contrary could be inferred reasonably from the language itself. The court does not, however, deal specifically with the question of privilege in this case. In *Fawcett v. Charles* (1835) 13 Wend. (N. Y.) 473, however, an incorporated county medical society was held to have no power to expel a member because he had procured himself to be admitted as a member by means of false pretenses concerning his qualifications to practice, and it was accordingly held that a resolution introduced by another member for the purpose of procuring the expulsion of the disqualified member was not privileged.

The facts in *Miller v. Roy* (1855) 10 La. Ann. 231, are not clearly shown, but it was there held that the fact that certain defamatory language was used by the defendant at a session of the grand division of the Sons of Temperance should not be taken into consideration in mitigation of damages. It does not appear whether the plaintiff and defendant were members of the organization, or what the nature of that organization was, and nothing is specifically said as to the matter being privileged.

### *III. Communication by officers, or higher bodies, to local society or members.*

In *Bayliss v. Grand Lodge* (1912) 131 La. 579, 59 So. 996, a communication sent by the Grand Master of a state, upon whom the duty rests to see that the edicts of Masonry are carried out, to lodges within his jurisdiction, warning them against spurious Masonic bodies organized by the plaintiff, was held privileged, where it was not shown to have been actuated by malice. And the phraseology of the communication, referring to the plaintiff's organization as bogus, spurious, and clandestine, and charging him with selling degrees, was held not to show malice.

In *Wise v. Brotherhood of Locomotive Firemen & Enginemen* (1918) — C. C. A. —, 252 Fed. 961, an action against a brotherhood to recover for a libel contained in communications

by the secretary and president to the lodge of which the plaintiff was a member, in which it was stated that the injuries for which he sought payment under a benefit certificate issued by the brotherhood were self-inflicted, and that the claim was an attempt to defraud the brotherhood, it was held that, in the absence from the record of the constitution, it could not be said that the court did not have evidence before it showing that the members addressed had an interest in the subject-matter, and that the occasion and subject-matter were privileged. And the form of the benefit certificate not being in the record, it was held that it could not be said that the statements complained of did not relate to legitimate defenses claimed by the society.

In the *Wise Case*, however, the failure to submit the question of malicious publication to the jury, was held error, there being some evidence that the statements were false, and no testimony by the president that he believed his statements to be true.

In *Burton v. Dickson* (1919) — Kan. —, 180 Pac. 216, motion for rehearing denied in (1919) — Kan. —, 180 Pac. 775, a circular, stating that an officer of a state grange had been suspended and expelled, which the executive committee caused to be printed and distributed among officers and members of subordinate granges, was held qualifiedly privileged, and the evidence in the case was held not to show malice.

And it has been held that a written communication from the president of a fraternal society to members at a certain place, to the effect that the collecting agent of the order at such place was behind in his remittances, and that it had become necessary to withdraw authority from him, and directing the members to pay their dues to another, is qualifiedly privileged, especially where he had threatened to withdraw from the order and take its members with him, so that the society had a right to guard against such threat. *Holmes v. Royal Fraternal Union* (1909) 222 Mo. 556, 26 L.R.A. (N.S.) 1080, 121 S. W. 100. And in

this case the incorporation, in a letter to members of the organization, notifying them of the cancelation of the authority of the collecting agent, and instructing them to pay their dues to another, of a statement that the agent was short in his remittances, was held not evidence of express malice, where the officers of the association ascertained that fact by a thorough examination of the books, and he had threatened suit against the association unless money which he claimed to be due him was paid, and to withdraw from the society and take a large portion of its members with him.

It has been held that the report of a member of a committee of the Grand Lodge of Odd Fellows, stating that the committee had examined the members of the subordinate lodge, and that they were unanimous in their opinion that charges of perjury against the plaintiff were justified, and that his expulsion for that reason was proper, which report was made in accordance with the regular procedure of the lodge, was held conditionally privileged, the circumstances being such as to repel the inference of malice. *Kirkpatrick v. Eagle Lodge* (1881) 26 Kan. 384, 40 Am. Rep. 316.

#### *IV. Statements made by one member to another member.*

A communication by a member of the Odd Fellows to another member of the association, for the purpose of procuring his signature to a presentment by which it was sought to have certain charges investigated, has been held prima facie privileged. *Streety v. Wood* (1853) 15 Barb. (N. Y.) 105.

And it has been held that a member of the Knights of Pythias has such an interest in the character and qualifications of persons seeking admission to that order as will warrant him in communicating to other members of the order, having a like interest, anything that he may know regarding the character, qualification, or fitness of a prospective member, and that a statement regarding such an applicant, made by a member of one lodge of the order to members of another lodge at their place of business, al-

though they were not members of any committee to investigate the fitness of the applicant, if made in good faith and without malice, are privileged. *Cadle v. McIntosh* (1912) 51 Ind. App. 365, 99 N. E. 779. It was held error in this case to direct a verdict for the defendant, there being testimony that the defendant had a private grievance against the plaintiff, and therefore some evidence on which a verdict for the plaintiff could rest. The court said: "It appears from the evidence that appellee had come 20 miles to impart to members of Orleans Lodge the information that appellant was a drunkard, a gambler, and a thief. The fact that the information was volunteered is no evidence of malice, if it was his duty to volunteer it. He may have been influenced in his conduct by the highest motives, a love of the order, and a laudable desire that none except men of good morals and of the highest character for honesty should become members; but there was evidence from which the jury would have been justified in finding that he acted from a different motive. Appellee told the gentlemen with whom he conversed of his own private grievance against appellant. He said that appellant, on one occasion, in company with two others, had waylaid him and beaten him. It may be that this treatment by appellant engendered in the breast of appellee feelings of resentment and hatred against him, and that these feelings were still harbored, and furnished a motive for the charges made. If the case had been submitted to the jury under proper instructions on the subject of express malice, it might have found that appellee made the charges complained of, not from a sense of duty, but from personal resentment, and that the object of the conversation was to prejudice appellee because of such personal resentment. There is some evidence in the record on which a verdict for plaintiff could rest."

It has been held that where plaintiff, by her own evidence, conclusively shows that a communication was qualifiedly privileged, and offers no

proof whatever of express malice, a nonsuit should be entered, notwithstanding the fact that the defendant failed to allege in his answer that the communication was a qualifiedly privileged one. *Kersting v. White* (1904) 107 Mo. App. 265, 80 S. W. 730. The questions in this case, whether or not the circumstances under which the actionable words were communicated made them privileged, and, if so, whether the defendant acted in good faith, were held questions of fact for the jury, and a demurrer to the plaintiff's evidence was held properly denied.

#### *V. Communications before committees.*

It will be observed that in the reported case (*BEROT v. PORTE*, ante, 1651), a communication concerning an applicant for membership in a secret society, made without malice by a member to an investigating committee, was held qualifiedly privileged.

In *Pate v. Trollinger* (1916) 113 Miss. 255, 74 So. 131, where a statute defined what should constitute defamatory matter, and provided that a plea, exception, or demurrer should not be sustained to preclude a jury from passing upon the evidence, there was held to be error in holding the communications privileged, and in striking out the evidence of certain witnesses which tended to show that the defendant, a member of a lodge, who had had charges preferred against him, while talking with other members of the lodge who were on a certain committee, spoke the words complained of by the plaintiff, who was also a member of the lodge, the court stated that the record did not disclose fully the circumstances, or show the charge preferred, nor that the committee was taking evidence on the charge, and that, if this was assumed, still it would be a question for the jury to determine whether the statements were necessary under the circumstances, and whether they were made maliciously, and that the mere fact that two men belong to the same fraternal organization, and that such organization is trying to settle some difference between them, does not au-

thorize one of the parties to denounce the other as a perjurer, even to fraternal brothers.

In *Holmes v. Johnson* (1850) 33 N. C. (11 Ired. L.) 55, an action of slander by one member of the Odd Fellows against another member, for statements made to a committee appointed to investigate charges against the plaintiff, it appearing that the lodge had by-laws regulating the conduct and duties of members, and requiring them to disclose anything against the character of a member, and these by-laws having been admitted in evidence, in affirming a judgment for plaintiff, it was held proper to exclude testimony by a witness that there were certain customs as to the duty of a member of a lodge to give information concerning the bad morals or character of other members. The court said that it was obviously the purpose to get from the witness his opinion of the moral duty of the defendant in making disclosures.

#### *VI. Statements at conference of officers.*

Statements by the president of a state organization of women's clubs, at a conference solicited by officers of a local club to devise means to stop larcenies which had occurred at meetings of the local club, made in answer to questions propounded by the officers concerning a member of the club in question, were held qualifiedly privileged in *Hayden v. Hasbrouck* (1912) 34 R. I. 556, 42 L.R.A. (N.S.) 1109, 84 Atl. 1087. The court stated that it is a principle well recognized that a communication made bona fide

upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable, and that the word "duty," as used, could not be confined to legal duties which might be enforced, but must include moral and social duties of imperfect obligation. And the president's statements with respect to a particular member that, although there was no positive proof, she was convinced that the suspect's husband had "paid her out before," and giving as a reason for the member's conduct that she was "as poor as Job's turkey," were held not per se evidence of malice.

#### *VII. Member's statement to prospective member.*

In *Bleitz v. Carton* (1908) 49 Wash. 545, 95 Pac. 1099, where a member of a fraternal order made a defamatory statement concerning one applicant for membership, to another applicant, the court, in arriving at its conclusion, in an action for slander against the member, that a verdict should have been directed for the defendant, apparently took into consideration the question of privilege, although the evidence in the case seems to have been such as to show that the member's statements were true, and also insufficient to sustain the plaintiff's allegations. J. T. W.

JONES HOLLOW WARE COMPANY OF BALTIMORE CITY, Appt.,  
v.

CHARLES T. CRANE et al., Constituting the State Board of Prison  
Control, and State Roads Commission.

*Maryland Court of Appeals — March 5, 1919.*

(— Md. —, 106 Atl. 274.)

**Constitutional law — impairing obligation of contract — convict labor.**

1. A statute permitting prison authorities to contract for the employment of convicts in the open air outside the prison, for the benefit of their

health and morals, notwithstanding existing contracts for their services at inside work, does not unconstitutionally impair the latter contracts.

[See note on this question beginning on page 1671.]

**Evidence — judicial notice — public sentiment — convict labor.**

2. The court takes judicial notice that, prior to the general election in Maryland in 1915, the public sentiment in favor of prison reform was such that both of the leading political parties declared in favor of abolishing contract labor in penal institutions.

[See 15 R. C. L. 1092.]

**Constitutional law — impairing obligation of contract — what contract protected.**

3. Contracts between individuals and a state, as well as those between individuals, are within the provisions of the Federal Constitution forbidding

the passing of laws impairing the obligation of contracts.

[See 6 R. C. L. 333.]

— police power — care of convicts.

4. The police power of the state extends to providing for the preservation of the health and morals of persons confined in its penal institutions.

[See 6 R. C. L. 203 et seq.]

**Contracts — by state — labor of convicts.**

5. The state cannot bargain away its right and duty to adopt such measures as it may from time to time deem advisable for the promotion of the health and morals of persons confined in its penal institutions.

[See 21 R. C. L. 1186-1188.]

**APPEAL** by plaintiff from a decree of the Circuit Court, No. 2, of Baltimore City (Ambler, J.) sustaining a demurrer to and dismissing a bill filed to enforce a contract for convict labor. *Affirmed.*

The facts are stated in the opinion of the court.

**Messrs. Bernard Carter & Sons** for appellant.

**Messrs. Albert C. Ritchie**, Attorney General, **Ogle Marbury**, Acting Attorney General, and **Philip B. Perlman**, Assistant Attorney General, for appellees:

The contract with the Jones Hollow Ware Company is the contract of the state, and the suit against the state board of prison control, involving that contract, is therefore a suit against the state, which has not consented to be sued.

State use of *Watkins v. Rich*, 126 Md. 646, 95 Atl. 956; State use of *Weddle v. County School Comrs.* 94 Md. 334, 51 Atl. 289; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Baltimore County v. Maryland Hospital*, 62 Md. 127; *Moore v. State*, 47 Md. 467, 28 Am. Rep. 483; 21 R. C. L. 1188; *Houston v. State*, 42 L.R.A. 59, note; *Comer v. Bankhead*, 70 Ala. 493; *Wesson v. Com.* 144 Mass. 60, 10 N. E. 762; *Hancock v. Ewing*, 55 Mo. 101; *Porter v. Haight*, 45 Cal. 631; *State ex rel. Davis v. Mortensen*, 69 Neb. 376, 95 N. W. 831, 5 Ann. Cas. 291; *Lord v. Thomas*, 64 N. Y. 107; *Caldwell v. Donaghey*, 108 Ark. 60, 45 L.R.A. (N.S.) 721, 156 S. W. 839, Ann. Cas. 1915B, 133; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277; *Re Ayers*,

123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Wells v. Roper*, 246 U. S. 337, 62 L. ed. 760, 38 Sup. Ct. Rep. 317; *Weyler v. Gibson*, 110 Md. 654, 73 Atl. 261, 17 Ann. Cas. 731; *State v. Baltimore & O. R. Co.* 34 Md. 344; *State v. Wingert*, 132 Md. 605, 104 Atl. 117.

Under its police power the state may change its system of convict labor at any time without regard to existing contracts.

21 R. C. L. 1168; *Shenandoah Lime Co. v. Governor*, 115 Va. 865, 80 S. E. 753, Ann. Cas. 1915C, 973; *Cooley*, Const. Lim. 7th ed. 400; 8 Cyc. 938; *Hancock v. Ewing*, 55 Mo. 101; *Porter v. Haight*, 45 Cal. 631; *Georgia Penitentiary Cos. v. Nelms*, 71 Ga. 351; *Banks v. Hun*, 20 App. Div. 501, 47 N. Y. Supp. 193; *Manigault v. Springs*, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; *Yeatman v. Towers*, 126 Md. 519, P.U.R.1915E, 811, 95 Atl. 158.

The legislature may break or annul contracts in exercising governmental functions, without contravening the constitutional prohibition against the impairment of the obligation of contracts.

6 R. C. L. 334; *Lord v. Thomas*, 64 N. Y. 107; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277; *Caldwell v. Donaghey*, 108 Ark. 60, 45 L.R.A. (N.S.) 721, 156 S. W. 839, Ann. Cas.

1915B, 133; *Brown v. Colorado*, 106 U. S. 98, 27 L. ed. 133, 1 Sup. Ct. Rep. 175; *Rittenhouse v. Baltimore*, 25 Md. 336.

The courts will not decree specific performance of a contract for convict labor.

*People ex rel. National Cigar Co. v. Dulaney*, 96 Ill. 503; *State ex rel. Davis v. Mortensen*, 69 Neb. 376, 95 N. W. 831, 5 Ann. Cas. 291; *Comer v. Bankhead*, 70 Ala. 493; *Rickard v. Neff*, 130 Md. 89, 99 Atl. 940.

*Mr. Osborne L. Yellott*, *amicus curiæ*:

The acts of assembly designed to establish a system of prison labor to supersede the old system of contract labor were passed pursuant to the police power of the state, and are not within the purview of § 10 of article 1 of the Federal Constitution.

*Georgia Penitentiary Cos. v. Nelms*, 71 Ga. 301; *Shenandoah Lime Co. v. Governor*, 115 Va. 865, 80 S. E. 753, Ann. Cas. 1915C, 978; *Easton v. Iowa*, 188 U. S. 220, 228, 47 L. ed. 452, 455, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522; *New York v. Miln*, 11 Pet. 102, 139, 9 L. ed. 648, 662; *Moore v. Illinois*, 14 How. 13, 18, 14 L. ed. 306, 308; *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047; *Moyer v. Nichols*, 203 U. S. 221, 51 L. ed. 160, 27 Sup. Ct. Rep. 121; *Respublica v. Cobbet*, 3 Dall. 467, 1 L. ed. 683; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Butler v. Pennsylvania*, 10 How. 402, 13 L. ed. 472; *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. ed. 709; *Newton v. Mahoning County*, 100 U. S. 548, 25 L. ed. 710; *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; *Hunt v. Hunt*, 131 U. S. CLXV. Appx. and 24 L. ed. 1109; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 778.

A bill for the specific performance of the contract here involved will not lie against the state board of prison control.

*State v. Baltimore & O. R. Co.* 34 Md. 374; *D. E. Foote & Co. v. Stanley*,

117 Md. 335, 82 Atl. 380; *Moore v. State*, 47 Md. 467, 28 Am. Rep. 483; *State use of Weddle v. County School Comrs.* 94 Md. 334, 51 Atl. 289; *Perry v. House of Refuge*, 63 Md. 27, 52 Am. Rep. 495; *Comer v. Bankhead*, 70 Ala. 493; *Neal v. Suber*, 56 S. C. 298, 33 S. E. 463, 34 S. E. 411.

*Thomas, J.*, delivered the opinion of the court:

Sections 623 to 651, art. 27, of vol. 3 of the Code of Public General Laws, under the subtitle, "State Penitentiary," provided for the appointment of six directors to manage the affairs of the penitentiary, and declared that the name and style of that institution should be the "Directors of the Maryland Penitentiary," and that by that name the directors should have power to institute any suit or suits for any sums of money due the institution, for injury to its property, for breach of any contract made with them in their official capacity, or on official bonds of any officer, etc. By § 639, the directors were given the control and management of the financial affairs of the institution. Section 641 authorized the directors to "enter into such contracts for the employment of the convicts in the penitentiary and for the sale of the manufactures in the institution as they" deemed proper, etc., and § 642 provided that the expenses of the penitentiary should be defrayed out of the funds thereof, and that no demand should be made upon the state for that purpose, "except for such sums as may be payable by law."

For some years prior to 1914 there existed a public sentiment in favor of prison reform and the abolishment of contracts for prison labor, and in that year a bill was introduced in the legislature to repeal the sections of the Code referred to, to abolish the board of directors of the Maryland penitentiary and the board of managers of the Maryland house of correction, and to create a board under the name of the "state board of prison control," with full power and authority to manage and control said institutions. That bill

was passed by both houses of the general assembly, but, because of certain features not affecting its general purpose, failed to receive the approval of the governor. Acts of 1914, chap. 466. It is a matter of common knowledge that, prior to the election of a new governor and a new legislature in the fall of 1915,

Evidence—  
judicial notice—  
public sentiment  
—convict labor.

the sentiment in favor of the reforms mentioned had become so pronounced that both of the leading parties in the state declared in favor of abolishing contract labor in penal institutions.

In November, 1915, the directors of the penitentiary, acting under the authority contained in § 641 of article 27 of the Code, entered into a contract with the Jones Hollow Ware Company of Baltimore City, a body corporate, the appellant in this case, by which the directors agreed, for the period of five years, commencing on the 1st of December, 1915, "to hire to" that company "two hundred and forty (240) male convicts at 75 cents per day for each male convict up to the number of one hundred and twenty (120), and seventy cents (70c) per day for each male convict in excess of the first one hundred and twenty (120)." The contract provided: "In the event of the party of the first part (the directors of the penitentiary) becoming short of convicts, however, and thereby being unable to furnish the complement of convicts under this contract and under other contracts for the hiring of convicts, then it is understood that it is to furnish to the said party of the second part only its pro rata of convicts, the number to be furnished them and other contracts to be ratably reduced. It is also understood and agreed that during the continuation of this contract, that, when any new convicts received and confined in the Maryland penitentiary, after the 1st day of December, 1915, are employed under this contract, no compensation is to be paid to the party of the first part by the

party of the second part for the labor of said new convicts for the space of thirty (30) days from the date of their first employment, unless previous service or employment on this kind of work has rendered said new convicts familiar with the same."

The fourth paragraph of the contract is as follows: "The party of the first part also agrees to rent to the party of the second part the ground floor of the building north of the warden's office; the entire two-story and basement building west of the warden's office, with the one-story building immediately north of the last described building (but not to include any part of the building east of the warden's office), together with the use of the engine and boiler located in the west wing, and also the new plain one-story brick building heretofore erected by them, for the sum of fourteen hundred and eighty dollars (\$1,480) per annum, payable monthly in cash; and the parties of the second part further agree to furnish stoves and fuel for heating and to keep the glass in the workshop in good order, and to keep and leave said buildings, engine, and boilers in good order, damage by fire and usual wear and tear excepted. It is further agreed that the parties of the second part shall pay the sum of one hundred and fifty dollars (\$150) annually for water used by them, said sum to be paid on the 1st day of March of each year."

By the sixth paragraph of the contract it was agreed that the appellant should have the exclusive right to carry on the business of an iron foundry in the penitentiary during the term of the contract. The twelfth paragraph required the appellant to give a bond in the penalty of \$20,000 for the faithful performance of the contract, and by the thirteenth paragraph it was agreed: "If national legislation adversely affects the employment of contract convict labor in the penitentiary, or interferes with the disposal of the product of such labor, either party shall have the right to terminate



this contract by giving one year's notice in writing to the other."

Shortly after the execution of the contract with the appellant, the legislature passed the Act of 1916, chap. 556, providing for the appointment of the "state board of prison control," and declaring that "From and after the appointment and qualification of the said state board of prison control, the said directors of the Maryland penitentiary and the board of managers of the Maryland house of correction shall be and the same are hereby dissolved and abolished." § 627.

Section 626 of the act provided: "from and after the appointment and qualification of said board of prison control, all rights, powers, duties, functions, liabilities, obligations, franchises, privileges, and property, real and personal, in any wise had, enjoyed or held by or vested in the directors of the Maryland penitentiary or the board of managers of the Maryland house of correction, shall be had, enjoyed and held by and vested in the said state board of prison control; and, from and after their appointment and qualification, the said state board of prison control shall be in all respects successors in right, title, interest and liability, to the directors of the Maryland penitentiary, and the board of managers of the Maryland house of correction; but nothing in this act shall be construed to impair or abrogate any existing contract."

Section 628 gives the board of prison control full power and control over the Maryland penitentiary and the Maryland house of correction, and declares that the board "shall have any and all incidental powers and authority appropriate and convenient to enable the said board to fully discharge the powers of management, control, supervision, visitation and inquisition conferred upon them" by the act. Section 629 provides that the title to and possession of all the property "appertaining to" the Maryland penitentiary and Maryland house of correction shall vest in and be held

by the state board of prison control, as trustees for the state, and authorizes the board, with the consent of the board of public works, to purchase or otherwise acquire on behalf of the state any real property appropriate to the needs of said institutions. Section 630 of the act was as follows: "The said board shall establish and maintain a system of labor for prisoners to supersede the present system of contract labor in the Maryland penitentiary and the Maryland house of correction, as soon as it shall deem the same expedient and proper, and in case said board does not establish such a system of labor before the convening of the general assembly of 1918, then the board shall report to such general assembly the result of the investigation of the subject, and any recommendations which it may deem desirable to make thereon. The said board shall have power and authority to place prisoners at labor upon state works whenever in the judgment of said board the same shall be expedient and proper, upon such terms as to it shall seem wise. The said board is hereby directed to provide, whenever in its judgment the same may be expedient, such form of labor as will offer an opportunity to prisoners to earn a surplus over the cost of their maintenance to the state, and said board shall further provide in its discretion for the payment of any surplus so earned, to the prisoner earning the same, or to such person or persons as he may direct."

In accordance with § 630 of the Act of 1916, chap. 556, and an order passed by the senate of Maryland, the state board of prison control reported to the general assembly of 1918 that there were 853 prisoners in the Maryland penitentiary on February 28, 1918, and that of that number 731 were employed by contractors. Senate Journal 1918, 531. Thereafter the legislature passed the Act of 1918, chap. 354, entitled: "An Act to Repeal and Re-enact with Amendments, §§ 626 and 630 of Article 27 of the Annotated Code

of Maryland, Title 'Crimes and Punishments,' Subtitle 'III. Places of Reformation and Punishments,' Subhead 'The State Board of Prison Control,' as the Same Were Enacted by Chapter 556 of the Acts of the General Assembly of Maryland of 1916, the Said Sections as Thus Amended Relating to the Establishment of a System of Labor for Prisoners to Supersede the Present System of Contract Labor in the Maryland Penitentiary and the Maryland House of Correction."

The only amendment made by the Act of 1918 of § 626 as enacted by the Act of 1916 is the omission from that section of the provision, "but nothing in this act shall be construed to impair or abrogate any existing contract," and the amendment of § 630 consists in the omission of the words, "and in case said board does not establish such a system of labor before the convening of the general assembly of 1918, then the board shall report to such general assembly the result of the investigation of the subject, and any recommendations which it may deem desirable to make thereon," and the insertion, in their place, of the following provision: "And the board is hereby vested with all power and authority necessary to that end and to put such system of prison labor when established into operation and effect."

The legislature also passed chapter 306 of the Acts of 1918, repealing and re-enacting with amendments § 61 of article 91 of the Code, so as to read as follows: "61. For the purpose of building and constructing or maintaining any roads, bridges and highways under the provisions of this act, or for the purpose of working in any stone quarry operated by said Commission [State Roads Commission], the said Commission is hereby authorized to make requisitions on the state board of prison control for as many inmates of the Maryland penitentiary and the Maryland house of correction as may be necessary for said purpose; and the said state board of prison

control is hereby directed to furnish the same with such guards or keepers as can be spared from their duties at said institutions; and any additional guards or keepers necessary for the safekeeping of said inmates shall be furnished and appointed by said Commission. The said Commission shall in conjunction with the aforesaid state board of prison control provide for the maintenance and safe-keeping of said inmates of the house of correction and the Maryland penitentiary while so employed."

On the 2d of October, 1918, the Jones Hollow Ware Company filed in circuit court No. 2 of Baltimore city its bill of complaint against Charles T. Crane and others, constituting the state board of prison control, and the State Roads Commission, in which, after alleging that it was a corporation duly incorporated under the general incorporation laws of the state for the purpose of manufacturing and selling hollow ware and other iron goods, and after setting out the execution and provisions of the contract with the directors of the Maryland penitentiary referred to, it alleges that in order to enable it to perform said contract the plaintiff had installed and maintained in the buildings of the penitentiary, machinery, trucks, and other foundry equipment and fixtures, and had constructed and maintained permanent buildings upon the penitentiary premises to the value of \$100,000, and that, relying upon the faithful performance of the contract by the directors of the penitentiary and the state board of prison control, it had obligated and bound itself by contracts for fuel and materials sufficient to enable it to perform its said contract and certain contracts by which it had bound itself for the manufacture and delivery of cooking and food preserving utensils, sanitary plumbing fixtures, and special castings, to the amount of \$157,000. The sixth paragraph of the bill alleges that notwithstanding the contract of the plaintiff with the

directors of the penitentiary had been entered into by said directors, and continued by the state board of prison control, "for commercial uses, reasons, and purposes, to secure the moneys and revenue issuing and resulting therefrom; and notwithstanding the fact that prior, up to and since July 5, 1918, there had been a sufficient number of convicts committed to and confined in the Maryland penitentiary, and under the control and direction of the state board of prison control, . . . to enable them to furnish the plaintiff at least two hundred and sixteen (216) male convicts daily," under the terms and provisions of the contract, nevertheless the state board of prison control, in wilful disregard of its obligations, against the protest of the plaintiff, and to the plaintiff's irreparable loss and injury, "and for commercial and business purposes only, and for the revenue to be derived therefrom, have arbitrarily, . . . assuming the right so to do under the provisions of chapter 354 of the Acts of the General Assembly of Maryland of the year 1918, and under the provisions of chapter 306 of the Acts of the General Assembly of Maryland of the year 1918, at the instance of the State Roads Commission of Maryland, . . . not only refused to furnish the plaintiff with the number of convicts to which it is entitled in accordance with the terms" of the contract, "but have also, purely for the commercial and business purposes aforesaid, and the revenue to be derived therefrom, since July 5, 1918, from time to time, taken out of the plaintiff's foundry in the penitentiary sixty-six (66) or more convicts, thus reducing the number of convicts in the plaintiff's foundry from the number of 221 on July 5, 1918, to 155 or less on September 30, 1918, on which last-mentioned day twenty-one convicts were taken from the plaintiff's foundry and hired out to work for contractors for railroad companies, and put to work for contractors and others on state roads,

. . . the larger number of said convicts so taken from the plaintiff's foundry being long-term convicts, who, under the long and careful tutelage and instruction and teaching of the plaintiff, had become expert and skilled molders and iron foundrymen, whose places it is now impossible for the plaintiff to fill from the men left it up to this time, and whose loss to the plaintiff is irreparable; and whose continued absence will render it impossible for the plaintiff to fulfil its contracts and meet its obligations." This paragraph further alleges that the plaintiff is credibly informed by the officers and agents of the state board of prison control in the penitentiary, that said board, at the instance of the State Roads Commission "and otherwise," will further reduce and curtail the number of convicts in the plaintiff's foundry in the penitentiary by removing them therefrom, and, "purely for commercial and business purposes and the increased revenue to be derived therefrom, intend to hire them out and put them to work for contractors and others outside of the penitentiary."

The seventh paragraph alleges that if the state board of prison control, "at the instance of the State Roads Commission, or otherwise, . . . are permitted to disregard" said contract, and are allowed to put to work outside of the penitentiary "any more of the convicts now in the plaintiff's foundry in the penitentiary, and are not required to return to the plaintiff's foundry the long-term men heretofore hired out and put to work outside of the penitentiary, and the twenty-one men convicts taken from the plaintiff's foundry on September 30, 1918, the obligation of the plaintiff's contract with the state board of prison control will not only be impaired in contravention of plaintiff's rights secured to it by § 10 of article 1 of the Constitution of the United States, prohibiting any state to pass any law impairing the obligation of contracts," but in addition thereto

the plaintiff would thereby suffer irreparable damage for which no adequate redress could be obtained at law, "for the reason that the convict labor contracted to be supplied by the defendants to the plaintiff in its foundry in the penitentiary is indispensable to the business of the plaintiff, and the plaintiff could not otherwise obtain labor for its foundry in the penitentiary, nor has it a foundry, nor could it now obtain one, outside of the penitentiary, or labor to work therein even if it had a foundry outside of the penitentiary, and fulfil its contracts and obligations."

The prayers of the bill are:

(1) That the contract may be specifically enforced so that the state board of prison control "may be required to furnish the plaintiff in its foundry in the penitentiary the number of convicts under their control to which it may be entitled under and by the terms" of the contract, "including the return to the plaintiff's foundry in the penitentiary the long-term convicts recently removed therefrom."

(2) That the state board of prison control and its officers, etc., may be enjoined "from removing any more convicts now or hereafter confined or committed to the penitentiary, which are now assigned to work in plaintiff's foundry in the penitentiary, or who may hereafter be so assigned, for the purpose of hiring them out or putting them to work to or for contractors or other persons outside of the penitentiary," and that the State Roads Commission, its officers, etc., may be enjoined "from making requisition upon, or otherwise securing, from the state board of prison control, convicts now confined in, or who may hereafter be confined in or committed to, the Maryland penitentiary, so far as the same would reduce the number of convicts in plaintiff's foundry."

(3) That chapters 306 and 354 of the Acts of 1918 may be declared unconstitutional and void, so far as they may be construed "as author-

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izing and empowering the state board of prison control to remove convicts confined in and committed to the Maryland penitentiary from the plaintiff's foundry therein, and not to comply in all respects with" said contract, "as being laws impairing the obligation of said contract in contravention of § 10 of article 1 of the Constitution of the United States."

The defendants demurred to the bill on the ground that it does not state such a case as entitled the plaintiff to any relief against the defendants, and is bad in substance, and this appeal is from the decree of the court below sustaining the demurrer and dismissing the bill.

The power and authority of the directors of the penitentiary, under the provisions of the Code then in force, to make the contract sought to be enforced in this case, is not questioned. Nor can it be doubted that the provision of the Constitution of the United States here invoked refers to contracts between individuals and a state as well as contracts between

Constitutional law—impairing obligation of contract—what contract protected.

individuals. 8 Cyc. 930; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395. It must also be conceded that the things complained of in the bill of complaint were done by the state board of prison control in pursuance of the power and authority supposed to be vested in the board by chapters 306 and 354 of the Acts of 1918. The important question, therefore, to be determined in this case, is whether the contract between the appellant and the directors of the penitentiary is one within the scope and purpose of the constitutional restriction relied on by the appellant.

It is said in 21 R. C. L. 1168: "The erection and operation of prisons and jails . . . is a purely governmental function, being an indispensable part of the administration of the criminal law. They are a part of the police system for the preservation of order and the secur-

ity of society, and are established by the state in the exercise of its sovereign powers, in performance of its duty to provide for the custody, employment, and maintenance of convicts. They are a public necessity."

Again it is said that statutes authorizing the hiring out of convicts are constitutional, and that among the reasons given for upholding the right of the state to so provide is "that the substitution of hard labor outside of the walls of the prison when the convict's condition is normal, where he has fresh air, pure water, and wholesome food, which are superior advantages over close confinement, is a humane and ameliorating policy in reference to the convict himself, as well as a more profitable use of his labor for the state." 21 R. C. L. 1186, 1187.

In the Dartmouth College Case, 4 Wheat. 518, 4 L. ed. 629, Mr. Chief Justice Marshall said: "That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted."

In the case of Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989, it is said: "All rights are held subject to the police power of the state. . . . Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, 'Salus populi suprema lex;' and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discre-

tion can no more be bargained away than the power itself."

The principle was applied in *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036, where it was claimed that an ordinance passed in pursuance of an authority to define and abate nuisances impaired the obligation of the contract contained in the charter of the Fertilizing Company. In the case of *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079, where the legislature of Mississippi in 1867, in consideration of the payment of certain sums, granted a charter to a lottery company for twenty-five years, and where the provisions of a Constitution adopted by that state in 1868 declared that no lottery should thereafter be drawn, the Supreme Court said: "If the legislature that granted this charter had the power to bind the people of the state and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object. . . . Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the state and the people of the state in that way. All agree that the legislature cannot bargain away the police power of a state. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.' *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 657; *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302. . . . The question is therefore directly presented whether, in view of these facts, the legislature of a state can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think

it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. . . . The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'"

In the case of *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652, the court had to pass upon the validity of an ordinance, passed in pursuance of authority conferred by the Constitution adopted by the state of Louisiana in 1879, which in effect repealed an exclusive privilege granted to the appellee by the legislature of 1869 for stock landing and slaughter-houses at New Orleans for twenty-five years. The court held that the Constitution of 1879 and the ordinance were not void as impairing the obligations of the contract, and said: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think

that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

In the case of *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, referring to the limitations contained in the Federal Constitution, the court said they were not "designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people." In the case of *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252, the contract was one growing out of a grant of an exclusive right or franchise to supply gas to a municipality. The court held that it was protected by the Constitution, and, in the course of the opinion delivered by Mr. Justice Harlan, said: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations. Whatever, therefore, in the manufacture or distribution of gas in the city of New Orleans proves to be injurious to the public health, the public comfort, or the public safety, may, notwithstanding the exclusive grant to plaintiff, be prohibited by

legislation, or by municipal ordinance passed under legislative authority. It cannot be said with propriety that to sustain that grant is to obstruct the state in the exercise of her power to provide for the public protection, health, and safety. The article in the state Constitution of 1879 in relation to monopolies is not in any legal sense an exercise of the police power for the preservation of the public health, or the promotion of the public safety; for the exclusiveness of a grant has no relation whatever to the public health, or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many."

In the more recent case of *Manigault v. Springs*, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127, decided in 1905, the court said: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. . . . While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with. . . . It only remains to consider, in connection with this branch of the case, whether the act of the general assembly of 1903 was a proper exercise of the police power of the state. Of this we have no

doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives, and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people, by the reclamation of swampy, overflowed, and infertile lands, and the erection of dams, levees, and dikes for that purpose."

Turning now to the decisions in this state, it will be found that the decisions we have referred to have been frequently quoted, and the principles therein announced consistently applied. In the case of *State v. Broadbelt*, 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 775, where the court was considering an act prescribing certain sanitary regulations to be observed by dairymen who supplied milk to cities, Chief Judge McSherry, after stating that the rights of property were subject to the power of the legislature to enact reasonable restraints and regulations in respect thereto, said: "This power, legitimately exercised, can neither be limited by contract nor bartered away by legislation."

In *State v. Hyman*, 98 Md. 596, 64 L.R.A. 637, 57 Atl. 6, 1 Ann. Cas. 742, where the court was passing upon the constitutionality of an act providing that no room in any tenement or dwelling house should be used for the manufacture of coats, vests, trousers, etc., until a permit was obtained from the chief of the bureau of industrial statistics, the court held, quoting from the syllabus: "It is a legitimate and important function of the state to make laws to preserve and protect the public health, morals, and safety, and in regard to such laws the authority of the state is complete, unqualified, and exclusive. This power can neither be limited by contract nor bartered away by legislation. It is for the legislature to determine whether particular acts or things are or are not dangerous to the public health or safety. And if a statute designed to protect the

public health has a real and substantial relation to this power of the state, the courts will not hold it to be void merely because it is, in their judgment, unreasonable and unwise."

In the case of *Byrne v. Maryland Realty Co.* 129 Md. 202, L.R.A. 1917A, 1216, 98 Atl. 547, Judge Burke, speaking for the court, said: "All uses of property or courses of conduct which are injurious to the health, comfort, safety, and welfare of society may be prohibited under the sovereign power of the state, even though the exercise of such power may result in inconvenience or loss to individuals. In this respect individual rights must be subordinate to the higher rights of the public. The power that the state may exercise in this regard is the overruling law of necessity, and is founded upon the maxim, '*Salus populi est suprema lex.*' The existence and exercise of this power are an essential attribute of sovereignty, and the establishment of government presupposes that the individual citizen surrenders all private rights, the exercise of which would prove hurtful to the citizens generally."

In the case of *Yeatman v. Towers*, 126 Md. 513, P.U.R.1915E, 811, 95 Atl. 158, where there was a contract to supply water to dwelling houses at a certain rate, and where it was claimed that an order of the Public Service Commission had the effect of impairing the obligation of that contract, Judge Stockbridge, speaking for the court, said: "The true principle, which must control in a case like the present, is that laid down in *Manigault v. Spring*, supra, in the following language: 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.

This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.'"

The rule applicable to contracts relating to matters within the police power of the state has been applied to contracts for hiring of convict labor. It is said in 12 C. J. 1001: "No contract can be made by the state for hiring convict labor which will deprive the state of its police power over convicts, and statutes, therefore, passed in the exercise of the police power are not invalid as impairing the obligation of prior contracts."

And it is said in 13 C. J. 927: "But inasmuch as the state cannot surrender its police power over convicts, prison authorities cannot make contracts for convict labor which would preclude the legislature from adopting another system, necessarily interfering with the execution of such contracts; and contracts for convict labor must necessarily imply a right of the legislature to change its policy in regard to the penal system, and the parties to such contracts must be presumed to know that such changes of policy may occur."

In the case of *Hancock v. Ewing*, 55 Mo. 101, the court said: "The question is whether the warden of the penitentiary, or the supervisors, called inspectors, or both, can make contracts for convict labor which will preclude the legislature from adopting another system necessarily interfering with the execution of such contracts, and we are clearly of the opinion that this could not be done. Such contracts, it may be conceded, are warranted by the law, and seem in various instances to have been made and sanctioned by the legislature; but all such contracts must necessarily imply a right on the part of the legislature to change its policy in regard to the



penal system. This is a necessary result of the peculiar character of such contracts. It may be that the legislature will abolish the whole system and require solitary confinement without labor, as we know is the policy of some states, or it may happen that the number of convicts will not enable the warden to furnish the contractors with the number called for in the contract."

In *Georgia Penitentiary Cos. v. Nelms*, 71 Ga. 301, the supreme court of that state held that the constitutional restriction against impairing the obligation of a contract did not prevent the state from changing "its penitentiary system."

No one will deny that it is the duty of the state, in the exercise of its police power, to provide for the custody and maintenance of convicts as an essential part of the administration of criminal laws enacted for the protection of the public. It would seem equally clear that regulations providing for the release of convicts from confinement in the prisons, and their employment in the open air outside of the penitentiary, under conditions that enable them to earn for their own benefit something beyond the cost of their maintenance, have a direct relation to the public welfare

—police power—  
care of convicts.

and public safety, the preservation of their health and the preservation of public morals. It is the duty of the state to make all reasonable regulations for the preservation of their health, and the public have a direct interest in their moral and physical well-being. The state cannot, therefore, by contract or otherwise, barter away its duty and right to adopt such measures as it may, from time to time, deem advisable for the promotion of those ends.

Contracts—by  
state—labor  
of convicts.

It is alleged in the bill that the convicts were hired out to contractors and others for work outside of the penitentiary, for commercial and business purposes, in order to obtain the increase in revenue there-

from, and the appellant contends that there is not the slightest ground for holding that the acts referred to were "necessary for the public health, safety, morals, or welfare, in the sense in which the police power may be used to override constitutional property and personal rights." It relies upon the case of *Baltimore & O. R. Co. v. Waters*, 105 Md. 396, 12 L.R.A. (N.S.) 326, 66 Atl. 685, where the court held that the charter of the Baltimore & Ohio Railroad Company was not repealed by the Act of 1906, chap. 457, and that the said act was not a police regulation designed to protect the public health, safety, or morals, but was enacted in the interest of property owners adjoining the line of the proposed lateral road. But in that case Judge Pearce quoted the statement of the court in *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, that "the purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is, or is not, repugnant to the Constitution of the United States, must be determined from the natural effect of such statutes, and not from their proclaimed purpose."

In the case at bar the acts in question were passed in reference to a matter clearly within the police power of the state. In the case of *State v. Hyman*, supra, Chief Judge McSherry, speaking for the court, said: "Running through all the cases, both Federal and state, is the doctrine that if the measure designed for, or purporting to concern, the protection or preservation of the public health, morals, or safety, is one which has a real and substantial relation to the police power, then no matter how unreasonable or how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon those grounds. . . . If the act has a real and substantial relation to the police power, no inquiry as to its unreasonableness can arise,

because it is the judgment of the lawmakers and not of the courts which must control; and if, in the judgment of the former, the thing be reasonable, all inquiry on that ground by the latter is foreclosed."

Upon the authorities referred to, and for the reasons stated, we hold that the acts in question are not unconstitutional and void as impairing the obligation of the contract here sought to be enforced, and that the appellant is not entitled to a decree for specific performance of that contract to the extent of depriving the state board of

**Constitutional law—impairing obligation of contract—convict labor.**

prison control of the power and authority vested in said board by said acts, or to an injunction restraining said board from the further exercise of such power and authority.

In this view of the case, it is not necessary to determine whether this is a suit against the state, or whether the acts referred to amount to a naked breach or repudiation of the contract in question as distinguished from an impairment of the obligation thereof within the meaning of the Federal Constitution, or to consider the other questions discussed by counsel,

Decree affirmed, with costs.

### ANNOTATION.

#### Impairment of obligation of convict labor contracts.

This note does not include cases where the contract is ended pursuant to a provision therein for its annulment by the state. See *F. H. Mills Co. v. State* (1906) 110 App. Div. 843, 97 N. Y. Supp. 676, affirmed in (1907) 187 N. Y. 552, 80 N. E. 1109. Contracts for the hire of convicts, made after the passage of an act providing for the annulment of such contracts, are, of course, subject to such statute. See, for example, *Jefferson County v. Truss* (1888) 85 Ala. 486, 5 So. 86.

Is the leasing of convict labor a matter of police power? Does the abrogation of such a lease impair the obligation of the contract? May the state abrogate the contract without compensation?

In *Graham v. State* (1918) — S. C. —, 96 S. E. 138, where the court sustained a complaint in an action brought under a statute authorizing one whose contract for the hire of convicts was abrogated by the legislature to bring an action for the recovery of such damages, if any, as he may have suffered by the abrogation of his contract, counsel for the state demurred, claiming that: "(1) The provisions of the law relating to the care and employment of convicts are embraced within the police power of the state; (2) that the contract in

question was made subject to the right of the state to exercise such police power, and to change its policy with regard to its penal system and the employment of its convicts; and (3) that the obligation of such contract is not impaired by the exercise of such powers, and plaintiff has sustained no injury in consequence of the act abolishing the said hosiery mill." The court said: "The first two grounds of the motion are scarcely debatable. The propositions therein stated may be affirmed upon reason and the weight of authority. The major premise of the third proposition has been affirmed and denied by respectable authority." It was unnecessary, however, for the court to consider the questions suggested by the last ground of demurrer, for the reason that the statute under which the action was brought was construed to waive, not only the state's immunity from suit, but also the defense that the contract was abrogated in the exercise of a sovereign power rightfully exercised. In this connection, the court said that even if it be conceded that the contract was rightly rescinded in the exercise of the power impliedly reserved to the state, and therefore sheared of its legal obligation, the circumstances may have

given rise to a moral obligation to compensate the plaintiff for the damage thereby done him, which the state unquestionably had the right to recognize.

It will be observed that in the reported case (*JONES HOLLOW WARE CO. v. CRANE*, ante, 1658) it is held that after a contract for the hire of convicts for indoor work has been lawfully made by the directors of a state penitentiary, the legislature may, by act, supersede the board by a new board, and give it power to abrogate the contract by the hire of convicts to outdoor employments; that such act is not void as impairing the obligation of the contract; and that the hirer may not have his contract enforced, for the reason that the act authorizing the abrogation of the contract was an exercise of the police power.

In *Hancock v. Ewing* (1874) 55 Mo. 101, quoted from *JONES HOLLOW WARE CO. v. CRANE*, the management of the penitentiary was by the new act taken from the state officials, and the penitentiary was leased. The court said: "If the plaintiffs by this sustained a loss, they undoubtedly have a claim against the state; but such a claim it is not in the province of the courts to allow, much less can the courts interfere by injunction to prevent the execution of the law."

But in *Georgia Penitentiary Cos. v. Nelms* (1883) 71 Ga. 301, it was held that a state, having made a contract for the leasing of its convicts reserving the police power over them, cannot pass thereafter a valid act directing the leasing of part of the convicts otherwise. The court said: "We find that the state, through its chief executive, has leased its convicts for twenty years, and is to receive \$25,000 per annum. Whether the contract thus made was proper, or whether now one more remunerative to the state could be made, are considerations by which this court cannot afford to be influenced; it is the mission of the courts to enforce, and not to make, contracts. The state can change its penitentiary system; can change its modes of punishment, may reduce felonies to misdemeanors, or make, prospectively,

misdemeanors felonies; but as long as the state continues its present system and modes of punishment, contracts made, in having the same enforced, are binding on the state. If this were not so, with what claim of right or degree of propriety could the state insist that the lessees should perform their part of the contracts, as hereinbefore set forth?"

In *People ex rel. McCauley v. Brooks* (1860) 16 Cal. 11, it was held that the state may not impair the obligation of her contract of lease of convict labor. Field, Ch. J., said: "Rights of property once vested under contracts, whether between individuals or between the state and individuals, cannot be frittered away by legislation. They have the protection of both the Federal and state Constitutions. If the state desire to resume the possession of the state prison, and the control of the convicts, she can do so only in one way,—by compensation, as is required in all cases where private property is taken for public use. The leasehold interest is as much property for which compensation is to be made before it can be subjected to the uses of the state as are lands held in fee."

It has also been held that the manner of employing convicts is not embraced within the police power. Thus, in *Bronk v. Barckley* (1897) 13 App. Div. 72, 43 N. Y. Supp. 400, it was held that it could not be said that a new state "Constitution, regulating the manner of employing state prisoners confined in its penal institutions, affects the public health, morals, comfort, or safety. Hence, it should not be given a retrospective operation, so as to nullify a contract authorized by the state and adopted by it prior to the enactment of the new Constitution."

The foregoing statement of Chief Justice Field in *People ex rel. McCauley v. Brooks* (Cal.) supra, would seem to be unanswerable. If the sovereign power desires to take property, for a public purpose, it takes it, but the constitutions declare that there must be compensation.

The following two cases, while not relating to statutory impairment of

obligation, may be referred to in this connection.

In *Porter v. Haight* (1873) 45 Cal. 631, it was held that a board of directors of state prisons, having inferential authority to hire out the labor of convicts, have no power "to enter into any contract for the employment of convict labor, or for any other purpose, that would deprive them in any degree of the full and exclusive control of the prisoners and prison labor, or of the grounds, buildings, and property, with which they are charged by" statute; and "if at any time after the making of a contract originally free from the vice we have mentioned, circumstances should arise which would, in the judgment of the directors, render the continuance of the contract incompatible with the safety of the convicts, or the proper management of the prison, it would be their right and duty to terminate it. This is a power of which they cannot deprive themselves by contract. It is imposed upon the board by the act which created it." In that case, the contractor had sued the board. The court said:

"The plaintiff is not left without remedy. His remedy, however, as was held by the court below, is, in fact, only against the state." The court does not refer to *People ex rel. McCauley v. Brooks* (Cal.) *supra*.

In refusing a mandamus to compel a state board of public lands and buildings to perform a contract for the hiring of convict labor, the Nebraska court said: "The state, like an individual or private corporation, may refuse to keep its engagements; and the board of public lands and buildings, as a governmental agency having plenary authority in all matters pertaining to the control and management of the penitentiary, is vested with power to determine whether the state will perform or refuse to perform its contracts for the leasing of convict labor. The action of the members of the board in the matter is the action of the state; their determination is its determination." *State ex rel. Davis v. Mortensen* (1903) 69 Neb. 376, 95 N. W. 831, 5 Ann. Cas. 291. B. B. B.

## RE ESTATE OF MARY ARKWRIGHT HUTTON, Deceased.

W. H. WINFREE, Guardian ad Litem of Lillian Dorothy Arkwright, Appt.

*Washington Supreme Court (Dept. No. 2) — May, 1, 1919.*

(— Wash. —, 180 Pac. 882.)

**Will — right of children of deceased child — application of statute.**

1. A devise to the children of a deceased person will not pass to children of a child dead at the time the will was made, to the knowledge of testator, leaving surviving brothers and sisters, under a statute providing that when any estate shall be devised to any child, and such devisee shall die before testator, having lineal descendants, such descendants shall take the property which such devisee would have taken had he survived the testator.

[See note on this question beginning on page 1682.]

— children as grandchildren.

2. The word "children" does not, in its ordinary acceptation as used in a will, include grandchildren.

**Costs — allowance to defeated party.**

3. An allowance of costs and counsel fees upon appeal cannot be made

to a minor defendant in a suit by an administrator to determine such minor's rights under a will, in case of affirmance of a decree denying the minor's claim, although the appeal was justified.

[See 7 R. C. L. 800-802.]

**APPEAL** by guardian ad litem from a decree of the Superior Court for Spokane County (Oswald, J.) in favor of the executor of the estate of Mary Arkwright, deceased, in a proceeding to determine who was entitled to take under the nonintervention will left by her. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. W. H. Winfree for appellant:

The court erred in concluding and decreeing that the minor, Lillian Dorothy Arkwright, took nothing under the will.

Kehl v. Taylor, 275 Ill. 346, 114 N. E. 125, Ann. Cas. 1918D, 948; Barnes v. Huson, 60 Barb. 598; Nutter v. Vickery, 64 Me. 490; Bray v. Pullen, 84 Me. 185, 24 Atl. 811; Minter's Appeal, 40 Pa. 111; Bradley's Estate, 166 Pa. 300, 31 Atl. 96; Cheney v. Selman, 71 Ga. 384; Darden v. Harrill, 10 Lea, 421; Wildberger v. Cheek, 94 Va. 517, 27 S. E. 441; Jamison v. Hay, 46 Mo. 546; Chenault v. Chenault, 88 Ky. 83, 11 S. W. 424; Strong v. Smith, 84 Mich. 567, 48 N. W. 183; Howland v. Slade, 155 Mass. 415, 29 N. E. 631; Pimel v. Betjemann, 183 N. Y. 194, 2 L.R.A.(N.S.) 580, 76 N. E. 157, 5 Ann. Cas. 239; Davie v. Wynn, 80 Ga. 673, 6 S. E. 183; Re Roberts, 84 Wash. 163, 146 Pac. 398; Rudolph v. Rudolph, 207 Ill. 266, 99 Am. St. Rep. 211, 69 N. E. 834; Moses v. Allen, 81 Me. 268, 17 Atl. 66; Guitar v. Gordon, 17 Mo. 408; Woolley v. Paxson, 46 Ohio St. 307, 24 N. E. 599.

Messrs. Luby & Pearson, for respondent:

Lillian Dorothy Arkwright is not a direct legatee and devisee.

Re Roberts, 84 Wash. 163, 146 Pac. 398; 40 Cyc. 1448; 2 Alexander, Wills, 1222, and cases cited; Hunt's Estate, 133 Pa. 260, 19 Am. St. Rep. 640, 19 Atl. 548.

Neither is she an indirect beneficiary.

2 Alexander, Wills, 1101, 1284; Re Tamargo, 220 N. Y. 225, 115 N. E. 462; Howland v. Slade, 155 Mass. 415, 29 N. E. 631; White v. Massachusetts Institute of Technology, 171 Mass. 84, 50 N. E. 512; Nicholson v. Nicholson, 115 Iowa, 493, 91 Am. St. Rep. 175, 88 N. W. 1064; Pimel v. Betjemann, 5 Ann. Cas. 239, and note, 183 N. Y. 194, 2 L.R.A.(N.S.) 580, 76 N. E. 157; Almy v. Jones, 17 R. I. 265, 12 L.R.A. 414, 21 Atl. 616; Re Turner, 208 N. Y. 261, 101 N. E. 905, Ann. Cas. 1914D, 245; Re Ross, 140 Cal. 282, 73 Pac. 976; Re Matthews, 176 Cal. 576, 169 Pac. 233.

Parker, J., delivered the opinion of the court:

Mary Arkwright Hutton died in Spokane county on October 6, 1915, being then a resident of that county. She left a nonintervention will, which was made by her on December 2, 1913, naming her husband, L. W. Hutton, executor thereof. She made no testamentary disposition of her property other than as evidenced by the following language found in her will:

"First. I give and bequeath unto my half sister, Eliza Grombacher, of Cleveland, Ohio, the sum of \$1,000.

"Second. I give and bequeath unto my half brother, Lyman B. Arkwright, of Youngstown, Ohio, the sum of \$1,000.

"Third. I give and bequeath unto my half brother, Delaney Arkwright, of Youngstown, Ohio, the sum of \$1,000.

"Fourth. I give and bequeath unto the children of my deceased half brother, William Arkwright, late of Youngstown, Ohio, the sum of \$1,000.

"Fifth. I direct my executor, hereinafter named, to contribute out of the funds belonging to my estate the sum of \$5,000 toward the completion of a labor temple in the city of Spokane, Washington, payable at his discretion when such temple shall have been substantially constructed.

"Sixth. All the rest, residue, and remainder of my estate, both real and personal, wherever situated, I give, devise and bequeath to my husband, L. W. Hutton, with full power to use, retain, hold, manage, invest, and keep the same invested, and receive and retain the rents, issues, and profits thereof, for and during the term of his natural life, if he should so long remain my widower, and upon his remarriage or death, or in case he shall not sur-

vive me, I give, devise and bequeath to the said Eliza Grombacher, to the said Lyman B. Arkwright, to the said Delaney Arkwright, and to the children of the said William Arkwright, each an undivided one fourth part thereof absolutely and in fee."

William Arkwright, the deceased half brother of Mrs. Hutton, named in the fourth and sixth paragraphs of her will, died long prior to her decease, leaving several children, one of whom, named Lyman Arkwright, died on August 19, 1904, which date, it will be noticed, was some nine years prior to the making of the will by Mrs. Hutton. At the time of and long prior to the making of her will, Mrs. Hutton was fully advised and well knew that Lyman Arkwright, the son of her deceased half brother, William Arkwright, had died in the year 1904. Lyman Arkwright left a daughter, Lillian Dorothy Arkwright, the grandniece of Mrs. Hutton. L. W. Hutton, the executor, acquired the entire interest of each and all of the legatees and devisees entitled to take under the will, except the possible interest which Lillian Dorothy Arkwright might take by virtue of being a daughter of Lyman Arkwright. L. W. Hutton, the executor, having fully administered the estate, and being desirous of having the question of whether or not Lillian Dorothy Arkwright shall take under the will, on March 27, 1918, filed in the probate proceeding in the superior court for Spokane county, wherein the will had been proved and the estate administered, in so far as it was necessary to be administered under the direction of the court, his petition for the distribution of the remaining property of the estate to himself as legatee and devisee under the will, and as assignee of the entire interest of each and all of the other legatees and devisees entitled to take under the will, alleging that he is advised and believes that Lillian Dorothy Arkwright took no estate by the terms of the will, and

has no interest in the estate. This petition was filed in pursuance of § 92 of our new Probate Code (Laws of 1917, p. 666), providing for the rendering of a decree determining who is entitled to take under a non-intervention will. The matter of distribution presented by the petition coming on for hearing in the superior court, timely notice thereof having been given, and a guardian ad litem to represent Lillian Dorothy Arkwright, who is a minor, having been appointed, evidence was introduced which, taken with the record in the proceeding already made, shows the facts as above summarized; and, the matter being submitted for final decision upon the merits, the court decreed distribution of the remaining property of the estate, as prayed for by L. W. Hutton as executor and individually, the court holding that Mary Arkwright Hutton, deceased, "did not intend or purpose to make either the said Lyman Arkwright or the said Lillian Dorothy Arkwright a beneficiary of her said will, and that the said Lillian Dorothy Arkwright took and takes no estate or interest thereunder either in her own right or as sole lineal descendant of the said Lyman Arkwright." From this disposition of the matter, the guardian ad litem of Lillian Dorothy Arkwright has, in her behalf, appealed to this court.

Counsel for appellant Lillian Dorothy Arkwright contends that she is entitled to take in the place of her father, Lyman Arkwright, under the will of her great-aunt, Mary Arkwright Hutton, by virtue of § 1328, Rem. Code, which reads: "When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, having lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator."

Had the appellant's father, Lyman Arkwright, been living at the time of the making of the will by Mrs.

Hutton, he being a son of William Arkwright, the deceased half brother of Mrs. Hutton, whose children are designated as beneficiaries in the fourth and sixth paragraphs of the will, this contention would seem to be well grounded. Or had Mrs. Hutton in her will designated her nephew Lyman Arkwright by name, or in some other manner specifically pointed him out as a beneficiary under her will, though then knowing that he was dead, it would also seem, under the weight of modern authority, that appellant would take in his place. But such is not our problem here to be solved. We are dealing with a gift to a class, designated in the will as "the children of my deceased half brother, William Arkwright;" the testatrix knowing at the time of making the will that there were several children of William Arkwright then living, and knowing that one, appellant's father, was then dead. The real question here to be answered is: Did Mrs. Hutton intend to include in the class she designated as "the children of my deceased half brother, William Arkwright," the then deceased son of William Arkwright, to wit, Lyman Arkwright, the father of appellant? The correct answer to this question will become decisive of this case, for, under § 1328, Rem. Code, appellant's right to take depends upon her right of substitution in the place of one of the class designated by Mrs. Hutton in the will by the language above quoted.

We do not understand counsel for appellant to here contend that the language, "the children of my deceased half brother William Arkwright," as used in the will by Mrs. Hutton, includes "grandchildren" of her deceased half brother. Indeed we think there would be no sound ground upon which to rest any such contention, since manifestly the word "children" was used in the will in its ordinarily accepted meaning, which does not include grandchildren. 40 Cyc. 1488; *Re Roberts*, 84 Wash. 163, 146 Pac. 398.

It is therefore plain, we think,

that appellant can take under the will, if at all, only as she may be substituted for one of the class designated by the language of the will above quoted. So the question remains: Was her father, Lyman Arkwright, who was the deceased son of William Arkwright, at the time of the making of the will by Mrs. Hutton, intended by her to be a member of the class of beneficiaries designated in her will, as though he were living at the time she made the will?

It was the rule of the common law, in the absence of any statute similar to § 1328, Rem. Code, that a legacy or devise to a person deceased at the time of the making of the will was void ab initio, and that a bequest or devise to a person who died after the making of the will, and before the death of the testator, would lapse, so that no one could take thereunder. 2 Alexander, Wills, 1101; 1 Jarman, Wills, 6th ed. 423; 40 Cyc. 1052, 1925.

Some of the American courts have noticed and have been somewhat influenced by the distinction recognized at common law between void and lapsed legacies and devises, in their application of statutes similar to § 1328, Rem. Code, which now exists in most, if not all, of our states. It seems, however, that the present view of such statutes, adopted by a majority of the courts, is that, when the legacy or devise is to a person named, or otherwise specifically designated in the will, who is dead, and even known by the testator to be dead at the time of the making of the will, the legacy or devise is not void, in the sense that those whom the statute substitutes for the deceased devisee or legatee shall not be permitted to take under the will. In other words, the majority rule seems to be that in the application of such statutes there is no occasion for making any distinction between void and lapsed legacies, in so far as the rights of those whom the statute substitutes in the place of the deceased legatees or devisees are concerned. *Pimel v.*

(— Wash. —, 180 Pac. 882.)

Betjemann, 183 N. Y. 194, 2 L.R.A. (N.S.) 580, 76 N. E. 157, 5 Ann. Cas. 239. Counsel for appellant invoke this view of the statute, and seem to argue that it is of controlling force in our present inquiry. We may concede that there should no longer be any distinction between void and lapsed legacies or devises, in determining the application of § 1328, Rem. Code, and similar statutes; but we think that is not a question of any serious moment in our present inquiry. The question still remains: Did Mrs. Hutton intend to designate her deceased half brother, William Arkwright's deceased son, Lyman Arkwright, the father of appellant, as one of the class of beneficiaries designated in her will as the "children of my deceased half brother, William Arkwright?" The decisions of the courts of this country are not in harmony upon this question, but it seems to us that the weight of authority, as well as the better reason, supports the view that such a class designation of beneficiaries in a will does not evidence an intent of the

Will—children  
as grand-  
children.      testator to include  
in such class one  
who is dead, and

known by the testator to be dead at the time of the making of his will, though, if such a one were then living, he would be one of such class. We will now notice some of the decisions of the courts adopting this view of the law.

In *Davie v. Wynn*, 80 Ga. 673, 6 S. E. 183, there was involved a residuary gift made by a testator reading: "Share and share alike, to my nephews and nieces, the children of my deceased brother, John L. Wynn, and of my deceased brother-in-law, John Wilkinson."

Holding that the deceased's nieces, who died before the making of the will, and who would have been of the designated class had they been living at that time, did not take under the will by virtue of a statute similar to § 1328, Rem. Code, Justice Blandford, speaking for the court, said: "The will gave

the property to a class, to wit, the testator's nephews and nieces, the children of his deceased brother, John L. Wynn, and of his deceased brother-in-law, John Wilkinson. At the death of the testator, the ancestors of these complainants were not in being, and were not of the class to whom this property was devised and bequeathed; and hence the complainants can take nothing under this clause of the will. . . .

It was contended by counsel for the plaintiffs in error that, under § 2462 of the Code, these representatives of the dead nieces would come in. That section is as follows: 'If a legatee dies before the testator, or is dead when the will is executed, but shall have issue living at the death of the testator, such legacy, if absolute and without remainder or limitation, shall not lapse, but shall vest in the issue in the same proportions as if inherited directly from their deceased ancestors.'

. . . The case of *Cheney v. Selman*, 71 Ga. 384, is relied on by counsel for the plaintiffs in error. In that case the testator devised certain property to the 'children of Tilda Cleckler.' At the death of the testator, Cleckler was dead, and her only child, a son, was also dead. This son left two children, who were in life when the testator died; and these children contended that they were entitled to represent their deceased father. And the court held, under the section of the Code above cited (§ 2462), that to prevent a lapse of the legacy the property, under the will, should go to these children. That decision is doubtless correct; for the bequest in that case was the same as if it had been made to the son of Tilda Cleckler; he was dead at the time the will was made and at the death of the testator; and, under this section of the Code, to prevent a lapse of the legacy, the property vested in the children. But in this case there is no lapse of the legacy. Here it appears from the bill filed by the complainants there are other nephews and nieces who fall within the class



designated by the testator. So there is a marked distinction between the two cases."

That decision was adhered to by the Georgia court in the later case of *Tolbert v. Burns*, 82 Ga. 213, 8 S. E. 79.

In *Howland v. Slade*, 155 Mass. 415, 29 N. E. 631, the court had under consideration a testamentary gift to "first cousins," and also the application of a statute in substance the same as ours. Justice Morton, speaking for the court, said: "It is clear that the issue of the first cousins who died before the making of the will cannot take under it. There is nothing in the will to indicate a purpose on the part of the testator that they should share his bounty, and, in the absence of such an intention, it is plain, upon the authorities, that they are not to be regarded as beneficiaries. *Merriam v. Simonds*, 121 Mass. 198, 203; *Re Webster*, L. R. 23 Ch. Div. 737, 52 L. J. Ch. N. S. 767, 49 L. T. N. S. 585; *Re Chinery*, L. R. 39 Ch. Div. 614, 57 L. J. Ch. N. S. 804, 59 L. T. N. S. 303; *Groves v. Musther*, L. R. 43 Ch. Div. 569, 59 L. J. Ch. N. S. 296; *Re Hotchkiss*, L. R. 8 Eq. 643, 38 L. J. Ch. N. S. 631; *Hebergham v. Ridehalgh*, L. R. 9 Eq. 395, 39 L. J. Ch. N. S. 545, 23 L. T. N. S. 214, 18 Week. Rep. 427. At the time when the will was made, they did not fall within the description of first cousins, and, without something to show that such was to be the case, they could not take as substitutes for or in the place of the first cousins who were dead, because these could not themselves have taken as members of the original class."

In the later case of *White v. Massachusetts Institute of Technology*, 171 Mass. 84, 50 N. E. 512, this view of the law is adhered to.

In *Harrison's Estate*, 202 Pa. 331, 51 Atl. 976, there was involved a gift by a testator to "the children of my sisters in equal shares." One daughter of a sister of the testator died before the execution of the will. Appellant, a child of such deceased

daughter, claimed under the will the share her mother would have taken as one of the designated class of beneficiaries had she been living at the time of the making of the will. The supreme court, adopting the language of the superior court, the intermediate appellate court of that state, in holding that the appellant could not take under the will, said, in part:

"The appellant now contends, however, that being of the issue of *Teresa L. C. Anderson*, the daughter of a sister of the testatrix who died during the lifetime of the latter and prior to the execution of the will, she is entitled to participate in the distribution of this fund by force of the provision of the Act of July 12, 1897 (P. L. 256): 'No devise or legacy hereafter made in favor of a brother or sister, or of brothers or sisters of any testator, or in favor of the children of a brother or sister of any testator, whether such brothers or sisters, or children of brothers or sisters be designated by name or as a class, such testator not leaving any lineal descendants, shall be deemed or held to lapse or become void by reason of the decease of such devisee or legatee, in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator, saving always to every testator the right to direct otherwise.' This legislation is not and was not intended to have any bearing upon the interpretation of wills; its effect is confined to the manner in which the intention of the testatrix, as ascertained from the words of the will, shall be carried into execution. Whether the person within the class designated by the act, who has died during the lifetime of the testator, was a legatee or devisee within the intention of the testator, must first be ascertained from the language which he used in disposing of his property. When the devise is to a

person by name, it is conclusive as to the intention of the testator that that person should take, and, the intention of the testator being established, the subject of the devise or bequest will, upon the death of the testator, be good and available in favor of the issue, when the primary devisee or legatee has died during the lifetime of the testator. This is the effect of legislation of this character, even in a case when the primary devisee was dead at the time the testator specifically designated him as the object of his bounty. *Minter's Appeal*, 40 Pa. 111; *Winter v. Winter*, 5 Hare, 306, 67 Eng. Reprint, 929.

"The legislation in question was no doubt enacted for the purpose of changing the law, as it had been determined in *Gross's Estate*, 10 Pa. 360, and in kindred cases, that in case of a devise to children of brothers and sisters, as a class, only those children who were in existence at the death of the testator were entitled, to the exclusion of the representatives of children dying before the testator, but after the date of the will. A bequest to a number of persons, not named but answering a general description, is a gift to them as a class; this rule of construction is intended to settle the testator's intention, unless the will itself shows that he intended otherwise. *Denlinger's Estate*, 170 Pa. 104, 32 Atl. 573. Prior to the Act of 1897, the persons who constituted a class described by the testator would have been ascertained as of the time when the legacy vested, and it is only in case of a devise or bequest to a class that the legislation has worked any change in the law, for devisees and legatees nominatim, standing in the same degrees of relationship, were protected by the Act of May 6, 1844 (P. L. 565). The effect of the Act of 1897 is to provide that, where one is within a class designated by the testator as the object of his bounty, the devise or legacy to him shall not lapse by his death during the lifetime of the testator, but the person

so dying must have been a member of the class at some time in the period during which the will remained ambulatory, between the execution of the will and the death of the testator. . . . The act was not intended to set up a new rule for the construction of wills or to include as primary legatees persons who did not come within the meaning of the language employed by the testator; its purpose was to provide for the substitution of the issue upon the death of one who was at the date of the will, or subsequently came, within the class to which the devise or bequest was made, and there was, therefore, nothing which the appellant was entitled to take by substitution."

In *Nicholson v. Nicholson*, 115 Iowa, 493, 88 N. W. 1064, there was under consideration a residuary clause in a will reading: "After paying all the foregoing amounts, I give and bequeath the balance of my property to be divided equally between all my nephews and nieces."

A niece of the testator died before the making of the will. A son of such deceased niece was claiming under the will, invoking the statute of that state reading as follows: "If a devisee die before a testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest."

Judge Deemer, speaking for the court, holding that the claimant could not take under the will as a substitute for his mother, who had died before the making of the will, though she would have been one of the class designated as beneficiaries had she been living at that time, said: "Under the common-law rule, the members of the class to whom testator left his residuary estate would be determined upon the day of his death; and, as applicant herein is neither a nephew nor a niece, he would be excluded. Applicant's counsel contend, however, that the statute which we have quoted modifies this rule to this ex-

tent: That, although the members of the class are to be determined as upon the day of the testator's death, yet, as the applicant is an heir of one of that class, who would have taken under the will had his mother survived, he is entitled to her share.

. . . . If a deceased beneficiary is specifically named in the will, this, perhaps, is a sufficient indication that the testator intended his heirs to take, under the statute before quoted, as substitutional or representative devisees. But where the gift is to a class, of which there are many members, it is reasonable to suppose that the testator had in mind only those of that class who were living at the time he made his will. To apply the rule to the instant case, when testator made his will he had several nephews and nieces living. He also had at least one grandnephew, whose mother had been dead for more than ten years. In the residuary clause of his will he devised his remaining property to his 'nephews and nieces,' share and share alike. Did he intend by this description to give any part of it to this grandnephew? Surely not; for it would have been easy to include him if he had so desired. Taking the will by its 'four corners,' and reading it in the light of the admitted facts, we hardly think one unversed in the law would say that testator intended to include applicant in the class described as 'nephews and nieces.' If he had intended to include the grandnephew, we think it more likely that he would have named him. Nephews and nieces are here the primary devisees. Nothing whatever is given to their issue except as they may be substituted under the statute. In order to claim under the will, this substituted legatee must point out the original legatee in whose place he would stand. At the date of the will none but living nephews and nieces of the testator could have taken. The issue of the one who was dead at that time can show no object of substitution, and to give him an original legacy would

be, in effect, to make a new will for the testator."

In *Pimel v. Betjemann*, 183 N. Y. 194, 2 L.R.A.(N.S.) 580, 76 N. E. 157, 5 Ann. Cas. 239, the court had under consideration a state of facts and a statute similar to the facts and the statute here involved. In that case, Chief Judge Cullen, speaking for the court, made observations in harmony with the view of the law expressed in the above-noticed decisions, as follows: "Nothing is better settled in the law of wills than that the term 'children' does not include grandchildren or more remote descendants, unless there is something in the will to show that the word was used in a broader sense. This is not based on any technical rule of law; on the contrary, it is founded on the ordinary meaning of the word and the presumption that the testator has used the term in its ordinary sense. The decision below overturns this rule and declares that a devise or bequest to children of the testator includes grandchildren. The distinction between a dead child expressly named or otherwise identified in a will, and one who must take under the designation of a class, seems to me very plain. Where the testator names the deceased child, there can be no room for doubt that he intends him or his issue to take, and the statute gives effect to that intent. Where, however, a testator writes or speaks of his children in general terms, he does not include grandchildren. So the courts have uniformly held, and such, I think, the experience of all of us will confirm as being the actual fact. So also there is a plain distinction between the death of a member of a class subsequent to making the will and a death prior to that time. In the first case it is both possible and probable, unless some provision for the contingency is made in the will, that the testator did not anticipate its occurrence. In the latter the occurrence is not contingent, but has actually happened, and therefore the fact is necessarily present in the

testator's mind except in some exceptional case. Take the present case. The plaintiff's mother had died five years before the will was made, and of her death the testator was entirely aware. If he had intended to leave a legacy to his grandchild, he would have said so, instead of leaving his intention to be worked out in an indirect manner."

There was a dissenting opinion rendered by a minority of the court in that case, but the majority view of the law has been adhered to, and apparently has become the settled law of New York, as shown in *Re Turner*, 208 N. Y. 261, 101 N. E. 905, Ann. Cas. 1914D, 245.

These decisions seems to be quite in harmony with the settled law of England, as shown by the decision of the supreme court of judicature rendered in *Re Musther*, L. R. 43 Ch. Div. 569, the decision being stated in substance in the syllabus of the case as reported as follows: "A testatrix, by her will, gave the residue of her property to be equally divided between her nephews and nieces, sons and daughters of her late brothers, G., J. W., and C., and then proceeded: 'But should any of them be dead before me I then direct that his or her share shall be equally divided between his or her children.' Held, by the court of appeal, affirming the decision of Kay, J., that the children, living at the death of the testatrix, of nephews or nieces who were dead at the date of her will, did not take."

We have noted that the decisions of the American courts upon this question are not harmonious. We think, however, the decided weight of authority, as well as the better reason, supports the view of the

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courts rendering the decisions above noticed. The decision of the Illinois court in *Kehl v. Taylor*, 275 Ill. 346, 114 N. E. 125, Ann. Cas. 1918D, 948, we think, may be regarded as the leading decision holding to the contrary, wherein are collated the decisions which that court regards as supporting its conclusion. We are of the opinion that appellant Lillian Dorothy Arkwright cannot take under the will of her great-aunt, Mary Arkwright Hutton, by substitution in the place of her father, who was dead at the time of the making of the will, and then known by Mrs. Hutton to be dead, though he would have been a member of the class of beneficiaries designated by the language of the will had he been living at the time of its making.

—right of children of deceased child.

The judgment is affirmed.

Appellant by her counsel has asked this court to deny to the respondent executor costs against her in this court, in the event of the affirmance of the trial court's judgment, and also to award compensation to her counsel as a charge against the estate for taking the appeal, whether the trial court's judgment be affirmed or reversed. This question seems to be rested upon the theory that appellant should be so favored, because the appeal was in any event justifiable. We are not cited any authority in support of these requests, and we know of none which would authorize us granting either of them. We therefore feel constrained to deny the requests.

Costs—allowance to defeated party.

It is so ordered.

Chadwick, Ch. J., and Holcomb and Mount, JJ., concur.

## ANNOTATION.

**Applicability of statute to prevent lapses, in case of person dead at time will was made.****I. Introduction, 1682.**

- II. Applicability of statute where person dead at date of will is named or otherwise specifically designated as a legatee, 1682.**

*I. Introduction.*

The purpose of this annotation is to discuss the right of the issue of a person deceased when a will was made, who, had he survived the testator, would have been a beneficiary thereunder, to take by virtue of a statute to prevent lapses. It does not include cases in which the claim of such persons to participate is based not upon a statute, but upon a provision in the will itself for the children or issue of deceased beneficiaries. These may be found in a note in 8 B. R. C. 365, on "Right of descendants of a person deceased when a will was made, who, had he survived the testator, would have been a beneficiary thereunder, to take under provision for children or issue of deceased beneficiaries."

It does not include cases in which the children of persons deceased at the time the will was made were held entitled to take by virtue of a provision therein, requiring the division to be made according to the Statute of Distributions, as in *Re Paine* (1900) 176 Mass. 242, 57 N. E. 346.

In one respect, however, this annotation exceeds the limitations imposed by its title. This is in the discussion of the applicability to class gifts of statutes to prevent lapsing, since a complete development of the question of their applicability in the case of persons dead at the time of the making of the will, who, had they survived, would have been members of the class, involves a consideration of the question of their applicability in the case of persons dying after the making of the will, but before the testator.

The question whether the descendants of a person deceased at the time

**III. Applicability of statute to class gifts:**

- a. In general, 1686.
- b. Where person dead at date of will would have taken as a member of a class had he survived testator, 1691.

the will was made may, in any given case, claim to take by virtue of a statute against lapsing, while at the outset a question of statutory interpretation, may also involve a question of testamentary construction; since the statute can in no case operate, except on the hypothesis that the deceased ancestor was within the contemplation of the testator. (See, upon this point, *Fuller v. Martin* (1895) 96 Ky. 500, 29 S. W. 450; *Barnhill v. Sharon* (1909) 135 Ky. 70, 121 S. W. 983; *White v. Massachusetts Institute of Technology* (1898) 171 Mass. 84, 50 N. E. 512.)

These two questions have been so confused, confounded, commixed, and commingled by the courts that their decisions must be read with the utmost circumspection, and applied with the greatest discrimination.

**II. Applicability of statute where person dead at date of will is named or otherwise specifically designated as a legatee.**

Where a person dead at the date of the will is expressly named, or otherwise expressly designated therein, the question is purely one of statutory interpretation. There is, in such case, no doubt of the testator's intention to confer a benefit, either upon such person, if the fact of his death was not known, or, if it was known, upon his family. The only doubt as to the applicability of the statute in such a case has arisen from the distinction formerly observed between a legacy to a person dying after the date of the will, but before the testator, which was said to lapse, and a legacy to a person who was dead when the will was made, which was said to be void. Hence it has been contended that, as

the legacy had no inception, there is nothing upon which the statute can operate, that it is impossible to vivify what never had life. This view prevailed in *Billingsley v. Tongue* (1856) 9 Md. 575; *Lindsay v. Pleasants* (1846) 39 N. C. (4 Ired. Eq.) 320; *Scales v. Scales* (1860) 59 N. C. (6 Jones, Eq.) 163; *Almy v. Jones* (1891) 17 R. I. 265, 12 L.R.A. 414, 21 Atl. 616; *Pegues v. Pegues* (1860) 32 S. C. Eq. (11 Rich.) 554; and *Suber v. Nash* (1909) 84 S. C. 12, 65 S. E. 947.

The reasoning upon which this view is based may be illustrated by reference to the following cases:

In *Billingsley v. Tongue* (Md.) *supra*, it is said that a statute which provides that no devise, etc., shall lapse or fail of taking effect by reason of the death of the devisee in the lifetime of the testator, clearly imports the happening of some future contingency to defeat the devise, which, without the happening of such contingency, would have been valid and effectual, and hence does not operate where the legacy was void at the beginning by reason of the fact that the legatee was dead when the will was made.

In *Lindsay v. Pleasants* (1846) 39 N. C. (4 Ired. Eq.) 320, the court said: "The legacies and devises to the three dead children of the testator were void. And the children of such deceased children cannot take, by force of the act of assembly, Rev. Stat. chap. 122, § 15. That section of the statute declares that when any person shall bequeath or devise to his child or children, and such child or children shall have died in the lifetime of the testator, the said legacy or devise shall take effect and vest a title to the property described and mentioned in the issue of such child or children. Such a testamentary disposition must have lapsed, by the death of the legatee or devisee, during the life of the testator, were it not for the statute. 1 Roper, Legacies, 320. The case before us is not within the definition of a lapsed legacy or devise, and therefore it is not aided by the above statute. The legislature never thought of a

case like this, and has not provided for it."

In *Pegues v. Pegues* (1860) 32 S. C. Eq. (11 Rich.) 554, the court said: "It [the statute] contemplates the case of a legacy given; that is, a provision made for the child of such a character as would be valid if the will should come forthwith into operation. Such a legacy being given, the statute goes on to provide that if the child (thus provided for) should die, then the legacy given to him shall go to his issue, unless, etc. This language seems to be intended to describe a case (not uncommon) where a legatee should happen to die after the execution of a will in his favor, by which casualty his personal enjoyment of the intended bounty would be frustrated. I can hardly suppose the legislature contemplated the case of a man's giving a legacy to a dead child, or that it intended to remedy the effect of such an absurdity. It may be very well conceived that it intended to make good a legacy which had become void, without going the length of supposing it intended to give effect to one which was void *ab initio*. There is room for another remark upon the statute. It provides that the legacy to the child shall be made good to the child's issue, 'unless such deceased child was equally portioned with the other children, by the father or mother' (who made the will), 'when living.' Advancements are, by law, to be taken into consideration only in cases of intestacy. A testator may make what provision he pleases among his children, though it result, from gifts previously made by him *aliunde* the will, that he has dealt unequally by them. The legatee in this case would have taken the whole of his legacies mentioned in the will, had he been alive when the will was made, and had he survived his father. When the statute gives his legacies to his children upon condition that he has not been fully advanced, does it not refer to advancements made after the will, and which may be considered as an equitable satisfaction of the legacies it contains? And, if so, does it not follow that it contemplated

the case of the legatee being in esse at the date of the will?"

**Majority view.**

The weight of authority, however, is to the effect that such statutes apply to a case in which the beneficiary named was dead at the time the will was made. See

Connecticut.—*Lee v. Lee* (1914) 88 Conn. 404, 91 Atl. 269.

Maine.—*Nutter v. Vickery* (1874) 64 Me. 490; *Moses v. Allen* (1889) 81 Me. 268, 17 Atl. 66; *Bray v. Pullen* (1892) 84 Me. 185, 24 Atl. 811.

Missouri.—*Guitar v. Gordon* (1863) 17 Mo. 408; *Jamison v. Hay* (1870) 46 Mo. 546.

New York.—*Pimel v. Betjemann* (1905) 183 N. Y. 194, 2 L.R.A. (N.S.) 580, 76 N. E. 157, 5 Ann. Cas. 239; *Barnes v. Huson* (1871) 60 Barb. 598.

Pennsylvania. — *Minter's Appeal* (1861) 40 Pa. 111.

Tennessee. — *Darden v. Harrill* (1882) 10 Lea, 421.

Virginia. — *Wildberger v. Cheek* (1897) 94 Va. 517, 27 S. E. 441.

Washington.—*RE HUTTON* (reported herewith) ante, 1673.

England.—*Winter v. Winter* (1846) 5 Hare, 306, 67 Eng. Reprint, 929; *Mower v. Orr* (1849) 7 Hare, 473, 68 Eng. Reprint, 195, 18 L. J. Ch. N. S. 361, 13 Jur. 421; *Wisden v. Wisden* (1854) 2 Smale & G. 396, 65 Eng. Reprint, 452, 18 Jur. 1090, 2 Week. Rep. 616; *Barkworth v. Young* (1860) 4 Drew. 1, 62 Eng. Reprint, 1, 26 L. J. Ch. N. S. 153, 3 Jur. N. S. 34, 5 Week. Rep. 156; *Re Stansfield* (1880) L. R. 15 Ch. Div. 84, 49 L. J. Ch. N. S. 750, 43 L. T. N. S. 310, 29 Week. Rep. 72.

And, in some jurisdictions, the question has been set at rest by the explicit inclusion in the statute of the case of a person dead when the will is executed. See *Cheney v. Selman* (1883) 71 Ga. 384; *Shumaker v. Pearson* (1902) 67 Ohio St. 330, 65 N. E. 1005; *Mather v. Copeland* (1898) 5 Ohio N. P. 151.

It makes no difference whether the legatee named was dead when the will was made, or was living when the will was made, but had died at the time of the making of a codicil which reaffirmed the provisions of the will not

inconsistent therewith. See *Lee v. Lee* (1914) 88 Conn. 404, 91 Atl. 269; *Winter v. Winter* (1846) 5 Hare, 306, 67 Eng. Reprint, 929.

In discussing this point, in *Lee v. Lee* (Conn.) supra, the court said: "It is said that, as both of the sisters named in the third clause of the will were dead when the codicil was executed, the bequests contained in the third clause are, in legal effect, gifts to persons already dead at the date of the execution of the will, and therefore legacies which were void when made. The legal conclusion of the argument is that our statute for preventing lapses in certain cases is confined to legacies which lapse by reason of the death of the beneficiary after the execution of the will, and that it does not operate to save a bequest which was void when made, because the beneficiary was already dead when the will was executed. In the view we take of the case, it is unnecessary to determine whether our statute is so limited or not, because this case must be controlled by the universally accepted principle that no rule for the construction of wills shall be permitted to defeat the intention of the testator, expressed in the will itself. The first enacting clause of the codicil here in question is as follows: 'First: I hereby reiterate and reaffirm all the provisions of my said last will and testament, except in so far as the same are altered hereby.' That is to say, the testatrix reiterates and reaffirms, as of January 20th, 1908, the third clause of her will, making certain bequests to sisters already dead; obviously intending, so far as her written word is concerned, that such legacies, in common with all other unaltered provisions of her will, should continue in the same legal force and effect as before the codicil was executed. The statute, which the testatrix is presumed to know, had, at the dates of the sisters' deaths, converted their legacies into valid gifts to the issue of such sisters; and it would be a misapplication of the rule contended for, to hold that the testatrix, by the very act of reaffirming these gifts, had inadvertently made

them utterly ineffectual in law. *Blakeslee v. Pardee* (1903) 76 Conn. 267, 56 Atl. 503. The codicil of 1908 did not convert the bequests contained in the third clause of the will into void legacies. They still remained of the same effect, and therefore still remained operative under the statute as gifts to the issue of the original legatees."

In *Nutter v. Vickery* (1874) 64 Me. 490, it was said: "The adverse argument is based upon the distinction between lapsed and void devises, and the assumption that the statute takes effect only in cases of lapse. But no such limitation of its effect is found in the statute, the intent of which, obviously, is to save to the lineal descendants of the person named as devisee in the will, the benefit of a devise which would, at the common law, fail of effect by reason of the death of the original devisee before the testator. The statute has regard rather to the class of individuals for whose relief it is interposed, than to any technical distinction in the manner of the failure against which it proposes to guard them. As to them, the result at the common law would be the same, whether their ancestor died before or after the date of the will, if he died before the testator. Against this result, in either case, the statute places a barrier."

In *Barnes v. Huson* (1871) 60 Barb. (N. Y.) 598, it is said that no reason can be perceived for the different rule, whether the death happened before or after the making of the will, either occurrence being entirely within the mischief intended to be remedied. Continuing, the court said: "In fact, the circumstance that the death of a proposed legatee had occurred before the making of the will would strengthen the presumption that the name of the deceased, as a legatee or devisee, was inserted through ignorance of the death, or by mistake. Besides, many wills are made upon the eve of the death of the testator, when the death of the beneficiary named may have been so recent that information of the fact could not have reached the testator, even though it had occurred

under ordinary circumstances, and at no very remote distance, until it would be too late to remedy the accident. The construction of the statute contended for by the appellants' counsel would call upon us to hold that a devise or legacy to a child, contained in a will made in extremis, would lapse and be wholly avoided, if the child had died one hour before the making of the will, although such death was wholly unknown to the testator. Such a discrimination between the case of a death happening before the making of the will, and one happening after, is founded in no reason, and we cannot believe it to have been within the intention of the legislature. Considering the evident purpose and policy of the act, the mischief intended to be remedied, and the fact that it is a remedial statute, to be liberally construed, we are of the opinion that its meaning is to prevent the lapse of a devise, or bequest, to a descendant of the testator, although the proposed devisee or legatee shall have died before the testator; provided such devisee or legatee shall have left lineal descendants, who shall be living at the testator's death; and this, whether the death of the proposed devisee or legatee shall have occurred before or after the date or making of the will."

In *Winter v. Winter* (1846) 5 Hare, 306, 67 Eng. Reprint, 929, it was said by Vice Chancellor Wigram: "The question on the construction of the 33d section is whether the words, 'shall die,' mean shall die after a bequest to him by a will made after the 31st of December, 1837, or whether they mean shall die after the act comes into operation. If the former meaning be given to the words, the claim of the representatives fails. If the latter, it is good. Upon the face of the act itself, I certainly can find nothing to exclude the latter construction in favor of the former; and in the absence of anything upon the face of the act to fix the meaning of the words, I am bound, as well as I can, to fix that meaning by considering the policy of the act, and the objects it was intended to accomplish. Now, the policy of



the act, and the objects it was intended to accomplish, are, for the present purpose, sufficiently manifest. It was intended to prevent a portion given by a testator to a child going from the estate of such child, and his family from being left portionless, by reason only of the death of the child under certain circumstances—a consequence of law which the common feelings of mankind declared to be a disappointment of the intention of the father. The cases in which this event most commonly happened, and against which the act was intended to provide, were cases in which the child died in the testator's lifetime, after the bequest was made, and cases in which the testator, in providing for an absent child, was ignorant of the fact that such absent child was dead. In both cases, the family of the child dying after, or dead at the time of, the bequest, was left unprovided for; and it was to remedy this evil, amongst others, that the 33d section of the Wills Act was passed. The construction of the act which alone will include all the cases which the act must presumably have been intended to include is that which makes the time of the legatee's death unimportant, provided he died after the act came into operation, and the bequest to him is by a will made after that date; and, as far as I can see, that construction cannot possibly include any case not obviously within the purposes of the act."

The statute, however, does not apply to a case in which the legatees named were dead, not only at the time of the making of the will, but before the statute came into operation. *Wild v. Reynolds* (1846) 5 Notes of Cases (Eng.) 1.

**Statute does not apply where contrary intention manifested.**

A statute which provides that if a devisee or legatee is dead at the making of the will, leaving issue who survive, such issue shall take the estate devised and bequeathed unless a different disposition thereof is made or required by the will, does not apply when its application destroys the general plan of bequest. *Eckler v. Hilgerich* (1888) 9 Ky. L. Rep. 723.

The child of a person deceased at the date of the will is not entitled to take, where the context shows that the naming of such deceased person in the will was a mere inadvertence. *Ibid.*

**III. Applicability of statute to class gifts.**

*a. In general.*

Where the gift is not one to an individual, but to a class, a further difficulty arises. In such cases the claimants, if they have succeeded in establishing that the operation of the statute is not limited to cases where the legatee was living when the will was made, must meet the further objection that as, in the case of a gift to a class, the gift is presumably to those only who survive the testator, one who, had he survived, would have been a member of the class, was not an object of the testator's bounty, and, as there was no gift, there is no lapse, and no room for the statute to operate. This the claimants can do either (a) by showing that the testator intended the membership of the class to be ascertained at some period prior to his death, which would admit of the inclusion of their deceased progenitor,—in other words, that what appears to be a class gift is, in reality, a gift to described individuals; or (b) by persuading the court that the effect of the statute is to displace the ordinary rule of testamentary construction, that the members of a class are presumably to be determined at the time of the testator's decease, in cases in which the conditions defined by the statute exist.

**View that such statutes are inapplicable.**

Some courts have taken the view that such statutes were intended to provide against lapse merely, and were not meant to alter the rules of testamentary construction, and hence do not operate in the case of gifts to a class.

*Connecticut.* — *Morris v. Bolles* (1894) 65 Conn. 45, 31 Atl. 538.

*Georgia.* — *Davis v. Sanders* (1905) 123 Ga. 177, 51 S. E. 298.

*Maryland.* — *Young v. Robinson* (1840) 11 Gill & J. 328.

*New Jersey.* — *Trenton Trust & S. D.*

Co. v. Sibbits (1901) 62 N. J. Eq. 131, 49 Atl. 530; Security Trust Co. v. Lovett (1911) 78 N. J. Eq. 445, 79 Atl. 616.

**Pennsylvania.** — Gross's Estate (1849) 10 Pa. 360; Guenther's Appeal (1877) 4 W. N. C. 41; Livingston's Estate (1887) 5 Lanc. Bar. 25, as digested in 49 Century Dig. col. 1294; Diemer's Estate (1893) 2 Pa. Dist. R. 543; Hause's Appeal (1896) 39 W. N. C. 411; Reynolds's Estate (1902) 11 Pa. Dist. R. 387; Cooper's Estate (1904) 13 Pa. Dist. R. 127 (following but criticizing Gross's Estate, *supra*, as "a strained construction of a remedial statute").

**England.**—Olney v. Bates (1855) 3 Drew. 319, 61 Eng. Reprint, 925, 3 Week. Rep. 606; Browne v. Hammond (1858) Johns. V. C. 210, 70 Eng. Reprint, 400; Re Jackson (1883) L. R. 25 Ch. Div. 162, 53 L. J. Ch. N. S. 180, 50 L. T. N. S. 18, 32 Week. Rep. 194; Re Harvey [1893] 1 Ch. 567, 62 L. J. Ch. N. S. 328, 68 L. T. N. S. 562, 41 Week. Rep. 293.

**Canada.**—Re Sinclair (1901) 2 Ont. L. Rep. 349; Re Williams (1903) 5 Ont. L. Rep. 345; Re Clark (1904) 8 Ont. L. Rep. 599; Re Moir (1907) 14 Ont. L. Rep. 541. The case of Eberts v. Eberts (1880) 42 Mich. 404, 4 N. W. 172, sometimes cited as supporting this view, turned on the fact that the devise was "to the surviving children of my brothers," and is so explained in Strong v. Smith (1891) 84 Mich. 567, 48 N. W. 183.

In Browne v. Hammond (1878) Johns. V. C. 210, 70 Eng. Reprint, 400, the Vice Chancellor said: "I agree with what was argued on behalf of the plaintiff, that the testator in making his will intended to include in the devise and bequest all his children who were then in existence; but I must treat him as having had that intention, subject to the rule of construction which the authorities had well established, and of which I must presume him to have been informed, that under a gift by his will to his children those only could take who should be in existence at the time of his death. It was argued that the reasons which induced the legislature to interfere, as it has done by the 33d

section of the act, in cases where the devise or bequest is to the testator's children nominatim, apply with equal force where the devise or bequest is to children as a class. But the rule of construction to which I have already referred was perfectly well established in all the courts when the act was passed. According to that rule, under a gift to children as a class, the share to which a child surviving the testator would have been entitled does not lapse in consequence of his death in the testator's lifetime. Had the legislature intended to suspend that rule so as to bring all such cases within the operation of the 33d section, it would have expressed that intention."

This rule is not affected by the fact that, in the event which happened, the class consisted of but one individual (Re Harvey [1893] 1 Ch. (Eng.) 567, 62 L. J. Ch. N. S. 328, 68 L. T. N. S. 562, 41 Week. Rep. 293), or that one of the class is named specially, or is to get a double share (Re Moir (1907) 14 Ont. L. Rep. 541).

The observation in Davis v. Sanders (Ga.) *supra*, that, though the statute has no application in the case of the death of a member of a class between the time of the execution of the will and the death of the testator, it may apply when all the members of the class predecease the testator, seems to have been made per curiam. In such a case, as pointed out in Re Harvey [1893] 1 Ch. (Eng.) 567, *supra*, "extraordinary anomalies would result. If a testator had several children, say five, living at the date of his will, and four of these died in his lifetime, leaving issue who survived him, the effect of the decisions is that the fifth child surviving would take the whole; but if that child also happened to die in the testator's lifetime, leaving issue who survived him, the representatives, not only of the fifth child, but of all the other four children, would, according to the defendant's argument, be let in, and in equal shares. And further, if there had been a sixth child who had died before the date of the will, leaving issue who survived, the representatives of the sixth child, who by no

possible construction of the will could himself have taken, would be inevitably let in to share with representatives of his brothers and sisters, all dying as above supposed."

Where the view prevails that the statutes to prevent lapse do not operate in the case of gifts to a class, it is immaterial whether the claimants' ancestor died before or after the making of the will. See, for example, *Guenther's Appeal* (1877) 4 W. N. C. (Pa.) 41. In either case they derive no aid from the statute, and can succeed, if at all, only by establishing that testator meant to include their ancestor in his description of the persons who were to take (proposition (a) *supra*).

For instances in which the statute was held applicable on this ground, see *Cheney v. Selman* (1883) 71 Ga. 384; *Jamison v. Hay* (1870) 46 Mo. 546; *Bradley's Estate* (1895) 166 Pa. 300, 31 Atl. 96; *Shetter's Estate* (1892) 2 Pa. Dist. R. 284. The question when a gift, which is apparently one to a class, may be construed as one to described individuals, is not peculiar to the class of cases falling within the purview of this annotation, and forms the subject of discussion in notes in L.R.A.1918B, 234, and 7 B. R. C. 784.

**View that such statutes are applicable.**

In other jurisdictions, the courts have held that the statute operates in favor of the issue of members of a class dying after the execution of the will, but before the testator. See

**Illinois.** — *Rudolph v. Rudolph* (1904) 207 Ill. 266, 99 Am. St. Rep. 211, 69 N. E. 834.

**Iowa.** — *Nicholson v. Nicholson* (1902) 115 Iowa, 493, 91 Am. St. Rep. 175, 88 N. W. 1064.

**Kentucky.** — *Yeates v. Gill* (1848) 9 B. Mon. 203.

**Massachusetts.** — *Moore v. Weaver* (1860) 16 Gray, 305; *Re Stockbridge* (1888) 145 Mass. 517, 14 N. E. 928; *Howland v. Slade* (1892) 155 Mass. 415, 29 N. E. 631.

**Michigan.** — *Strong v. Smith* (1891) 84 Mich. 567, 48 N. W. 183 (explaining *Eberts v. Eberts* (1880) 42 Mich. 404, 4 N. W. 172).

**Ohio.** — *Woolley v. Paxson* (1889) 46 Ohio St. 307, 24 N. E. 599; *Shumaker v. Pearson* (1902) 67 Ohio St. 330, 65 N. E. 1005; *Mather v. Copeland* (1898) 5 Ohio N. P. 151, 7 Ohio S. & C. P. Dec. 257.

**Rhode Island.** — *Moore v. Dimond* (1858) 5 R. I. 121; *Williams v. Knight* (1893) 18 R. I. 333, 27 Atl. 210.

And see also *Hoke v. Hoke* (1878) 12 W. Va. 427, in which it is held that, although the statute was intended to prevent the lapsing of legacies in certain cases, it also was intended in part to modify the common-law rule that where a devise is made to two persons jointly, and one of them does not survive the testator, the survivor takes the whole, the effect being to prevent the operation of such rule where the devisee leaves issue who survive the testator, and who accordingly, in such case, take the estate as the original devisee would have done if he had survived the testator.

To hold that the statute operates in favor of the issue of members of a class is to give it the effect of a legislative declaration that the ordinary rule that the objects of a class gift are to be ascertained at the time of the testator's death does not operate to give effect to the testator's intention, where the legacy is of the type described by the statute and there are surviving issue. Possibly this is the case; but to pretend, as some courts have done, that the statute, as so construed, does not prevent the giving effect to the testator's intention, because the testator must be taken to have known that the statute would have the operation which the court has given it, is, to say the least, little more than a pious fraud.

It may also be remarked in criticism of this view, that in some cases it does not seem to have been deliberately and understandingly adopted, but to be based upon a misunderstanding of decisions in which the gift, while nominally a class gift, was really a gift to individuals; and some of the cases above cited as supporting the rule are perhaps susceptible of differentiation on this ground.

The reasoning upon which this view

is based may be illustrated by the following excerpts:

In *Yeates v. Gill* (1848) 9 B. Mon. (Ky.) 203, the court said: "It is contended that the word 'lapse' must be taken in its technical sense, as indicating the falling back of the legacy or devise, or its subject, into the testator's estate, and that this single word, in this sense, is to govern the construction and restrict the operation of the entire statute. And it is argued that, as a legacy given to children does not thus lapse by the death of one or more children before the death of the testator, if there be at that time any survivors who come within the description, therefore, the statute has no application to such a case, but applies only to the case where all the persons who, if alive, might take as children or grandchildren, die before the testator. But if this had been intended, it is probable that, instead of saying the legacies shall not lapse by the death of the legatee in the singular number, the language would have been that they shall not 'lapse by the death of the legatees,' etc. The use of the singular number throughout the statute, in reference to the person for whose death it is intended to make provision, shows that the statute should be understood as if it read, 'that legacies, etc., to children, etc., shall not lapse by the death of any legatee, etc., provided,' etc. And the nature of the proviso which limits the cases to which the statute applies shows that it was intended for the benefit of the children of such legatee, etc. Although, as the law formerly stood, legacies to children did not, in a proper sense, lapse by the death of one of the children before that of the testator, yet so far as related to any interest of the decedent, it did lapse, not into the estate of the testator, but into the interest of the survivors, and the heirs or distributees of the decedent were deprived of it. The word 'merge' would have been more proper than the word 'lapse.' But it is sufficiently clear that the legislature had in view, not the death of all of the legatees, but the death of any of them, and intended to provide for such

death, provided the decedent shall have children, etc.; and this intention, manifested by the general language and object of the statute, must control the meaning of the single word 'lapse.' It is obvious, too, that if the operation of the act be confined to the case of the death of all of the legatees or devisees, constituting the class of children or grandchildren at the date of the will, it will make little change in the law in those cases in which the devise is to the testator's own children or grandchildren."

In *Woolley v. Paxson* (1889) 46 Ohio St. 307, 24 N. E. 599, the court said: "The rule as to the lapsing of devises and legacies that prevailed before the statute defeated, in most cases, the intention of the testator. He generally made his will with reference to the objects of his bounty as they existed at the time, and as though his will took effect at the date of its execution—not apprehending that a lapse would occur in case any of them should die before himself, unless some express disposition should be made in anticipation of such event. The statute was passed to remedy such disappointments and should receive a liberal construction, so as to advance the remedy and suppress the mischief. It, among other things, provides that where a devise is made to a child or other relative of the testator, who dies before the testator, the issue of such object of his bounty shall take the portion devised to such child or relative. Nothing is more just and conformable to the probable intention of the testator in every instance. The fact that the child or relative is not mentioned by name should not defeat the application of the statute, where the language applied to the facts, as they were at the execution of the will, designates a child or relative as an object of the testator's bounty, with as much certainty as if it were mentioned by name. At the time the testator made this will, his son Isaac had four children living. They were all adults and their names well known to him; and the devise that he makes is to Isaac for life, and then to his children in fee simple. This, in the light of the

circumstances, must be taken in a distributive sense, and is a devise to each of Isaac's children of the fee simple in remainder, as definitely as if it had been to each by name. For, as observed by Vice Chancellor Malins in *Re Porter* (1869) L. R. 8 Eq. (Eng.) 52, 39 L. J. Ch. N. S. 102, 20 L. T. N. S. 649, there can be no substantial difference between a gift, for instance, to six children named, and a gift to children simply, there being six. The real objects of the gift are in such cases easily ascertainable by parol testimony. It is not, however, claimed that the individuals constituting Isaac's children were, at the date of the will, indefinite, and so incapable of taking as individuals under its provisions, but that the devise was to them as a class, and must be construed, under the rules applicable to such devises, not as a devise to each of the children, but to such of them as should survive the testator. The ground of this rule was that no one can be a devisee or legatee until the will takes effect by the death of the testator. But any argument drawn from this rule proves too much, for, if applied according to its reason, it would abrogate the statute, as no object, however definitely described, can take in this sense, until the will ceases, by the death of the testator, to be ambulatory. It was upon this ground that a devise to one by name, who predeceased the testator, was held to lapse. The fact that, in the latter case, the extinguished or lapsed legacy went to the residuary legatees, or to the heir, where there were no such legatees, whilst in the case of the death of a member of a class it went to the survivors, supplies no reason for excluding the application of the statute where the devise is to a class. It was not because the extinguished legacy or devise was disposed of by the law in one way rather than another that the statute was adopted, but because it did not go to the issue of the deceased devisee, as the testator in all probability supposed it would. In other words, it was not designed to prevent the failure of a legacy by the death of the legatee before the tes-

tator; that were impossible; but to make a new disposition by law of such legacy, where the testator had himself failed to do so, in anticipation of the possible death of any one of the chosen objects of his bounty before himself, where such object was a child or other relative of his. Hence, the only question that can arise in the construction of a will under this statute is whether it, as a matter of fact, contains a devise of real or personal estate to a child or other relative of the testator, which such devisee would have taken had he survived the testator; if so, then, by the express language of the statute, the issue of such devisee surviving the testator 'shall take the estate devised in the same manner as the devisee would have done if he had survived the testator,' unless a different disposition shall be made or required by the will. Now, it is a settled rule that, in a devise to children as a class, each member who survives the testator then takes a vested interest in the devise (*Hawkins, Wills*, 68); and this is so, though the devise is not immediate, subject, however, in such case, to the liability to be partially divested by children subsequently coming into existence before the period fixed for enjoyment (*Hawkins, Wills*, 71; *Schouler, Wills*, § 562). Hence as, under a devise to a class, each member who survives the testator would, independent of the statute, take an aliquot part of the devise as a tenant in common with the other survivors, therefore, under the statute in such case, the issue of a deceased member of the class surviving the testator must take what the deceased would have taken had he survived. Any other construction would render the statute nugatory in a large class of cases to which its provisions are, by its terms, directly applicable."

**Legislative determination of question.**

In some jurisdictions, any doubt as to the applicability of the statute to class gifts is settled by their express inclusion therein. See *Renaker v. Lemon* (1864) 1 Duv. (Ky.) 212; *Chenault v. Chenault* (1888) 88 Ky. 83, 11 S. W. 424; *Sloan v. Thornton* (1897) 102 Ky. 443, 43 S. W. 415; *Har-*

rison's Estate (1902) 202 Pa. 331, 51 Atl. 976; Fosbenner's Estate (1901) 26 Pa. Co. Ct. 56; Todd's Estate (1907) 33 Pa. Super. Ct. 117.

*b. Where person dead at date of will would have taken as a member of a class had he survived testator.*

But both in those jurisdictions in which the statute is held to operate in the case of class gifts, and in those in which the terms of the statute provide that it shall so operate, the question still remains whether the statute operates in favor of the descendants of one dead at the time of the making of the will who, had he survived the testator, would have taken under a gift to a class. So to hold is, in effect, to create a presumption that the testator intended to benefit not only the members of the class who might survive him, but also the descendants of those who at any time answered to the class description.

**Majority view.**

Upon this point there is a difference of opinion, the preponderance of authority being that such an extension of the operation of the statute is unjustifiable where there is nothing in the will to indicate a purpose on the part of the testator that the issue of members of a class deceased when the will was made should share his bounty.

**Georgia.**—Davie v. Wynn (1888) 80 Ga. 673, 6 S. E. 183; Tolbert v. Burns (1888) 82 Ga. 213, 8 S. E. 79.

**Iowa.**—Nicholson v. Nicholson (1902) 115 Iowa, 493, 91 Am. St. Rep. 175, 88 N. W. 1064.

**Massachusetts.**—Howland v. Slade (1891) 155 Mass. 415, 29 N. E. 631; White v. Massachusetts Institute of Technology (1898) 171 Mass. 84, 50 N. E. 512.

**New Hampshire.**—Campbell v. Clark (1887) 64 N. H. 328, 10 Atl. 702.

**New York.**—Pimel v. Betjemann (1905) 183 N. Y. 194, 2 L.R.A.(N.S.) 580, 76 N. E. 157, 5 Ann. Cas. 239; Re Turner (1913) 208 N. Y. 261, 101 N. E. 905, Ann. Cas. 1914D, 245.

**Pennsylvania.**—Harrison's Estate (1902) 202 Pa. 331, 51 Atl. 976; Fosbenner's Estate (1901) 26 Pa. Co. Ct.

56; Todd's Estate (1907) 33 Pa. Super. Ct. 117.

**Rhode Island.**—Williams v. Knight (1893) 18 R. I. 333, 27 Atl. 210.

**Washington.**—RE HUTTON (reported herewith) ante, 1673.

**Canada.**—See Re Williams (1903) 5 Ont. L. Rep. 345, in which it was held that (apart from the fact that the gift was to a class) the children of a daughter who had died leaving issue before the execution of the will could not take by virtue of the statute, there having been no gift to their parent.

In Davie v. Wynn (Ga.) supra, it was expressly held, distinguishing Cheney v. Selman (1883) 71 Ga. 384, that a statute providing that if a legatee is dead when the will is executed, leaving issue living at the death of the testator, such issue shall take the legacy, does not so operate in the case of a bequest to a class as to let in the children of persons deceased at the time of the making of the will who, had they survived, would have been members of the class.

See also, to the same effect, Tolbert v. Burns (1888) 82 Ga. 213, 8 S. E. 79.

In Nicholson v. Nicholson (Iowa) supra, the court said: "If a deceased beneficiary is specifically named in the will, this, perhaps, is a sufficient indication that the testator intended his heirs to take, under the statute before quoted, as substitutional or representative devisees. But where the gift is to a class, of which there are many members, it is reasonable to suppose that the testator had in mind only those of that class who were living at the time he made his will. To apply the rule to the instant case, when testator made his will he had several nephews and nieces living. He also had at least one grandnephew, whose mother had been dead for more than ten years. In the residuary clause of his will he devised his remaining property to his 'nephews and nieces,' share and share alike. Did he intend by this description to give any part of it to this grandnephew? Surely not, for it would have been easy to include him if he had so desired. Taking the will by its 'four corners,' and reading it in the light of the admitted facts, we

hardly think one unversed in the law would say that testator intended to include applicant in the class described as 'nephews and nieces.' If he had intended to include the grandnephew, we think it more likely that he would have named him. Nephews and nieces are here the primary devisees. Nothing whatever is given to their issue, except as they may be substituted under the statute. In order to claim under the will, this substituted legatee must point out the original legatee in whose place he would stand. At the date of the will, none but living nephews and nieces of the testator could have taken. The issue of the one who was dead at that time can show no object of substitution, and to give him an original legacy would be, in effect, to make a new will for the testator. Of course, if the proposed legatee or devisee is living at the time the will is made, and subsequently dies before the death of the testator, a different intent is manifest, which will be given effect in virtue of the statute under which applicant claims. But where, as in this case, the gift is to a class, it is perfectly clear that testator had in mind only those members of the class who were then in existence."

In *Harrison's Estate* (1902) 202 Pa. 331, 51 Atl. 976, the court said, with reference to a statute preserving to their issue legacies to brothers or sisters, or children of brothers or sisters, whether designated by name, or as a class: "This legislation is not and was not intended to have any bearing upon the interpretation of wills; its effect is confined to the manner in which the intention of the testatrix, as ascertained from the words of the will, shall be carried into execution. Whether the person within the class designated by the act, who has died during the lifetime of the testator, was a legatee or devisee within the intention of the testator, must first be ascertained from the language which he used in disposing of his property. When the devise is to a person by name, it is conclusive as to the intention of the testator that that person should take, and, the intention of the

testator being established, the subject of the devise or bequest will, upon the death of the testator, be good and available in favor of the issue, when the primary devisee or legatee has died during the lifetime of the testator. This is the effect of legislation of this character, even in a case when the primary devisee was dead at the time the testator specifically designated him as the object of his bounty."

See also in *Todd's Estate* (1907) 33 Pa. Super. Ct. 117, it was said with reference to a statute expressly including legacies to members of a class: "The act does not apply unless deceased legatee was a member of a class at some time between the execution of the will and the death of the testator."

#### Minority view.

The authority to the contrary consists of some Kentucky cases (*Chenault v. Chenault* (1888) 88 Ky. 83, 11 S. W. 424; *Dunlap v. Shreve* (1885) 2 Duv. (Ky.) 334, and *Sloan v. Thornton* (1897) 102 Ky. 443, 43 S. W. 415), the decision of which is largely influenced by the peculiar form of the Kentucky statute; and of the Illinois case of *Kehl v. Taylor* (1916) 275 Ill. 346, 114 N. E. 125, Ann. Cas. 1918D, 948.

In *Kehl v. Taylor* (Ill.) supra, the court, in holding a statute which provided: "Whenever a devisee . . . in any last will and testament, being a child or grandchild of the testator, shall die before such testator and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator," which, as a matter of construction, had been applicable to gifts to a class,—applicable to the case of the death, before the making of the will, of one who, had he survived, would have been included in the class to which a bequest was made, said: "Without reviewing the various decisions on this question and the reasons given to sustain the conclusions there reached, we think the construction most in harmony with both the spirit and intention of the

act, as well as the policy of our law, is that which allows all devisees or legatees of the class named in the statute to take, irrespective of the time of their death, either before or after the time of the execution of the will, so long as their death occurred prior to that of the testator, leaving issue, and no provision is made for such contingency. . . . Under the harsh rule of the common law, all gifts and devises were avoided by the death of the devisee or legatee before that of the testator. At common law, a bequest or devise by will to a child of the testator who was dead when the will was made was void, and a bequest or devise to a child who died after the will was made, and before the testator, lapsed; and such rules would prevail in this state but for the statute in question, and do prevail where the beneficiaries are other than children or grandchildren. This must often have thwarted the intention of the testator, and worked a hardship upon those who were the natural beneficiaries of his bounty, when it is considered that wills were frequently made in extremis,—but a few days, or even hours, before the testator's death, and at a time when it could not be known to a certainty, or ascertained, whether or not all the devisees or legatees, in case they were numerous and widely scattered, were alive and in being at the time of the execution of a will. It was to provide against such contingencies that this statute was enacted. It does not, in direct terms or by implication, take any notice of the time of the execution of the will, or impose as a condition to its operation or nonoperation upon a gift or devise that the devisee or legatee shall be in esse at the date of the execution of the will. The only conditions imposed by it are that the devisee or legatee shall die before the testator, leaving issue surviving the testator, and that no provision shall be made in the will for the contingency of the death of such devisee or legatee before that of the testator. The words, 'shall die,' refer not to the time of the execution of the will, but to the death of the devisee or legatee before the testator,

and, we think, included those whose death occurred prior to the execution of the will, as well as those whose death occurred in the interim between the making of the will and the death of the testator."

In *Chenault v. Chenault* (1888) 88 Ky. 83, 11 S. W. 424, it was held (overruling *Sheets v. Grubbs* (1863) 4 Met. (Ky.) 339) that a statute providing that if a devisee or legatee was dead at the making of the will, leaving issue who survives the testator, such issue shall take unless a different disposition is made or required by the will, applies in the case of a gift to a class, as well as in a case where the legatees are specially named, when construed in juxtaposition with the kindred and simultaneous statutory provision that, when a devise is made to several as a class, the share of any who shall die before the testator shall go to his descendants, if any, unless a different disposition is made by the deviser.

A similar conclusion was reached in *Dunlap v. Shreve* (1885) 2 Duv. (Ky.) 334.

In *Sloan v. Thornton* (1897) 102 Ky. 443, 43 S. W. 415, it was held that under a statute providing that if a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survives the testator, such issue shall take, the children of persons who were dead at the time the will was made were entitled to participate in a bequest "to the children of my late uncle, John Woods, deceased, their names, number, or place of residence being unknown to me, . . . to be divided equally between them, share and share alike; but if none of said children should be living at the time of my death, then this legacy shall fall into and become a part of my residuary estate, and pass accordingly."

The force of the foregoing Kentucky decisions is, however, considerably lessened by the fact that in other Kentucky cases the court has expressly declared that before a statute providing that if a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take, can



apply, it must first be determined whether the testator meant to include persons dead at the date of the will in his description of the legatees therein. See *Fuller v. Martin* (1895) 96 Ky. 500, 29 S. W. 315; *Barnhill v. Sharon* (1909) 135 Ky. 70, 121 S. W. 983.

**Statute operates where testator manifests intention to include deceased persons in class.**

Where the will shows that the testator regarded a certain person as a member of the class to whom a gift was made, the fact that such person was deceased at the time will not (except in those jurisdictions in which the statute to prevent lapses is not regarded as applicable in the case of persons deceased) prevent the operation of the statute.

So, where a testator, who at the date of his will, and when he died, had only one living brother and five living sisters, and also two brothers and a sister dead, who left children, made a devise to his "brothers and sisters," his use of the word "brothers," when in fact there was only one brother living, indicated that he meant to include all his brothers and sisters, living and dead, and therefore the children of those who were dead may, under the statute, take what their parents, if living, would take. *Fuller v. Martin* (Ky.) *supra*.

In *Barnhill v. Sharon* (Ky.) *supra*, where testator, who at the time his will was made had a half sister, who was then dead, leaving issue, and a living sister, devised the remainder, after a life estate in land, to his "brothers and sisters," it was held that as, in order to give the word "sisters" any meaning at all, it must be made to include more than one sister, it was

apparent that the deceased's half sister was included in the class, and, accordingly, that her issue were entitled to the benefit of the statute.

The statute was held in *Bray v. Pullen* (1892) 84 Me. 185, 24 Atl. 811, to operate in the case of a bequest to the "children of" a certain person, to be "equally divided between them," but in which, however, it appeared that the inclusion of the deceased child was necessary to satisfy the plurality of terms employed in the bequest.

The statute was likewise held to operate in *Moses v. Allen* (1889) 81 Me. 268, 17 Atl. 66, where it was held to make no difference that the legatees, instead of being referred to by name, were described by their relationship to the testator, as his nephews and nieces.

Evidence of an intention on the part of the testator to include a deceased child as a member of a class to whom a bequest is made may be found in the fact that the testator mentions her in his will as though she was alive, stating the advancement which he had made to her, as well as to the rest of his children. *Guitar v. Gordon* (1853) 17 Mo. 408.

In *Dunlap v. Shreve* (1885) 2 Duv. (Ky.) 334, it is said with reference to a devise to a class described as "the children of" a deceased sister that, had two of her children, who were dead at the time of the publication of the will, been then believed by the testator to be alive, or had he not known that they were dead, his simple devise to her children would undoubtedly have included them, and then, beyond question, the statute would have substituted their children as devisees.

E. S. O.

## STATE OF NEVADA

v.

B. E. KUHL, Impleaded, etc., Appt.

*Nevada Supreme Court — September 5, 1918.*

(— Nev. —, 175 Pac. 190.)

### Evidence — comparison of palm prints.

1. Palm prints may be compared by experts for identification purposes in a criminal case.

[See note on this question beginning on page 1706.]

— photographic enlargements.

2. Photographic enlargements of palm prints may be used by experts in testifying before the jury as to identity in a criminal case.

[See 10 R. C. L. 992, 1153-1156.]

— projectoscope.

3. A projectoscope may be used by experts in testifying as to identity from palm prints, in a criminal case, for the purpose of displaying photographic impressions to the jury.

— illustrative marks — effect.

4. The placing upon photographic impressions of palm prints, of markings by experts, for the purpose of illustrating their testimony, does not render the photographs inadmissible in evidence.

Appeal — preserving objection — sufficiency.

5. An objection that an expert is testifying positively instead of giving his opinion cannot be preserved for review by merely stating that the question has already been answered.

[See 2 R. C. L. 77-79.]

— positive statement.

6. An expert may testify positively as to the identity of two palm impressions rather than state his belief or judgment as to their identity.

[See 11 R. C. L. 627-629.]

Witness — impeachment — contradictory statements.

7. Where a witness, who, in a criminal trial, has denied the making of a statement out of court as to ability to identify an article of clothing, the one to whom the statement was made may testify to the statement for purposes of impeachment, if time, place, and person are brought to the attention of the witness.

Sunday — judicial proceeding — validity.

8. Under a statute permitting the reception of a verdict on a nonjudicial day, the court, upon receiving a verdict on Sunday, may fix the day for pronouncing judgment.

APPEAL by defendant Kuhl from a judgment of the District Court for Elko County (Taber, J.) convicting him of murder. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Edwin E. Caine and Harold P. Hale for appellant.

Messrs. George B. Thatcher, Attorney General, William McKnight, E. P. Carville, and Charles A. Cantwell for the State.

McCarran, Ch. J., delivered the opinion of the court:

In this we are dealing with the appeal of B. E. Kuhl only. The appeal of Ed. Beck, who was tried separately, is dealt with by this court in another opinion. — Nev. —, 174 Pac. 714.

The appellants Kuhl with his codefendants were jointly informed against by the district attorney of Elko county for the crime of murder. They were specifically charged with the killing of one Fred M. Searcey, a United States mail stage driver, at or near Jarbidge, in Elko county, Nevada. The testimony was wholly circumstantial. One of the elements in the case was an envelop, secured from one of the rifled mail sacks, on

which was a bloody print or impression of a portion of the palm of a human hand. The trial of the defendant Kuhl resulted in a verdict of murder in the first degree, by reason of which the death penalty was imposed. From the judgment, and from the order denying a new trial, this appeal ensues.

It is the contention of appellant here that the trial court erred in admitting the testimony of the witnesses Stone and Botorff, offered in behalf of the state, as experts on palm-print identification. From the record it is disclosed that the impression found upon the envelop taken from the rifled mail sack was made by that portion of the palm which is immediately below the base of the little finger of the left hand. In offering the testimony of the experts, photographic enlargements and projectoscope views were used and presented to the jury. Objections were interposed to these methods of presenting the evidence,

and with such we will deal during the course of the opinion.

The first question which we propose to discuss is a novel one, inasmuch as our research has failed to disclose an expression from any court from which we might gain aid or guidance. After the arrest of the appellant Kuhl, and while he was confined in the jail at Elko, an impression was taken of the palm of his left hand, and particularly that portion of the palm below the base of the little finger. The fact that the witnesses Stone and Botorff testified that the two impressions were made by the same hand gives rise to that phase of the appeal most strongly contended for by appellant.

Before testifying to their opinion as to the identity of the defendant's palm print with the impression found upon the bloody envelop taken from the mail sack, each of the witnesses fully explained his qualifications. The witness Stone related in detail as to his study on the subject of finger-print identification and classification. It is disclosed that his investigation and research in this line had taken up his time almost continuously from the year 1908, or 1909, to the time of the trial; that during that time he had been engaged by at least two recognized identification bureaus, one under the state police department of the state of Nevada, the other under the police department of the city of Fresno in California. He testified to his having visited numerous identification bureaus and to having attended conventions held by those engaged in this science in the United States. The witness Botorff related an experience entailing research and investigation in the line of finger-print identification and classification, continuing from the year 1903 up to the time of the trial. Each of the witnesses was, as the record discloses, exhaustively and skilfully cross-examined on every phase of the subject that would bring forth to the jury their ability or lack of ability to give a

correct or worthy conclusion as to the identity of finger-print impressions.

Were we dealing here with a finger-print impression, or the question of the comparison or identity of finger-print impressions, our course would be easy, for the courts of this country, and of England as well, have paved the way for the recognition of this science as an evidentiary element in criminal prosecutions. The main contention here is that the experts who testified were not qualified to give an opinion as to the identity of palm-print impressions; and, as we understand the contention of appellant, it is that science has not yet developed this question sufficiently to bear out the conclusion of an expert on the subject. Will the same rule which has led the courts to recognize experts on finger-print identification permit such experts to testify as to their conclusion upon palm-print identification? This is the one vital question here.

The origin of finger-print identification may be traced back to a period some 100 years before the birth of Christ. *Scientific American*, April 1, 1916, p. 356. By a Japanese scholar, Mr. Kumagusu Minakata, in an article entitled, "The Antiquity of the Finger Print Method," we are told that the discovery of this phenomenon of identity, as it may be termed, was made by the Chinese. In a most interesting article, entitled, "History of the Finger Print System" (Annual Report of the Board of Regents of the Smithsonian Institute for the year ending June 30, 1912, p. 631), Mr. Berthold Laufer traces the subject back to an era before the birth of Christ. He refers to the writings of Kai Kung-Yen, an author who wrote about the year 650 A. D., and who makes allusion to the employment of finger-print impressions in his time, and earlier, for the purposes of identification.

It may have come as a result of the diversified and extensive reading of the learned author that, in his famous novel, "Pudd'n Head

Wilson," Mark Twain causes one of his characters to make the significant speech: "Every human being carries with him from his cradle to his grave certain physical marks which do not change their character and by which he can always be identified—and that without shadow of doubt or question. These marks are his signature, his physiological autograph, so to speak; and this autograph cannot be counterfeited, nor can he disguise it or hide it away, nor can it become illegible by the wear of the mutations of time. This signature is each man's own—there is no duplicate of it among the swarming millions of the globe. Upon the haft of this dagger stands the assassin's natal autograph, written in the blood of that helpless and unoffending old man who loved you and whom you all loved. There is but one man in the whole earth whose hand can duplicate that criminal sign."

When these lines were written by the beloved author modern science and modern culture had as yet failed to grasp the full significance of his words. Indeed, it was not until recent years that the true force of the lines of the great Westerner could be fully appreciated. However ancient may be the origin of this means of identification, it remained for Sir Francis Galton to bring forth the principle in such a way as to gain the recognition of the world of science. In his book, published in 1892, we find the following significant paragraph: "We read of the dead body of Jezebel being devoured by the dogs of Jezreel, so that no man might say, 'This is Jezebel,' and that the dogs left only her skull, the palms of her hands, and the soles of her feet; but the palms of the hands and the soles of the feet are the very remains by which a corpse might be most surely identified, if impressions of them, made during life, were available."

All of the writers upon the subject, to whose lines we have had access, agree that the palmar surface of the hands and the soles of

the feet in men and monkeys are covered with minute ridges that bear a superficial resemblance to those made on the sand by wind or flowing water. Galton first gave expression to this fact; and Sir E. R. Henry, commissioner of police of the metropolis of London, corroborates with the statement that the inner part of the hand and the sole of the foot are traversed in all directions by lines of varying length. He says that the most conspicuous are the creases caused by the folding of the skin; but the least conspicuous, but much more numerous, lines, are the papillary ridges which exist over the whole palmar surface, giving it an appearance that may be likened to that of a newly plowed field with its ridges and furrows, or to sand, which the water, in receding from, has left ribbed. In Mr. Frederick A. Brayley's book, entitled, "Finger Prints Identification," we find the following significant language: " 'God's finger-print language,' the voiceless speech, and the indelible writing imprinted on the fingers, hand palms, and foot soles of humanity by the all-wise Creator for some good and useful purpose in the structure, regulation, and well-being of the human body, has been utilized for ages before the civilization of Europe as a means of identification by the Chinese, and who shall say is not a part of the plan of the Creator for the ultimate elimination of crime by means of surrounding the evilly disposed by safeguards of prevention, and for the unquestionable evidence of identity in all cases where such is necessary, whether it be in wills, deeds, insurance, or commercial mediums of finance, as well as in the discovering and identification of lawbreakers."

Mr. Tighe Hopkins, in his work, "Wards of the State," makes extended reference to the papillary lines as covering the palms of the human hands and the soles of the human feet. In a work entitled, "Criminal Investigation," translated by John and J. Collyer Adam from

the work entitled, "System der Kriminalistik," by Dr. Hans Gross, extended reference is made to the general subject. In a pamphlet published by Sir William J. Herschel, dealing with the subject of fingerprint identification, we find a most interesting history of experiments made by the learned author while acting in the British service in India. He interestingly relates of his experimentation with his own whole hand and with his right foot, which, he says, after an interval of fifty-seven years, remained irresistibly unchanged. "The Origin of Finger Printing," by Sir William J. Herschel, Humphrey Milford, Oxford University Press, June, 1916, p. 11.

In his work, "Guide to Finger Print Identification," by Henry Faulds, late surgeon superintendent of Tsukiji Hospital, Tokyo, Japan, reference is made to the papillary ridges found covering the face or palmar surface of the hands and feet of the human being. In a terse and graphic little work, entitled, "Hints on Finger Prints," written by Rai Sahib Hem Chandra Bose, fingerprint expert of Bengal, India, and a pupil of Sir Edward Henry, we find that, after dwelling on the possibility of error in finger-print comparison, the author makes this most significant assertion: "In fact, the indications on the inner surface of the hand are so numerous that, if half a square inch of any part of it were all that remained, that would be enough, in that it would prove identity by comparison."

In his work entitled, "The Finger Print Instructor," Mr. Frederick Kuhne, of the bureau of criminal investigation of the police department of the city of New York, after dwelling at length on the basis of finger-print identification and the methods of classifying finger-print impressions, and especially upon the extent and usefulness of such identification, tells us that in some European cities impressions of the palms of the hands are utilized as an additional means of identifica-

tion, especially because numerous patterns and characteristics appear in the palms as well as in the fingers, and in his work (page 96) he sets forth an illustration vividly portraying the truth of his assertion.

The lines on the palms of the human hand and the soles of the feet, which form the basis of individual identification, are the papillary ridges. They serve the office of raising the mouths of the ducts, so as to facilitate the discharge of the sweat, and perhaps perform the additional functions of aiding the sense of touch and of giving elasticity to the skin of the hand, and, having a vacuumistic tendency, they assist in preventing against slipping. These papillary ridges form figures, patterns, or designs, which research, study, and science have divided into classes named after their particular form, to wit, arches, loops, whirls, and composites. These patterns, as they have been established and named by those who have become devotees to the science of finger-print identification, while they have been discussed principally in connection with finger impressions, are not confined to the human finger alone, but are found with equal importance and equal persistency in the human palm and the sole of the human foot.

Mr. Harold J. Shepstone, in an article entitled, "The Finger Print System of Identification," appearing in the *Scientific American* of date October 1, 1910, at page 256, after dwelling upon the wonderful lineations in the form of ridges and patterns which adorn the palmar surface of the human hand, says: "One of the most interesting facts about this system is that every member of the human race, irrespective of age or sex, carries in person certain delicate markings by which identity can be readily established."

The learned author illustrates his article by a whole-hand impression showing the systems and the identifying markings. In the issue of the *Scientific American* of date August

19, 1911, there appears an article entitled, "No Two Finger Prints Alike," and there reference is made to a communication addressed to the French Academy of Science by Mr. M. V. Balthazard, a student of the finger-print science. This learned authority declares his findings to the effect that, if any finger print be divided into 100 squares, each square will contain some distinctive mark. He says that two finger prints will differ from each other, either in the arrangement of the marks in the different squares or in the character of the marks in a particular square. He says the total number of combinations of the two kinds of marks (branching or termination of ridges) in the 100 squares is the 100th power of 4. "This," says the author, "is a number that no one can possibly imagine. It is equal approximately to a number that would be represented by the figure 1 followed by 60 zeros. This means that there are possible just so many different kinds of prints, and that no particular combination will occur more frequently than others. The chances, therefore, of any particular combination of marks occurring, may be represented by a fraction with 1 as the numerator and a denominator represented by 1, followed by 60 zeros, a very tiny fraction of a chance indeed." To the suggestion as to how many points must agree in two finger prints to make sure of identity, this author bases his reply on mathematical grounds, to the effect that, when two finger prints agree in 17 out of the 100 squares, it is practically certain that they were made by the same finger. His reasoning in establishing this basis is most interesting and instructive.

In the issue of "Law Notes" of February, 1917, there appears an article entitled, "Finger Print Evidence," in which the subject is treated at some length. In an issue of the same publication, of date January, 1918, and under the same caption, attention is directed to the

learned discussion of the subject by Judge Wadhams, of the court of general sessions of the peace of New York, where, in the case of *People v. Sallow*, 100 Misc. 447, 165 N. Y. Supp. 915, the matter is historically dealt with in the consideration of the validity of an act requiring the taking of the finger prints of persons arrested for crime.

In a most exhaustive work that has just come to our attention, in the writing of which Mr. Harris Hawthorne Wildes, Ph. D., and professor of zoölogy in Smith College, and Mr. Bert Wentworth, former police commissioner of Dover, New Hampshire, collaborate, a system somewhat similar to that established by Galton is made the basis of sectional investigation by which palm-print identification may be carried out by means of the human hand. On page 138 of the work, illustrations are set forth in which the several sections of the hand are portrayed. By this work our attention is called to a term applied to the skin of the palmar surface of the hand and the sole of the foot, which we think most appropriate, to wit, "friction skin." After dwelling upon the nature and character of this, the authors reassert the statement found in the works of all the other writers to whom we have referred, to the effect that this friction skin is covered by breaking, forking, splitting ridges, which ridges form patterns and designs most irregular and individual, and, say the authors: "As these features remain absolutely constant throughout the entire life, and are far too complicated to make a duplication of even a single ridge probable, it naturally follows that a small area of friction skin, no matter where taken, is sufficient for an absolute and positive identification, provided only that a record of it, in the form of a 'print,' or some other form of accurate reproduction, has been previously made, and is available for comparison."

On page 126 of the work the authors refer to an instance where a

small square area was cut out from the same place in the hand prints of two individuals, the place selected being one which has never occasioned any special interest among investigators, and where the ridges run monotonously in straight or slightly curved parallels. The area from which this patch of friction skin was taken lies above the proximal end of the metacarpal bone of the thumb, which would be approximately at the base of the first system of the hand under Galton's plan of subdivision. The authors refer to the fact that this region, or area, from which the experimental patch was taken, is the most featureless and monotonous of any of the parts of the human hand. Yet they say a careful scrutiny of the prints, especially when aided by a slight magnification, shows such marked differences that even a beginner in the work of identification would have no trouble in distinguishing them at once.

In concluding a most interesting chapter on the subject of structure and development of friction ridges on the palmar surface of the human hand and the sole of the human foot, dealing with details of their course and arrangement, the authors conclude that these surfaces furnish a basis upon which to found a system of identification positive and absolute. Here we find the unequivocal declaration that the patterns of the friction skin are individual, and, taken together, impossible to duplicate in another individual. Further, they declare that the separate ridges, too, show numerous details, which are in themselves so individual that a small area of friction skin, taken even in the most featureless portion, cannot be matched by any other piece. "Personal Identification," by Wildes and Wentworth.

All of the learned authors, experts, and scientists on the subject of finger-print identification, and each of those to whom we have heretofore referred, agree that these patterns, formed by the papil-

lary ridges on the inner surface of the human hand and the sole of the foot, are persistent, continuous, and unchanging, from a period in the existence of the individual extending from some months before birth until disintegration after death. While most of the experts on finger-print identification deal most extensively with impressions of the human fingers, we find that some, of whom Mr. Galton is first and foremost, have divided the palmar surface of the human hand into what they term well-marked systems of ridges. Mr. Galton in his work fixes these systems thus:

First, that which runs over the ball of the thumb and adjacent parts of the palm, bounded by a line which starts from the middle of the palm, close to the wrist, and sweeps around the ball of the thumb to the edge of the palm on the side of the thumb, which it reaches about half an inch, more or less, below the base of the forefinger. The second system is bounded toward the thumb by the base line of the first system and toward the little finger by a line starting from about the middle of the little-finger side of the palm, and ending on the opposite side, just below the forefinger. The third system is bounded thumbwards by the base line of the second until that line arrives at a point immediately below the axis of the forefinger. There the boundary of the third system leaves this base line and skirts the base of the forefinger, until it reaches the interval which separates the fore and middle fingers. The upper boundary of the third system consists of a line which leaves the middle-finger side of the palm a small distance below the base of the little finger, and terminates between the fore and middle fingers. Galton on Finger Prints, Macmillan & Co. London and New York, 1892, p. 53.

Mr. Galton in his work draws comparison between the patterns that may occur in these individual systems of the palm and those which occur on the bulbs of the

thumb and fingers. He refers to the latter as being more definite in position, more conspicuous in lineation, and more instructive to study. Moreover, he says they are more easy to classify. The palm print or impression involved in this case is made by that portion of the hand which falls principally in the third

Fig. A.

Fig. A.—The impression found on the envelop taken from the mail sack found at the scene of the crime.

Fig. B.—The impression made by the palm of the hand of defendant after arrest.

We have gone at length into the subject of palm-print and finger-print identification, largely for the

Fig. B.

system, and perhaps partly in the second system, as these systems have been established by Galton in his arrangement of the human palm heretofore referred to.

The cuts are from the palm impressions as admitted in evidence at the trial in the lower court.

purpose of evolving the indisputable conclusion that there is but one physiological basis underlying this method of identification; that the phenomenon by which identity is thus established exists, not only on the bulbs of the finger tips, but is continuous and coexisting on all



parts and in all sections and subdivisions of the palmar surface of the human hand. History of the Finger Print System, by Berthold Laufer, *supra*. The rules and systems established by students of the subject, through which identification is made positive, apply no more to one section or system of

**Evidence—**  
**comparison of** this palmar surface  
**palm prints.** than to another. A

student of the subject may have confined his research and study largely to prints or impressions made only by the finger tips or by the bulbs on the ends of the fingers, but the knowledge and experience thus gained, and the methods of determining identity thus established and used, are applicable with equal significance and effect to any given surface of the palm of the hand. This is true, because of the truth of our former assertion as to a common physiological basis underlying this established method of identification.

Progressive and scientific processes and appliances which belong to the various human endeavors belong equally to the machinery of the law. The principle underlying the *Sussex Peerage Case*, 11 Clark & F. 85, 8 Eng. Reprint, 1034, 8 Jur. 793, and recognized by Greenleaf in his work on Evidence (Greenl. Ev. 516), has found sanction by the courts in modern American jurisprudence, and this principle it is which will allow evidence of those scientific processes, the work of trained, skilful men in their respective departments, to be applied by way of demonstration of a fact, leaving the weight and effect of such demonstration entirely to the consideration of the jury under proper instruction. \**State v. Cerciello*, 86 N. J. L. 309, 52 L.R.A. (N.S.) 1010, 90 Atl. 1112.

In the case of *State v. Miller*, 71 N. J. L. 528, 60 Atl. 202, the court held that it was not erroneous to admit evidence of the coincidence between the hand of the accused, and the bloody print of a hand upon the wall of a house where a crime was committed. This case, as we

understand it, did not turn upon finger-print identification, such as is involved in the case at bar; but the principle there applied is worthy of note as supporting the position which we deem proper here. In the case of *State v. Connors*, 87 N. J. L. 419, 94 Atl. 812, the court recognized the propriety of admitting the testimony of finger-print experts for the purpose of establishing identity.

In the case of *Parker v. Rex*, 14 C. L. R. (Austr.) 681, 3 B. R. C. 68, the only evidence upon which conviction of breaking and entering rested was a comparison of one of several finger prints found on a bottle in the premises entered, with the print of the middle finger of the accused's hand taken in jail. The High Court of Australia, in considering the case on appeal from the Supreme Court of Victoria, speaking through Mr. Chief Justice Griffith, made reference to the fact of the general recognition by courts and authorities of the individuality of the corrugations in the skin on the fingers of the human hand, and said: "A finger print is, therefore, in reality, an unforgeable signature. That is now recognized in a large part of the world, and in some parts has, I think, been recognized for many centuries."

The court, after thus referring to the finger print, concluded by saying: "There is in this case evidence that the prisoner's signature was found in the place which was broken into."

In the case of *Emperor v. Sahdeo* (1904; India) 3 Nagpur L. Rep. 1 [cited in 3 Chamberlayne, Ev. § 2072] the court recognized the propriety of establishing the identity of the party accused by the use of sheets bearing impressions of finger markings. Again, in the case of *Emperor v. Hulost*, 7 Crim. L. J. (India) 406, the principle was followed that identity of the individual might be established by the opinion of experts, testifying as to the identity of finger impressions made upon certain impression slips with

those of the accused taken in court. To the same effect is the case of *Emperor v. Abdul Hamid*, 32 Indian L. Rep. (Calcutta Series) 759 [cited in 3 Chamberlayne Ev. § 2561].

The courts of Great Britain have followed the principle that, inasmuch as the science of finger-print identification was an established science, evidence proving identity by this means should be received; and in *Castleton's Case*, 3 Crim. App. (England) 74, a conviction was sustained where the only proof of identity in the lower court was the evidence of finger prints.

Two leading cases in this country have gone at length into this question. In *Peoplé v. Jennings*, 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077, the supreme court of Illinois, speaking through Mr. Chief Justice Carter, on an appeal from conviction of murder in the first degree, upheld the trial court, wherein it admitted the evidence of experts as to the comparison of photographs of the finger prints found on a railing in the premises, with the enlarged finger prints of the defendant. The opinion of the chief justice of the Illinois court is to our mind exhaustive of the subject, and we cite it here with approval.

In the case of *People v. Roach*, 215 N. Y. 602, 109 N. E. 618, Ann. Cas. 1917A, 410, Mr. Justice Seabury went at length into the subject, and referred approvingly to the case of *People v. Jennings*, supra, and upheld the ruling of the admissibility of such evidence. In the *Roach Case*, as in the *Jennings Case*, the appeal was from a conviction of murder. The appellant assigned as error the testimony of an expert as to finger-print impressions found upon the clapboards of a house where the homicide was committed. There the experts testified positively that the impressions on the clapboards were finger prints of the left hand of the defendant. This testimony was rendered after the expert had opportunity to compare the finger prints of

the defendant with those markings found in the house. The supreme court of New York in that case held that the evidence was admissible, its weight being for the determination of the jury.

These cases, and others to which we might properly refer (*Young v. State*, 68 Ala. 569; *People v. Storrs*, 207 N. Y. 147, 45 L.R.A.(N.S.) 860, 100 N. E. 730, Ann. Cas. 1914C, 196), establish the rule of the admissibility of this character of evidence, and in the light of progressive science, and inasmuch as the underlying principle of this science, as recognized in the cases cited, is directly applicable and is the underlying principle here, the foundation was sufficiently laid for the testimony of the witnesses Stone and Botorff. The evidence of these experts as to the identity of the palm print of the defendant with that found upon the blood-smearred envelop taken from the rifled mail sack was a proper subject for the consideration of the jury. The weight to be given to this testimony was for the jury to determine.

It is contended by appellant here that the court erred in admitting certain photographic enlargements, and in permitting the witnesses Stone and Botorff to illustrate their testimony by the use of a projectoscope, by means of which an enlarged photograph of the impressions was displayed to the jury. It might suffice to say that no question is raised as to the accuracy of the photographic exhibits, nor is any question raised as to the method of identifying the photographs, or as to the manner in which the palm-print impression of the defendant was taken, or as to the correctness of the enlargements. The appliances used and the methods resorted to, so far as we are able to determine, were those appliances and methods recognized by science. By these appliances, the jury was afforded an opportunity to follow the testimony of the experts in their direct and cross examination. By this means they were better able to

judge of the correctness of the testimony as it was being given, and to

—photographic enlargements.

estimate its weight and significance.

This method of presenting proof has received the sanction of the highest authority. Whart. Crim. Ev. 8th ed. § 544;

—projectoscope.

1 Wigmore, Ev. § 795; Rogers, Ex-

pert Testimony, 2d ed. § 140; Dederichs v. Salt Lake City R. Co. 35 L.R.A. 802, and note (14 Utah, 137, 46 Pac. 656); State v. Connors, 87 N. J. L. 419, 94 Atl. 812. That instruments may be photographed for the purpose of so enlarging as to make the proportions plainer, and such photographs, when already in evidence, may be projected to illustrate the testimony of witnesses, is a rule that has found general sanction. First Nat. Bank v. Wisdom, 111 Ky. 135, 63 S. W. 461; United States v. Ortiz, 176 U. S. 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466; Howard v. Illinois Trust & Sav. Bank, 189 Ill. 568, 59 N. E. 1106; Marcy v. Barnes, 16 Gray, 161, 77 Am. Dec. 405.

Appellant complains of the act of the trial court in admitting photographs of the palm impressions, when upon such photographs there were certain lines and markings, placed there by the witnesses Stone and Botorff before their testimony was given. These lines, as appears from what record there is before us, were placed on the photographs by the experts for the purpose of more clearly illustrating their testimony. They indicated the points of similarity and identity to which the experts testified. Their existence and sig-

—illustrative marks—effect.

nificance were fully explained by the witnesses. These

markings in no wise affected the photographs, and we are at a loss to discern any prejudice or injury that could have thus accrued to the appellant.

Error is assigned to the ruling of the trial court in permitting the witness Stone to make a positive statement as to the identity of the palm

impressions. In this respect he testified positively that these palm prints were made by one and the same hand. We might with propriety pass this assignment without comment, for the reason that the only ground of objection assigned in the trial court was that the question had already been

answered. Aside <sup>Appeal—pre-serving objection—sufficiency.</sup>

from this, it may with propriety be said that, while it is the usual practice for expert witnesses to testify as to their belief in a given conclusion, or as to their best judgment, no rule of law prevents them from

testifying positive—<sup>—positive statement.</sup>

ly on such subjects. Whether they give their best judgment or belief, or testify positively as to their conclusion, the fact remains that it is for the jury to determine the weight to be given to their testimony. People v. Jennings, supra.

Near the scene of the murder there was found an overcoat bearing blood stains. From the briefs of counsel we are informed that E. B. Williams, a restaurateur, testified to having seen the appellant wearing this overcoat in and about his place of business. In putting in his case, the appellant called as a witness Pearl Williams, associated with E. B. Williams in the restaurant business. We are informed by the briefs that Pearl Williams testified on her examination in chief positively, as did E. B. Williams, in regard to Kuhl's familiarity with and treatment in the restaurant. She, however, testified that she had never seen the appellant, Kuhl, wear such a coat; that the only coat she had ever seen him wear was a brown mackinaw. The record as to this testimony is not before us, either in narrative form or otherwise; hence, we must content ourselves with such statement of facts bearing on this phase of the case as we find in the briefs of the respective counsel. It appears that on cross-examination the witness Pearl Williams was asked as to a statement she had

previously made to Sheriff Harris, and, if we understand the proceedings correctly, she was asked, on cross-examination by the state, if it were not true that shortly after the murder, in the town of Jarbidge, where her restaurant was located, she had told Sheriff Harris that she could positively identify the coat as the property of Kuhl, but that she did not want to be drawn into the case, for business reasons. At the trial, and on cross-examination, she denied having made this statement. The state called the sheriff in rebuttal, and, it appears, propounded the question to the sheriff, incorporating therein the language of the witness Pearl Williams, as used by her on the occasion referred to.

Appellant contends that the court erred in permitting this interrogatory to be answered by the sheriff on rebuttal. The question propounded to the witness Pearl Williams by the state, if we are correctly informed, implied that she had, on another and former occasion, made a contradictory statement as to the defendant's having worn the coat. If her statement made on a former occasion was brought home to her on cross-examination, with the proper elements of impeachment incorporated therein (that is, as to time, place, and the party to whom the statement was made), and if she denied having made the statement at the time and place and to the party, it was proper for the state, on rebuttal, to present the party to whom her former statement was made, and to propound to

that witness, after the fixing of the time and place, the exact language of the witness sought to be impeached. We find no error in the conduct of the court in this respect.

The verdict in this case was rendered and received by the court on Sunday, and, after the recording of the verdict, the court proceeded to fix a date on which judgment would be pronounced. The act of the trial court in this respect is assigned as

error. Under the second subdivision of § 4870 of our Revised Laws, the court is authorized to receive the verdict of a jury on a nonjudicial day. This statute necessarily contemplates the making of such order or orders, on the reception of the verdict, as may be necessary for the proper and expeditious course of justice. If a verdict of acquittal were received by the court on a nonjudicial day, manifestly the statute permitting the reception of such a verdict would contemplate an order discharging the defendant. So, too, where a verdict of conviction is rendered and received on a nonjudicial day, the right to receive the same implies the right and power in the court to remand the defendant and to fix a date for further proceedings. In the case of *State v. Rover*, 13 Nev. 17, Mr. Justice Hawley, speaking for this court, said: "The power given to the court to sit on Sunday to receive the verdict necessarily authorizes it to have the verdict then read and recorded, to discharge the jury, and make such other orders as are incident to the power given by the statute."

The making of the order setting a date on which judgment would be pronounced pursuant to the verdict was an act incident to the reception of that verdict.

We have scrutinized the instructions given by the trial court in this case, and find no error upon which reversal could be predicated. Assignment No. 54 deals with an instruction on which we commented in the case of *State v. Sella*, 41 Nev. 113, 168 Pac. 285. The decision of this court in the *Sella* Case was not in the hands of the trial court at the time of the trial of this case. As to the propriety or advisability of the giving of such an instruction in this case we are not at liberty to say, in view of the meager record that is here before us. In the *Sella* Case we gave expression to our views, discouraging the giving of this instruction, inasmuch as one clause

Witness—  
impeachment—  
contradictory  
statements.

Sunday—judicial  
proceeding—  
validity.

therein, at least, might be considered as a comment by the court on the weight to be given to witnesses whose testimony might agree on all points. We again express our disapproval of this instruction, and advise against its being given.

At the outset of our opinion, we made mention that the proof of guilt in this case rested entirely on circumstantial evidence. We are not advised as to the completeness of the circumstantial chain connecting appellant with the commission of the crime. We note, however, in the brief of his able and painstaking counsel, the following assertion: "It is fully appreciated that this is one of those curious cases where every link in the chain of circum-

stantial evidence seems satisfactorily forged."

We find nothing in the appeal from which it might be inferred that appellant received other than a fair trial, or that there was other than the utmost diligence put forth by able counsel.

The judgment is affirmed. The court below is directed to fix a time and make all necessary orders for having its sentence carried into effect by the warden of the state penitentiary.

Let the order be entered accordingly.

Sanders, J., concurs. By reason of the unavoidable absence of Mr. Justice Coleman, he does not participate in the foregoing opinion.

## ANNOTATION.

### Identification by palm-print impressions.

That evidence as to the correspondence of finger prints is admissible to prove identity is affirmed in all the cases which have considered the question. See *People v. Jennings* (1911) 252 Ill. 534, 43 L.R.A.(N.S.) 1206, 96 N. E. 1077; *State v. Cerciello* (1914) 86 N. J. L. 309, 52 L.R.A.(N.S.) 1010, 90 Atl. 1112; *State v. Connors*, 87 N. J. L. 419, 94 Atl. 812; *People v. Roach* (1915) 215 N. Y. 592, 100 N. E. 618, Ann. Cas. 1917A, 410; *Castleton's Case* (1909) 3 Crim. App. (Eng.) 74; *Parker v. Rex* (1912) 14 C. L. R. (Austr.) 681, 3 B. R. C. 68; *Rex v. Morris* [1914] St. R. Qd. 274; *Emperor v. Sahdeo* (1904; India) 3 Nagpur L. Rep. 1, cited in 3 Chamberlayne, Ev. § 2072.

And while the weight of the evidence of identity of the prisoner with the person who committed the crime, thus adduced, is a question for the jury (see *People v. Jennings* (Ill.) supra; *State v. Cerciello* (1914) 86 N. J. L. 309, 52 L.R.A.(N.S.) 1010, 90 Atl. 1112; *Emperor v. Abdul Hamid* (1905) 32 Indian L. Rep. (Calcutta Series) 759, cited in 3 Chamberlayne, Ev. § 2561, note 3), such evidence is suf-

ficient to support a conviction (*Castleton's Case* (1909) 3 Crim. App. (Eng.) 78; *Parker v. Rex* (1912) 14 C. L. R. (Austr.) 681, 3 B. R. C. 68; *Rex v. Morris* [1914] St. R. Qd. 274).

The reported case (*STATE v. KUHLE*, ante, 1694) seems to be one of first impression upon the question whether evidence as to the identity of palm-print impressions is admissible, as tending to connect the accused with the commission of the crime.

There are, however, several decisions in which it was held competent to show that hand marks found at the scene of the crime were apparently made by the hand of the accused.

Thus, in *Powell v. State* (1907) 50 Tex. Crim. Rep. 592, 99 S. W. 1005, where it appeared that the defendant's little finger on his right hand was abnormal, and that in using it it made marks different from an ordinary hand, and it was further shown that impressions of a bloody hand were discovered at the scene of the crime, showing a peculiarity of the little finger of the right hand, it was held that impressions of the defendant's right hand, which had been taken

with his consent, were admissible, in order to show their similarity with those found at the scene of the crime.

And in *Brown v. State* (1915) 76 Tex. Crim. Rep. 316, 174 S. W. 360, it was held not error to refuse to exclude, as the opinion of the witness, testimony that the accused had a peculiarly deformed thumb, and that a blood print made on a door casing was apparently made by such a thumb.

And in *State v. Miller* (1905) 71

N. J. L. 527, 60 Atl. 202, where it appeared that, before the defendant was arrested, he accompanied some officers to the house where the murder in question was committed, and when in a room where an imprint of a bloody hand appeared, he was asked to place his hand upon the bloody mark, which he voluntarily did, it was held proper to admit testimony as to the comparison of his hand with the mark.

E. S. O.



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